CEMIRIDE (ON BEHALF OF THE ENDOROIS COMMUNITY)

V

REPUBLIC OF KENYA

Communication 276/2003

SUBMISSION ON THE MERITS

African Commission on Human and People's Rights

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List of Abbreviations

ACHPR: African Commission on Human and Peoples' Rights
CERD: Committee to Eliminate Racial Discrimination
EWC: Endorois Welfare Committee
HRC: Human Rights Committee
ICCPR: International Covenant on Civil and Political Rights
ICESCR: International Covenant on Economic, Social and Cultural Rights
ILO: International Labour Organization
KWS: Kenyan Wildlife Service
WAPA: Wild Animal Protection Act
WGIP: African Commission Working Group on Indigenous Populations/Communities
UN: United Nations

PREAMBLE

pursuant to Articles 55, 56 and 58 of the African Charter;

regarding the actions and inactions of the State of Kenya and its respective authorities and agents, a member state of the Organisation of African Unity and a state party to the African Charter on Human and People's Rights, having ratified the Charter on 23 January 1992;

involving the displacement of the Endorois Community, an indigenous people, from their ancestral land, the failure to adequately compensate them for their loss of property, the disruption of the community's pastoral enterprise and violations of the right to practice its religion and culture, as well as the overall process of development of the Endorois people;

alleging violations of Articles 8, 14, 17, 21, 22 of the African Charter on Human and People's Rights;

seeking consideration of the complaint by the Honourable Commission under Articles 55 and 56, a declaration of violations of the Charter and the making of recommendations to the Kenyan authorities

noting the Commission's decision of May 2005 on the full admissibility of the complaint and the exhaustion of available domestic remedies; and

brought by CEMIRIDE on behalf of the Endorois Community.

SUMMARY OF THE FACTS

History

1. The Endorois are a community of approximately 60 000 people[1] who, from time immemorial, have lived in 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.

2. The Endorois have always considered themselves to be a distinct community. Historically, the Endorois are a pastoral community almost solely dependent on livestock. Their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy seasons, and turning to the Monchongoi forest during the dry seasons. They have also traditionally relied on beekeeping for honey.

[1] The Endorois are sometimes classified by others 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, Marakwet among others. Statistics suggest that, within the larger grouping of 75,000, the Endorois Community number around 60,000 persons. The Community is represented by William Sitei Yatich, former Chairman of the Endorois Welfare Council, and 15 clan leaders of the Community, listed in Annex (h) of the admissibility submission in 2003.

3. The area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle.[2] The Lake is also the centre of the Community's religious and traditional practices: around the Lake are the Community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies.[3] These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.

4. The spirits of all former Endorois people, no matter where they are buried, are believed to live on in the Lake. Annual festivals at the Lake took place with the participation of Endorois from the whole region. The Monchongoi forest is considered the birthplace of the Endorois people and the settlement of the first Endorois Community.

5. The Endorois Community's leadership is traditionally based on elders. Under the British colonial administration, chiefs were appointed, but this did not continue after Kenyan independence. More recently, the Community formed the Endorois Welfare Committee (EWC) to represent its interests. Local authorities have refused to register the EWC despite two separate efforts to do so since its creation in 1996.

Traditional Ownership of Lake Bogoria Region

6. As a pastoralist Community, the Endorois conception of "ownership" of their land has not been one of ownership by paper. Nonetheless, the Community has always understood the land in question to be "Endorois" land, belonging to the Community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices. Other communities would, for instance, ask permission to bring their animals into the area.

7. Apart from a confrontation with the Masai over the Lake Bogoria region approximately three centuries ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of their land. The Endorois continued to occupy and use the land under the British colonial administration, although the British claimed title to the land in the name of the British crown.

8. On independence in 1963, the British crown's claim to the Endorois land was passed onto the respective County councils. However under section 115 of the Kenyan Constitution the Country councils held this land on trust on behalf of the Endorois Community who remained living on and using the land. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting central to this case.[4]

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2 World Wildlife Federation, Lake Bogoria National Reserve Draft Management Plan, July 2004, p.16, para. 2.1.10.2 (hereinafter World Wildlife Federation Report).

