

TRANSITIONAL JUSTICE AND INDIGENOUS PEOPLES

**Lessons Learned from the
Cases of Kenya, Morocco, Nigeria,
Rwanda, and Sierra Leone**



GIJTR

Global Initiative for Justice
Truth & Reconciliation



International Coalition of
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Cover: Community work by Kenyan ICSC member Manene Cultural Trust at Oleteepes, Kajiado
Photo: Manene Cultural Trust

ABOUT THIS TOOLKIT

The concept of transitional justice refers to a set of institutional mechanisms that document human rights violations suffered in relatively recent periods of violence, with the dual objective of providing an effective remedy to victims and reducing the potential for new cycles of violence by reforming institutions and social processes.

This model understanding of transitional justice has proved to be insufficient to reflect the experience of Indigenous peoples. The various transitional justice mechanisms, due to their historical contexts and doctrinal roots, have not properly recorded the experiences considered relevant by Indigenous peoples. And because they have failed to incorporate the range of Indigenous encounters with violence and oppression, they have not adequately linked the violations of the past with the ongoing marginalization of the present.

However, transitional justice is dynamic and has been gradually incorporating more effective practices to reflect Indigenous experiences. At times, it has been transformed in response to interventions and adaptations by Indigenous communities and thanks to the growing international recognition of Indigenous peoples' rights.

The report Transitional Justice and Indigenous Peoples: Lessons learned from the cases of Morocco, Nigeria, Rwanda, Kenya, and Sierra Leone shows both the limitations and the possibilities for constructive interaction between the field of transitional justice and the normative framework of Indigenous rights.

Broadening the field of transitional justice potentially includes the understanding of, and action on, the continuing territorial dispossession and harassment of Indigenous peoples. The cases examined call for a decisive integration of the framework of Indigenous peoples' rights and Indigenous leadership within transitional justice, decolonizing its approaches, broadening its historical perspective, and enhancing its capacity to shape profound political transformations in modern states.

This report was prepared as part of a project undertaken in the first half of 2021 by three GIJTR member organizations: the Due Process of Law Foundation (DPLF) the Centre for the Study of Violence and Reconciliation (CSV), and the International Coalition of Sites of Conscience (ICSC). The section on Latin America was coordinated by DPLF, and summarizes some of the case studies of Guatemala, Peru and Colombia, while the section on Africa was coordinated by CSV, summarizing the main cases of Morocco, Nigeria, Rwanda, Kenya, and Sierra Leone.

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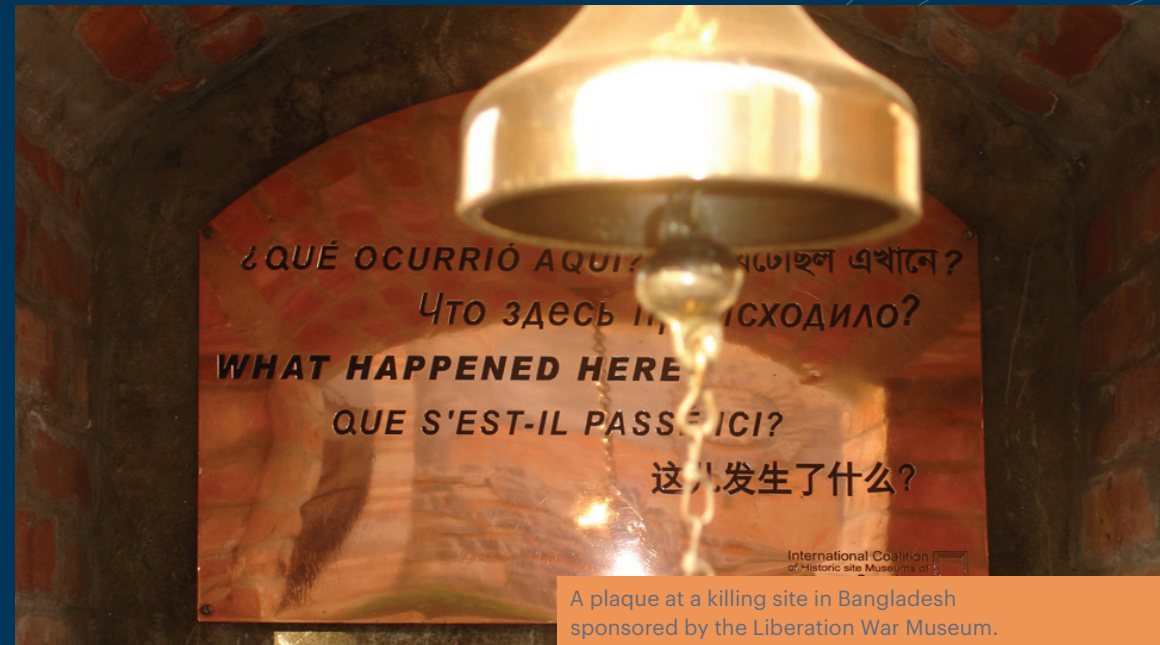
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ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION (GIJTR)

Around the world, there are increasing calls for justice, truth and reconciliation in countries where legacies of gross human rights violations cast a shadow on transitions from repressive regimes to participatory and democratic forms of governance.

To meet this need, the International Coalition of Sites of Conscience (ICSC or the Coalition) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014. GIJTR seeks to address new challenges in countries in conflict or transition that are struggling with legacies of or ongoing gross human rights abuses. The Coalition leads the GIJTR, which includes eight other organizational partners: American Bar Association Rule of Law Initiative (ABA ROLI), United States; Asia Justice and Rights (AJAR), Indonesia;



A plaque at a killing site in Bangladesh sponsored by the Liberation War Museum.

Centre for the Study of Violence and Reconciliation (CSVR), South Africa; Documentation Center of Cambodia (DC-Cam), Cambodia; Due Process of Law Foundation (DPLF), United States; Fundación de Antropología Forense de Guatemala (FAFG), Guatemala; Humanitarian Law Center (HLC), Serbia; and Public International Law & Policy Group (PILPG), United States. In addition to leveraging the expertise of GIJTR members, the Coalition taps into the knowledge and longstanding community connections of its 300-plus members in 65 countries to strengthen and broaden the GIJTR's work.

GIJTR partners, along with members of the Coalition, develop and implement a range of rapid-response and high-impact program activities, using both restorative and retributive approaches to justice and accountability for gross

human rights violations. The expertise of the organizations under the GIJTR includes:

- Truth telling, reconciliation, memorialization and other forms of historical memory;
- Documenting human rights abuses for transitional justice purposes;
- Forensic analysis and other efforts related to missing and disappeared persons;
- Victims' advocacy such as improving access to justice, psychosocial support and trauma mitigation activities;
- Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage in transitional justice processes;
- Reparative justice initiatives; and
- Ensuring gender justice in all these processes.

To date, the GIJTR has led civil society actors in multiple countries in the development and implementation of documentation and truth-telling projects; undertaken assessments of the memorialization, documentation and psychosocial support capacities of local organizations; and provided survivors in Asia, Africa and the Middle East and North Africa region with training, support and opportunities to participate in the design and implementation of community-driven transitional justice approaches. Given the diversity of experience and skills among GIJTR partners and among Coalition network members, the program offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner, while promoting local participation and building the capacity of community partners.



Nubian elders participating in a focus group interview in Kenya with ICSC member site Manene Cultural Trust. Photo: Manene Cultural Trust

TABLE OF CONTENTS

INTRODUCTION.....10

Understanding the Concept of “Indigenous” People12

Overview of Findings.....15

PART ONE.....19

1.1 General Background to the Case Studies19

PART TWO.....27

2.1 Injustices Suffered by the Ogiek and Endorois Peoples of Kenya27

DISCRIMINATION AND MARGINALIZATION27

FORCED EVICTIONS28

DISPOSSESSION OF ANCESTRAL LANDS29

DENIED ACCESS TO LANDS30

LIMITED ACCESS TO JUSTICE30

2.2 Existing Legal Frameworks, Judicial Mechanisms and Non-judicial Accountability Mechanisms for the Ogiek and Endorois Communities.....30

FOREST ACT (2005).....30

WILDLIFE (CONSERVATION AND MANAGEMENT) ACT (2013)31

KENYAN CONSTITUTION (2010)31

COMMUNITY LAND RIGHTS (2016)32

DOMESTIC JUDICIAL MECHANISMS33

REGIONAL JUDICIAL MECHANISMS.....33

African Court on Human and Peoples’ Rights33

African Commission on Human and Peoples’ Rights.....34

NON-JUDICIAL MECHANISMS34

Kenya Land Commission34

Ndugu Land Commission Inquiry35

Mau Forest Task Force.....36

2.3 Transitional Justice Processes36

TRUTH, JUSTICE AND RECONCILIATION COMMISSION36

PUBLIC APOLOGY37

2.4 Community Expectations in the Transitional Justice Process.....37

2.5 Effectiveness of Implementation38

2.6 Unaddressed Claims of Indigenous Communities and Gaps in Practice and Policies38

2.7 Main Challenges.....38

2.8 Key Findings39

PART THREE.....40

3.1 The Amazigh in the Context of Marginalization and Oppression in Morocco.....40

3.2 Existing Legal Frameworks and Judicial Mechanisms...43

3.3 Transitional Justice Processes45

ADVISORY COUNCIL ON HUMAN RIGHTS45

EQUITY AND RECONCILIATION COMMISSION45

INDIGENOUS AND RESTORATIVE JUSTICE MECHANISMS OF THE AMAZIGH (IZERF)47

3.4	Community Expectations in the Transitional Justice Processes	48
3.5	Effectiveness of the Implementation	48
3.6	Main Challenges	49
3.7	Key Findings	50

PART FOUR 51

4.1	The Ogoni People in the Context of Corporate Accountability, Economic and Political Violence in Nigeria	51
4.2	Existing Legal Frameworks, Judicial Mechanisms and Other Non-Judicial Accountability Mechanisms	56
4.3	Transitional Justice Processes	57
	JUDICIAL COMMISSION FOR THE INVESTIGATION OF HUMAN RIGHTS VIOLATIONS (OPUTA PANEL)	57
	FEDERAL AMNESTY PROGRAM.....	58
4.4	Indigenous and Restorative Justice Processes of the Ogoni People.....	59
4.5	Community Expectations in the Transitional Justice Process.....	60
4.6	Effectiveness of the Implementation	60
4.7	Main Challenges	61
4.8	Key Findings	62

PART FIVE 63

5.1	The Batwa People in the Context of Political Violence in Rwanda	63
	DISPOSSESSION AND EVICTION FROM ANCESTRAL LANDS	63
	LACK OF RECOGNITION AS AN IDIGENOUS GROUP	63
	EXCLUSION, MARGINALIZATION AND INEQUALITY	64
5.2	Existing Legal Frameworks	66
	DOMESTIC LEGAL FRAMEWORKS	66
	Constitution of Rwanda (2003)	66
	Organic Law (2005)	67
	NON-JUDICIAL ACCOUNTABILITY MECHANISMS	67
	ACWGIP Mission to the Republic of Rwanda (2008).....	67
	Concluding Observations Adopted by the Committee on Economic, Social and Cultural Rights (2013)	68
	Submission of Shadow Reports by Non-governmental Organizations to the Committee on Economic, Social and Cultural Rights.....	68
5.3	Critiques of Rwanda's Transitional Justice Processes in Relation to Batwa.....	69
5.4	National Unity and Reconciliation Commission	70
5.5	Community Expectations and Effectiveness of Implementation in the Transitional Justice Processes	70
5.6	Main Challenges.....	71
5.7	Key Findings	72

CONCLUSION AND GENERAL RECOMMENDATIONS 73

INTRODUCTION

Transitional justice as a multidisciplinary response to legacies of violence in post-conflict societies has gained wide acceptance as an effective way of helping such societies grapple with their violent past.¹ It embodies all the various “formal and non-formal (including traditional justice processes) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities, and to create conditions for security, democratic and socio-economic transformations”.²

During conflicts, political repression or crises, indigenous communities are usually most affected, and suffer continued social and economic marginalization, or remain among the most vulnerable members of society. They are often displaced by violence or fall victim to warring factions seeking to control their resource-rich territories. At other times, they become victim of their country’s economic or development policies, resulting in their displacement, loss of ancestral lands, and in some cases, their very means of survival as a people. Even when their countries initiate formal transitional justice processes to address its challenges, indigenous communities are usually sidelined, and are not provided adequate justice that is commensurate with their peculiar experiences, or that is meaningful and culturally relevant to them.



Family in a Batwa community in Rwanda. Photo: Forum pour la Mémoire Vigilante

This report follows extensive research into the experiences of indigenous communities with transitional justice processes in Africa. As case studies, it reports on the experiences of the Ogoni people of Southern Nigeria; the Amazigh (sometimes referred to as the Berbers) in Morocco; the Ogiek and Endorois indigenous communities of Kenya; and the Batwa indigenous communities of Rwanda. The first section of the report considers the indigeneity debate, and analyses some of the issues surrounding the concept, including the United Nations’ and African Union’s approach to addressing indigenous peoples’ concerns during transitional justice processes. The second section gives a general overview of the findings of the research.

