Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

[Communication 276/2003, 27th Activity Report (2009)]

In this groundbreaking decision, the African Commission held the government of Kenya accountable for violations of the rights of an indigenous group linked to the denial of access to their traditional land. The decision is notable as the first time that the African Commission elaborates on the meaning of the right to development in article 22 of the African Charter, the only international treaty to recognise this right.

1. The complainants allege that the government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

2. The complainants state that the Endorois are a community of approximately 60 000 people[35] who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The complainants allege that since 1978 the Endorois have been denied access to their land.

...

Decision on merits

144. The present communication alleges that the respondent state has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from their ancestral land, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

145. Before addressing the articles alleged to have been violated, the respondent state has requested the African Commission to determine whether the Endorois can be recognised as a 'community'/sub-tribe or clan on their own. The respondent state disputes that the Endorois are a distinct community in need of special protection. The respondent state argues that the complainants need to prove this distinction from the Tugen sub-tribe or indeed the larger Kalenjin tribe. The immediate questions that the African Commission needs to address itself to are:

146. Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection? If they are a distinct community, what makes them different from the Tugen sub-tribe or indeed the larger Kalenjin tribe?

35 The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.

147. Before responding to the above questions, the African Commission notes that the concepts of 'peoples' and 'indigenous peoples/communities' are contested terms.[36] As far as 'indigenous peoples' are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of 'peoples'. The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of 'people(s)'.[37] In its Report of the Working Group of Experts on Indigenous Populations/Communities,[38] the African Commission describes its dilemma of defining the concept of 'peoples' in the following terms:

> Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESR do not define 'peoples'. It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding article 17 make reference to 'every individual'. Article 18 serves as a break by referring to the family. Articles 19 to 24 make specific reference to 'all peoples'.

148. The African Commission, nevertheless, notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

149. The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'.[39] It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three 'generations' of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. In that regard, the African Commission notes its own observation that the term 'indigenous' is also not intended to create a special class of citizens, but rather to address

36 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on 'Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3, 26 February 2007: "Mission to Kenya"' from 4 to 14 December 2006, at 9.

37 See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II)), p.4.

38 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

39 The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image .

historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.[40] In the context of the African Charter, the Working Group notes that the notion of 'peoples' is closely related to collective rights.[41]

150. The African Commission also notes that the African Charter, in articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives.[42] The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.[43] These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

> … first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists …
>
> … A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.[44]

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy — especially rights enumerated under articles 19 to 24 of the African Charter — or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.[45]

152. As far as the present matter is concerned, the African Commission is also enjoined under article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter.[46] It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

> ... that indigenous peoples are ... those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of

40 Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *supra* n. 47.

41 Ibid.

42 See *Social and Economic Rights Action Centre* (*SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)] (*Ogoni case*). African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002), *Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 2001-2002.

43 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

44 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

45 Ibid.

46 See art 60 of the African Charter.

> their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[47]

153. But this working definition should be read in conjunction with the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, which is the basis of its 'definition' of indigenous populations.[48] Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries:[49]

> Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[50]

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples — that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/ communities include pastoralist communities such as the *Endorois*,[51] Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. The UN Special Rapporteur further observed that the Endorois community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.[52]

155. In the present communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.[53] The complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that protect collective

47 Jose Martinez Cobo (1986), Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/ Sub.2/1986/7/Add.4.

48 The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of 'first or original occupant' of territory, which is not always relevant to Africa.

49 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, *entered into force* Sept. 5, 1991, Article 1(1)(b).

50 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, *entered into force* Sept. 5, 1991, Article 1(1)(b).

51 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit*, *Supra* n. 47 - Emphasis added.

52 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit*, *supra* note 47.

53 The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*. Here the Commission stated: 'The African Charter, in its articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives.'

rights. The respondent state disagrees.[54] The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

156. After studying all the submissions of the complainants and the respondent state, the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands — Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.[55] The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous.[56] The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as 'peoples' is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.[57] The African Commission further notes that the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples' self-identification is an important ingredient to the concept of peoples' rights as laid out in the Charter. It agrees that the alleged violations of the African Charter by the respondent state are those that go to the heart of indigenous rights — the right to preserve one's identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for

[54] The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the *Ogoni case*, the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

[55] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

[56] See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para 53.

[57] See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), UN Doc A/45/18 at 79 (1991). 'The Committee', in General Recommendation VIII stated that membership in a group, 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'.

Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.[58]

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Alleged violation of article 8

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166. This Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois. During oral testimony, and indeed in the complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the lake … Lake Bogoria is considered the spiritual home of all Endorois, living and dead.

167. It further notes that one of the beliefs of the Endorois is that their Great Ancestor, *Dorios*, came from the Heavens and settled in the Mochongoi Forest.[59] It notes the complainants' arguments, which have not been contested by the respondent state, that the Endorois believe that each season the water of the lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the lake.