3 Id., p.18, para. 2.2.7.

4 As evidenced in the national proceedings of 1998, the Kenyan Authorities have not disputed that the Endorois are an indigenous people who historically had ownership, use and occupation of the Lake Bogoria lands; in the High Court judgment of 19 April 2002 the residential status of the Endorois was

Trust Land and Creation of the Game Reserve

9. In 1973, by Legal Notice number 239, the Lake Bogoria area was declared "Lake Hannington Game Reserve." This declaration was revoked in 1974 and the "Lake Bogoria Game Reserve" was declared in its place.

10. As a result of the creation of the Game Reserve, the government of Kenya determined that the Endorois would be required to leave their historic lands *en masse.* Very limited discussions took place after this decision had been made, and the Endorois Community believed that it had no choice in the outcome. The Endorois Community as a whole was not aware that, as well as having to leave its dwellings on the land, it would be prevented from accessing the land for natural resources, culture, or religion. The Endorois concept of land did not conceive of the loss of land without conquest.

11. Despite the lack of understanding of the Endorois community regarding what had been decided, the Kenyan Wildlife Service (KWS) informed certain Endorois elders shortly after the creation of the Game Reserve that 400 Endorois families would be compensated with plots of "fertile land." The undertaking also specified that the Community would receive 25% of the tourist revenue from the Reserve and 85% of the employment generated from the Game Reserve, and that cattle dips and fresh water dams would be constructed by the Kenyan authorities.

12. After several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide 3,150 Kenya Shillings per family. Virtually none of these terms have been implemented. Only 170 of the 400 families were eventually compensated in 1986, years after the agreements concluded. These funds were always understood to be mere allocations for facilitating relocation rather than compensation for the Endorois' loss.

13. Although they believed that they had no choice regarding leaving their dwellings on the land, the leaders of the community initially hoped that the Game Reserve would present an opportunity to work together with the Kenyan authorities to protect wild animals, and that ensuing employment generation would also contribute to prosperity. The Endorois community did not understand the creation of the reserve as incompatible with their pastoralist way of life. Nor did they ever understand the creation of the Game Reserve as limiting any access for cultural or religious ceremonies, or restricting access to grazing lands and traditional natural resources.

Displacements and Result of the Evictions

14. Evictions from the Lake Bogoria Game Reserve began in the mid-1970s, with the final evictions taking place in 1986. The promised relocation to land of equal value never materialised and the Endorois were relegated to semi-arid land. This new land proved unsustainable for pastoralism, particularly in view of the strict prohibition on

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acknowledged, William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, High Court Judgement of 19 April 2002, Civil Case No. 183 of 2000, p. 3.

access to the Lake area's medicinal salt licks or traditional water sources.[5] Parcelling of land within Mochongoi forest, also traditionally inhabited by the Endorois, further restricted and curtailed the Community's nomadic pastoralism.

15. Approximately half of the Endorois Community's livestock died during the first years after eviction. Since the bartering of livestock was the only means of exchange within the local economy (apart from modest beekeeping revenues), most families were unable to afford sending their children to school or providing for basic needs. Most families became dependent on relief food.[6]

16. Some Endorois attempted to re-occupy their 1974 farms in Mochongoi Forest. As a result, many Endorois were beaten, their houses burnt, and eviction from the area went hand in hand with numerous arrests and charges of trespassing.

17. To reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Moi, who was their Member of Parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel, a few metres from the gate to the Game Reserve.

18. As a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and direct 25% of annual income towards Community projects. In November of the following year, upon being notified by the Community that nothing had yet been implemented, the President again ordered these directives to be followed.

19. Following the failure of the meetings with President Moi, the Endorois began legal action against Baringo and Koibatek County Councils. Judgment was given on 19 April 2002 dismissing the application. Although the High Court recognised that Lake Bogoria had been trust land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974. It concluded that the small amount of money given in 1986 to 170 families for the costs of relocating represented the fulfillment of any duty owed by the authorities towards the Endorois for the loss of their ancestral lands, stating:

> *The two Councils tried to show that they use some of their Revenue for the benefit of the applicants and the people they represent. In our view they needed not show such proof.*[7]

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5 Only 2 cattle dips have been built since the creation of the Reserve. The Community maintains that they were not even aware of one of the dips' existence until recently. Furthermore, the Community maintains that a minimum of 20 dips would be required, thus demonstrating the inadequacy of the authorities' efforts to compensate.

