Endorois Complaint
Submissions on Admissibility

1. **The Centre for Minority Rights Development (CEMIRIDE) hereby submits its official Communication on admissibility to the African Commission on Human and Peoples' Rights ("the Commission") against the State of Kenya, in accordance with article 56 of the African Charter for Human and Peoples' Rights ("the Charter").[1] This Communication is sent by way of complement to the Letter of Intent forwarded for the Honourable Commission's attention on 22 May 2003.**

2. CEMIRIDE is a non-governmental organisation registered as such in the Republic of Kenya working to secure the rights of minority and indigenous communities in the country and within the African region. It is engaged in research, advocacy on public policy and legal intervention. In this regard, CEMIRIDE has worked with the Endorois community (on behalf of whom this Communication is lodged) to give their issues visibility both nationally and internationally. The Endorois community ("the Applicants") have requested that CEMIRIDE seek further solution to their predicament upon the conclusion of a case filed before the Nakuru High Court against the Baringo and Koibatek local county governments.[2]

3. The Endorois community, which have suffered displacement from their ancestral land following the Government's gazetting of their land, alleges violations of articles 8[3], 9(1), 14, 16, 17(2), 20(1), 21 and 22(1) of the Charter. Through its acts and omissions, the government of Kenya has violated its general obligations to respect and ensure the above rights and to adopt legislation to give them domestic legal effect (Article 1, Charter);

4. The present Communication is not written in disparaging or insulting language directed against the state concerned or its institutions;

5. The Communication has been brought to the attention of the Commission within 13 months of the High Court Ruling, and has not been examined by any other international mechanism for the promotion and protection of human rights or settlement body.

6. The following documents are submitted in support of the present Communication:

   (a) A copy of the Nakuru High Court ruling (Miscellaneous Civil Case No. 183 of 2000);

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1 The State of Kenya ratified the African Charter on Human and Peoples' Rights on 23 January 1992.

2 The Endorois are 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, Marakwet among others. Statistics suggest that, within the larger grouping of 75,000, the Endorois community number around 60,000 persons. The community are represented by William Sitei Yatich, former Chairman of the Endorois Welfare Council, and 15 clan leaders of the Community, listed in Annex (h).

3 Originally, the religious significance attached to the area was framed within the broader socio-cultural scope of articles 17(2), 17(3) and 22(1). However, upon further consultation with the Endorois people, the community has expressed its wish that freedom of religion is submitted as a self-standing violation.

(b) A copy of the relevant Constitutional provisions (Chapters IV, V and IX of the Constitution of Kenya);

(c) A copy of letters asking the High Court to avail the Applicants of certified proceedings, dated 24 April 2002 and 26 May 2003;

(d) A copy of Kenya Gazette Notice number 1069 of 2002, granting a mining licence to Messrs Corby Limited;

(e) A copy of a 1997 Amnesty International appeal in relation to the repeated harassment of Juma Kiplenge, a lawyer representing the Endorois community;

(f) A copy of a letter dated 6 October 1998 from The Law Society of England and Wales to the President of Kenya expressing its concerns over politically motivated charges brought against Mr. Kiplenge; and

(g) A copy of President Kibaki's manifesto on land questions in Kenya prior to election.

(h) A list of the clan leaders representing the Endorois Community.

Endorois People : Background

7. Prior to the dispossession of their land by the Government of Kenya - through its creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Gamer Reserve in 1978 - the Endorois had established and, for centuries, practiced a sustainable way of life inextricably linked to the land which they occupied. Their way of life embraces the traditions and values of a unique African population. Their concept of land rights, seen from the African perspective, is dramatically different from the concept of land rights developed in the Western world. Land for the Endorois is held in very high respect, for the reason that tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life[4]. They assert their right as a collective, in that their land belongs to the community not to the individual. They are, in this sense, the trustees of that land for future generations. Their relationship with the land is essential to their way of life and ultimately, their preservation and survival as a traditional people.

8. The Honourable Commission well understands this conception of land rights. At the outset of the preamble to the African Charter, "the virtues of their historical tradition and the values of African civilisations" are proclaimed to inspire and characterise the African concept of human and people's rights. At present, the Endorois community continues to be denied access to the gazetted land for pastoralist purposes and can no longer occupy homes within the reserve. Their ability to make use of revered or spiritual sites, traditional medicines, salt rock and soils is under threat. Their exclusion from effective participation in the management of their ancestral land, and indeed their inability to challenge the

[4] The importance of the relationship of traditional communities to their land, territories and resources has been recognised and explored by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. See "Indigenous Peoples and their relationship to Land: Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes" UN Doc. E/CN.4/SUB.2/2001/21.

game reserve's very existence, results in a violation of their right to economic, social and cultural development with due regard to their freedom and identity. The Endorois people seek the protection of the African Commission, in its uniqueness amongst regional human rights tribunals, to grant them an effective remedy for the impact of the gazetting of their land on their cultural integrity, their pastoral enterprise and their ability to secure their livelihood and that of future generations of the community.