The remainder of the report is divided into five parts. The first deals with the general backgrounds to each of the case studies. The second, third, fourth and fifth analyses in greater detail the particular experiences of indigenous communities in each of the case studies, their experiences with the transitional justice processes of their respective countries, and the legal framework and other mechanisms put in place to address their concerns, outlining key findings. The report includes a conclusion and general recommendations on how best to engage indigenous communities in transitional justice processes.

The choice of sites for the case studies was deliberate to achieve, as nearly as possible, a geographical spread to reflect the experiences from different sub-regions of the continent.

Understanding the Concept of “Indigenous” People

Sometimes referred to as “autochthonous”, “aboriginal”, or “native” people, there is yet no universally accepted definition of the concept of “indigenous people”.³ However, the United Nations (UN) has described indigenous peoples as any group or community of people who have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live.⁴ It lists the factors that are relevant to understanding the concept to include any ethnic community having priority in time, with respect to the occupation and use of a specific territory; “the voluntary perpetuation of cultural distinctiveness, which may include language, social organization, religion and spiritual values; self-identification as well as recognition by other groups or by state authorities as a distinct collectivity; and experiences of subjugation, marginalization, dispossession, exclusion or discrimination”.⁵

In the African context, the African Commission on Human and Peoples’ Rights Working Group on Indigenous Populations/Communities and Minorities in Africa (ACWGIP) lists similar factors to include any people having a distinct culture from the dominant society, and whose cultures are under threat, in some cases, of extinction; whose survival of their particular way of life depends on their access to their ancestral lands and the resources thereon; who suffer discrimination as they are regarded as less developed than other parts of the society; who suffer various forms of marginalization; who are subjected to “domination and exploitation through political and economic structures that reflect the interest of the national majority; and who identify themselves as indigenous”.⁶

Although some of these factors immediately present indigenous communities as minority ethnic groups, the reality is not always the case. For example, while the Amazigh indigenous people of Morocco fit into each of the other listed factors, they are not a minority ethnic group in Morocco. In fact, they are one of the largest, and constitute up to 10.4 million of the more than 37 million population of the country, with their Tamazight language spoken in several variants by over 40% of the population.⁷ They however suffer political exclusion, marginalization and various forms of violations on the basis of their cultural identity, as a result of a Moroccan state policy which favors the Arabic/French cultures of its colonial pasts, in disregard and exclusion of the Amazigh cultural identity and languages.



Focus group in Kono district in Sierra Leone. Photo: Campaign for Good Governance



Of course, the identifying factors listed by both the UN and the ACWGIP are by no means cumulative, just as the concept of indigeneity differs according to context, and so, cannot possibly be captured in a single definition. However, a common thread in understanding the concept is that the term relates to a people “in

their often desperate struggle for political rights, for land, for a place and space within a modern nation’s economy and society”,⁸ and for the Ogoni people of southern Nigeria, for example, for corporate accountability by oil companies operating within their territory, and a more equitable distribution of revenue from the resources found therein.

Survival, whether of political, economic, language or cultural identity, is at the core of indigenous peoples’ struggles. This is also true for the four case studies in this report: the Amazigh, for their cultural survival and political relevance; the Ogonis, for economic survival in the midst of environmental degradation by multinational oil companies; the Batwa, for legal identity, political relevance and land rights; and the Ogiek and Endorois of Kenya, for legal protection against forceful relocation, displacement and dispossession of ancestral lands.

Although the African Union Transitional Justice Policy (AUTJP) does not specifically mention indigenous communities as a cross-cutting issue during conflict,⁹ it however contemplates and recognizes conflict situations where violence can be perpetrated on the bases of ethnicity, social origin, and other considerations and, therefore, sets benchmarks for the management of such diversities.¹⁰ It also encourages the use of indigenous values, and the empowerment of traditional and religious leaders as part of the benchmarks for achieving institutional and political reforms.¹¹ Similarly, the UN approach to transitional justice recognizes the role of indigenous processes in transitional justice in the implementation of transitional justice programs. In its guiding

principles and framework on its approach to transitional justice mechanisms, the UN encourages the accordance of due regard to indigenous and informal traditions in justice administration and dispute settlement in the coordination of transitional justice programs.

However, an important but perhaps most contested aspect of the indigeneity debate is the issue of identification. While it is easier for a group of people, based on their collective experiences, to appellate themselves as “indigenous”, most countries simply refuse to so identify them, or accord them any form of legal recognition in their laws. For example, neither Nigeria nor Rwanda accords any legal recognition to indigenous communities in its laws. This is partly blamed on the misconception that such legal recognition or positive categorization will lead to conflicts and tribalism.¹² As argued by the ACWGIP, however, tensions and conflict are rather caused “when certain dominant groups force through a sort of ‘unity’ that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives”.¹³ In the next section, we provide an overview of findings in this research, with regards to engagements with indigenous communities in transitional justice initiatives.

Overview of Findings

Many African countries have undergone, and are still undergoing, transitional justice processes to deal with their violent pasts. In this research, we focus on the experiences of Kenya, Morocco, Nigeria and Rwanda, and make an overview of findings on their respective experiences with transitional justice processes, which are indicative of transitional justice experiences in the broader situation on the continent.

In Kenya, the Truth, Justice and Reconciliation Commission (TJRC) was established to help promote peace, justice and national reconciliation through the investigation of all cases of human rights violations that took place in the country from its independence. As indigenous communities, both the Endorois and the Ogiek tribes experienced years of oppression, displacement, forceful land dispossession and various forms of injustices, and therefore looked forward to the TJRC to address their grievances and historical injustices. In the same

way, the Moroccan experience with its Equity and Reconciliation Commission (ERC) and other national reconciliation mechanisms was to help the country address the political violence that characterized the 'years of lead' in the general context,¹⁴ but also the specific concerns of the Amazigh who experienced national exclusion and political marginalization on the basis of their cultural identity, and military suppression during their calls for the recognition of their cultural rights.

In Nigeria, several transitional justice initiatives reflect the country's past experiences with internal crises, ethnic violence and the many years of military regimes that were characterized by serious human rights violations. The Judicial Commission for the Investigation of Human Rights Violations, established in 1999, popularly referred to as the "Oputa Panel", came on the heels of the country's return to democracy in the same year. It was also meant to adequately address the environmental concerns which threaten the very survival of the Ogoni people due to the effects of oil exploration activities by multinational oil companies. But most specifically, the Oputa Panel was supposed to specifically address government's clampdown on the Ogoni struggle, leading to the execution of the 'Ogoni nine' – the symbol of the Ogoni struggle under the previous military junta.

Rwanda's transitional justice process followed the 1994 genocide that resulted in the deaths of many. However, beyond the dominant ethnic groups that were most prominent in the crisis are other small indigenous/ethnic communities who also experienced, and are still experiencing, marginalization and other forms of injustice, and which the transitional justice initiatives were also meant to help bring justice to. Like other such communities, the Batwa continue to face suppression, denial of socioeconomic rights, basic infrastructural development, and political exclusion in the country. They also face the challenge of lack of legal recognition as indigenous people, with cases of eviction and displacement from their ancestral lands posing a threat to their survival and existence as a people.

A common trend in these experiences indicates that transitional justice processes fail to address the nuanced concerns of indigenous communities, due to a variety of reasons, including the failure of their inclusion in the policy formulation, execution and implementation stages of transitional justice

programs which are meant to address indigenous peoples concerns. Another gap is that, despite the existence of informal/traditional dispute resolution processes among some of the indigenous communities, formal transitional justice processes fail to consider them as relevant to the people whose grievances they are meant to address, thereby denying them the prospect of utilizing these traditional processes and benefiting from their reintegration and reconciliation elements.

Although the Rwandan transitional justice initiatives included aspects of traditional justice processes, the problem of exclusion of the Batwa communities was nonetheless evident in both the appointment of local judges and the composition of the Gacaca courts, which excluded the historically marginalized Batwa. While the Batwa are now considered in many development programs, they continue to suffer the discrimination and exclusion which has characterized their collective experience in larger Rwandan society. They still experience problems with accessing quality education, accessing ancestral lands, and the denial of legal identification as an indigenous group by the Rwandan government, despite being so identified by the ACWGP.¹⁵



Batwa community participating in the group interview program, Rwanda.
Photo: Forum pour la Mémoire Vigilante

The situation is similar in the Kenyan case study, where the government is yet to implement both the recommendations and the judgment of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights with respect to the rights of the Endorois and Ogiek indigenous communities, respectively. The experiences of the Endorois and Ogiek, which include dispossession and denial of access to and forced evictions from ancestral lands, were never adequately addressed despite several judicial and institutional frameworks recognizing them as indigenous peoples with their rights affirmed by the international judicial mechanisms.

The inclusion of former victims of coerced exile and arbitrary detention in Morocco's transitional justice process was praised for enhancing the credibility and ownership of the process in the country. The process however failed to equally involve the Amazigh indigenous communities, which itself speaks to one of their main grievances – exclusion, based on their cultural identity. The Moroccan transitional justice process therefore fell short of the expectations of the Amazigh, most importantly because during the hearings conducted by the ERC, they were not allowed to confront their oppressors so as to know the entire truth with regard to their experiences with state security agents. Again, despite the recent constitutional recognition of the Tamazight language, which followed legal reforms aimed at addressing injustices against them, there is still a feeling of dissatisfaction among the Amazigh, who consider these reforms as mere window-dressing, rather than tackling the intergenerational injustices they have suffered as a people struggling for relevance in their society. More than a decade since Morocco concluded its transitional justice process, the reality is that Moroccan society has still not evolved toward equity, where the Amazigh have an equal stake in both political and human development indices.

In conclusion, in all the case studies considered, transitional justice initiatives failed to consider the particularities of indigenous communities and their collective experiences as peoples, by lumping them into the general needs of the larger society of their countries. This resulted in the failure of these processes to meet the justice needs of the affected communities by leaving several of their claims unaddressed. In the next part of this report, we make an analysis of the backgrounds of each of the indigenous communities in the context of their societies. This will provide a clearer understanding of their needs, demands and engagement with the transitional justice processes of their countries.

PART ONE

1.1 General Background to the Case Studies

The indigenous communities in the four country case studies have had diverse experiences, which nonetheless have a number of common elements. The Ogiek and Endorois communities of Kenya are among more than 25 indigenous communities still existing in Kenya.¹⁶ The two groups have been subjected to serious human rights violations, including land dispossession, forced evictions and displacement, denied access to ancestral land, discrimination, and marginalization, to name a few.¹⁷

Historically, the Endorois lived along the shores of Lake Bogoria, which is important for their religious and cultural practices.¹⁸ They dedicate the area around Lake Bogoria to historical prayer sites, circumcision rituals, and other ceremonies.¹⁹ The Ogiek people, meanwhile, are a hunter-gatherer group that depends on the Mau



Kajiado Maasai community in Kenya. Photo: Manene Cultural Trust

forest for food, medicine, shelter, and preservation of their culture.²⁰ As Corinne Katz notes, the Ogiek “have lived on the forested Mau escarpment for as long as oral tradition can trace”.²¹ The Ogiek community has an approximate population of 30,000, while the Endorois community consists of 60,000 people.²²

During the colonial administration, the British established the East Africa Protectorate in 1895 and established Kenya in 1920 as a British colony.²³ During this time indigenous communities experienced a series of evictions from their ancestral land, such as the displacement of the Ogiek people from the Mau forest and resettlement to Chepalangu forest²⁴ in the 1920s to 1930s.²⁵ The colonial government also banned hunting within the forests. As a result, the Ogiek were forced to change their traditional lifestyle. They began owning cattle and farming. Furthermore, in 1930, 10% of the Mau forest was deforested to create forest plantations using exotic species.²⁶ The planting of exotic trees affected the traditional livelihood of the Ogiek.²⁷ In the case of the Endorois, during the colonial era, they remained on their ancestral land without interference from the colonial government.²⁸ Nevertheless, the British legislated that the land belonged to the Crown.²⁹ The Endorois were dispossessed of their ancestral land in terms of the law, even though they faced few challenges in accessing this land.

After independence in 1963, the Kenyan government intensified forced evictions, displacement, and dispossession of indigenous communities’ land. The government restricted indigenous peoples from accessing their ancestral land with the creation of the Huntington Game Reserve in 1973 and the Bogoria Game Reserve in 1978.³⁰ After this, the groups’ access was up to the discretion of the game reserve authorities.³¹ Additionally, in the case of the Endorois people, in 2002 ruby mining was permitted on their ancestral land.³² This was followed by the construction of a road to allow the passing of heavy mining machines, which increased the risk of contaminating the waterways.

The Kenyan government’s mismanagement of the Mau forest through activities such as wood-cutting, logging, and clearance devastatingly impacted indigenous traditional practices, especially among the Ogiek.³³ The establishment of schemes in the 1990s for resettling the Ogiek people led to the degradation of the forest environment in the Mau forest and allocation of land to well-connected people in the government, such as politicians and wealthy businesspeople.³⁴ Instead of addressing injustices perpetrated under colonialism, the post-colonial government continued to marginalize these communities.