6 Though previously needed on few occasions prior to the creation of the Game Reserve, food relief has become a *sustained and recurring* need since the evictions.

7 William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, High Court Judgement of 19 April 2002, Civil Case No. 183 of 2000, p. 6 (hereinafter the *" High Court Judgement 2002"*).

20. The promises made to the Endorois people by the Kenyan authorities were also dismissed:

> *It goes without saying therefore that no individual or individuals have a direct right to the management of the Game Reserve or revenue collected therefrom.*[8]

21. The Court also stated clearly that it could not address the issue of a Community's collective right to property, referring throughout to "individuals" affected and stating that "there is no proper identity of the people who were affected by the setting aside of the land … that has been shown to the court". It also stated that it did not believe Kenyan law should address any special protection to a people's land based on historic occupation and cultural rights:

> *What is in issue is a National natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.*[9]

22. Since the Kenyan High Court case in the year 2000, the Community has become aware that parts of their ancestral land have been demarcated and sold by the Kenyan authorities to third parties.

23. In addition, concessions for ruby mining on Endorois traditional land have recently been granted to a private company. Both mining operations and the demarcation and sale of land have continued despite the request by the Honourable Commission to the President of Kenya to suspend these activities pending the outcome of the present communication.

Present Situation of the Endorois Community

24. At present the Endorois live in crowded conditions around the borders of the Game Reserve and in proximity to the Mochongoi forest.[10]

Monetary Compensation

25. Nearly 30 years after the evictions began, the Endorois remain without full and fair compensation for the loss of their land and their rights on it.

Access Rights

26. Following the commencement of legal action on behalf the Community, some improvements have been made to the Community members' access to the Lake: subject to the Game Reserve authority's discretion, members of the Community are no longer required to pay Game Reserve entrance fees, the Endorois have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for

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8 High Court Judgement 2002, p. 6.

9 Id., p. 7.

10 Few families have secured the right to live in Mochongoi Forest.

collecting traditional herbs. The lack of legal certainty surrounding access rights and rights of usage render the Endorois completely dependent on the Game Reserve authority's discretion to grant these rights on an *ad hoc* basis.

Participation

27. The Endorois have no say in the management of their ancestral land. The EWC, which is the representative body of the Endorois Community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation.[11]

28. The denial of domestic legal title to their traditional land, the removal of the community from their ancestral home and the severe restrictions placed on access to the Lake Bogoria region today, together with a lack of adequate compensation amount to a serious violation of the articles set out below. The Endorois community claim these violations both of themselves as a people and on behalf of all the individuals affected.

Provisional Measures

29. The Honourable Commission issued provisional measures in June 2003 on the issuing of mining concessions and the parcelling of land in the Mochongoi Forest, which both threaten Endorois economic, social and cultural rights to these lands. The provisional measures remain ignored by the Kenyan authorities.

THE ENDOROIS AS A 'PEOPLE'

30. The African Charter is unique among regional human rights instruments in placing special emphasis on the rights of peoples. The Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that protect collective rights.

Adjudicating Collective Rights under the African Charter

31. The Honourable Commission affirmed the right of peoples to bring claims under the African Charter in the case of *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, stating: "The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives. The importance of Community and collective identity in African culture is recognised throughout the African Charter."[12]

32. The Honourable Commission further noted that when there are a large number of individual victims, it may be impractical for each individual complainant to go before

[11] The failure to register the EWC has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the Community.

[12] *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001), para. 40. (hereinafter *The Ogoni case 2001*).

domestic courts. In such situations, as in the *Ogoni case,* the Commission can adjudicate the rights of a people as a collective.[13] Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

Definition of Indigenous Peoples

33. That peoples have collective rights is well established in international human rights instruments. The United Nations Charter, the cornerstone of international legal system, begins with the phrase "We the peoples of the United Nations….".[14] Additionally, common Article 1(3) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights refers to the right of self-determination, which the Human Rights Committee has explained is a right of "all peoples".[15]

34. During the 1960s and 1970s, as the movement for decolonisation gained wide support, the term "peoples" referred primarily to colonised populations.[16] More recently, however, international attention has shifted towards the collective rights of indigenous groups. Newer definitions of peoples reflect the unique characteristics of indigenous populations.

