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HUMAN RIGHTS VIOLATIONS IN THE NAME OF ENVIRONMENTAL PROTECTION: REFLECTIONS ON THE REPARATIONS OWED TO THE OGIEK INDIGENOUS PEOPLE OF KENYA

SUMMARY: Introduction. – 2. Colonial Underpinnings of Environmental Conservation in Kenya. – 3. Whether Eminent Domain Could Have Been Applied to the Ogiek People's Case. – 4. The Judgement of the African Court on Reparations. – 4.1. Monetary and Non-monetary Reparations for the Evictions. – 4.2. The Right to Consultation and to Free, Prior and Informed Consent. – 5. Final Recommendations. – 6. Conclusions.

1. *Introduction*

This article focuses on the case of the Ogiek Indigenous peoples in the Republic of Kenya in a matter concerning gross human rights violations and forced evictions from their ancestral land, the Mau Forest Complex. First, it analyses the reasons beyond such human rights violations and evictions. The article argues that environmental conservation and sustainable resource management are the reasons why the Mau Forest Complex is conceptualized as an environment that should be uncontaminated, and its water resources preserved in light of the strategic interest of the nation. Then, the article criticizes the colonial underpinnings of environmental conservation in Kenya by drawing parallels to the place where the concept of uncontaminated nature and wilderness was invented: the colonial US. Even today the legacy of this colonial system of environmental conceptualization is still relevant in the creation of Protected Areas (PAs), which should be void of any human presence, even if people have been inhabiting the area for centuries and have indeed contributed to shaping the environment as it is. This underlying philosophy of uncontaminated nature in several instances has led to the displacement of Ogiek people for reasons of environmental protection.

Because of such injustices, the Ogiek people brought their case before the African Commission on Human and Peoples' Rights (ACmHPR), arguing that they had been

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victims of several violations of articles enshrined in the African Charter on Human and Peoples' Rights (ACHPR).[1] The case was then passed on to the African Court on Human and People's Rights (ACtHPR), which ascertained that human rights violations had taken place and reparations were due to the Ogiek people.

But before delving into this specific case law, the paper wishes to clarify what role, if any, the doctrine of eminent domain, or the State's power to expropriate land through the awarding of a just compensation, could have had in the case of the Ogiek people. Since the Ogiek people argued in case law that they hold a customary right to property on the forest, why did the State not apply the related (scarce) safeguards connected to the doctrine of eminent domain by providing just compensation for the land expropriated? The answer to this – and related questions – is discussed in Section 3.

There follows a focus on the judgement of the ACtHPR, specifically on the material and moral reparations due to the Ogiek people, and then to the right to consultation and to Free Prior and Informed Consent (FPIC), highlighting how the Court established the existence of such rights in a State that has not yet ratified the International Labour Convention n. 169 (ILO Convention 169).

Finally, the article gives some general recommendations on possible ways to manage environmental conservation with due respect to human rights, suggesting practical examples of Indigenous involvement on the management of PAs.

2. *Colonial Underpinnings of Environmental Conservation in Kenya*

Environmental conservation initiatives, whether sustained by States or international organizations, and Indigenous peoples' struggles to maintain access and inhabit their ancestral territories are a «good guy vs. good guy» story, Dowie writes.[2] Protected Areas (PAs) are an important way of conserving biodiversity, natural resources and also contributing to a country's adaptation and mitigation efforts in relation to climate change. PAs concur with the control of strategic natural assets such as watercourses. Additionally, forests, marine reserves, peatlands and so on are considered by environmental governance models as crucial "carbon sinks" that have the potential to contribute to Green House Gases (GHGs) reduction. Indigenous knowledge – also known as Traditional Knowledge, Traditional Ecological Knowledge – is also crucial for the protection of biodiversity, maintenance of ecological balance, sustainable food systems and sustainable use of ecological resources. Indigenous knowledge is locally situated, and it can be maintained, transmitted and applied only if its holders are granted access to their traditional territories and lands where such knowledge originated and to which it is deeply tied.[3]

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[1] For a comment on the decision, refer also to my earlier work G. GIACOMINI, *The forced eviction of the Ogieks indigenous people from their ancestral land in Kenya: the intervention of the African Court on Human and Peoples' Rights,* in *Federalismi - Focus Africa* (on-line), 2017.

[2] M. DOWIE, *Conservation refugees: the hundred-year conflict between global conservation and native peoples*, Cambridge, 2011.