The Principle of Exhaustion of Domestic Remedies

9. It is recognised by the Honourable Commission, and indeed by other international mechanisms for the protection of human rights, that complainants are required to exhaust local domestic remedies before the Commission can take up a case, unless these remedies are as a practical matter unavailable or unduly prolonged.[5] The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

10. The principle of exhaustion of domestic remedies further avoids the difficulty of contradictory judgments arising between national and international levels. Thus, where the facts and issues of the complaint are, as a matter of law or fact, not subject to effective legal or administrative redress within the national system concerned, potential conflict cannot arise and the complainant may proceed directly to the international level. Further, the African Commission has "never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation"[6]. In the submissions on admissibility below, the Applicants demonstrate that these requirements are satisfied.

Chronology of Domestic Action

11. On 5 August 1997, High Court Miscellaneous Civil Application No. 214 of 1997 (dated 4 August 1997) was lodged with the High Court for Kenya by William Ngasia and Others, for leave to file a representative constitutional reference case on behalf of the Endorois Community.

12. Leave was granted and the substantive application, High Court Miscellaneous Civil Application No. 522 of 1998, was filed by way of originating summons. However, after consultation with counsel, the Applicants were advised that a procedural error had occurred as the courts were only permitted to entertain constitutional applications commenced by way of Notice of Motion or normal Plaint. The application was subsequently withdrawn on the basis of this advice.

13. The Applicants sought fresh leave to commence a representative suit on behalf of the Endorois community by way of High Court Miscellaneous Civil Application No. 159 of 1999. Leave was granted by Justice David Rimita on 1 July 1999 and Miscellaneous Civil Case No. 183 of 2000 proceeded to the High court of Kenya at Nakuru on 19 August 2000. Judgment was given on 19 April 2002, dismissing the Applicants on the basis that all necessary provisions of law had been adhered

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5 Article 56(5), African Charter.

6 African Commission. *Free Legal Assistance Group Lawyer' Committee for Human Rights v Zaire*. Communication No. 25/89, § 37.

to when the disputed land was set aside for use as a game reserve. A copy of the judgment is attached at Annex (a).

14. A notice of appeal against the High Court judgment was lodged with the Court of Appeal of Kenya on 2 May 2002. However, despite the Applicants' renewed efforts to obtain certified proceedings, the Court has failed to issue the necessary documents required in order to file the substantive appeal[7]. Meanwhile, the Government has continued to threaten the integrity of the Endorois community's ancestral lands through further exploitation of the area. (See paragraph 16.3).

15. Notwithstanding the Applicants' legal efforts and the urgency of this claim, the analysis below demonstrates that the domestic action *as a whole* does not constitute an *effective* remedy for the violations complained of, and, as such, all domestic remedies have been exhausted.

Submissions on Admissibility

16. **The Government of Kenya has had ample time with which to deal with the complaint and urgent action is now required to prevent irreparable damage to the way of life of the community**.

16.1 Although legal action was not commenced until 1997 in relation to the claim of the Applicant, the Government of Kenya has been aware of the assertion of rights by the Endorois people since 1979, when the community expressed concerns to District Commissioner Mr Ole Orumoi over plans requiring the community to move from the land[8]. The delay in bringing legal proceedings was due to the considerable hurdles of the isolated nature of the community,[9] high levels of illiteracy resulting in a chronic lack of knowledge concerning potential rights under national or international law,[10] and the limited means of the community combined with the unavailability of legal aid in Kenya.

16.2 Case law demonstrates that where legal services are required either as a matter of fact or law in order for a right guaranteed by international human rights law to be recognised, and a person is unable to obtain such services because of his indigency and the absence of legal aid, then, particularly with respect to a constitutional motion, this may render the recourse essentially unavailable to the indigent applicant[11]. In particular, the Inter-American Commission on Human Rights has found that *constitutional motions* are procedurally and substantively complex and cannot be effectively raised or presented in the absence of legal representation, which must be provided to an applicant by way of legal aid in the

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7 Copies of two letters from the Applicants to the Court of Appeal requesting certified proceedings are supplied to the Commission at Annex (c).