35. A study on the discrimination of indigenous people by the Special Rapporteur for the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Martínez Cobo, produced a widely-cited working definition of indigenous peoples:

> *Indigenous communities, peoples and nations 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 their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*[17]

36. The International Labour Organisation defines indigenous peoples in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries:

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13 Id. at para. 43.

14 Preamble, United Nations Charter.

15 Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 134 (2003), para. 6.

16 See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, GA Res. 2625, (1970).

17 Jose Martinez Cobo, 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 (1986).

> *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.*[18]

37. ILO Convention No. 169 further states that a people's self-identification as indigenous "shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".[19]

38. The African Commission has also formulated a definition of indigenous peoples. The African Commission's Working Group of Experts on Indigenous Populations/Communities[20] set out four criteria for identifying indigenous peoples, using the well-known definition developed by Erica-Irene Daes, the chairperson of the United Working Group in Indigenous Populations. An indigenous people does not need to demonstrate all four characteristics at once to be defined as such. The four characteristics 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.[21]

39. The Working Group also delineated 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.*[22]

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[18] 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).

[19] Id. at Article 1(2).

[20] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, (Twenty-eighth session, 2005).

[21] Id. The Working Group also referred to the World Bank's Operational Manual of March 2001, which states: "The term 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups' and 'scheduled tribes' describe social groups with a social and cultural identity that is distinct from the dominant groups in society and that makes them vulnerable to being disadvantaged in the development process. Many such groups have a social and economic status that limits their capacity to defend their interest in and rights to land and other productive resources, or that restricts their ability to participate in and benefit from development.

40. Although the above definitions vary, they share key commonalities that form the core of any definition of indigenous people. First, indigenous peoples have a specific relationship to a defined territory. In this sense, indigenous peoples are sometimes referred to as 'territorial minorities'. The Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands, Lake Bogoria and the surrounding area.

41. Indeed, Lake Bogoria and the Monchongoi Forest are central to the Endorois creation story, which has been passed down through generations of Endorois.[23] Without access to their ancestral lands, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their ancestors. The Endorois have demonstrated a particular attachment to a land.

42. In addition to a sacred relationship to their land, self-identification remains the cornerstone for identifying indigenous peoples. The importance of self-identification is emphasised in General Recommendation VIII of the Committee on the Elimination of Racial Discrimination (CERD) which stated that membership in a group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned".[24] This view was reiterated in concluding observations of CERD vis-à-vis Denmark. The Committee raised:

> *[s]erious concern (regarding) claims of denials by Denmark of the identity and continued existence of the Inughuit as a separate ethnic or tribal entity, and recalls its general recommendation XXIII on indigenous peoples, general recommendation VIII on the application of article 1 (self-identification) and general recommendation XXIV concerning article 1 (international standard).*[25]

43. The Commission on Human Rights' 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.[26] The Endorois fulfil this criterion. The Endorois consider themselves to be a distinct people, sharing a common history, culture and religion.

44. Under international definitions, it is clear that the Endorois qualify as an indigenous people. The alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands. Accordingly, the Endorois are considered a people and have the necessary standing to bring collective claims under the Charter.

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22 Id. at page 41 (Section 4.1, "Characteristics of indigenous peoples in Africa").

23 This has been recounted in paras 147 and 148 of the present document.

24 Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth session, 1990), U.N. Doc. A/45/18 at 79 (1991).

25 Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, Denmark, U.N. Doc. CERD/C/60/CO/5 (2002).