[3] In relation to Indigenous knowledge, Drahos writes «knowledge is part of an ancestral place-time cosmology … powerful ancestors have transformed the land into a territorial cosmos in which they remain present as active forces, with various geographical features … The human inhabitants of these territories have to understand, respect and care for these territories …». P. DRAHOS, *Intellectual Property, Indigenous Peoples and their Knowledge*, Cambridge, 2014, p. 7.

The global pressure for the creation of PAs in order to reach the aforementioned objectives is increasing. For example, in the context of the Convention of Biodiversity, the current pledge is to move towards a global biodiversity framework in which 30% of the Planet will be declared PAs by 2030.[4] While this objective is crucial in terms of environmental and biodiversity protection, international and local NGOs are concerned about the possible repercussions on the human rights of Indigenous peoples and local communities if such PAs are designed through evictions and removal in order to realize ecological zonings. In fact, during the 20th century, more than 100,000 PAs have been realized in order to curb deforestation trends and biodiversity loss.[5] However, the creation of such areas has resulted in the eviction of local communities, criminalization of traditional hunter-gatherer practices, and militarization of PAs.[6] PAs are generally deemed to be void of any human interference in order to realize forest protection and biodiversity conservation, and relocation of local communities has been a common practice for creating undisturbed habitats and "recreation" spaces, such as tourist parks.[7] Conservation has led to the displacement of tens of millions of people who formerly lived, hunted, and farmed in areas now protected for the preservation of biodiversity.[8]

In addition, despite the theoretically "noble" end goal of protecting biodiversity and nature from human action, environmental conservation is rooted in colonial thought and colonial practices. The first initiatives for the creation of recreation parks and PAs dates back to the early 1800s in the United States. The start of the contemporary conservation movement can be traced back to the thinking of intellectuals such as Ralph Waldo Emerson, Henry David Thoreau and John Muir. Nature started to be conceived as something essentially separated from humankind, and the creation of environmental protection policies coincided with Indian removal from their ancestral lands. The most famous – and first ever created – national parks such as Yellowstone, Yosemite and Glacier, were conceived as nature-without-human-interference environmental reserves. The very idea of "wilderness" is a colonial construction, whereas in the second half of the nineteenth century «outdoor enthusiasts viewed wilderness as an uninhabited Eden that should be set aside for the benefit and pleasure of vacationing Americans».[9] But these parks, instead of being "wild", were inhabited – since time immemorial – by Native Americans. The presence of Native Americans in such environmental reserves was seen as detrimental to the preservation of the beauty of the landscape because of the use they made of natural resources – hunting, fires, gathering and so on. Thus, the politics of Indian removal from national parks that were enacted from the 1870s to the 1930s contributed to the creation of the contemporary parks as we know them. These symbols of American

[4] First draft of the post-2020 Global Biodiversity Framework, accessible at https://www.cbd.int/conferences/post2020/wg2020-03/documents.

[5] C. JENKINS, L. JOPPA, *Expansion of the global terrestrial protected area system*, in *Biol. Cons.*, 2009, pp. 2166–2174.

[6] J. MBARIA, M. OGADA, *The big conservation lie: the untold story of wildlife conservation in Kenya*, Auburn, 2016.

[7] A. SHARMA, A. KABRA, *Displacement as a Conservation Tool: Lessons from Kuno Wildlife Sanctuary, Madhya Pradesh* pp. 21-47 in G. SHAHABUDDIN, M. RANGARAJAN (eds.) *Making Conservation Work: Towards innovative strategies for securing biodiversity in India*, Delhi, 2007.

[8] D. CHATTY, M. COLCHESTER, *Conservation and mobile indigenous peoples: Displacement, forced settlement, and sustainable development*, Oxford, 2002.

[9] M. D. SPENCE, *Dispossessing the wilderness: Indian removal and the making of the national parks,* Oxford, 1999; W. M. DENEVAN, *The pristine myth: the landscape of the Americas in 1492,* in *Ann. Ass. Am. Geog,* 1992, pp. 369-385.

wilderness became a worldwide model for environmental protection – and land taking from Native peoples – with the dramatic legacy we are still facing today.[10]

Kenya is no exception to this conceptualization of wilderness and environmental protection as non-human-presence dominion, as demonstrated by the case study analysed in the present article. Before delving into the state of the Mau Forest with regard to the presence of the Ogiek Indigenous peoples, it is useful to understand first the legal instruments that are used for the creation of a PA in Kenya; and second, having set this context, to expand on the status of the rights of Indigenous peoples in Kenya in order to understand why limited protection is offered to them at the country level, and why such protection is insufficient to guarantee the application of Indigenous knowledge to environmental protection.