Meeting with Maasai elders - Ngong Hills, Kenya. Photo: Manene Cultural Trust

In Morocco, the country’s multi-ethnic and cultural background speaks to the several invasions and the subsequent colonial overlords in the Maghreb. The Amazigh are one of the largest ethnic groups in Morocco, and are also found in other North African countries. In fact, they are said to be the original inhabitants of Morocco, and constitute up 10.4 million of the more than 37 million population of the country. Their language, Tamazight, is spoken in several variants by over 40% of the country’s population.³⁵ In present-day Morocco, the Amazigh are mostly found in the Rif, the Middle and High Atlas, the Sous Valley, and the Sahara regions of the country.

Apart from being the original residents in Morocco, the Amazigh also established and were able to maintain autonomous states prior to Morocco’s independence.³⁶ Although it is arguable that the Amazigh cannot be categorized as a minority ethnic group in Morocco, given their population in relation to other ethnic groups in the country, they however satisfy other factors such as having priority in time and a distinct and well-established lingual, religious and cultural distinctiveness. They have also suffered subjugation and exclusion from national reckoning on the basis of their cultural identification. The Amazigh self-identify as indigenous, and have been so acknowledged by both the Moroccan state and non-state actors.

The cultural and lingual plurality of Morocco is one of its most prominent features. But as prominent and populated as the Amazigh indigenous people are, the dominant Arabic-Islamic narratives in the country fail to recognize the cultural/lingual identity of the Amazigh.³⁷ Like the several invasions that took place in the Maghreb, the Muslim Arabs who arrived in the territory in the late 17th century conquered the Amazigh, brought Islam to them and attempted the Arabization of the polity.³⁸ After Morocco's independence, the Amazigh were still subjected to legal discrimination based on their ethnic identity, while the Moroccan national discourse favored the Arabic-Islamic civilization which sits at the top of its national cultural consciousness.³⁹ The prominence accorded to the Arabic and French languages created what has been referred to as a 'linguistic wall', which is blamed for the repression of Amazigh indigenous people and which complicates their educational pursuits.⁴⁰

The first attempt at open advocacy in Morocco for Amazigh rights and cultural identity was in the 1970s.⁴¹ The Amazigh were inspired by a series of Amazigh uprisings in Algeria, which led to the 'Amazigh spring' of 1980, with tremendous

impacts on the same struggle in Morocco.⁴² In 1994, an incident similar to the Amazigh spring played out in Morocco, when demonstrators were arrested for bearing placards with the Tamazight language.⁴³ Their arrest and trial had the opposite effect from that intended by the government, as it ignited outrage across the country.⁴⁴ The struggle received tremendous support from the media and civil society organizations, who rallied in support of Amazigh demands for the recognition of their cultural and language rights.

In 2000, Amazigh rights activists presented the Amazigh manifesto to King Mohammed VI, demanding national legal recognition of their language and identity. This move yielded the desired result when King Mohammed VI, through a royal decree in 2001, established the Royal Institute for the Amazigh Culture.⁴⁵ Although most Amazigh areas are still said to be poor, underdeveloped and lacking in amenities like schools, factories and roads,⁴⁶ the Arab Spring that swept through the North African region helped strengthen social and political institutions in Morocco, and helped the Amazigh to gain political momentum.⁴⁷ Recent constitutional developments in the country have also helped the Amazigh identity to become "congruent with Moroccan national identity".⁴⁸ However, ten years after the constitutional changes that took place in 2011, most Amazigh cultural advocates are still dissatisfied with the path taken to activate these changes.⁴⁹

In Nigeria, long before the incursion of British colonialists into what is now known as Nigeria in 1901, the Ogoni people had already settled in the southern coastal region of the country and had a well-established social order based on class distinctions.⁵⁰

The discovery of crude oil deposits in the Niger Delta region of Nigeria in the late 1950s represented a major phase in the economic transformation of the country. In fact, immediately after the Nigerian civil war ended in 1970, prices of crude oil in the international market tripled, resulting in what has been described as the 'oil boom' and an astronomical increase in oil revenue for the country.⁵¹ This period also witnessed the influx of international oil exploration companies, including Shell Petroleum Development Company (SPDC),⁵² into the region. The oil prospecting, exploration and production activities of these multinational giants would have tremendous adverse effects on both the ecosystem and the quality of life of the people in the area – the Niger Delta people, and especially the Ogoni people. The Ogonis are a group of several small indigenous communities in the Niger Delta, South-South region of Nigeria, who are also



Focus Group Participants in Kailahun, Sierra Leone. Photo: Campaign for Good Governance

one of the most marginalized ethnic minority groups in the country due to their distinct identity among wider Nigerian ethnoreligious groupings.⁵³

Due to gas flaring, oil spillage and other environmentally destructive activities of oil companies, the predominantly peasant farmers and fishing communities of Ogoniland witnessed serious environmental pollution and the destruction of their sources of water and means of livelihood.⁵⁴ Calls by the Ogoni people for more responsibility on the part of both the government and the oil giants operating in the area progressed from peaceful agitation to sabotage, criminality and violence.

In one of the earliest of these incidents, the management of SPDC based in the region wrote to security agents of the government requesting 'security protection' following a planned protest at its facilities by local communities.⁵⁵ In the series of events that would follow, security agents invaded the communities in the early hours of 1 October 1990, on the allegations that some of its officers were missing in the aftermath of the protests. In that single operation, an estimated 80 people were killed, while several houses were burnt down.⁵⁶ An inquiry set up by the government indicated that the Police Mobile Force (a specialized combat unit of the Nigeria Police Force) was responsible, and recommended their prosecution. It also called for reparations to be paid to the affected communities. These recommendations have not been implemented.⁵⁷

Following this incident, in October 1990, members of the affected communities founded the Movement for the Survival of Ogoni People (MOSOP) to provide a common front by which the communities could interface with both the government and multinational oil companies in the region.⁵⁸ In its clamor for a sustainable environment and a more equitable distribution of the resources found in its soil, MOSOP issued what it called its 'bill of rights' in 1990, a document detailing its demands on many issues, including political autonomy, the right to a part of the oil revenue for the development of its devastated communities, the development and promotion of the Ogoni language within its territory, and the protection of the ecosystem from further degradation.⁵⁹

Following these developments and the rising tensions in the region, security forces under the military administration of Sani Abacha carried out extrajudicial killings, arbitrary arrests, flogging, rape, extortion and other gross human rights violations against Ogoni communities in 1994.⁶⁰ But the Ogoni communities continued to promote their demands. Although these agitations were carried out on several fronts and by several interest groups both at home and abroad,

MOSOP became the face of the struggle, and its continuous agitation for the survival of the Ogoni people would result in a serious crisis and the eventual execution of some prominent Ogoni rights activists.

In Rwanda, the Batwa are an indigenous community who historically have been a marginalized people. The marginalization started with the colonial government and was exacerbated after independence. The Batwa are the oldest ethnic group in Rwanda.⁶¹ Traditionally, the Batwa are hunter-gatherers who depended on the forest for their livelihood.⁶² The exact population of Batwa is unknown because Rwanda prohibited ethnic categorization after the 1994 genocide.⁶³ The group's population is estimated to be 25,000 to 30,000, equivalent to less than 1% of the Rwandan population.⁶⁴ The Batwa's traditional livelihood makes them a culturally distinctive people because of their dependence on forest resources for sustaining their livelihood, religious activities, and identity.⁶⁵

Due to their vulnerable situation, the Batwa have been the victims of a series of forced evictions and displacement from their ancestral land, particularly in the 1970s and 1990s.⁶⁶ The evictions were carried out under the justification of the conservation of forests. For example, the Batwa were forcefully evicted from their ancestral land of Mgahinga, Bwindi, and Echuya after the Rwandan government created national parks for conservation purposes. In 1998,



Focus group discussions with a Kikuyu community in Kenya. Photo: Manene Cultural Trust



Nubian elders participating in a focus group interview in Kenya. Photo: Manene Cultural Trust

the government removed the Batwa from Nyungwe forest so that it could establish a military zone and national park.⁶⁷ Due to this series of evictions, the Batwa's access to their ancestral land was denied.⁶⁸ The Batwa are still facing discrimination and exclusion because of their indigenous identity. They are suffering from non-recognition as an indigenous community in Rwanda, even though the ACWGIP recognizes the Batwa as an indigenous group.

The analysis above indicates the situation and contexts of each of the indigenous communities in the case studies. In the next four parts of the report, we provide an in-depth analysis of the contextual circumstances of each of the indigenous communities and their experiences with the transitional justice processes of their respective countries. We also consider some of the legal and institutional frameworks relevant to them, including informal accountability mechanisms, and outline key findings in each of the case studies.

PART TWO

2.1 Injustices Suffered by the Ogiek and Endorois Peoples in Kenya

DISCRIMINATION AND MARGINALIZATION

The Ogiek and Endorois have continuously suffered discrimination and constraints on their social-economic rights on basis of ethnicity, social origin, and religion.⁶⁹ As a result of discrimination, they have been denied access to education, healthcare, employment, and justice.⁷⁰ Many Ogiek and Endorois in Kenya are homeless, without proper housing and shelter, and coping with poor sanitation.⁷¹

For instance, the government prohibited Ogiek children from attending school near the Mau forest, which obviously affected the right to education for Ogiek children. The infringement of the right to education was also observed in the report of Truth, Justice, and Reconciliation Commission of Kenya (TJRC).⁷² Discrimination and marginalization of Endorois and Ogiek people are perpetuated by laws enacted in Kenya that hinder the enjoyment of their



Manene Cultural Trust preparing a meeting with Maasai elders in the Ngong Hills, Kenya. Photo: Manene Cultural Trust

property rights, religious and cultural rights, and use of their natural resources. Furthermore, discrimination was reaffirmed by the African Court in the case of the *African Commission on Human and Peoples Rights v Republic of Kenya* where the court found that the Kenyan government discriminated against the Ogiek community on basis of their traditional way of life and cultural distinctiveness, which depend on the forest.⁷³

FORCED EVICTIONS

The Ogiek and Endorois communities have been subjected to evictions since the time of the colonial administration. The Ogiek people were the victims of evictions in the 1920s, 1930s, 1940s, and 1950s.⁷⁴ Post-independence, several more forced evictions were carried out against the Ogiek, such as the evictions in Northern Tinderet, Londiani, Koibatek, Maasai Mae, North Narok, Eastern Mau, and South West Mau, to name a few.⁷⁵ In the same way, the Endorois people were evicted from their ancestral land in the area around Lake Baringo following the declaration of the Game Reserve of 1973/74.⁷⁶ Research shows that more than 400 families were evicted at that time.⁷⁷

This injustice was highlighted in the 2013 TJRC, which states that “hunters and gatherers of Kenya have been affected most of severely, by land loss, land fragmentation and forced eviction.”⁷⁸ Furthermore, the evictions were conducted without due process. At times people were evicted without being given notice and violently. An example is the eviction of the Ogiek people of West Mau in 1975, when police burned houses, food stores, and animals.⁷⁹

The evictions were carried out without proper consultation and compensation. They had devastating effects on the indigenous people in Kenya, including the loss of property, displacement, land loss, and continuation of the cycle of poverty within the communities. They also forced the communities to change their traditional way of life.



Dialogue between ICSC member Manene Cultural Trust and Kikuyu elders, Kenya.
Photo: Manene Cultural Trust

DISPOSSESSION OF ANCESTRAL LANDS

The Ogiek and Endorois have suffered dispossession of their ancestral land, which has made many landless and squatters. This is evident in the case of the Endorois people, who for centuries lived on their land without interruptions.⁸⁰ Although the colonial government vested legal ownership of the land in the Crown, they recognized the Endorois’ right to occupy and use the land.⁸¹ However, the post-independence government made the Endorois land entrusted land with Article 115(2) of the former Constitution.

Endorois’ dispossession was also due to gazettement of land in 1973 by the government of Kenya, which stripped the community’s customary rights in the Lake Bogoria region.⁸² The government declared the area a game reserve and did not provide the full, prompt, and adequate compensation it promised to the elders of the community. The dispossession caused the displacement of the entire community and destruction of houses and religious buildings. The Ogiek suffered the same dispossession of ancestral land in the Mau forest.