26 Rodolfo Stavenhagen, Special Rapporteur, 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.

VIOLATION OF ARTICLE 14 – RIGHT TO PROPERTY

45. Article 14 of the African Charter states that:

> *The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the Community and in accordance with the provisions of appropriate laws.*

46. The Endorois Community has a right to property with regards to their ancestral lands, the possessions attached to it, and their cattle. These property rights are derived both from domestic Kenyan law and the African Charter, which recognises the right of an indigenous people to property rights over their ancestral land. The Endorois' property rights have been violated by the continuing dispossession of the Lake Bogoria land without adequate compensation in the violation of the appropriate domestic and international laws. The impact on the Community has been wholly disproportionate to any public need or general Community interest.

Endorois Property

47. The land surrounding Lake Bogoria is the traditional land of the Endorois people. For centuries the Endorois have constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the lands to sustain their livelihoods. In doing so, the Endorois people exercised an indigenous form of tenure, holding the land through a collective form of ownership. The Endorois people lived in close relationship with the land; the land formed a foundation for their culture, family and clan organisation, spiritual life, and economic survival.

48. Fertile grazing lands around Lake Bogoria were used by the Endorois people to tend herds of goats, cows and sheep as well as maintain beehives that provided milk, honey, food, and income. Traditional huts, thatched with grass from the Lake shores were clustered into villages on dry land areas in both Koibatek and Baringo districts on a family and clan basis. Such behaviour indicated traditional African land ownership, which was rarely written down a codification of rights or title, but was nevertheless understood through mutual recognition and respect between landholders.[27] 'Land transactions' would take place only by way of conquest of land.

49. The British Crown first challenged the Endorois formal rights over the land when, under colonial rule, the Crown claimed formal possession of the Endorois people's land. However, even the colonial authorities recognised the Endorois' right to occupy and use the land and its resources. In law, the land was recognised as the "Endorois Location"; in practice, the Endorois were left largely undisturbed during colonial rule.

50. That the Endorois people continued to hold such traditional rights, interests and benefits in the land surrounding Lake Bogoria was also recognised upon the creation of the independent Republic of Kenya in 1963. On 1 May 1963, the Endorois

[27] See supra note 4.

people's land became 'Trust Land' under section 115(2) of the Kenyan Constitution, which states:

> *Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interest or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.*

51. Through habitation the Endorois people were "ordinarily resident on [the] land", and their traditional form of collective ownership of the land clearly qualifies as a "right, interest or other benefit… under African customary law" vested in "any tribe, group [or] family" for the purposes of section 115(2). As a result, under Kenyan law, the Baringo and Koibatek County councils were – and indeed still are[28] – obligated to give effect to the rights and interests of the Endorois people as concerns the land.

Property under Article 14

52. "Property" has an autonomous meaning under international human rights law[29], which supersedes national legal definitions. Both the European and Inter-American Courts of Human Rights examine the specific facts of individual situations to determine what should be classified as property, particularly for displaced persons, instead of limiting themselves to formal requirements in national law.[30] It is therefore for the Honourable Commission to determine a definition of property rights that accords with African and international tradition.

53. The Honourable Commission has recognised in its jurisprudence that land can constitute property for the purposes of Article 14 of the Charter.[31] It has also found that the right to property includes the right to have access to one's property and not to have one's property invaded or encroached upon.[32]

54. The Honourable Commission has also recognised that "owners have the right to undisturbed possession, use and control of their property however they deem fit".[33]

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[28] Following the displacement of the Endorois people in 1973, they were of course no longer "ordinarily resident on the land". However, as the displacement was caused by the direct actions of the Kenyan Authorities - with the Endorois left to believe they had no choice - the Kenyan Authorities, as a matter of national law, is estopped from arguing that the Endorois people cannot now benefit from the provisions of section 115(2).

[29] From which the Honourable Commission shall draw inspiration and take into consideration under Articles 60 and 61 of the Charter.

[30] See *The Mayagna Awas Tingni v. Nicaragua,* Inter-American Court of Human Rights, (2001), para. 146. (hereinafter the *Awas Tingni Case 2001*) "The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."

[31] *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para. 128. See also Communications 54/91 et al v Mauritania, 13th Activity Report, para. 128.

[32] *The Ogoni Case (2001),* para. 54.

[33] Communication 225/98 v Nigeria, 14th Annual Report, para. 52.