168. From the above analysis, the African Commission is of the view that the Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter.

169. The African Commission will now determine whether the respondent state by its actions or inactions have interfered with the Endorois' right to religious freedom.

170. The respondent state has not denied that the Endorois have been removed from their ancestral land they call home. The respondent state has merely advanced reasons why the Endorois can no longer stay within the Lake Bogoria area. The complainants argue that the Endorois' inability to practice their religion is a direct result of their expulsion from their land and that since their eviction the Endorois have not been able to freely practice their religion, as access for religious rituals has been denied the community.

171. It is worth noting that in *Amnesty International v Sudan,* the African Commission recognised the centrality of practice to religious freedom.[60] The African Commission noted that the state party violated the authors' right to practice their religion, because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. The African Commission also notes the case of *Loren Laroye Riebe Star* from the IACmHR, which determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. It notes that the Court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.[61]

58 See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc E/CN.4/2002/97, (2002) at para 100, where he argues that self-identification is a key criterion for determining who is indeed indigenous.

59 See paras 73 and 74.

60 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)] (*Amnesty International v Sudan)*.

61 *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/ Mexico,* Inter-American Commission on Human Rights, Report No 49/99, Case 11.610, (1999). *Dianna Ortiz v Guatemala,* Inter-American Commission on Human Rights, Report 31/96, Case 10.526, (1997).

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.[62] The *raison d'être* for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the respondent state to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v Sudan,* the African Commission stated that a wide-ranging ban on Christian associations was 'disproportionate to the measures required by the government to maintain public order, security, and safety'. The African Commission further went on to state that any restrictions placed on the rights to practice one's religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.[63]

173. The African Commission is of the view that denying the Endorois access to the lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification. The African Commission is also not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

...

Alleged violation of article 14

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187. The complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of 'formal' title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions

62 Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 (1994), 35, para 8.

63 The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v Zambia*, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter … and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v Sudan* (1999), paras 82 and 80.

and customs.[64] The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.

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199. The African Commission is of the view that even though the Constitution of Kenya provides that Trust Land may be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation, the Endorois property rights have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land. It agrees with the complainants that the Endorois were never given the full title to the land they had in practice before the British colonial administration. Their land was instead made subject to a trust, which gave them beneficial title, but denied them actual title. The African Commission further agrees that though for a decade they were able to exercise their traditional rights without restriction, the trust land system has proved inadequate to protect their rights.

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204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the state or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.[65]

205. The Inter-American Court jurisprudence also makes it clear that mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples' effective protection.[66]

206. In the *Saramaka* case, the Court held that the state's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court held that, rather than a privilege to use the land, which can be taken away by the state or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples. The situation of the Endorois is not different. The respondent state simply wants to grant them privileges such as restricted access to ceremonial sites. This, in the opinion of the Commission, falls below internationally recognised norms. The respondent state must grant title to their territory in order to guarantee its permanent use and enjoyment.

64 See Report of the African Commission's Working Group of Experts, Submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/ Communities in Africa', Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session (2005).

65 See articles 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples.

66 Para 110 of the *Saramaka* case.

207. The African Commission notes that articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term 'occupied or otherwise used'. This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of *Awas Tingni v Nicaragua*. In the current leading international case on this issue, *The Mayagna (Sumo) Awas Tingni v Nicaragua,*[67] the IActHR recognised that the American Convention protected property rights 'in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property'.[68] It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[69]

208. The African Commission also notes that in the case of *Sawhoyamaxa v Paraguay*, the IActHR, acting within the scope of its adjudicatory jurisdiction, decided on indigenous land possession in three different situations, viz: in the *Case of the Mayagna (Sumo) Awas Tingni Community*, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration;[70] in the *Case of the Moiwana Community*, the Court considered that the members of the N'djuka people were the 'legitimate owners of their traditional lands', although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them, though in this case, the traditional lands were not occupied by third parties.[71] Finally, in the *Case of the Indigenous Community Yakye Axa*, the Court considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualise those lands and transfer them on a no consideration basis.[72]

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

210. That such encroachment has taken place could be seen by the Endorois' inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threatens to cause irreparable

67 *The Awas Tingni Case* (2001), paras 140(b) and 151.
68 Ibid, at para 148.
69 Ibid, at para 151.
70 See case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para 151.
71 See case of the Moiwana Community. Judgment of 15 June 2005. Series C No 124. para 134.
72 See case of the Indigenous Community Yakye Axa, paras 124-131.

damage to the land. The African Commission has also been notified that the respondent state is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.