The procedure for the creation of PAs in Kenya is established in the Constitution and by law through the Forest Conservation and Management Act (2016). At present, in Kenya 7.4 of the territory is defined as a PA, which is below the standard recommended at the Constitutional level (10 percent under Article 69(1) (b)). Of these PAs, gazetted state forests (or public forests) comprise 4 percent, and the remaining 3.4 percent is occupied by community forests and private forests.[11] The creation of the first parks and PAs dates back to the colonial period in Kenya. The Mau Forest was gazetted as a state forest as early as the 1930s. The complex of the Mau Forest, located in Southern Kenya, is the largest in the country. It is of strategic importance for the country because it contains crucial water resources, located as it is in the Mau Water Tower where several rivers originate: the Ewaso Nyiro River; the Njoro River; the Mara River which flows into the Maasai Mara Game Reserve in Kenya and the Serengeti National Park in Tanzania, and also the Yala, Sondu Miriu, Nyando and Nzoia rivers that flow into Lake Victoria.[12] Therefore, it is relatively easy to understand how colonial governments then, and independent governments since 1963, have tried to secure environmental conservation of this area.

The inclusion of forests in Kenya under the PA status means they are controlled by the state, and this means there are legal restrictions to the access and use of natural resources in those areas. The Ogiek people have inhabited the Mau Forest since time immemorial, that is to say long before the complex was recognized as a PA in the Kenyan Gazette. This controversy is at the core claim of the Ogiek people before the ACHPR, because the Kenyan government has sought to restrict access to the forest by evictions, arrests and prosecution before courts with the ultimate goal of protecting the precious natural resources that constitute a "public interest" for the State. While the notion of "public interest" is analysed in the next section, which clarifies whether eminent domain

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[10] There is growing academic literature around environmental conservation and colonial practices, displacement and dispossession of Indigenous peoples' lands through evictions, relocations and human rights violation. See L. DOMÍNGUEZ, C. LUOMA, *Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment,* in *Land,* 2020, pp. 1-22; W. B. ADAMS, M. MULLIGAN, *Decolonizing nature: strategies for conservation in a post-colonial era*, London, 2012; W. CRONON, *The trouble with wilderness: or getting back to the wrong nature,* in *Env. Hist.*, 1996, pp. 7-28; R. GUHA, *The Authoritarian Biologist and the Arrogance of Anti-humanism*, in *The Ecologist,* 1997, pp. 14-20; V. PLUMWOOD, *Decolonisation relationships with nature*, in *PAN: Philosophy Activism Nature*, 2002, pp. 7-30; T. A. BENJAMINSEN, I. BRYCESON, *Conservation, green/blue grabbing and accumulation by dispossession in Tanzania,* in *Jour. Paes. St.*, 2012, pp. 335-355.

[11] N. SIFUNA, *The Fate of Aboriginal Habitation of Gazetted State Forests in Present Day Kenya: A Case Study of the Agitation by the Ogiek and Sengwer Traditional Communities*, in *Adv. Anth.*, 2021.

[12] *Idem.*

could have been applied to the Ogiek case, the next paragraphs focus on the legal status of the Ogieks as Indigenous people in Kenya.

The first important consideration due here is that Indigenous peoples are not entitled to any specific protection under Kenyan law, except, naturally, for those legal protections that refer to all minorities. Similarly, there is no dedicated provision for the right to traditionally inhabit their ancestral lands, despite the fact that Ogiek people have been claiming their entitlement to dwelling in it. Moreover, their traditional hunting activities have been banned in Kenya through Legal Notice No. 120 of 1977, which prohibited traditional forms of hunting.[13] In addition, Kenya has not ratified the International Labour Convention n.169 on Indigenous and Tribal Peoples. Therefore, the human rights protection dedicated to Indigenous peoples can be subsumed through Chapter Four of the Kenyan Constitution, which contains a Bill of Rights that makes international law a key component of the laws of Kenya and guarantees protection of minorities and marginalized groups.

On a more positive note, in 2016 through the promulgation of the Community Land Act (CLA) of 2016, Indigenous communities in Kenya obtained legal status to their land. This initiative culminated in the Memorandum of Understanding (MoU) between the Indigenous organisation Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT), and the National Land Commission. However, the CLA cannot be applied to PAs because they are State gazetted territories, which prevents Indigenous peoples from obtaining formal legal title to them.