8 Affidavit of Richard Yegon in Misc. Civil Application No. 183 of 2000 between William Yatch Sitet and 29 others of the Endorois Community (Applicants) and Baringo County Council, Koibatek County Council and the Attorney General (Respondents), § 8.

9 The Community occupies the Mochongoi forest and the hilly and rugged terrain of the Laikipia escarpment, which are serviced by very poor road and communication networks. As a result, residents of the area are obliged to trek approximately 60 kilometres in order to access public transport.

10 This is due to a lack of adequate educational facilities.

11 See for example UN Human Rights Committee, *Wright and Harvey v Jamaica*. Communication 459/1991 and Inter-Am. CHR *Neville Lewis v Jamaica*. Communication 11.825. See also European Court of Human Rights. *Airey v Ireland*. Case 6289/73, which confirms a state's positive obligation to provide legal assistance to those lacking financial means.

event of indigency[12]. Further, the *serious* consequences of a constitutional motion, which, in the case of the Endorois, impacts upon the very *livelihood* of the community, dictates that legal aid is required to be provided by the state. That the Endorois people were able to bring national constitutional legal proceedings at all steps beyond the requirements of international law.

16.3 The Government of Kenya remains aware of the complaint of the Endorois people by virtue of the notice of appeal to the Kenyan Court of Appeal of 2 May 2002. Notwithstanding that the issue of the rights to the land remain contested and legal proceedings remain unresolved, the situation on the ground continues to change to the detriment of the Applicants and the future generations of the community. For instance, in 2001, the Government granted a mining licence to a multinational company, Messrs Corby Limited *vide* Kenya Gazette Notice number 1069 of 2002 without knowledge of, or consultation with, the Community[13]. Further, in late 2002, the Government allocated land within the Mochongoi forest to persons other than members of the Endorois Community. It is deeply concerning to the Community that the delay in the hearing of their claims results in their situation being ever more likely to remain unresolved, particularly as third party rights intervene. Yet, the Endorois have made every effort to seek to resolve the position and seek a remedy through the proper domestic proceedings.

16.4 That an international body is under a special responsibility to consider an application when action is required *urgently* is demonstrated by the United Nations Human Rights Committee case of *Lubicon Lake Band v Canada.*[14] Despite the fact that a number of domestic appeals were pending at the time of the communication, the Committee declared the communication admissible, noting the importance of saving the community which, at the material time was, according to the applicants, "on the brink of collapse". The Endorois community also faces a grave and urgent situation. Large numbers of livestock have been lost, the community and its culture are splintered and the practice of nomadic pastoralism is severely curtailed, threatening the continued existence of their traditional way of life.

16.5 Despite the fact that notice of appeal was lodged more than a year ago, substantive arguments cannot yet be filed as certified proceedings from the Court of Appeal are still awaited. In light of the fact that the Lake Bogoria environment is rapidly changing, and that appeal proceedings are certain to take several additional years, the Applicants submit that urgent action is now required to prevent irreparable damage[15] to the community.

17. **Those domestic remedies that do exist are, in any event, not effective.**

17.1 The Honourable Commission has consistently found, in *Sir Dawda K Jawara v The Gambia* and *The Social and Economic Rights Action Centre v Nigeria*, that

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12 Inter-Am. CHR *Rudolphe Baptiste v Grenada*. Communication 11.743.

13 A copy of this document is provided at Annex (d).

14 UN Human Rights Committee. Communication 167/1984.

15 On average, it takes three to five years from filing an appeal to when it is heard. In the present case, more than one year has elapsed without any possibility of even *initiating* an appeal due to the Court's failure to provide the Applicants with copies of the proceedings. The certitude of several further years of delays is supported by the 1998 Kwach Committee Report, which states that: "*The Kenyan judiciary has experienced, in the recent past, lengthy case delays and backlog, limited access by the population… allegation of corrupt practices, cumbersome laws and procedures*". (The Kwach Report was carried out by a Committee appointed by the Chief Justice to look into reform in the Kenyan judiciary. The Committee was chaired by the Court of Appeal Judge Richard Kwach.)

such remedies as do exist at domestic level must be "*available, effective* and *sufficient*"[16], such that "if the right is not well provided for, there cannot be effective remedies, or any remedies at all"[17]. A remedy is considered "*available* if the petitioner can pursue it without impediment", "*effective* if it offers a prospect of success" and "*sufficient* if it is capable of redressing the complaint"[18].

17.2 Such an approach is also well established in the work of other regional and international mechanisms for the protection of human rights. The European Court of Human Rights, for instance, has held that the remedy must be capable of redressing the applicant's complaints[19] and that effective protection means that any national action must offer a remedy for the act itself, rather than relieving the *consequences* of an act[20].