211. The African Commission is aware that encroachment in itself is not a violation of article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted — 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'. The African Commission will now assess whether an encroachment 'in the interest of public need' is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the complainants that the test laid out in article 14 of the Charter is *conjunctive*, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws.

212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

> Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.[73]

213. Limitations on rights, such as the limitation allowed in article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that '... the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.'[74] The African Commission also notes the decisive case of *Handyside v United Kingdom*, where the ECHR stated that any condition or restriction imposed upon a right must be 'proportionate to the legitimate aim pursued'.[75]

214. The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present communication, the African Commission holds the view that in the pursuit of creating a game reserve, the respondent state has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the game reserve.

215. It is also of the view that even if the game reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the

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73 Nazila Ghanea and Alexandra Xanthaki (2005) (eds). *'Indigenous Peoples' Right to Land and Natural Resources' in* Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

74 *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] para 42.

75 *Handyside v United* Kingdom, No 5493/72, Series A 24 (7 December 1976), para 49.

government in a way that respected their property rights, even if a game reserve was being created. In that regard, the African Commission notes its own conclusion in the *Constitutional Rights Project* case, where it says that 'a limitation may not erode a right such that the right itself becomes illusory.'[76] At the point where such a right becomes illusory, the limitation cannot be considered proportionate — the limitation becomes a violation of the right. The African Commission agrees that the respondent state has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a game reserve and the subsequent eviction of the Endorois community from their own land, the respondent state has violated the very essence of the right itself, and cannot justify such an interference with reference to 'the general interest of the community' or a 'public need'.

216. The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the 'public interest test' is further confirmed by jurisprudence of the IActHR. In *Yakye Axa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.

217. The IActHR held that one of the obligations that the state must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the state has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

218. The African Commission also notes that the 'disproportionate' nature of an encroachment on indigenous lands — therefore falling short of the test set out by the provisions of article 14 of the African Charter — is to be considered an even greater violation of article 14, when the displacement at hand was undertaken by force. Forced evictions, by their very definition, cannot be deemed to satisfy article 14 of the Charter's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. The grave nature of forced evictions could amount to a gross violation of human rights. Indeed, the United Nations Commission on Human Rights, in resolutions 1993/77 and 2004/28, has reaffirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing.[77] Where such removal was forced, this would in itself suggest that the 'proportionality' test has not been satisfied.

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225. Two further elements of the 'in accordance with the law' test relate to the requirements of consultation and compensation.

226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent — or to compensate — ultimately results in a violation of the right to property.

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[76] *The Constitutional Rights Project Case*, para 42.

[77] See United Nations Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/1993/RES/77 and United Nations Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

227. In the *Saramaka* case, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory do not amount to a denial of their survival as a tribal people, the Court stated that the state must abide by the following three safeguards: first, ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; second, guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; third, ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

228. In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a *prior* environment and social impact assessment was not carried out. The absence of these three elements of the 'test' is tantamount to a violation of article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the game reserve (or other adequate forms of compensation) also extends to a violation of the right to development.

229. On the issue of compensation, the respondent state in rebutting the complainants' allegations that inadequate compensation was paid, argues that the complainants do not contest that a form of compensation was done, but that they have only pleaded that about 170 families were compensated. It further argues that, if at all the compensations paid was not adequate, the Trust Land Act provides for a procedure for appeal, for the amount and the people who feel that they are denied compensation over their interest.

230. The respondent state does not deny the complainants' allegations that in 1986, of the 170 families evicted in late 1973, from their homes within the Lake Bogoria Game Reserve, each receiving around 3 150 Kshs (at the time, this was equivalent to approximately £30). Such payment was made some 13 years after the first eviction. It does not also deny the allegation that £30 did not represent the market value of the land gazetted as Lake Bogoria Game Reserve. It also does not deny that the Kenyan authorities have themselves recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and does not constitute full compensation for loss of land.

231. The African Commission is of the view that the respondent state did not pay the prompt, full compensation as required by the Constitution. It is of the view that Kenyan law has not been complied with and that though some members of the Endorois community accepted limited monetary compensation that did not mean that they accepted it as full compensation, or indeed that they accepted the loss of their land.

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Alleged violation of article 17 (2) and (3)

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246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted article 17(2) as requiring governments to take measures 'aimed at the conservation, development and diffusion of culture', such as promoting 'cultural identity as

a factor of mutual appreciation among individuals, groups, nations and regions; ... promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.'[78]

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248. The African Commission is of the opinion that the respondent state has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,[79] but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.[80]

249. In its analysis of article 17 of the African Charter, the African Commission is aware that unlike articles 8 and 14, article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the respondent state were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the game reserve constitutes a legitimate aim, the respondent state's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

250. It is the opinion of the African Commission that the respondent state has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The respondent state has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the lake.