In conclusion, the conceptualization of the Mau Forest Complex as an area that should be preserved as wild and uncontaminated in view of the public interest resonates with the colonial ideas of "wilderness" discussed in the initial paragraphs of this session. Environmental conservation policies based on this idea have led to the displacement and massive violation of the rights of Indigenous peoples in Kenya, not just regarding the Ogieks, but also the Endorois in the Embobuto forest. Land takings are often connected to the denial of Indigenous human rights, and to the misrecognition of fundamental principles of international human rights law that afford special legal protection to Indigenous peoples and to their territorial rights.

The next section explores if, under current Kenyan law, the Ogiek people could have been entitled to compensation for the loss of their traditional territories, or, in other words, if the doctrine of eminent domain could have been applied to their case.

3. *Whether Eminent Domain Could Have Been Applied to the Ogiek People's Case*[14]

In Kenya, as in many other jurisdictions, when private land is acquired for public interest by the State, the legal doctrine of eminent domain applies. Apparently, eminent domain would justify the creation of PAs because environmental protection is in the public

[13] N. SIFUNA, *Use of Illegal Methods in Kenya's Rural Communities to Combat Wildlife Damage,* in *Hum. Wildl. Inter.*, 2011, pp. 5-8.

[14] I am thankful to the Center for Environmental Ethics and Law (Washington, DC) to have contributed to the funding of the fellowship on «Land takings by eminent domain or other colonial instruments from Native Americans and local communities: exploring connections with contemporary green grabbing» in the months of July and August 2022. This section is built on the scholarship connected to that research project.

interest of the State, and it would oblige the State to engage just compensation to the people who would lose their land. But why, or why not, was eminent domain not applied to the Ogiek people's case? In order to clarify this aspect, this section explains what eminent domain is and how it is tied to the creation of PAs. Then, it clarifies why it has not been applied in the case of the creation of a PA in the Mau Forest, explaining why Ogiek people are not entitled to compensation for the loss of their ancestral lands under Kenyan law.

In Kenya, private property cannot be acquired compulsorily by the State. However, the Constitution at Article 40(3) and the Land Acquisition Act establish that private land can be acquired through an administrative act by the State under certain circumstances. The constitution establishes that, in that case, «prompt and full compensation» shall be provided to the private owner who lost their land.[15]

Obviously, there are some strict criteria under which private land can be acquired by the State, insofar as the doctrine of eminent domain does not establish an absolute power of the State.[16] The first criterion that should be respected regards the use for which the land is being acquired. As foreshadowed in the previous section, there shall be a public, nationwide interest for which the land is acquired, for example reasons of defence, public health, town planning and so on. Second, mandatory prior requirements shall be fulfilled before land acquisition, such as the payment of compensation. Third, a specific procedure must be followed, which includes the consent of the Minister for Lands and an Environmental Impact Assessment.

Regarding PAs in Kenya, under the Wildlife (Conservation and Management) Act of 1976, the Minister for Wildlife holds the power to proclaim "any land" a PA. The Constitution and the Land Acquisition Act, however, require the approval of the Minister of Lands to acquire private lands to make this land a PA. Therefore, in Kenya the land acquisition for the creation of a PA requires the approval of the Minister of Lands.[17] Because of the notion of public interest, acquisition of land for purposes of biodiversity conservation and protection of natural resources can be a valid reason to exercise the power of eminent domain.

The key question for the purposes of the present paper is whether eminent domain, and compensation, could have been paid to the Ogiek people.[18] The short answer to this question is no, and the reason stands in how the doctrine of customary property rights is framed in Kenya. Prima facie, it could be argued that because Ogiek people, as other Indigenous peoples of Kenya like the Endorois, hold customary title to their ancestral lands, and therefore the doctrine of eminent domain and compensation should be applied.

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[15] This provision was already present in the 1963 Constitution, in Articles 19-1, it was stipulated that «no property of any description shall be taken without just compensation».

[16] For an extensive reading on the process of eminent domain in Kenya, please refer to N. SIFUNA, *Using eminent domain powers to acquire private lands for protected area wildlife conservation: a survey under Kenyan law*, in *Law Env. Dev. Jour.,* 2006.

[17] G. VEIT, PETER, M. O. RUGEMELEZA NSHALA, M. O. ODHIAMBO, J. MANYINDO, *Protected areas and property rights: democratizing eminent domain in East Africa*, Washington DC, 2008.