17.3 The Applicants seek restitution of their rights to the land and preservation of their community and traditional way of life as a collective. Such national remedies as are available to the Endorois people *are not* and *cannot* be effective and adequate *in regard to the grievances in question.*[21]

17.4 In so far as the Constitution of Kenya provides for the protection of fundamental rights and freedoms, this is contained within Chapter V (Sections 70-83) of the Constitution, in the form of a bill of rights *of the individual*. This Constitutional chapter protects fundamental rights such as the right to life, liberty, freedom from slavery or servitude, property, due process, freedom of expression, assembly and association. As is the case with many other post-independent constitutions of the ex-British colonies, it is based on the European Convention for the Protection of Human Rights and Fundamental Freedoms[22]. In light of the fact that the 1950 European Convention rests on a highly individualistic conception of society it is unsurprising that Chapter V of the Constitution of Kenya does little to protect the concept of *group or collective rights* in the sense asserted by the Applicants. Neither does the jurisprudence of the High Court of Kenya in matters pertaining to constitutional rights serve to expand the nature of the rights contained therein.

17.5 Moreover, the nature of the fundamental rights contained in Sections 70-83 of the Constitution of Kenya places them squarely within the civil and political rights sphere. Economic, social and cultural rights, such as the right to development (protected by Article 22 African Charter) or the right to cultural life (protected by Article 17 African Charter) - as primarily complained of by the Applicants in the present communication - receive no equivalent degree of Constitutional protection. It is not therefore open to the Applicants to bring such grievances before the national courts.

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16 African Commission. *Sir Dawda K Jawara v The Gambia*. Communication 147/95 and 149/96 at § 31.

17 African Commission. *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*. Communication 155/96 at § 37.

18 *Sir Dawda K Jawara v The Gambia* at § 32.

19 See for example European Court of Human Rights. *Stögmüller v Austria.* Case 1602/62 (Admissibility Decision) at § 11.

20 See for example European Court of Human Rights. *Case of Deweer v Belgium*. Case 6903/75 at § 29.

21 See for example European Court of Human Rights. *G.D. and Others v United Kingdom*. Case 5577/72 at § 4 (p.19).

22 See for instance, the opinion of Lord Wilberforce in UK Privy Council *Minister for Home Affairs v Fisher* [1980] AC 319 at 328.

17.6 Thus, to the extent that Constitutional, and other *non*-Constitutional national remedies are, or were, open to the Applicants, it is the Applicants' position that none were at any time, nor are now, capable of offering an effective remedy to restore or protect the traditional livelihood and culture of the group for future generations. As the petitioners in *Lubicon Lake Band* submitted:

> "*The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."*[23]

17.7 In declaring the *Lubicon Lake* communication admissible, the Human Rights Committee observed that at issue was the important question of whether the road of domestic litigation would have represented an "effective method of saving or restoring the traditional or cultural livelihood" of the community. Having considered the petitioners' submissions it concluded that it was not persuaded that domestic litigation would have constituted an effective remedy for the purposes of the Optional Protocol[24].

17.8 The Applicants find themselves in exactly such a situation. In the absence of meaningful access to, and use of, the Lake Bogoria land, together with concrete steps to safeguard their culture and identity - a remedy which no domestic action offers[25] - violations of the Endorois peoples' African Charter rights to cultural life, development, property, and health remain outstanding and unchecked.

17.9 The rule that only those remedies which are *effective* are required to be exhausted has already been explored, in a range of circumstances, by the Honourable Commission[26]. Indeed, the situation in which the Applicants find themselves - that where Charter rights complained of are not protected directly, or even indirectly, in the national legal system - is not unusual in the experience of international bodies concerned with the protection of human rights. The facts and issues of the case having been raised before the national courts, and no effective remedy being available, the Applicants merely request that the Honourable Commission follow established international jurisprudence[27] in finding a complaint admissible where the road of domestic litigation is unable to offer an effective method of directly saving or restoring the damage caused by violations of Charter rights.

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23 UN Human Rights Committee. *Lubicon Lake Band v Canada*. Communication 167/1984 at § 11.2.

24 *ibid* at § 31.1.

25 The Applicants are advised by counsel that once the "setting aside of Trust Land" mechanism (see paragraph 17.13 and *footnote 27*) has been engaged, restitution of the land is not possible. First registration of such land, under the Registered Land Act, is indefeasible, even if a private party has been fraudulent in his or her dealings with the land.