DENIED ACCESS TO LAND

In addition to being evicted and dispossessed of their ancestral land, the Ogiek and Endorois have been denied access to their land. The Endorois community has had very limited access,⁸³ as it is required to seek permission from the authorities operating the game reserve in Lake Bogoria. This denied access affects the community's ability to conduct their traditional rituals.⁸⁴

LIMITED ACCESS TO JUSTICE

While the Ogiek and Endorois communities have endured discrimination, marginalization, and other forms of injustice, it has been very difficult for them to access justice.⁸⁵ This is due to their being under-represented in the government and legal system of Kenya. Corruption exacerbates the problem. The TJRC's report notes that the lack of access to justice for indigenous peoples is due to inequitable distribution of court service in Kenya, lack of court infrastructure, and lack of legal aid.⁸⁶

2.2 Existing Legal Frameworks, Judicial Mechanisms and Non-judicial Accountability Mechanisms for the Ogiek and Endorois Communities

FOREST ACT (2005)

The Forest Act provides for sustainable management of forest resources for the socio-economic development of Kenya. Sustainable management is defined as "management of the forest to permit only such use constitute sustainable use".⁸⁷ The law declares that all forests except those that are privately owned are vested to the state. It recognizes the forest community, which includes the group of people who traditionally have been associated with the forest for reasons of livelihood, culture, or religion.⁸⁸ Forest communities, including the Ogiek, are permitted to use the forest if following certain rules.⁸⁹

The Forest Act does not grant land tenure to indigenous communities, which continues to deprive them of their ancestral land. While the legislation seeks to ensure community participation in forest management by allowing members of the forest community to register community forest associations (CFA) and granting forest user rights, for example for honey collection, the groups have limited access to the forest.⁹⁰ A CFA may request to enjoy forest user rights, but this is upon the director of the Kenyan Forest Service to grant.

A World Bank strategic environmental assessment of the Forest Act underscores that in Kenya, most tribes attribute cultural values to forests using them for different purposes and needs. While new legislation provides for this continued use, a formal application is required to register and authorize the existing practice. Not all communities or local groups will have the necessary capacity or support to enter this application process so maybe excluded, unintentionally.⁹¹

WILDLIFE (CONSERVATION AND MANAGEMENT) ACT (2013)

The Wildlife (Conservation and Management) Act provides for the protection, conservation, sustainable use, and management of wildlife in Kenya.⁹² The legislation is guided by the principles of devolution, effective public participation, an ecosystem approach, sustainable utilization, and equitable sharing of benefits, to name a few.⁹³ It establishes the Kenya Wildlife Service as the body that manages national parks and reserves.⁹⁴ The legislation directly affects indigenous people in Kenya by criminalizing unauthorized hunting and honey collection in those areas.⁹⁵ It put in place a cumbersome procedure to apply for a permit.⁹⁶

KENYAN CONSTITUTION (2010)

The Constitution protects several rights of indigenous peoples in Kenya. It protects and promotes indigenous languages.⁹⁷ It further acknowledges

indigenous peoples as a marginalized community, as stipulated under Article 260(c), where it is defined as an “indigenous community that has retained and maintained a traditional lifestyle and livelihood based on hunter and gatherer economy.” While the Constitution recognizes communal land, which includes ancestral land and land traditionally occupied by hunters and gatherers under Article 63, indigenous communities continue to face eviction.

COMMUNITY LAND RIGHTS (2016)

This law was enacted to give effect to Article 63 of the Kenyan Constitution, which protects community rights.⁹⁸ Among other things, the act provides for recognition, protections, and registration of community land rights in Kenya, as well as administration and management of community land.⁹⁹ It vests the land ownership to the community. The law provides an avenue for the Ogiek and Endorois to legally claim, own and manage their ancestral land. While the law is progressive in terms of giving legal force to community land rights in Kenya, the challenges of indigenous people on the question of land continue.¹⁰⁰



Circle of dialogue between ICSC member Manene Cultural Trust and Kajiado Maasai community in Kenya. Photo: Manene Cultural Trust

DOMESTIC JUDICIAL MECHANISMS

In the case of *Joseph Letuya & 21 Others v Attorney General & 5 Others*, the applicants acted as representatives of the Ogiek community in filing a constitutional petition alleging the violation of their rights by the respondents.¹⁰¹ They claimed that the Ogiek people derive their livelihood from the forest but have been denied communal land rights. Furthermore, they claimed that the infringement of their rights caused their illegal eviction from the Mau forest and that they have not been given alternative land for resettlement.

Going through the arguments of both sides, the court found that the Ogiek people have been infringed in terms of their right to life and dignity. The court held that the allocation of land occupied by the applicants was illegal and further ruled that all the titles issued inconsistent with the purpose of the settlement scheme be revoked and that the Ogiek community be settled outside critical catchment areas and biodiversity hotspots.

REGIONAL JUDICIAL MECHANISMS

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The case of *African Commission on Human and Peoples' Rights v Republic of Kenya* was brought before the court after the respondent state issued a 30-day eviction notice to the Ogiek people in Mau forest.¹⁰² Following the notice, the application was filed to the court for alleged violation of the right to property, the principle of non-discrimination, right to life, and many other rights. One of the questions the court was called to determine was whether the Ogiek are indigenous people under the Africa Charter. The court affirmed that Ogiek people are an indigenous community in Kenya for the following reasons: The Ogiek have suffered continued subjugation and marginalization; they engage in voluntary perpetuation of cultural distinctiveness; and they have a strong attachment to their ancestral land. It found Kenya to be in violation of Articles 1, 2, 8, 14, 17(2)(3), 21, and 22 of the African Charter. After the judgment, the government established a task force to implement the judgment. Unfortunately, until today, the task force's report has not been published. In 2020, the government again evicted Ogiek people from their ancestral land.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,¹⁰³ the complainant filed a communication with the African Commission on Human and Peoples' Rights alleging the violation of rights in the displacement of the Endorois people from their ancestral land and the failure to adequately compensate them. The Commission reasoned that the traditional possession of land by the indigenous community has the same effect as granted rights by the state. Traditional possession by indigenous peoples entitles them to demand recognition and registration of rights, while members of the community who have lost possession of the land still have a property right. The Commission found the respondent state in violation of Articles 1, 8, 14, 17, 21, and 22 of the African Charter on Human and Peoples' Rights. The Kenyan government has not made changes in response to this finding.

NON-JUDICIAL MECHANISMS

KENYA LAND COMMISSION

The Kenya Land Commission, known as the Carter Commission, was set up in 1933 with the task of giving recommendations on the measures for righting wrongs occasioned by the earlier dispossession of land.¹⁰⁴ The Commission published a 535-page report that recommended the classification of native occupation of land under four headings: native land, native reserve, native leasehold areas, and native occupation of the area.

The report recognized the change of lifestyle of the Ogiek, noting that "the passing of the game laws and forest laws interfered with the primitive mode life led by the Dorobo, the effort has been made by the administration with varying success to induce them to become useful members of native society. They have been encouraged to acquire stock and to cultivate." The report stated that indigenous communities in Kenya need to change their lifestyle either to become agricultural or pastoral tribes because in modern times they cannot exist as forest dwellers without affecting forests and sources of water.



Circle of dialogue between ICSC member Manene Cultural Trust and Kajiado Maasai community in Kenya. Photo: Manene Cultural Trust

NDUGU LAND COMMISSION INQUIRY

The Ndugu Land Commission Inquiry was appointed by the Kenyan president in 2003 with the mandate to inquire into the allocation of public land to private individuals, collect evidence relating to the nature and extent of unlawful or illegal allocations, and prepare a list of land irregularly and illegally allocated.¹⁰⁵

The commission published a report in 2004, which found that indigenous communities, especially the Ogiek, have been displaced from their ancestral land through settlement schemes. It noted that the displacement of indigenous people was facilitated by protectionist laws and policies that do not acknowledge the historical claims of indigenous people. The report also revealed that the intention was not to resettle the people but rather to allocate land to private individuals. The report recommended that all illegal allocations of land be revoked.

MAU FOREST TASK FORCE

The Mau Forest task force was established in 2008 under the office of the prime minister following the Constitution Coalition Government based on a National Accord to make a recommendation to the government on the restoration and conservation of the Mau forest. Its report was published in 2009 and tabled before the Parliament. The report underscores that the Mau forest is the home of forest dwellers like the Ogiek and provides a livelihood for them.

The task force examined the establishment of a settlement in the Mau forest aimed at resettling the Ogiek, but found that some private individuals who do not belong to the Ogiek community benefited from the settlement.¹⁰⁶ In terms of its recommendations, the task force suggested that the Ogiek people be settled and given titles far from water catchment and biodiversity hotspots.¹⁰⁷ Furthermore, it recommended the establishment of an Ogiek register in collaboration with the elders of the Ogiek community.

2.3 Transitional Justice Processes

TRUTH, JUSTICE AND RECONCILIATION COMMISSION

With the Truth, Justice and Reconciliation Commission Act of 2008, the truth commission was established with the mandate of promoting peace, justice, national unity, healing, and reconciliation among the people in Kenya by investigating all state human rights violations from 1963 to 2008. The report of the TJRC was published in 2013. The report found that violation of indigenous peoples in Kenya was one of the atrocities committed by the state, and that the land rights of the Ogiek and Endorois have been infringed upon. It noted that they have lost their land rights because of the government's reluctance to deal with historical injustices.¹⁰⁸

The expulsion of Endorois, Ogiek ... from their ancestral lands and the allocation of forest lands to other communities, have led to the destruction of the forest upon which the traditional livelihood of these communities depends, and has rendered it virtually impossible for hunter-gatherers to practice their culture. The pastoralist and gatherers in Kenya have been affected mostly by land loss, land fragmentation, and forced eviction. The result has been increased marginalization, deepening poverty.

The commission pointed out that access to justice is one of the challenges for indigenous communities because of a lack of adequate courts and legal aid for the communities.

The commission recommended the recognition of the Endorois community's right of ownership of ancestral land, including their ability to access this land without restrictions. It further stressed the need for paying the community compensation for the losses they suffered.

PUBLIC APOLOGY

On 26 March 2014, President Kenyatta in a State of Nation speech offered an apology "to all compatriots for all past wrong of the Government of Kenya."¹⁰⁹ While the president did not specifically mention the Ogiek and the Endorois, the apology implicitly extended to indigenous communities.

2.4 Community Expectations in the Transitional Justice Process

The Ogiek and the Endorois had expectations regarding the Kenyan TJ process. Firstly, they expected to acquire legal ownership of their ancestral land and resources.¹¹⁰ They were optimistic that the TJ process would address the land question so that they would not face further evictions by the government, giving them legal access to ancestral land and the right to participate in development

programmes and proper consultations. Secondly, they expected change to come with the 2010 Constitution, which recognizes the right of the community to own land and the rights of indigenous peoples.¹¹¹ Thirdly, they expected reparations for the historical injustices the community suffered.

2.5 Effectiveness of Implementation

Despite Kenya having one of the most progressive constitutions in Africa, which protects the rights of indigenous and marginalized groups, the communities perceive no effective implementation of TJ measures for indigenous peoples.¹¹² This lack of implementation stems from a lack of political will.

2.6 Unaddressed Claims of Indigenous Communities, and the Gaps in Practice and Policies

The claims of indigenous communities in Kenya remain unaddressed. The eviction of Ogiek people from the Mau forest in 2020 is evidence of the continuation of the marginalization of indigenous communities. In addition, reparations and access to justice are among the unaddressed claims of indigenous communities.

These unaddressed claims show gaps in practice and policies in Kenya. Access to justice remains an ideal for the Ogiek and the Endorois as the judiciary has interfered politically. The policy gap is manifested in conflict of interest between indigenous communities and government in the sense that the government is more concerned with development and conservation of the forest.

2.7 Main Challenges

There are several challenges, particularly poor implementation of the existing legal framework in Kenya. For instance, the 2010 Constitution provides for the rights of indigenous peoples and some mechanisms have been put in place, but they are ineffective. The government continues to trade-off rights of indigenous

communities for developmental reasons. There is lack of dialogue between the government and the authorities of these communities, which has fuelled misunderstandings. Additionally, indigenous peoples are inadequately represented in government. This is one of the stumbling blocks for indigenous peoples in engaging and pushing for their concerns with the government.



Batwa family in Rwanda.
Photo: Forum pour la Memoire Vigilante

2.8 Key Findings

Advocacy and awareness-raising by civil society and different stakeholders needs to be done, so that the injustices endured by indigenous communities can be fully addressed. This can include the use of social media platforms, as the government seems to pay attention to social media outcries. Awareness-raising concerning the rights of indigenous people in Kenya will help government officials be sensitive while dealing with the issues of indigenous people.

The decisions of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights need to be implemented.

Indigenous peoples should be better represented within Parliament, so that their issues can be a national issue.

The implementation of the 2010 Constitution needs to be improved so that indigenous peoples can enjoy their rights.

The TJRC report should be tabled before Parliament for its implementation, particularly with regard to the recommendations regarding historical injustices against indigenous peoples.

Access to justice for indigenous communities can be improved by providing courts near them.