[18] Regarding the issue of compensation in general terms, another contested issue to highlight is that Indigenous peoples do not see their ancestral land as having mere economic value and it cannot be substituted by the awarding of other land with similar characteristics. This is because Indigenous peoples hold a special, intimate bond with their ancestral lands and territories, which are the sources of knowledge, laws and identity. Therefore, there is no "just" or "fair" compensation for the loss of their ancestral land. See generally: P. G. HIERRO, *The land within: indigenous territory and the perception of the environment*, Denmark, 2005.

In the Ogiek case, Sifuna argues that because at the time of the transformation of their lands into a PA the law was not contested by any member of the community, this has automatically translated into a permanent loss of the right to property for the Ogiek people over their ancestral lands.[19] While this issue can be considered valid from a mere legalistic point of view, other important considerations should be made on this point and on the injustices of colonial rule. The gazettement of Indigenous land, as already pointed out, dates back to the 1920s, 1930s, 1940s and 1950s. It is difficult to imagine how and with what means, if any, Indigenous peoples were made aware of the actual meaning of encroachment of their land by the colonial State, how they were involved in the decision-making process and what legal instruments were given to oppose such a decision. It is clear that the gazettement of their land took place within a context of imbalances of power typical of colonial rule, which did not take into consideration their spiritual and material attachment to the land, and their customary collective right to land.

Contemporary jurisprudence in Kenyan courts reiterates this approach. In the case Chongeiywo & 10 others v Attorney General & 4 others in the Environment and Land Court (2022) the Petitioners are Kenyan citizens who belong to the Ndorobo/Ogiek Community of Chepkitale, Mt Elgon and are also leaders of the Ogiek Community in Mt Elgon.[20] Chepkitale National Reserve was gazetted in the year 2000 for its biodiversity characteristics, and subsequently evictions took place according to the Chepyuk Settlement Scheme. However, the Ndorobo/Ogiek community argued that such evictions took place through burning of houses and destruction of property. This constituted a violation of the Petitioners' rights under the Kenyan Constitution. In asserting the merits of the case, the Court invoked the doctrine of eminent domain in paragraph 129. However, in their conclusion the Court held that «The gazettement of Mt Elgon Forest as a public forest effectively extinguished the Ogiek's claim to the forest. It may be true that the Ogiek Community initially occupied the forest as a hunter-gatherer community … The claim that they have cultural sites and shrines in the forest as well as gather honey and vegetables from the forest does not qualify the land as Community land».[21] Therefore, in paragraph, 156 the Court «declines the Petitioners invitation to award the Ogiek compensation for the loss and damage occasioned to them during the eviction exercise».

Similarly, in Francis Kemai & 9 Others V. Attorney General & 3 Others (2006) the High Court dismissed a claim to aboriginal rights in the East Mau Forest because «nothing was placed before us by way of early history to give (the Ogiek) an ancestry in this particular land».[22] In addition, the Court observed that allowing the Ogiek to have the possession of the Mau Forest would have negative consequences for the country and could lead to further litigation and suits by other communities.

Finally, the case of Joseph Letuya & 21 Others V. Attorney General & 5 Others (2014) in the Environment and Land Court in Nairobi was only partially resolved in a positive way for the rights of the Ogiek people – and therefore escalated to the African

[19] N. SIFUNA, *supra* note 16.

[20] *Chongeiywo & 10 others (Suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt. Elgon) v Attorney General & 4 others*; Kenya National Commission on Human Rights (Amicus Curiae) (Environment & Land Petition 1 of 2017) [2022] KEELC 13783 (KLR) (19 October 2022) (Judgment), available at http://kenyalaw.org/caselaw/cases/view/244065/, last accessed November 2022.

[21] *Idem*, para. 131.

[22] *Kemai & 9 Others v Attorney-General & 3 Others,* High Court of Kenya at Nairobi, civil case 238 of 1999, 23 March 2000, available at https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-2000-Kemai-and-Ors.-v.-Attorney-General-of-Kenya-and-Ors..pdf, last accessed November 2022.

Commission on Human and Peoples Rights, which constitute the focus of the present paper.[23] It was a constitutional petition filed in the year 2012, which tried to assert the territorial rights of the Ogiek people in the Mau Forest relying on Article 63(2) (d) of the Constitution, and denouncing the evictions they had been victims of in the name of environmental conservation. In this case, unlike the Kemai case, the Court found that the forcible evictions of members of the Ogiek community from the Mau Forest Complex were indeed a violation of their right to life, their economic and social rights, and their right not to be discriminated against. However, the Court did not establish the territorial right of the Ogiek people in the Mau Forest, arguing that the National Land Commission shall identify alternative lands upon which the communities could be resettled.