26 For instance, in Communication No. 87/93, *The Constitutional Rights Project v Nigeria*, the Commission found that 'the remedy available [was] not of a nature that required exhaustion according to Article 56, paragraph 5 of the African Charter.' § 9.

27 As expressed by the UN Human Rights Committee in *Lubicon Lake Band v Canada.*

Miscellaneous Civil Case No. 183 of 2000

17.10 Notwithstanding the Applicants' position that domestic litigation offers no effective remedy for the violations complained of, the Applicants have nonetheless sought to preserve their position in national law by seeking a declaration as to the status of the land and by requesting temporary recompense f or their loss of use of the land, by way of Miscellaneous Civil Case No. 183 of 2000. This action was, and is, however, incapable of restoring the African Charter rights of the Endorois people.

17.11 Miscellaneous Civil Case No. 183 of 2000 was brought under Section 84(1) of the Constitution of Kenya, which empowers the High Court to provide a remedy for a person who alleges that a provision of Section 70-83 of the Constitution has been, is being or is likely to be contravened. By way of background, the operation of Section 84(1) is governed by rules promulgated by the Chief Justice of Kenya under Section 84(6) of the Constitution. The constitutionality of a number of these rules has been challenged, with one having been declared *ultra vires*, resulting in a low level of legal certainty over the invocation of Section 84(1) before the High Court.

17.12 In addition to Section 84(1), Section 67(1) of the Constitution provides that a lower court may refer a question of interpretation of the Constitution for determination by the High Court. Apart from Sections 84 and 67, there are no other provisions in the Constitution by which a party may move the High Court for constitutional redress.

17.13 In light of this limited number of routes for protection of fundamental Constitutional rights, the Applicants asserted their claim under Section 84(1) of the Constitution of Kenya, submitting:

(i) that the land around Lake Bogoria was Trust Land for the purposes of Sections 114 and 115 of the Constitution[28];

(ii) that the County Council of Baringo and the County Council of Koibatek were in breach of fiduciary duty under the Trust, and

(iii) that the Endorois community be entitled to just compensation and damages.

17.14 The High Court observed that the community had not alleged that any of the (fundamental rights) provisions of Sections 70-83 of the Constitution had been contravened, despite the fact that affidavits submitted by the community referred clearly to the property rights of the Endorois people in respect of the land. The High Court nonetheless continued to consider the community's claims attaching to Articles 114, 115 and 117 of the Constitution, for a declaration of rights and recompense of loss of use of the land.

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[28] Section 114 and 115 of the Constitution of Kenya define Trust Land as land held on trust by a county council for the benefit of persons ordinarily resident on that land. Under Section 115, the county council shall give effect to such rights, interests, or other benefits in respect of the land as may, under African customary law for the time being in force be vested in any tribe, group, family or individual. The Government of Kenya, by way of affidavit in the course of Misc. Civil Application No. 183 of 2000, conceded that, prior to the creation of the game reserve, the land was Trust Land, but asserted that the land was "set apart" by the county council for the purposes of Section 117(1) of the Constitution on gazetting.

17.15 On 19 April 2002, the High Court rejected the application, holding that all necessary provisions of law, including the Trust Land Act, had been adhered to when the disputed land was set aside.

17.16 With respect to the remedies available for an action brought under Section 84(1) of the Constitution of Kenya, Section 84(2) empowers the High Court to "make such orders, issue such writs and give such directions as it may consider appropriate." However, constitutional courts have strictly interpreted the meaning of this 'any remedy' clause to mean existing remedies under *common law* only. Such remedies are limited to a *declaration* and/or *damages*. In the context of the violations experienced by the Endorois people, they therefore offer merely the possibility of recompense for the *consequences* of the gazetting of the land, and not an effective remedy in the sense required by the jurisprudence of the Honourable Commission. (See paragraphs 17.3 and 17.5)

17.17 That the application to the High Court, even had it been successful, could not have represented anything other than a preservation of rights and the *status quo* of the Endorois situation, gains support from the jurisprudence of the European Court of Human Rights. Having held in *Donnelly v UK* that there was a distinction between *compensation* for breach of a Convention right and a domestic remedy for the *breach* itself[29], the Court found, in *Egue v France*, that where a violation was *continuing*, compensation alone *could not* represent an effective or adequate remedy:

> "*Elle* [La Commission] *remarque que la droit d'obtenir la cessation de la privation de liberté et celui d'obtenir la réparation de toute privation de liberté… sont deux droits distincts… La Commission considère, à la lumière de ce que précède, que les voies de droit préconisées par le Gouvernement ne visent pas la cessation de privation de liberté mais au contraire la réparation de dommage dû à une privation de liberté… La Commission considère dès lors que les voies de droit suggérées par le Gouvernement ne pouvaient constituer dans les circonstances de l'espèce, un recours efficace au sens de l'article 26 (Art. 26) de la Convention.*"[30]

Appeal of Miscellaneous Civil Case No. 183 of 2000

17.18 A notice of appeal against the High Court judgment was initiated on 2 May 2002 to ensure that the land remained an issue of dispute *vis-à-vis* the Government of Kenya, and in a final effort to offer the Government of Kenya the opportunity to prevent further irreversible development of the land and resultant prejudice to the collective rights of the Applicants. As submitted below, however, (and as supported by the fact that the Appeal Court is yet to even issue certified proceedings), the basis for appeal against a constitutional decision of the High Court of Kenya suffers from legal uncertainty.

17.19 In circumstances where a constitutional complaint is initiated in the High Court of

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[29] European Court of Human Rights. *Donnelly v UK*. Case 5577/72 (1975). Notably, the Court observed that compensation alone could not be seen as an adequate remedy where the *occurrence or repetition* of the acts and violations in question was *not prevented*.

[30] European Court of Human Rights. *Egue v France*. Case 11256/84 at § 1, "En Droit".

Kenya, (as was the case for the Applicants), the Kenyan Constitution provides for a right of appeal by virtue of Section 84(7)[31] "against determinations of the High Court… as of right". Thus, formally, the Applicants might be considered to have a right of appeal against the High Court ruling in Misc. Civil Case No. 183 of 2000. For the reasons set out below, however, this right is highly artificial.

17.20 As noted in Paragraph 17.14 above the High Court of Kenya ruled that the Applicants had failed to raise any issue relating to fundamental rights (Constitution, Sections 70-83), for which Section 84(1) of the Constitution offers a method of protection[32]. Consequently, the corollary right of appeal contained in Section 84(7) is unavailable in so far as no determination of the High Court was in fact made under Section 84 of the Constitution.

17.21 Further, the potential right of appeal under Section 66 of the Kenyan Civil Procedure Act ("CPA")[33] is also unavailable. In the highly persuasive UK Privy Council case of *Durity v A-G for Trinidad and Tobago*, the Council reasoned that, due to the unique nature of constitutional proceedings, there was a specific requirement for clear language incorporating the application of procedural laws to constitutional proceedings[34]. As such, constitutional motions are to be viewed as *sui generis* and not governed by or subject to the practice and procedure of ordinary criminal or civil proceedings. In so far as the Kenyan CPA is not expressly incorporated to apply to Constitutional motions, it cannot therefore provide for an effective right of appeal from Misc. Civil Case No. 183 of 2000. Moreover, there is no direct local authority on whether Section 66 CPA could, in any event, apply to a High Court ruling *brought* under Section 84(1), but concerning sections of the constitution *not* falling under the 'Bill of Rights' of Sections 70-83

17.22 In the circumstances, and particularly in light of the urgent requirement to prevent irreparable damage to the Endorois community (see paragraph 16.3 above), the pending appeal fails to offer the Applicants either a reasonable prospect of recompense for loss of use of the land to date, or an effective final remedy for the outstanding African Charter violations. (See paragraphs 17.3 and 17.5)

18 There is no requirement to exhaust domestic remedies where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation.

18.1 The Honourable Commission has held, in *Free Legal Assistance Group Lawyers' Committee for Human Rights v Zaire* that the requirement to exhaust domestic remedies does not apply *literally* in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation[35].

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31 Introduced in 1997 as an amendment to the Constitution of Kenya, Action No 9 of 1997 effectively overruled common law decisions, such as *Anarita Karimi Njeru v The Republic* (No 2) (1979) KLR 162, which had suggested that there was no right of appeal.

32 This was despite the fact that pleadings submitted to the High Court referred to property rights of the Endorois people in the land.

33 Section 66 CPA states that there is a right to appeal from all decrees and orders of the High Court except where otherwise expressly provided for in Chapter 21.

34 UK Privy Council. *Durity v A-G of Trinidad and Tobago* [2002] 2 WLR 988 at 414.

35 African Commission, *Free Legal Assistance Group Lawyers' Committee for Human Rights v Zaire*. Communication No. 25/89 at § 37.

18.2 The judgment of the High Court of Kenya in Misc. Civil Application No. 183 of 2000 was critical of the Applicants on the question of the identity of those persons bringing the claim; stating "in any case, there is *no proper identity* of the people who were affected by the setting aside of the land to form the game reserve."