PART THREE

3.1 The Amazigh in the Context of Marginalization and Oppression in Morocco

By their distinctiveness and refusal to assimilate the popular Arabic-Islamic culture and language, the Amazigh for a long time suffered political marginalization and cultural relegation.¹¹³ Contested issues remain their cultural and lingual identity, which has witnessed serious attacks following the Moroccan state's implied adoption of the Arabization policy that held sway prior to its independence. Unlike the case with most indigenous peoples on the African continent, the Amazigh people's experiences in Morocco have little to do with natural resources and the adverse effects of their exploitation. Instead, the main thrust of the injustices they have suffered is economic deprivation and political isolation based on the denial and relegation of their cultural identity by the Moroccan state.¹¹⁴

In 1958, 1960, and 1973, respectively, several uprisings by Amazigh tribes in different regions of the country were met with brutal repression from the government, resulting in the deaths of many Amazigh activists and the demolition of their homes.¹¹⁵ Anti-government uprisings in predominantly Amazigh areas resulted in devastating army reprisals.¹¹⁶ The education policy of the country also favored Arabic as the main language of instruction in schools, which is blamed for high illiteracy rates in predominantly Amazigh communities, and is considered by many as a deliberate disempowerment strategy by the

government.¹¹⁷ Children of Amazigh origin are instructed in such a way as to disorient them about their cultural identity, thereby creating an identity crisis and a psychological trauma that lives with children for a long time.¹¹⁸

Discrimination against Amazigh people is also demonstrated in the limited access they have to executive positions, while those who manage to rise to them are able to do so only when they repress their cultural identity and assimilate to the Arabic-Islamic identity.¹¹⁹ Even when laws provide that accused persons standing trial be provided with sworn certified interpreters, this right is never adequately met for defendants of Amazigh origin, who are instead provided with police officers or any other person within the court to do so. This, it is claimed, further complicates the right to a fair trial of Amazigh people standing trial, who are immediately disadvantaged because their lingual preference.¹²⁰

Beyond the intentional suppression of their lingual and cultural identity, there is also the issue of the state policy of impoverishment – the expropriation of ancestral lands of peasant Amazigh communities, usually on the basis that they lack legal titles, despite evidence of long-standing occupation even prior to independence.¹²¹ As with most indigenous communities, land is central to the Amazigh people, to which they have a relationship that goes beyond the physical into the spiritual.¹²² To them, land is a symbol not only as a sustenance to life but as a protection from the imperialistic outside world.¹²³



Demonstrators with Amazigh flags in a march requesting the official recognition of the Amazigh language in the northern city of Alhucemas, Morocco.
Photo: Melania Brito Clavijo under Creative Commons license.

Lands forcefully taken away from poor Amazigh communities are also sold to wealthy investors, to the exclusion and displacement of the original inhabitants. The government's extractive activities in a silver mine in Tangir, a predominantly Amazigh community in southeastern Morocco, and a gold mine in Adrar Awam in the Atlas region have negatively affected the water quality in both areas. Yet, the people within the mining areas are denied basic economic and infrastructural development, even in the midst of the revenue generated from their land.¹²⁴

The spoliation of Amazigh lands and natural resources dates back to Morocco's colonial days under French imperialists. Today, Amazigh rights groups allege that the government, in continuation of the colonial pattern, annexes their lands through its Departments of Water and Forest and the National Agency of Cadastral Land Conservation and Cartography.¹²⁵ The modern regionalization policy of the country, which was started in the early 1970s and continued under King Mohammed VI in 2008, followed the same pattern as in the past, and is implemented without regard to tribal boundaries within Amazigh territories, thereby causing discord among their populations.¹²⁶ Amazigh tribal lands are also declared 'Forest Domain Zones' without consultation with the indigenous communities.¹²⁷

The continuous clamor for their socio-cultural and political survival informed the sustained 'Berberism' or 'Amazighism' movement, and the signing in August 1991 of the Agadir Charter – a document that chronicles the experiences of the Amazigh, calling for an end to their marginalization and oppression based on their cultural identity.¹²⁸ In May 1994, however, the Moroccan police arrested 28 Amazigh leaders for taking part in a protest calling for recognition of the Tamazight language.¹²⁹ Some of the arrested activists were convicted of

disturbing the peace and sentenced to various prison terms. In July of the same year, the government banned a proposed meeting by an Amazigh cultural association scheduled to take place in the southern city of Agadir.¹³⁰



Family of Chleuh (Suss) Berbers in Morocco.
Photo: JJMBA Creative Commons

This sustained clampdown by government's security agents had rather a catalytic effect, as more people became sympathetic to the Amazigh cause. Amazigh activists received tremendous support from local civil society organizations and especially from the media, which gave full coverage to the trial of the Amazigh activists.¹³¹ Mounting unrest and continued agitation yielded some results when King Hassan announced that the Tamazight language would be taught in primary school in August 1994.¹³² Following this announcement, even more local and regional Amazigh advocacy groups sprang up in obvious capitalization on the positive development. These include the *Congrès Mondial Amazigh* (Amazigh World Congress) in 1995, the Amazigh Moroccan Democratic Party in 2005, *Parti écologiste marocain-Izegzawen* (Moroccan Ecologist Party) in 2006, and *Tamunt n Iffus*, a confederation of Amazigh associations in southern Morocco. Today, an estimated 800 associations in Morocco are involved in the promotion of the rights of the Amazigh people.¹³³

3.2 Existing Legal Frameworks and Judicial Mechanisms

Morocco's earliest attempt at affording some form of legal recognition to Amazigh indigenous tribes was the establishment of the Royal Institute of Amazigh Culture through *Dahir* (Royal Decree) No. 1-01-299 in October 2001.¹³⁴ The establishment of the institute came a few years after King Mohammed VI ascended to the throne in July 1999, which would witness a major departure from Morocco's attitude towards human rights accountability generally, and the improvement of the rights of the Amazigh in particular. The royal decree followed an earlier public acknowledgement of the plurality of the country by King Mohammed VI in July 2001, with the Amazigh being an indispensable part of it.¹³⁵ The king also expressed the belief that the teaching of the Tamazight language would enhance education, and afford equal opportunities to the people.¹³⁶ The Royal Institute was charged with the development and promotion of the Amazigh culture, languages, and courses for public schools.¹³⁷

In 2011, the revised Moroccan constitution formally recognized the Tamazight language as an official language and a common heritage of all Moroccans.¹³⁸ The constitution also prohibits any form of discrimination based on cultural, social, regional and other considerations.¹³⁹ In line with improved human rights

accountability in the country, Morocco has ratified key international human rights instruments, some of which are relevant to the socioeconomic and cultural rights of the Amazigh.¹⁴⁰

Despite some of these innovations, critics consider these initiatives as mere propaganda to deflect attention from the real issues concerning Amazigh indigenous communities. At an international conference on collective and individual rights over lands of the Amazigh people held in 2014, in Agadir, stakeholders contended that despite recent constitutional and other legislative mechanisms to guarantee the rights of the Amazigh, certain policies of government, including the appropriation of lands for the Green Morocco Plan (an ambitious agricultural plan), deprive Amazigh indigenous tribes of their collective and individual rights over lands, forests and natural resources as protected under international laws.¹⁴¹ Similarly, in a report published under the auspices of the National Federation of Amazigh Associations in Morocco, some Amazigh contend that “in multiple administrative, economic, social, cultural areas, Moroccan legislation still enshrines discrimination against Amazigh people”.¹⁴²

Morocco is yet to adopt the United Nations Declaration on the Rights of Indigenous People, and has not ratified the International Labor Organization’s Convention 169, which concerns indigenous peoples in independent countries.



Focus group in Kenema District discuss indigenous rights with ICSC members during GIJTR’s research in Sierra Leone. Photo: Campaign for Good Governance

3.3 Transitional Justice Processes

ADVISORY COUNCIL ON HUMAN RIGHTS

Sustained national and international calls for human rights accountability in Morocco informed the establishment of the Advisory Council on Human Rights (ACHR) by King Hassan II in 1990. The ACHR was part of several reforms that were geared towards reconciliation and reparation for the ‘years of lead’ – the period between 1956 to 1999 characterized by a repressive dictatorship.¹⁴³ Other reforms included the release of several political prisoners,¹⁴⁴ and the recall of many Moroccans who fled the country into exile. The mandate of the ACHR was to address the human rights violations of those years, including cases of forced disappearance and arbitrary killings.

In carrying out its mandate, the ACHR did not address the collective experiences of victim groups, nor did it seek to address the historical grievances particular to Amazigh indigenous communities beyond the general experiences of human rights violations within the political context of those times. Thus, different stakeholders and victim groups are of the opinion that both the ACHR and the Independent Commission of Arbitration which accompanied it were not enough to address the injustices of those dark years.¹⁴⁵ They demanded “greater disclosure of government’s wrongdoings [and] the adoption of a comprehensive approach to dealing with the past”.¹⁴⁶ In its report, the ACHR recommended the establishment of an official body to adequately consider all of these gaps, with an aim to compensate victims of past human rights violations.¹⁴⁷ The recommendation thus necessitated the establishment of the ERC.

EQUITY AND RECONCILIATION COMMISSION

The ERC was established by King Mohammed VI through *Dahir* (Royal Decree) No. 1.04.42 of January 2004, with a scope spanning from independence in 1956 to the beginning of his reign in 1999.¹⁴⁸ It was mandated to assess, research, investigate, arbitrate and make recommendations about the human rights violations that occurred within this period. These violations were listed in the *Dahir* to include forced disappearances, arbitrary detention, torture, sexual abuse and deprivation of the right to life as a result of unrestrained and improper use of state force, and coerced exile.¹⁴⁹ The ERC was also mandated to establish the nature and scale of human rights abuses that were committed, and to



recommend appropriate reparations for both material and moral losses to victim groups, individual victims or their survivors.¹⁵⁰

Apparently to guarantee legitimacy and ensure local buy-in, membership of the 16-person ERC included past victims of serious human rights violations, who themselves suffered unlawful detention, coerced exile, and imprisonment.¹⁵¹ The ERC commenced its work in 2004, and heard approximately 20,000 complaints/applications from the people.¹⁵² In 2005, it completed its work and submitted its final report of five volumes to the king. The report has since been made public.¹⁵³ Among its many findings were cases of unlawful and arbitrary detention, inhuman treatment, expropriation of properties of real or perceived critics of government, enforced disappearances, torture and ill-treatment, killings, and so on.¹⁵⁴

With regards to Amazigh indigenous communities, the ERC determined that repression and excessive use of force in the suppressing uprisings took place during the peak of Amazigh rights activism in the 1990s. As with other cases of extrajudicial killing, individual victims were identified and recommended for compensation by the ERC. The commission also recommended the adoption of socioeconomic and cultural development plans tailored to a number of cities, including predominantly Amazigh regions like the Rif and the middle Atlas.¹⁵⁵

In recommending appropriate reparations for human rights violations, the ERC, apart from the considerations set out in the law establishing it, was motivated by the prior recognition of the cultural rights of the Amazigh, and of the Tamazight language as an important constituent of the national identity, and the need to protect it.¹⁵⁶ It therefore made wide-ranging recommendations as to reparations for both individual victims and victim groups, following its determination of over 16,861 cases requiring reparations.¹⁵⁷ For collective violations against communities, the report recommended communal reparations, and the initiation of socioeconomic and cultural development projects that must serve the interests of the affected communities and regions.¹⁵⁸ It also recommended the memorialization of the injustices and violence in the national archives for national consciousness,¹⁵⁹ and the prosecution of certain individuals for their role in those dark years.¹⁶⁰

INDIGENOUS AND RESTORATIVE JUSTICE MECHANISMS OF THE AMAZIGH (IZERF)

Like most traditional African communities, Amazigh indigenous communities have a well-established informal traditional dispute settlement mechanism, which they effectively used for dispute resolution even before the imperialist invasions and subsequent colonization of the region.¹⁶¹ *Izerf* is the customary law and dispute resolution mechanism of the Amazigh, and consists of a collection of customs, values and practices of dispute resolution.¹⁶² The mechanism is so effective that both the French imperialists and the sultanate after independence elected to have it retained by a decree – the “Berbers *Dahir*” in 1930.¹⁶³

The Amazigh informal justice mechanism differs from the formal judicial processes of the country in the sense that it takes a more holistic view of the interests and positions of the parties, as opposed to addressing only those claims that arise under law. The role of the fact-finder in the *Izerf* customary dispute resolution process tends to be more mediation-driven, rather than making a ruling, and relies more on social and cultural norms in arriving at findings.¹⁶⁴ Analysts have pointed out some of the pitfalls of the process to include wide discretion, which local judges manifest through discrimination against women due to the entrenched patriarchal religious and traditional values of the communities. The process is however praised for taking a more holistic view of the positions of the parties, instead of fixating on the legal dimension of disputes.¹⁶⁵

3.4 Community Expectations in the Transitional Justice Processes

Although the ERC was born out of the need to properly address the injustices of the past, and thereby achieve national reconciliation through reparation and accountability, it failed to adequately address the question of the Amazigh indigenous people. Stakeholders contend that the whole process from policy conceptualization to its mandate and the procedure of determination of cases sidelined the specific yearnings of Amazigh communities by lumping their distinctive experiences in with the general human rights experiences of the country during the years of lead.¹⁶⁶

There is also the problem of what the Amazigh consider as a one-sided approach to achieving reconciliation, where the ERC sought to know the truth by listening only to the testimonies of the victims, but not questioning the violators or offenders, nor allowing victims to confront their former oppressors at hearings.¹⁶⁷ This of course does not represent a process that is desirous of achieving durable reconciliation if victims are not allowed to benefit from the element of truth telling in the reconciliation process.