Such cases demonstrate how the Republic of Kenya applied an anachronistic doctrine concerning the territorial rights of the Ogiek people, relying on legal sources that were enacted during the colonial time, and promoted in the contemporary Kenyan property law. As we shall see in the following sections, the ACtHPR had the crucial function of establishing Ogiek right to land following the norms established in the international human rights framework.[24]

This section has clarified the reasons why the doctrine of eminent domain could not be applied to the Ogiek people's case. Such reasons rely on the lack of recognition of territorial rights of Indigenous peoples in Kenya, and in the fact that such lands were transformed into PAs at the time of colonial dominion. However, as the next sections will demonstrate, such a conceptualization of PAs, which led to the compulsory evictions of Ogiek people alongside other communities such as the Endorois, is in stark contrast with principles of international human rights law regarding Indigenous peoples, upon which there is consensus, constituting thus positive obligations for States.

4. *The Judgment of the African Court on Reparations*

4.1. *Monetary and Non-monetary Reparations for the Evictions*

Before delving into the important question of the reparations for the Ogiek people, as a general premise it must be noted that the ACtHPR ordered the Republic of Kenya to «take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner».[25] The topic of the recognition of Indigenous peoples is of utmost importance in Kenya because of the reasons explained in the previous sections. The Ogiek people are entitled not only to the human rights specifically devoted to minorities, but also to all the other rights enshrined in instruments such as UNDRIP and ILO Convention 169. Therefore, even if the Republic of Kenya did not ratify the Convention, it must respect the customary international law that protect Indigenous peoples, for example the right to their ancestral lands and the collective dimension of the right to property as part of the Indigenous

[23] *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, available at http://kenyalaw.org/caselaw/cases/view/95729/, last accessed November 2022.
[24] For a doctrinal approach regarding the role of international adjudication of international courts against the backdrop of colonially established laws, see also W. M. REISMAN, *Protecting Indigenous Rights in International Adjudication*, in *Am. Jour. Int. Law*, 1995, pp. 350-362.
[25] *Idem*, para. 126.

peoples' right to self-determination.[26] The reparations owed to the Ogiek, especially those regarding land demarcation and titling and consultation and consent, should be interpreted in the light of this recognition.

The ACtHPR established in its judgement of 26 May 2017 that the Ogiek people had been victims of the relevant violations of their human rights perpetrated by Kenya in the context of the eviction from the Mau Forest for conservation of strategic environmental resources. Moreover, in the ancestral territory of the Ogiek people, logging and tea plantation concessions were given to private actors. The Court asserted that Kenya «violated article 1 of the Charter by not taking adequate legislative and other measures to give effect to the rights enshrined under Articles 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter». Such articles refer to the right of non-discrimination, right to life, right to freedom of religion, right to property, right to take part in social and cultural life, right to freely pursue economic and social development. Following this judgement, the Court established the specific reparations the Ogiek are entitled to on 23 June 2022.

As a form of reparation, the ACmHPR demanded that the State undertook a «process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order».[27] The respondent State objected that formal demarcation was unnecessary, and that the Ogiek people could still use the resources and reside in the forest whilst not having formal legal title to the land.

Regarding pecuniary reparations, the ACmHPR demanded the ACtHPR pay the sum of US$297 104 578 into a Community Development Fund within no more than 1 year of the Court's Order on Reparations. Such an amount was calculated based on a survey conducted among the Ogiek people who had been victims of human rights violations and argued that they had suffered material and immaterial damages. The State of Kenya objected that this amount was based «on speculative presumptions which are neither fair nor proportionate».

However, the ACtHPR upheld the statement made by the Commission by recalling the provision contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Article 28, which prescribes that Indigenous peoples are also entitled to monetary compensation upon encroachment of their territories. In its consideration on material reparations, the Court decided that the Respondent State must compensate the Ogiek with the sum of 57 million, eight hundred and fifty thousand Kenya Shillings for the material prejudice suffered in the violations of Articles 14 and 21 of the ACHPR.[28]

Regarding moral prejudice, the ACmHPR requested the payment of compensation as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article

[26] According to Anaya, there is an unequivocal emergence of customary international norms that protect and fulfil the rights of Indigenous peoples. While such customary law is still evolving, there are certain core principles that embodied the consensus around Indigenous peoples' rights. For example, the consensus on the right to self-determination, which is in the view that Indigenous peoples shall determine freely their destiny, and the right to lands and resources and the right to self-government. S. J. ANAYA, *The emergence of customary international law concerning the rights of indigenous peoples*, in *Int. YB. Leg. Anth.*, Leiden, 2004, pp. 127-139.