18.3 Misc. Civil Application No. 183 of 2000 was brought by thirty representatives of the Endorois people. If the effect of the Kenyan High Court judgment is to require domestic applications to be brought by each and every individual member of the Endorois - a community comprising a population of approximately 60,000- then this would be impractical and undesirable within the meaning of *Free Legal Assistance Group Lawyers' Committee for Human Rights v Zaire*.[36] It follows that the Applicants, who, of necessity must assert group or collective rights (which are, in any event, unprotected by the Constitutional Bill of Rights), benefit from the *Free Legal Assistance Group* exception to the rule on domestic remedies.

19 Any remaining obligations on the Applicants to pursue domestic remedies are annulled by the actions of the Government of Kenya in raising obstacles to the Applicants' attempts to obtain such domestic redress as exists.

19.1 The Honourable Commission has held, in circumstances where the actions of the State party are such as to frustrate attempts of the complainant to seek domestic redress, that there can be no requirement of exhaustion of domestic remedies[37].

19.2 The Applicants respectfully submit that the Government of Kenya has, in the past, raised obstacles to the attempts of the Endorois community to bring their grievances before the national authorities. In a case highlighted by Amnesty International ("AI") in 1997, AI report that Juma Kiplenge, a lawyer working for Mirugi Kariuki & Co., Advocates - the legal advisers to the Endorois community in Misc. Civil Application No., 183 of 2000 - was repeatedly harassed and threatened in February 1997, 6 months before the first High Court Application No. 214/1997 (see paragraph 11 above). The publicly available AI appeal states:

> "*Juma Kiplenge is 28 years old and qualified as a lawyer in 1996... He is acting for his community, the Endorois, some 20,000 nomadic pastoralists in Northern Kenya who… were moved off their land in the early 1970s. In August 1996, Juma Kiplenge was arrested and accused of 'belonging to an unlawful society'… In February 1997, police went to the Nakuru law office of Mirugi Kariuki, a human rights lawyer and former prisoner of conscience, where Juma Kiplenge works. They wanted to arrest Juma and search the office, but were turned away because the warrant was defective… He has since received death threats*." [38]

19.3 The alleged harassment of Juma Kiplenge was also noted by the Law Society of England and Wales, which on 6 October 1998 wrote to the President of Kenya expressing its concerns over politically motivated charges brought against Mr. Kiplenge. (See Annex (f)).

19.4 In addition, the harassment of Juma Kiplenge has been brought to the attention of the United Nations Special Rapporteur on the independence of judges and

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36 See *footnote 2*.
37 See African Commission. *John K Modise v Botswana*. Communication 97/93 at § 20-22.
38 See http://www.amnesty.org/ailib/intcam/kenya/appeals/kiplenge.htm Attached at Annex (e).

lawyers, Mr Param Cumaraswamy. In his report to the fifty-fifth session of the United Nations Commission on Human Rights, the Special Rapporteur states that:

> "*On 26 August 1998, the Special Rapporteur sent a communication to the Government [of Kenya] concerning Mr Juma Kiplenge, a lawyer and human rights defender who was on bail at the time awaiting trial on charges of incitement to violence and unlawful assembly… It was alleged that the magistrate hearing the case had reportedly stated at another hearing of the case in November 1997 that he would convict the defendants regardless of the evidence produced in court 'because they are troublemakers'*."[39]

19.5 The alleged harassment of legal counsel to the Endorois community, reportedly in connection with the attempts of the Applicants to obtain recognition of their rights under Kenyan national law, evidences the extent to which the Community have met severe resistance in their attempts to make use of those domestic 'remedies' as do exist, and the futility of such action. To the extent that the Government of Kenya has engaged, or acquiesced, in such activities, the Applicants have been frustrated in their attempts to pursue national recourse.

20 The complaint does not fail for reason of the general principle of the non-retroactive application of treaties.

20.1 Whilst the Applicants are mindful of the fact that the Endorois' traditional land area was gazetted as a game reserve firstly on 29 November 1973, and again on 12 October 1974 - both dates being prior to the ratification of the African Charter by Kenya, - the communication is not barred by the operation of the principle of non-retroactive application of international treaties.

20.2 The jurisprudence of both the Honourable Commission and the United Nations Human Rights Committee is clear in defining two exceptions to the principle of non-retroactivity:

(i) where the violations complained of *continue* after the entry into force of the relevant treaty[40]; or

(ii) where there are *effects* after the entry into force of the treaty, constituting in themselves, violations of that treaty[41].