3.5 Effectiveness of the Implementation

At the end of its mandate, the ERC made various recommendations, including for pecuniary reparations to victims and their families, symbolic community reparations for collective experiences, and assurances of non-repetition. The Moroccan government through the National Council on Human Rights (NCHR) has since taken steps towards implementing some of these recommendations, including constitutional and other legislative reforms like the adoption of key international human rights instruments.

For material reparations, a total of 140 million Euros is said to have been paid directly to victims and their relatives as compensation for human rights violations.¹⁶⁸ The NCHR has also initiated symbolic projects in communities, with the aim of alleviating poverty and empowering disadvantaged groups.¹⁶⁹ However, most of the recommendations with respect to indigenous communities are yet to be implemented.

Some of the unaddressed claims of the Amazigh indigenous communities include the inability to meet and confront their former oppressors through formal reconciliation processes.¹⁷⁰ There is also the problem of non-recognition or proper accordance of primacy to the particularity of their collective experiences as an indigenous people.

3.6 Main Challenges

One of the major challenges of the reconciliation process was the definition of 'victim' in the context of the Moroccan experience. First is the difficulty of linking violations that took place in the distant past in the late 1950s to contemporary issues for the purposes of determining the status of the victims. Second is the challenge of limited resources for the compensation of communities of victims, compared to their experiences or the nature of the violence they suffered.¹⁷¹

Searching for the truth about the past and meeting the expectations of indigenous populations necessarily require hearing testimonies from victims regarding their past experiences. But this has inflamed passions and heightened tensions within indigenous communities, who, seething with the anger these memories bring up, expressed their disagreement over the decision of the ERC not to disclose the names of the perpetrators responsible for the violations.¹⁷² Similarly, due to a feeling of discontent and mistrust for the whole process, a parallel truth and reconciliation process was organized by the Moroccan Association of Human Rights – a coalition of NGOs actively involved in Amazigh activism. Their grievance was that the absence of truth-telling and the anonymity of the perpetrators did not guarantee the justice they seek.¹⁷³



Nubian elders participating in focus group discussions with ICSC member Manene Cultural Trust in Kenya.
Photo: Manene Cultural Trust

3.7 Key Findings

1. The ERC and previous attempts at reconciliation fell short of the expectations of the Amazigh, especially as they did not afford people the opportunity to confront their oppressors, or at least hear the truth about their roles in the violence.
2. Even with the new constitutional recognition of the Tamazight language as a national language, there is a feeling of discontent and dissatisfaction among the people, who consider the process to be window dressing rather than a genuine effort at addressing intergenerational injustices against them.
3. Attempts by Morocco to meet the expectations of Amazigh indigenous communities through different policies and reconciliation mechanisms clearly neglected to ensure the participation of those communities. After more than a decade, it is easy to perceive that social reality has still not evolved towards equity, reconciliation and human and sustainable development.
4. Although the ERC and other transitional justice initiatives before it was designed to address past injustices and bring reconciliation to the people, perpetrators were never called upon to tell the truth about their roles in the long years of human rights violations. This essentially reduced the process to a one-sided account of the experiences of victims.
5. Despite the fact that the findings of the ERC implicated many persons for their role in human rights violations, nobody has so far been held accountable.
6. Even after the constitutional and other institutional reforms, cultural identity as an Amazigh continues to be the basis for marginalization within government institutions and other political settings.
7. Although there is a constitutional text that recognizes the Amazigh language as an official language, and the Royal Institute for Amazigh Culture has been established as an institutional reform mechanism, the absence of an adequate legal framework to implement these measures is a hindrance to the rehabilitation and development of Amazigh communities, especially those within rural settlements.

PART FOUR

4.1 The Ogoni People of Nigeria in the Context of Corporate Accountability, Economic and Political Violence

The scramble for crude oil by multinational companies in the Niger Delta region witnessed one of the most devastating cases of environmental pollution on the continent,¹⁷⁴ and further awakened the question of corporate accountability for human rights violations by non-state actors.¹⁷⁵ On the one hand are the multinational oil companies whose production and exploration activities have serious impacts on the environment, and the Nigerian government whose economic interest from the oil industry is evidently at the zenith of its priorities, over and above every other interest. On the other hand are criminal elements consisting mainly of youths in the wider region, who consider the non-violent approach of MOSOP as largely ineffective, and who have hijacked the struggle through gun violence, kidnapping and sabotage.¹⁷⁶ In the scramble for the oil wealth in the region, the Ogoni people became victims of warring factions and are subjected to violence, discrimination and the forceful reclamation of their ancestral lands, among other human rights violations.¹⁷⁷

The Ogoni ‘bill of rights’ as championed by MOSOP notes that though petroleum oil was produced from its territory for about 30 years before 1990, the returns to the Ogoni people were nothing. They further note that apart from the marginalization they suffer in all institutions of the federal government of Nigeria, the Ogonis are denied pipe-borne water, electricity and job opportunities for their teeming youth population, with no social or economic project of the federal government in their territory.¹⁷⁸ They allege that their languages are under serious threat of imminent disappearance due to the forceful imposition of other Nigerian languages on their people.¹⁷⁹ They further allege that successive administrations in Nigeria seem determined on pushing Ogoni communities into slavery and extinction by their policies, while SPDC has failed to employ or otherwise engage its people in any meaningful manner, in violation of the Nigerian government’s regulations in that regard.¹⁸⁰

With regard to its environmental rights, the Ogoni people contend that the exploration activities of oil companies operating in the region have caused them untold hardship and acute shortages of food. They note that the activities of the oil companies and the failure of the federal government to enforce environmental safety standards against the companies have led to serious environmental degradation of their communities, turning the ecosystem into an ecological disaster.¹⁸¹ In light of the highlighted grievances, the Ogoni people demanded political autonomy to participate in the Nigerian political arrangement as a distinct and separate unit by whatever name they chose for themselves.¹⁸² They also demanded the right to the oil mineral found within their territory, for the use and betterment of their people, among other demands.

The demand for political autonomy was rebuffed by the Nigerian government, while little or nothing was done about the other issues raised. Frustrated by the apparent disregard for its demands, MOSOP in 1994 declared that SPDC was no longer welcome to operate in its territory. On its part, SPDC continued to raise concerns about the activities of MOSOP and its leadership, which were personified at the time in one of its leaders, Ken Saro-Wiwa, a renowned author and environmentalist. SPDC’s perception of MOSOP and its leadership was that of a potential problem to its activities in the region, with the possibility of dire economic consequences for the Nigerian state.¹⁸³ Thus, SPDC continued to frame the Ogoni people, including by funding Nigeria’s security agents for that purpose, thereby becoming complicit in the use of violence against the Ogoni people.¹⁸⁴ In fact, SPDC was specifically accused of genocide in Ogoniland by Ken Saro-Wiwa.¹⁸⁵

Apart from canvassing for the socioeconomic and cultural rights of its people in Nigeria, MOSOP leaders sought help from the international community by drawing the world’s attention to the situation in Ogoniland. In July 1992, Saro-Wiwa was invited to address the United Nations Working Group on Indigenous Peoples in Geneva, where he once again presented the Ogoni bill of rights.¹⁸⁶ In October of the same year, he was in London with his campaigns for corporate accountability by SPDC in Ogoniland. In 1993, MOSOP was formally admitted into the Unrepresented Nations and Peoples Organization (UNPO), which also joined the Ogoni struggle, submitting several shadow reports on the Ogoni situation to the United Nations Office of the High Commissioner for Human Rights and other international fora. The European Union was particularly visible in the support for the Ogoni people, releasing funds to local relief organizations for rehabilitation and resettlement within Ogoniland, and making representations through the European Parliament regarding the plight of the Ogonis to the Abacha regime.¹⁸⁷



Activists of the Movement for the Survival of the Ogoni People, MOSOP, in the Nigeria Breakfree2016 demonstration against fossil fuel.

Photo: Babawale Obayanju, under Creative Commons license via Flickr.

Back home, the Ogoni struggle started receiving the needed support from the people, including Ogoni communities, after the activities of MOSOP gained popular support from major international human rights organizations like Amnesty International, Human Rights Watch and Greenpeace.¹⁸⁸

The brutal murder of four Ogoni chiefs on 21 May 1994 in Gokana, one of the Ogoni communities, was just the impetus the federal government under the military dictator General Abacha needed to order a military occupation of Ogoni land. The murdered community leaders were presumed to be pro-government and to support SPDC against the interests of the Ogoni people.¹⁸⁹ Although MOSOP denied any complicity in the murders, Saro-Wiwa and eight other MOSOP leaders were arrested.¹⁹⁰ While in detention, the 'Ogoni nine' were tortured, dehumanized and denied access to medical care.¹⁹¹ They were also prevented from having access to their family or legal representatives.¹⁹² Eight months after they were arrested, they were arraigned before a special tribunal set up specifically for their trial, and charged with the murders in Gokana.¹⁹³

Many Nigerians believed that the charges were unfair and the trial politically motivated.¹⁹⁴ In fact, reports suggested collusion by SPDC and the prosecution – an allegation that was flatly denied by SPDC. However, there was ample proof of SPDC's secret meetings with Nigeria's military and top security representatives on how to quell MOSOP's agitation in its office in London.¹⁹⁵ Despite a local and international outcry against the trial, which itself fell short of international human rights standards, Ken Saro-Wiwa and his eight colleagues were hanged by the Nigerian government on 10 November 1995.¹⁹⁶ SPDC would later make an out-of-court settlement with the families of the slain activists, to the tune of USD15.5 million for its role in the trial and execution of the Ogoni nine, in a federal court in New York in 2009.¹⁹⁷

For years after the execution of the Ogoni nine, SPDC's destructive activities in the region continued. An estimated 2,976 separate oil spills were recorded, in addition to other environmentally hazardous incidents like blowouts, gas flaring, and pipeline explosions occasioned by poorly maintained pipes.¹⁹⁸ Human Rights Watch reports that security agents targeted the Ogonis for human rights violations based on their real or imputed association with MOSOP;¹⁹⁹ with



Ogoni elders celebration in Bangha Town, Nigeria. Photo: Ogoni TV via Facebook

many deaths, and even more people displaced.²⁰⁰ In other instances, military operations in the area also took the form of flagrant human rights abuses, including extrajudicial executions, indiscriminate shooting, arbitrary arrests and detention, floggings, rapes, looting, and extortion, which have brought untold mental and psychological trauma to the communities.²⁰¹ Although production operations by SPDC have been discontinued in most of the region, scars of SPDC's destructive activities are still evident, while psychological trauma lives with the Ogoni people.

4.2 Existing Legal Frameworks, Judicial Mechanisms and Other Non-Judicial Accountability Mechanisms

In Nigeria, there is no policy or legal framework on the status of indigenous communities. Thus, the Ogoni people have never been accorded any special recognition or status either at the federal or at the state government level. However, the execution of Ken Saro-Wiwa and his colleagues drew global attention to the plight of the Ogoni as an indigenous group facing threats to their very existence. Accountability for the human rights violations against the Ogonis by state and non-state actors was not officially addressed by successive Nigerian administrations. A few cases however exist where foreign judicial mechanisms have been deployed in an attempt to hold certain persons accountable.

Following its role in the events that led to the execution of the Ogoni nine, relatives of the executed activists brought an action before a federal court in New York against SPDC in 1996, based on the United States Alien Tort Statute.²⁰² As highlighted above, the matter was settled out of court by the parties.²⁰³ In a complaint filed by representatives of the Ogoni people and members of civil society in 2001, the African Commission on Human and Peoples' Rights found



Focus group with Nubian Elders in Kenya. Photo: Manene Cultural Trust

against Nigeria and SPDC, that the pollution of the environment and means of survival of the Ogonis amounted to a violation of their socioeconomic rights as protected under the African Charter.²⁰⁴ The African Commission recommended that the Nigerian government conduct an investigation into the various cases of human rights violations and pay financial compensation to the Ogoni people.²⁰⁵

Following these recommendations, the Nigerian government commissioned the United Nations Environment Programme (UNEP) to conduct an environmental assessment of Ogoniland for the purpose of understanding the level of destruction of the environment. UNEP's report indicated seriously contaminated soil and land water, with grave implications for vegetation, aquatic life and public health.²⁰⁶ The report recommended the establishment of an institutional framework for contaminated soil management and an entire clean-up of Ogoniland, among other recommendations.²⁰⁷ Although the Nigerian government commenced the clean-up in June 2016, civil society organizations in the region express dissatisfaction with the process, which they argue has had no visible impacts on the environment.²⁰⁸

Seven years after their execution, the Nigerian government under the new civilian administration of President Olusegun Obasanjo approved the exhumation of the bodies of the Ogoni nine in 2002, for 'decent' burial according to their traditional rites.²⁰⁹ The government hoped the reburial would help in the reconciliation process and bring closure to families who suffered losses in the Ogoni crisis.

4.3 Transitional Justice Processes

Nigeria has experimented with several accountability and transitional justice processes in response to its experiences with violence. The most relevant to the Ogoni crisis and the restiveness in the Niger Delta region are discussed below.