[27] African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012; Judgement (Reparations), 23 June 2022, African Court on Human and Peoples' Rights, para. 11(i).

[28] The ACtHPR accepted the objection raised by the Republic of Kenya that the sum should have been paid in the local currency, and not in US dollars.

22) of the ACHPR. It argued that «the Ogiek have suffered routine discrimination at the hands of the Respondent State including the non-recognition of their tribal or ethnic identity and their corresponding rights». The ACmHPR noted how such discrimination is deeply tied to the lack of access to the Mau Forest, a space to which the Ogiek people are intimately connected, where they traditionally practiced their religious beliefs and where their sacred sites are located. For these reasons, the sum of US$92 million was requested to repair the moral prejudice the Ogiek people had to endure through decades of discrimination. In response to this request, the ACtHPR recognised that the rights that have been violated by the Republic of Kenya are «central to the very existence of the Ogiek» and awarded the sum of one hundred million Kenyan Shillings for the moral prejudice suffered.

However, there are also damages that cannot be repaired through monetary compensation. The loss of ancestral lands upon which Ogiek knowledge, beliefs, tradition and ancestors are tied is not something that can be monetarized. Therefore, the ACmHPR requested the restitution of the ancestral land through «communally held titles, subject to delimitation, delineation and demarcation», with particular reference to the entire Public Forest area, which comprises the Mau Forest Complex, as well as the Maasai Mau Forest Block, Kiptagich tea estate and tea factory in South West Mau near Tinet, the Sojanmi Spring Field flower farm in the Njoro area (East Mau) and land owned by a logging company in East Mau.

In dealing with the issue, the ACtHPR noted that the collective right to land and resources is a fundamental right for Indigenous peoples, and that the mere access to such lands is not enough to guarantee such right. The Court held that «*the Ogiek have a right to the land* that they have occupied and used over the years in the Mau Forest Complex. However, in order to make the protection of the Ogiek's right to land meaningful, there must be more than an abstract or juridical recognition of the right to property».[29] Therefore, the Court argued that demarcation and delimitation is necessary, and it should be realized in accordance with the Community Land Act, 2016, and the Forest Conservation and Management Act, 2016. Such demarcation must be realized through an administrative or legislative act that recognizes «*de jure* collective title to such land in order to ensure the permanent use, occupation and enjoyment, by the Ogiek, with legal certainty».[30] However, the Court added that this is not an absolute requirement, because whereas the Republic of Kenya is unable to give back such land for «any reasonable ground» it must enter into negotiations with the Ogiek with the objective of either offering adequate compensation or identifying alternative lands to be given for occupation.[31] The establishment of the recognition of the right to land and property is the *key* issue in this judgement, as from this recognition derives the compensation and restitution of the Ogiek ancestral lands.

4.2. *The Right to Consultation and to Free, Prior and Informed Consent*

In international human rights law, and in some instances in international environmental law, Indigenous peoples are entitled to the right to consultation and to FPIC. According to ILO Convention 169 Article 6, Indigenous peoples have the right to

[29] *African Commission on Human and Peoples' Rights v. Republic of Kenya*, *supra* note 27, para. 114. Emphasis added.
[30] *Idem.* para. 116.
[31] *Idem.*

be consulted «through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly». Such consultation «shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures». UNDRIP, which in addition recognises the right to self-determination of Indigenous peoples, establishes unequivocally that Indigenous peoples have the right to FPIC, which means that they should be informed about the measures affecting them, prior to the commencement of any activities on their territories, and their consent must be given freely without coercion and/or manipulation. In international environmental law, the consent requirement is defined in the Convention on Biological Diversity (1992) and in the Nagoya Protocol on Access and Benefit-Sharing (2010) at Article 8(j).

The consent requirement was greatly enforced through the jurisprudence of the Inter American system, specifically in the cases Awas Tingni v. Nicaragua, Maya Communities of Belize v. Belize, Sarayaku v. Ecuador, Saramaka v. Suriname, Xucuru Indigenous peoples v. Brazil and Lhaka Hohnat v. Argentina. The Inter American Court and Commission clearly established the right to FPIC for Indigenous peoples according to international law, and, on the same note, the ACmHPR called for the ACtHPR to request the Republic of Kenya to conform to such international standards. In fact, the ACmHPR urged the Republic of Kenya to «Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land».