20.3 In this respect, the United Nations Human Rights Committee interprets a continuing violation as "an *affirmation*, after the entry into force of the Optional Protocol, by act or by *clear implication*, of the previous violations of the State Party."[42]

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39 United Nations. Commission on Human Rights. Report of the Special Rapporteur on the independence of judges and lawyers, Mr Param Cumaraswamy. 13 January 1999 at § 112. UN Doc. E/CN.4/1999/60.

40 See for example African Commission. *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*. Communication No. 39/90 § 15. African Commission *Louis Emgba Mekongo v Cameroon.* Communication 59/91 and African Commission. *Amnesty International v Sudan*. Communication 48/90, 50/91, 52/91, 89/93.

41 See for example UN Human Rights Committee. *A.S. and L.S. v Australia*. Communication 490/1992 at § 4.2.

42 UN Human Rights Committee. *E and A.K. v Hungary*. Communication 520/1992, at §6.4.

20.4 Notwithstanding the fact that the present situation of the Endorois people arises from or originates in pre-Charter events, each violation of the African Charter committed by the Government of Kenya is either of a continuing nature and/or has effects which, of themselves, constitute current violations. Moreover, the Government of Kenya has recently explicitly *affirmed* its pre-Charter actions and violations in its rejection of the Nakuru High Court Misc. Civil Application No. 183 of 2000.

20.5 As a direct effect of the gazetting, the Endorois people are *presently* denied meaningful access to, use of, and participation in decisions concerning their ancestral land, resulting in *current* violations of Article 17(2), Article 16, and Article 22(1) of the African Charter. Violations of the right to property (Article 14 African Charter) and the right to freely dispose of wealth and natural resources (Article 21 African Charter), deriving from the creation of the Lake Bogoria game reserve, remain continuing, as benefits of the property interest of the Endorois people over the land continue to be denied and rendered worthless.

20.6 That the communication is admissible on the facts is evident by the approach of the United Nations Human Rights Committee in *Hopu and Bessert v France*[43]. In a complaint concerning a dispute over ancestral land - in which the descendants of the owners of the land tract were dispossessed of their property by a court judgment *predating* the entry into force of the Optional Protocol for the State party - the Committee declared the communication admissible in accordance with the author's submissions that their rights connected with the land *continued* to be violated *after* the entry into force of the Covenant and the Optional Protocol for the State party.

20.7 The current situation of the Endorois people demonstrates that the Government of Kenya has committed violations of the African Charter which have a continuing nature and/or effects that constitute, in themselves, violations within the meaning of the African Commission's own jurisprudence and that of other authoritative international human rights bodies. Nothing having been done by the Government of Kenya to cease or remedy the continuing violations or effects, the communication deserves full consideration on the merits.

Conclusion

21 The Applicants submit that:

21.1 **The Government of Kenya having had notice of the complaint since the 1970s, being ample time with which to deal with the complaint;**

21.2 **Urgent action now being required to prevent irreparable damage to the way of life of the community;**

21.3 **The principle of the requirement of effectiveness of national remedies being recognised by the Honourable Commission and other international mechanisms for the promotion and protection of human rights;**

21.4 **Those national remedies which are available being ineffective, in that they do not offer restitution of the Applicants' rights to the land or preservation of their community and traditional way of life as a collective;**

[43] UN Human Rights Committee. Communication 549/1993, Views of 29 July 1997.

21.5 **The Applicants having sought recompense for loss of use of the land to date by way of constitutional motion in the High Court of Kenya;**

21.6 **There being no requirement to exhaust domestic remedies where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation;**

21.7 **There being credible international reports that the Government of Kenya has engaged in or, in acquiescence, allowed local authorities to raise obstacles to the attempts of the Applicants to obtain domestic recourse; and**

21.8 **The communication not being barred by reason of the application of the rule of non-retroactive application of international treaties;**

The application satisfies Article 56 of the African Charter in relation to the requirements for admissibility.

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22 The Applicants further note that the Honourable Commission is in a unique position, in both time and authority, to fashion a resolution to the dispute in a way that could represent a distinctly African solution. Issues of protection of traditional life are at the forefront of the development of human rights discourse, and their full development is vital if society is to not lose fragile traditional communities in future generations. The Honourable Commission is exceptional in being the only regional institution, by virtue of the authority vested in it by the African Charter, with the standing to address such issues and the authority to request that governments take effective action. The sensitivity with which it handles the preservation of African culture, values and heritage is capable of setting standards and examples to be followed world-wide.

On behalf of the Endorois Community, I thank you for considering the present application.

Yours sincerely,

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