JUDICIAL COMMISSION FOR THE INVESTIGATION OF HUMAN RIGHTS VIOLATIONS (OPUTA PANEL)

Established in 1999 as a presidential initiative, the Judicial Commission for the Investigation of Human Rights Violations was mandated to look into the causes,

nature and extent of human rights violations from the events of the first military coup in January 1966 to the return to civilian rule in May 1999, and to identify perpetrators and the role of the state in those violations.²¹⁰ It was also required to make recommendations on the means to achieve justice and prevent future human rights abuses. The eight-member commission was headed by the respected retired justice of the Supreme Court Chukwudifu Oputa, and so was commonly referred to as the Oputa Panel.

As part of its general mandate, the Oputa Panel conducted public hearings about the Ogoni crisis, where the management of SPDC was cross-examined to determine its role in the human rights violations in Ogoniland.²¹¹ Although the panel also heard testimonies other implicated actors, including the military and the police, its work was largely undermined by the absence of powers to compel attendance by relevant actors whose testimonies were considered important. Some of its other challenges include a limited budget and the absence of an enabling legal framework.²¹²

Despite these challenges, the panel submitted its report to President Obasanjo in 2002, although the report was never officially released to the public. An unofficial release indicates some of its recommendations to include compensation for victims of gross human rights violations; close monitoring of the environmental conditions in Ogoniland due to oil exploration; and improved human rights conditions in the country.²¹³

FEDERAL AMNESTY PROGRAM

The Federal Amnesty Program was introduced by the federal government in 2009 to address the protracted crisis in the Niger Delta region as a whole, of which the Ogoni case was just a part. The amnesty program was essentially a Disarmament, Demobilization and Reintegration (DDR) program for militants who took part in the violence that resulted from the activities of criminal gangs operating in the region, following agitation for resource control and other demands.²¹⁴ Militancy in the Niger Delta region was spearheaded by the Movement for the Emancipation of the Niger Delta (MEND) and splinter groups demanding rights to the revenue from the crude oil. At the peak of the crisis, the militants engaged in kidnapping for ransom, destruction of oil installations, attacks on security formations and general criminality.

One of the most significant implications of the amnesty program was the implied admission of the government's excesses, and the complicity of multinational oil companies operating in the region.²¹⁵ Over 30,000 militants embraced the program, surrendering several kinds of weapons, including gunboats, rocket-propelled grenades and machine guns.²¹⁶ Despite its obvious pitfalls and criticisms which included government's implied condonation of criminality, and the absence of a clear will to address the more remote causes of the crisis in the region, the program is arguably one of the most successful post-conflict interventions in the country, going by the impact it had on young people and the relative peace it has encouraged since its introduction.

4.4 Indigenous and Restorative Justice Processes of the Ogoni People

Ogoni indigenous communities resolve disputes traditionally through a process of customary arbitration. Although the practices of different communities vary, they have certain similarities. For example, depending on the nature and complexities of the dispute, an aggrieved person brings his or her complaints to *mene be*, which means the head of the house, or the *mene ga*, who is the head of the community.²¹⁷

Disputes are resolved collegiately by the elderly members of the *mene be* or *mene ga*, who act as a jury in the determination of responsibility of the parties, with the prospects of having their decisions appealed to the highest authority in the village, known as the *tor buen*, or the town head in-council.²¹⁸ The procedure for the determination of violent crimes like murder and bloodshed is markedly different from that for non-violent crimes. Violent crimes are 'heard' in the village square and open to attendance for all members of the community, with the *mene buen* acting as the chief judge.²¹⁹ Violent crimes are considered a desecration of the land, and as such the ultimate goal of the community is the sanctification of the desecrated land, which is usually done through appeasement sacrifices and other cleansing rituals.²²⁰

The concept of victimhood in murder cases transcends direct victims and includes their immediate family members, extended family, age grade, and their entire kindred. Therefore, reparation for such crimes must necessarily involve all of these groups, through appeasement ceremonies, rituals and

sacrifices. Although the punishment for murder may in rare cases include the death penalty, the Ogoni traditional dispute resolution mechanism is more reconciliation- and rehabilitation-driven than punitive. Offenders are sometimes ‘banished’ to other communities, until they are cleansed of the ‘bloodstains on their hands’ and reintegrated back into the society. This period of cleansing varies from six months to a few years.

None of the traditional Ogoni dispute resolution mechanisms was employed during the transitional justice initiatives introduced following the violence and human rights violations that took place in the region.²²¹

4.5 Community Expectations in the Transitional Justice Process

Despite government’s attempts at reconciliation and rehabilitation, it is obvious that these attempts fell short of the expectations of the Ogoni people based on their collective experiences. The people expect any genuine reconciliation processes to include truth telling about the injustices perpetrated against them by security agents, including disclosures about who made what orders for the invasion of their communities. They also expect to know the truth of who actually murdered the Ogoni chiefs in Gokana, on which the government predicated the arrest, trial and eventual execution of the Ogoni nine.

The Ogoni people also expect that the trial and eventual execution of the Ogoni nine will be declared illegal, and that the activists will be exonerated.²²² A respondent expressed his dissatisfaction thus: “How can you be mentioning reconciliation or even justice, when our symbols of the struggles were tried and hung on trumped-up charges. How?”²²³ Another respondent expressed his frustration thus: “Our rivers and creeks are all covered with crude oil. ... We no longer breathe the natural oxygen rather we inhale lethal and ghastly gases. Our water can no longer be drunk unless one tests the effect of crude oil in the human body. Where is the justice in this?”²²⁴

4.6 Effectiveness of the Implementation

The Ogoni people looked forward to the recommendations of the Oputa Panel to address the injustices and human rights violations suffered over the years. However, the government has not made the report public. As noted earlier, an



Dialogue with Nubian elders in Kenya. Photo: Manene Cultural Trust

informal release of the report revealed recommendations for an institutional framework to address the problem of infrastructural development for the region and provisions for strict adherence to best practices by oil firms to ensure the safety of the environment.

Although the federal government later established the Niger Delta Development Commission as part of institutional reforms to guarantee development of the entire Niger Delta region, the commission has been enmeshed in corruption allegations, while the region is still grappling with the lack of basic infrastructure and social amenities like schools, hospitals, water and electricity.

4.7 Main Challenges

One of the major challenges that may be considered as impeding the process of addressing the needs and claims of Ogoni communities is the militarization of the government’s response to the crises, as well as the hijacking of the Niger Delta struggle by violent gangs like MEND and other militant groups.²²⁵

Some respondents have different view of the challenges. They allege that the government’s insincerity, lack of political will, and deliberate neglect or indifference to the plight of the Ogoni people is at the root of the problem.

4.8 Key Findings

1. Both the Oputa Panel and the Amnesty Program that the government initiated to address the Ogoni crises in particular, and the restiveness in the Niger Delta area as a whole, were initiated without consultation and inputs from the Ogoni people.
2. Neither the expectations nor conception of justice of the Ogoni people according to their particular experiences was met in both government initiatives.
3. Although the Oputa Panel made specific recommendations concerning the Ogoni people, the final report was never made public by successive administrations, and the recommendations have not been implemented.
4. Although the government formally began the Ogoni clean-up in June 2016, five years down the line not much has been achieved as the process has not been accorded the primacy it deserves. The Ogoni doubt the sincerity of purpose of the government to carry out the exercise, and are still plagued by the adverse effects of the environmental degradation following oil pollution.
5. The Ogoni people have well-structured and effective traditional/informal dispute resolution mechanisms, which have been used for serious crimes, including murder.
6. None of these traditional processes was considered a viable mechanism for reconciliation during the transitional justice processes in the country.
7. The government has not paid any compensation to individual victims and groups, including women who suffered sexual and gender-based violence during the crisis.
8. Although Ken Saro-Wiwa and the other Ogoni rights activists have since been reburied as a measure of reconciliation, the Ogoni people are yet to gain full closure concerning their execution despite an international outcry.

PART FIVE

5.1 The Batwa People in the Context of Political Violence in Rwanda

DISPOSSESSION AND EVICTION FROM ANCESTRAL LAND

While land in Rwanda is a key factor for empowerment, dignity, and social inclusion, the Batwa have been deprived of their ancestral land by the government.²²⁶ They have been displaced through a series of evictions; as a result, they have lost their customary land rights and most of them became landless.²²⁷ A recent study shows that 30.3% of indigenous people in Rwanda are homeless.²²⁸ For those who own land, they have a small portion that is difficult to farm for food.²²⁹ Furthermore, evictions have made the Batwa unwillingly abandon their traditional livelihood, which they practiced for centuries. Due process of law was not followed in evicting Batwa people. There was neither consultation nor compensation thereafter.²³⁰

LACK OF RECOGNITION AS AN INDIGENOUS GROUP

After the 1994 genocide, the Rwandan government sought to create a homogenous Rwandan identity exclusive of ethnic identification. This is pursuant to Law no. 47/2001 on Prevention, Suppression, and Punishment of Crime of Discrimination and Sectarianism, which criminalizes sectarianism and discrimination on basis of ethnicity.²³¹ In this regard, the government banned any ethnic identification in the country.²³² This is why the Batwa are recognized neither as an indigenous group nor an ethnic group in Rwanda. The government in several reports to international bodies merely refers to them as historically

marginalized people.²³³ Lack of legal recognition makes it hard for the Batwa to promote and protect their rights as a distinctive group. Despite Rwanda being a signatory to many regional and international human rights treaties that recognize the rights of indigenous groups, such as the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, the Batwa's cultural distinctiveness has been traded off for the sake of an unattainable homogenous Rwandan identity.

EXCLUSION, MARGINALIZATION AND INEQUALITY

While the Rwandan government and other stakeholders have taken various measures to prohibit the marginalization of the Batwa, the indigenous community is experiencing marginalization and poor access to healthcare and decent living conditions. The economic impoverishment of the Batwa is attributed to structural marginalization and inequality. Their access to basic services in the country is limited in comparison to that of other ethnicities. The prejudices against the Batwa are entrenched in social and government institutions, which exacerbates their structural marginalization. The ACWGIP highlighted that²³⁴

they can neither eat nor drink with their neighbor; they are forbidden to enter their houses and are not permitted to have sexual partners other than from their own ethnic group. The Batwa communities live on the outskirts of other people's settlements. Even sitting down with a Mutwa would be considered as an insult or a dishonor to the friends and family of any Hutu or Tutsi who agrees to do so. If an individual no-Mutwa should sympathize with the Batwa and became their friend his peers will treat him as ridiculous or mentally disturbed.

The same is noted by the Senate Committee in Charge of Social Affairs and Human Rights in its report on the condition of some Rwandan disadvantaged groups throughout history. The report underscores that many people in Rwanda consider the Batwa as less than human beings.²³⁵



Dialogue with Nubian elders in Kenya. Photo: Manene Cultural Trust

In terms of inequality, Batwa people are facing challenges in accessing basic services and opportunities such as healthcare services, employment, sanitation, and education, just to name a few.²³⁶ Data shows that only 0.5% of the Batwa population has completed secondary education.²³⁷ In comparison with other children, Batwa children hardly finish primary education.²³⁸ Access to healthcare service for the Batwa is a problem as they mainly depend on traditional medicine for the treatment of illness.²³⁹

5.2 Existing Legal Frameworks and Judicial Mechanisms for Indigenous Communities in Rwanda

DOMESTIC LEGAL FRAMEWORKS

CONSTITUTION OF RWANDA (2003)

The Constitution of Rwanda does not directly mention the Batwa or indigenous people. Nevertheless, Article 80 of the Constitution speaks of historically marginalized groups, directing the president in appointing members of the Senate to pay regard to the representation of marginalized groups.²⁴⁰ The construction of this provision implicitly includes Batwa people within the definition of a marginalized group. The lack of explicit protection of the Batwa or indigenous people in the Rwandan Constitution aggravates discrimination and marginalization of the Batwa in the government's developmental programmes.

While the Rwandan Constitution does not provide for the constitutional protection of indigenous people, it provides general protections for all people in Rwanda, including the Batwa.²⁴¹ The Constitution is anchored in the principle of non-discrimination on the basis of sex, religion, and ethnicity. The principle envisages that the individual in Rwanda is guaranteed rights without any discrimination on basis of their indigenous origin. This protection extends even to the Batwa.

Additionally, the Constitution provides the right of protection from discrimination, right to education, right to health, and right to a clean environment. The enjoyment of these rights includes indigenous people in Rwanda even though there is no mention of them.

ORGANIC LAW (2005)

The Organic Land Law recognizes some forms of customary land rights, but it does not expressly provide for land rights for indigenous people.²⁴² Article 7 of the law recognizes the land acquired through customs and written laws. However, land acquired through customs is only limited to inheritance from parents and it does not protect the communal customary land rights of indigenous people in Rwanda. Furthermore, the law is silent on compensation in case indigenous people are deprived of their land for public interests.