251. By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the respondent state have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to

78 *Guidelines for National Periodic Reports,* in *Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989*, ACHPR/RPT/2nd, Annex XII.

79 See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, article 15(3).

80 See statement by Mr Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item 'Indigenous Issues' New York, 20 October 2008.

culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the respondent state is found to have violated article 17(2) and (3) of the Charter.

Alleged violation of article 21

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255. The African Commission notes that in the *Ogoni* case the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under article 21 of the African Charter.[81] The respondent state does not give enough evidence to substantiate the claim that the complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the game reserve have been used to finance a lot of useful projects, 'a fact' that the complainants do not contest. The African Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter's article 21 on the right to natural resources. It therefore reads the right to natural resources into the right to property (article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The 'test' in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

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267. In the instant case of the Endorois, the respondent state has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to ruby. Nevertheless, it is instructive to note that the African Commission decided in the *Ogoni* case that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of article 21.[82] Article 14 of the African Charter indicates that the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

268. As far as the African Commission is aware, that has not been done by the respondent state. The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the respondent state. Article 21(2) also concerns the obligations of a state party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation or restitution of their land. Accordingly, the Respondent State is found to have violated article 21 of the Charter.

Alleged violation of article 22

269. The complainants allege that the Endorois' right to development have been violated as a result of the respondent state's creation of a game reserve and the respondent state's failure to adequately involve the Endorois in the development process.

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81 The *Ogoni* Case (2001), paras 56-58.
82 The *Ogoni* Case (2001), paras 56-58.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[83]

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states '… the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available'. Freedom of choice must be present as a part of the right to development.[84]

279. The Endorois believe that they had no choice but to leave the lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a report produced for the UN Working Group on Indigenous Populations requiring that 'indigenous peoples are not coerced, pressured or intimidated in their choices of development.'[85] Had the respondent state allowed conditions to facilitate the right to development as in the African Charter, the development of the game reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the game reserve. However, the forced evictions eliminated any choice as to where they would live.

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281. The African Commission notes that its own standards state that a government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.[86] The African Commission agrees with the complainants that the consultations that the respondent state did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the

83 Arjun Sengupta, 'Development Cooperation and the Right to Development,' Francois-Xavier Bagnoud Centre Working Paper No. 12, (2003), available at www.hsph.harvard.edu/fxbcenter/working_papers.htm. See also UN Declaration on the Right to Development, UN GAOR, 41st Sess, Doc. A/RES/41/128 (1986), article 2.3, which to refers to 'active, free and meaningful participation in development.'

84 Arjun Sengupta, 'The Right to Development as a Human Right,' Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at http://www.hsph.harvard.edu/fxbcenter/working_papers.htm 2000.

85 Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. UN Doc E/CN.4/Sub.2/AC.4/2004/4 (2004), para 14 (a).

86 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Twenty-eighth session, 2003). See also ILO Convention 169 which states: 'Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.'

impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the game reserve.

282. Furthermore, the community representatives were in an unequal bargaining position, an accusation not denied or argued by the respondent state, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan authorities. The African Commission agrees that it was incumbent upon the respondent state to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community. It also agrees with the complainants that the inadequacy of the consultation undertaken by the respondent state is underscored by Endorois' actions after the creation of the game reserve. The Endorois believed, and continued to believe even after their eviction, that the game reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

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288. In the instant communication in front of the African Commission, video evidence from the complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence — through grazing their animals — has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.[87] The African Commission is of the view that the respondent state has done very little to provide necessary assistance in these respects.

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290. In the instant communication, even though the respondent state says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the respondent state did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve and commencing their eviction. The respondent state did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes — the reason, in fact why they are in front of the African Commission.

291. Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

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297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there

[87] See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.

would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses — the actual loss in well-being and the denial of benefits accruing from the game reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the game reserve.

298. The African Commission is of the view that the respondent state bears the burden for creating conditions favourable to a people's development.[88] It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The respondent state, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent state did not adequately provide for the Endorois in the development process. It finds against the respondent state that the Endorois community has suffered a violation of article 22 of the Charter.

Recommendations

In view of the above, the African Commission finds that the respondent state is in violation of articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the respondent state:

(a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.

(b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

(c) Pay adequate compensation to the community for all the loss suffered.

(d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

(e) Grant registration to the Endorois Welfare Committee.

(f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.

(g) Report on the implementation of these recommendations within three months from the date of notification.

2. The African Commission avails its good offices to assist the parties in the implementation of these recommendations.

Civil Liberties Organisation (in respect of Bar Association) v Nigeria

(2000) AHRLR 186 (ACHPR 1995)

Governmental control of the Nigerian Bar Association is held to be a violation of the right of freedom of association of practicing lawyers.

88 Declaration on the Right to Development, article 3.