In response to these requests, the ACtHPR ordered that consultation with the Ogiek people should be carried out in relation to land demarcation and titling of their collective lands. In addition, consultation and dialogue procedure shall be conducted on the initiative of the Republic of Kenya where concessions have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations. Such consultations shall have the purpose of reaching an agreement on whether these actors can be allowed to continue their operations by way of lease, reaching benefit sharing with the Ogiek in line with the Community Land Act. The Court also ordered that if such an agreement does not take place, land must be returned to the Ogiek people or appropriate compensation given.

The right to consultation and to FPIC represents a crucial way to operationalize the Indigenous peoples' right to self-determination. It is of outmost importance that a supranational court has called a State to enforce this right through participation, consultation and benefit sharing processes. In light of such considerations, it is desirable that the Republic of Kenya considers ratifying ILO Convention 169 and applying the UNDRIP standards for the protection of Indigenous peoples' rights.

5. *Final Recommendations*

The Ogiek case has evidenced how forest and natural resources conservation can lead to violent outcomes and violation of human rights in the name of PAs and the public interest. In this final section, I argue that the so-called *human rights-based conservation* should be at the centre of environmental policies at the local level, in order to avoid the

perpetration of a colonial model of evictions from natural areas of strategic importance to a State.[32] In fact, the Indigenous peoples' organization is requesting the adoption of such an approach in the future of environmental conservation, especially with regard to the initiative discussed at the beginning of the paper to transform the 30 perz cent of global land into PAs.[33]

However, there is more that can be done when it comes to environmental conservation in Indigenous ancestral lands. The main problem with the creation of PAs in these cases is the population's exclusion from forest management. But Indigenous peoples and local communities that have been inhabiting the lands since time immemorial are the holders of relevant environmental knowledge that can indeed contribute to conservation, climate change mitigation and adaptation, and sustainable use of resources. There are many examples worldwide of this model of PAs and environmental conservation management, an important one being the Indigenous and Community Conserved Areas Initiatives (ICCAs).[34] While the ICCAs listing is not exhaustive of all environmental areas managed by Indigenous peoples and many other cases exist and are not inscribed, this certainly represents a way forward to assert Indigenous territorial rights, the relevance of Indigenous knowledge and benefit-sharing. Another positive example, which relates to the management of national parks, is the recent initiative by Australia to hand back ancestral territories to Indigenous peoples. Three new marine parks were created in Western Australia in collaboration with Indigenous people for a total of 2,317 square miles. Previously, in 2021, Australia had returned to Indigenous peoples the Daintree Rainforest (Queensland). These initiatives can represent first, meaningful steps towards the healing of the legacy of colonialism.

6. *Conclusions*

With this article I have sought to spark reflection on how environmental conservation initiatives and the creation of PAs are a way for States to assert control over public interest natural resources through the application of a colonial ideal of uncontaminated and wild nature. This idea, which originated in the past, still today leads to the evictions of Indigenous peoples, like in the case of the Ogiek people in the Republic of Kenya. The loss of ancestral lands represents a loss of Indigenous knowledge, cultural identity, food and shelter for the peoples affected. The origins of such evictions rely in how the right to property is conceptualized in Kenya. The paper has explained, through the doctrine of eminent domain, why the Ogiek people did not have a formal property right to the Mau Forest, which is, under Kenyan law, a public forest that should not be subject to dwelling of any kind. But the judgment of the ACtHPR established unequivocally that the Ogiek people have collective land rights upon the Mau Forest, and therefore called for

[32] Please refer to H. JONAS, D. ROE, J. E. MAKAGON *Human Rights Standards for Conservation An Analysis of Responsibilities, Rights and Redress for Just Conservation*, Natural Justice & IIED, 2014, available at https://naturaljustice.org/wp-content/uploads/2017/04/Human-Rights-Standards-Conservation.pdf, last accessed November 2022.

[33] For example, consult the *Tribal Leader Statement on 30x30 Policy* published by Cultural Survival at https://docs.google.com/forms/d/e/1FAIpQLSdv7sYnEd2TQpvJSP-0MjTjv1XF_7HrPfQ2JnBRYqJ-CwE1OA/viewform?gxids=7628, last accessed November 2022

[34] Please consult the ICCAs registry: https://www.iccaregistry.org/, last accessed November 2022.

pecuniary and non-pecuniary reparations to the Ogiek people for all the sufferings they have had to endure since the PA was established. These reparations and their rationale represent an important starting point for States to reflect upon how environmental conservation is managed, and it calls for the inclusion of Indigenous peoples in the protection of biodiversity and natural resources, stepping away from colonial models of land taking.