NON-JUDICIAL ACCOUNTABILITY MECHANISMS

ACWGIP MISSION TO THE REPUBLIC OF RWANDA (2008)

In 2008, the ACWGIP conducted a five-day mission in Rwanda. The mission was charged with the tasks of collecting information on the Batwa people in Rwanda, initiating dialogue with the government concerning the rights of the Batwa, and engaging civil society in the country in promoting and protecting indigenous rights.²⁴³

After the visit, the working group observed that Batwa people are continuing to suffer from discrimination. It found that the Batwa are in a precarious condition as far as their livelihood is concerned.²⁴⁴ In resolving the challenges the Batwa are experiencing in Rwanda, the working group urged the Rwandan government to legally recognize the Batwa as an indigenous group.²⁴⁵ Furthermore, it recommended guaranteeing the right to land and resources, right to education, right to housing, right to housing, and right to health for the Batwa.



Focus group with Batwa women in Rwanda.
Photo: Forum pour la Mémoire Vigilante

CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2013)

The Committee on Economic, Social, and Cultural Rights (CESCR) issued a concluding observation during its fourth periodic report of Rwanda concerning Batwa. CESCR is the treaty body composed of independent experts charged with the implementation of the International Covenant on Economic, Social and Cultural Rights.²⁴⁶ The committee offers concluding observations after a state has filed a report on the implementation of the treaty, which are not binding. The CESCR recommended to the Rwandan government to fight the stereotype, stigma, and discrimination the Batwa are experiencing in Rwanda.²⁴⁷ Further, it encouraged the government to take measures to ensure the enjoyment of the right to housing of Batwa people as enshrined in the treaty.

SUBMISSION OF SHADOW REPORTS BY NON-GOVERNMENTAL ORGANIZATIONS TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS



Dance in a Batwa community, Rwanda.
Photo: Forum pour la Mémoire Vigilante

The submission of shadow reports is done by non-governmental organizations alongside the state report on the implementation of the International Convention on Economic, Social and Cultural Rights. For example, in 2012 the Unrepresented Nations and Peoples Organization submitted a report documenting violations of the rights of the Batwa by the Rwandan government.²⁴⁸ It alleged violations of the right to education, health, self-determination, work, and an adequate standard of living.²⁴⁹ The report made several recommendations, including an increase in the number of health facilities, combatting discrimination against the Batwa, addressing poverty in Batwa communities, offering skills training and providing compensation to Batwa evicted from their ancestral land.²⁵⁰

5.3 Critiques of Rwanda's Transitional Justice Processes in Relation the Batwa

After the 1994 genocide, Rwanda went through a transitional period, during which the government implemented several transitional justice measures to provide justice for victims. The transitional justice process aimed to prevent the reoccurrence of genocide through integrating combatants into society. Some of the transitional justice approaches opted for by Rwanda were prosecutions, both domestic and at the International Criminal Tribunal of Rwanda; traditional mechanisms through local community Gacaca courts; reparations; institutional reforms; and the National Unity and Reconciliation Commission. In terms of involvement in the 1994 genocide, the Batwa played double roles of perpetrators and victims. It is estimated that 30% of the Batwa were killed during the genocide.

The transitional justice approaches were inherently ineffective and shortsighted as far as historical injustices of Batwa people are concerned. They mostly focused on prosecuting the perpetrators of genocide and indigenous people's issues like Batwa people were not part of the discussion. In other words, transitional justice processes were more focused on retributive justice. There was a need for Rwanda to take a broad view of transitional justice to deal with issues of indigenous people.

Young contends that the transitional justice process denied the indigenous identity of the Batwa to serve other political purposes.²⁵¹ Despite Batwa experiencing marginalization and exclusion for many years in Rwanda, they were left out of the transitional justice process. For example, in the Gacaca courts, Batwa were not selected as judges to preside over the proceedings.²⁵²

The Rwandan government also opted for a strict non-discrimination policy against ethnicities. The effect of the policy was an absolute denial of differential identity based on ethnicity. This was mentioned in the New Partnership Report Review for Rwanda, which found that Rwanda's conduct during the transitional justice process in relation to the Batwa was based on an assimilation approach, which aimed to downplay the cultural distinctiveness of indigenous people and create a fictitious Rwandan identity.²⁵³

5.4 National Unity and Reconciliation Commission

The Rwandan government established the National Unity and Reconciliation Commission in 1999. It sought to ensure not only peace and justice during the transitional process but also the unity of the country through the social engineering of a single Rwanda identity. This was evident in the commission's mandate "to promote unity and reconciliation and social cohesion among Rwandans and build a country in which everyone has equal rights and contributing to good governance." According to the National Policy of Unity and Reconciliation, "unity and reconciliation of Rwandans is defined as a consensus practice of citizens who have common Nationality, who share the same culture and have equal rights; citizens characterized by trust, tolerance, mutual respect, equality, complementarity, truth, and healing of one another's wounds inflicted by their dark history, with the objectives of laying a foundation for development in sustainable peace." This indicates that the indigenous community of Batwa were supposed to abandon their cultural distinctiveness.²⁵⁴

5.5 Community Expectations and Effectiveness of Implementation in the Transitional Justice Processes

Batwa people had several expectations concerning the implementation of the transitional justice process in Rwanda. They expected recognition from the Rwandan government as indigenous people.²⁵⁵ This expectation was in vain after the Rwandan government passed the law prohibiting references to ethnicity. While the government in the Rwandan Constitution considers the Batwa as a historically marginalized group, this is not recognition. Consequently, the group continues to be discriminated against and stigmatized in society.

Additionally, the transitional justice process was supposed to deal with the question of land, which the Batwa have been deprived of under the pretense of forest conservation.²⁵⁶ A decade after the process, Batwa people are in great need of land to support their livelihood. The transitional justice process was more focused on ensuring the prosecution of perpetrators of genocide, and the land question for the Batwa is unresolved.²⁵⁷ Furthermore, reparations for being evicted from their land were not an issue in the implementation of the transitional justice process.

In addition, while the Rwandan government through the National Unity and Reconciliation Commission sought to guarantee equal access to social, cultural and economic rights regardless of ethnicity, indigenous people in Rwanda are forgotten in terms of social service delivery. Consequently, transitional justice has not been done as it was expected to lift the Batwa from the cycle of poverty.²⁵⁸

5.6 Main Challenges

The legal acknowledgement of the Batwa as indigenous people in Rwanda stands out as one of their unaddressed claims. For decades Batwa people have pushed for legal recognition in different fora both locally and internationally, but their efforts have not borne fruit. The Rwandan government has not recognized the Batwa for the fear of fuelling ethnic tension in the country. The hope for recognition of the Batwa has been blocked after the enactment of the Law no. 47/2001 on Prevention, Suppression, and Punishment of the Crime of Discrimination and Sectarianism, which criminalizes ethnicity references and identity. This is an impediment for Batwa in seeking special attention for their issues to be addressed.

Structural exclusion, marginalization, and discrimination in terms of access to healthcare, decent living conditions, land, and education continues.²⁵⁹ The Batwa have historically been involved in pottery and hunting. Our study found that the government has not facilitated in a proactive manner the Batwa to participate in activities like commerce and agriculture by offering them land, skills and mentoring on a more specialized approach.²⁶⁰

A law that protects the Batwas as indigenous people needs to be put in place, as they are vulnerable people and most of the time are victims of discrimination. In addition, the inclusion of the Batwa community in policy making is a gap that need to be addressed.

Dispossession of land and the absence of compensation for Batwa people is another unresolved issue.²⁶¹ The Batwa community has neither been compensated for the loss of their traditional land nor relocated to other areas to preserve their traditional livelihoods. Furthermore, the Organic Land Law has not provided for indigenous people's right to own land.

5.7 Key Findings

1. There is a lack of inclusion of Batwa people in policy making. Batwa should be included in the conceptualization of policies intended to assist them. While the Batwa have been included in many development programs initiated by the government, such as “Gira Inka” (own a cow) and “Zero Nyakatsi” (zero grass huts), the fact remains that Batwa is the most discriminated group in Rwanda.²⁶²
2. Access to education is the paramount concern for many Batwa people. The majority of parents do not have the means to send their children to school. If Batwa people are to be educated, some other challenges will be surmounted by themselves in actively participating in the country building project.
3. There is a need for dialogue between the Batwa community and the government in terms of working closely together to support the Batwa to integrate easily into economic activities. The present pace of support is not enough.
4. The Rwandan government needs to ensure that the Batwa are legally recognized as indigenous people. Giving the Batwa this legal status would not promote ethnic divisions in the country, but rather recognize the cultural distinctiveness of the community and protect them.
5. The government should ensure the Batwa have access to their ancestral lands. This goes together with providing compensation for evictions. In Rwanda, most indigenous communities are landless due to the conservation policies of the government.
6. There is a need to strike a balance between the conservation of forests and the protection of the rights of indigenous people.

CONCLUSION AND GENERAL RECOMMENDATIONS

The transitional justice experiences outlined in the four case studies in this report vary according to their contexts and the nature of the experiences of indigenous communities in the milieu of the political, economic or other crises of each country. A common thread in Kenya, Morocco, Nigeria and Rwanda is the inadequacy or complete absence of any form of inclusion of indigenous communities in the formulation and implementation of transitional justice processes. This impacts on the outcomes of transitional justice in relation to the communities, as the processes fail to meet their needs.

In the case of indigenous communities with well-established informal and traditional dispute resolution mechanisms, these practices were sidelined by official transitional justice programs, thereby denying the communities the opportunity to attain justice and reconciliation through practices that are most relevant to them.

Based on the key findings in the case studies, the following recommendations are considered imperative for strengthening the rights of indigenous communities in post-conflict societies and adequately addressing their needs and claims:

1. There is a need for the development of legal and policy frameworks for the recognition indigenous communities within each country, based on the historical antecedents and collective experiences of the communities concerned. Part of the identified impediments to strengthening the rights of indigenous populations is the absence of legal recognition, which is blamed on the misconception that such recognition could promote ethnic discord and violence.
2. In countries where indigenous communities are already legally recognized and afforded protection, as in Kenya and Morocco, the government must go beyond mere theoretical or constitutional recognition by putting in place mechanisms for the actualization of benefits and protection, and accord indigenous groups their rights as recognized by law.
3. During transitional justice processes, there is a need to engage indigenous communities in the conceptualization and implementation stages of all mechanisms, and to adequately understand their concept of justice as a people, for the purposes of accommodating their specific justice needs so as to achieve real and lasting reconciliation.
4. Transitional justice processes should include local justice practices, including those of indigenous groups. The AUTJP specifically recommends the support, respect for, and promotion of community-based dispute mechanisms that promote the integration and reconciliation of the community, at the same time as incorporating positive customary norms to compliment criminal prosecutions for certain crimes.
5. In cases where indigenous communities have been targeted or are under threat of attack, as was the Ogoni people's experience with Nigerian security agents during the peak of the crises, transitional justice processes must offer protection and security guarantees to such communities, by addressing all the dimensions of the conflict through measures that look at the structural causes of the violence.

6. As recommended in the 'transitional justice commissions' indicative element of the AUTJP, indigenous communities are entitled to the truth about the individuals, institutions and their accomplices complicit in their human rights violation, with a view to holding them accountable. In the Moroccan ERC processes, Amazigh indigenous communities were not accorded the opportunity of knowing the truths about the individuals and institutions responsible for their suppression during their agitations for the recognition of Amazigh rights.
7. Reconciliation and national cohesion as an element of transitional justice processes is important, and especially relevant to the Amazigh and Batwa indigenous communities of Morocco and Rwanda, respectively, considering that their specific experiences are steeped in transgenerational inequalities and marginalization. As the AUTJP specifies, there is a need for governments to adopt policies and programs that address structural inequalities, inclusive development, management of diversity, and educational programs that promote equality, dignity and common humanity.



Kikuyu elders participating in focus group discussions, Kenya. Photo: Manene Cultural Trust

8. Although the Moroccan transitional justice process commenced the implementation of a material reparations programs, this is lacking in most transitional countries on the continent, despite recommendations for material reparation in some of the case studies. To ensure effective reparation for the collective experiences of indigenous communities, there must be collective reparations, which must include restitution of communal lands, and the provision of social infrastructures like schools, health centers, electricity, water and accessible roads to indigenous communities affected by violence. As identified in the AUTJP, such collective reparations must also be transformative to promote equality and the participation of affected communities.
9. Apart from specific cases of particular forms of injustices experienced by indigenous communities, marginalization and structural inequality are at the core of their collective experiences. There is a need to address minority communities' concerns with redistributive/socioeconomic justice during transitional justice processes, to rectify structural inequalities. The AUTJP sets benchmarks for socio-economic justice to include the protection of traditional land ownership rights, which is particularly relevant to indigenous communities. There is also a need for countries to develop affirmative action programs to address historical marginalization, so as to achieve equitable wealth and power-sharing arrangements.
10. Indigenous communities' experiences during conflicts are essentially a manifestation of group dimensions of violence, which could be predicated on ethnicity and language, as is the case with the Amazigh of Morocco, or on national origin and birth status, as is best exemplified by the experiences of the Batwa people of Rwanda, among other factors. Transitional justice processes must therefore ensure the proper management of such diversities, by first acknowledging the ethnic or identity dimensions of the violence and then following up on these by establishing institutions that promote national unity and similar programs.

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