55. In the recent European Court of Human Rights case of *Doğan and others v Turkey*[34], which concerned applicants who had been unable to demonstrate registered title of lands from which they had been forcibly evicted, the court observed that:

> *[T]he notion 'possessions' (in French:biens) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.*[35]

56. The Court further recognised that the property rights of the applicants included the economic resources and rights over common land of the applicants, stating that:

> *The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted "possessions" coming within the scope of the protection afforded by Article 1 of Protocol No. 1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydaş village until 1994.*
> *Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as "possessions" for the purposes of Article 1.*

Property Rights and Indigenous Communities

57. The Endorois, as an indigenous community, ask the Honourable Commission to recognise their rights to communal property rights to their ancestral lands. This falls within the scope of Article 14.

58. 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. Combined, this has led to many cases of displacement from a people's historic territory, both by the colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities.

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[34] *Doğan and others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para. 138-139.

[35] Id. para. 138-139.

59. The Honourable Commission itself has recognised the problems faced by traditional communities in the case of dispossession of their land in publishing the Report of the Working Group on Indigenous Populations/Communities.[36] The Working Group pointed out that for pastoralist communities:

> *[…] their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.*[37]

60. A 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.

61. Moreover, scholarship on the jurisprudence of the Honourable Commission notes that Article 14 includes the right to property both individually and collectively, thereby protecting to traditional communities holding land communally in accordance with the 'values of African civilization'.[38]

62. Indigenous property rights have been legally recognised as being communal property rights. In the current leading international case on this issue, *The Mayagna (Sumo) Awas Tingni v Nicaragua,*[39] the Inter-American Court of Human Rights recognised that the Inter-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".[40]

63. It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[41] The Court set out its concept of indigenous property rights:

> *Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its Community.*[42]

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36 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).

37 Id. p.21.

38 Fatsah Ougueugouz, *The African Charter on Human and Peoples' Rights* , p. 154

39 *The Awas Tingni Case* (2001), para. 140(b) and 151.

40 Id. at para. 148.

41 Id. at para. 151.

42 Id. at para. 149. The Court also drew attention to the cultural, spiritual connection of indigenous peoples with their land, as well as the fundamental basis this resource represents for their economic survival.

64. Courts have addressed violations of indigenous property rights stemming from colonial seizure of land, such as when modern states rely on domestic legal title inherited from colonial authorities. There has been widespread condemnation of the acquisition of indigenous title by the colonial authorities.[43] National courts have recognised that the historic indigenous association with particular lands should be considered a 'property' right continued long after the seizure of their lands. Such decisions have been made by the United Kingdom Privy Council as far back as 1921,[44] the Canadian Supreme Court[45] and the High Court of Australia.[46] In the *Richtersveld* case, the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.[47]

65. The protection accorded by Article 14 of the African Charter includes indigenous property rights, particularly to their ancestral territories. The Endorois' right to the historic lands around Lake Bogoria are therefore protected by Article 14. The property rights protected go beyond those envisaged under Kenyan law and include a collective right to the property.

Summary of Property Protected under Article 14

66. Together, the Endorois people's (i) rights over the historic territory, including their collective ownership of it, (ii) economic interests in the land, (iii) resources from which they derive their living, including their cattle; and (iv) benefit under the trust held by Baringo and Koibatek County councils, constitutes 'property' for the purposes of Article 14 of the Charter.

Encroachment

67. As a result of the actions of the Kenyan authorities, the Endorois people's property has been encroached upon, in particular by the expropriation, and in turn, the effective denial of ownership, of their land.

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[43] See, for example, Erica-Irene A. Daes, Special Rapporteur, Indigenous peoples and their Relationship to Land: Final working paper by the Special Rapporteur, Commission on Human Rights, UN Doc. E/CN.4/Sub.2/2001/12, (2001), para. 31-32. The Special Rapporteur observes that the international Community has come to see that the concept that the "discovering" colonial power may take free title to indigenous lands is illegitimate; *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003), in which the court recognised that the rights of the Richtersveld Community survived the annexation of their traditional land by the British Crown; and *Mabo and Others v. Queensland,* High Court of Australia, 107 A.L.R. 1, (1992), in which the court rejected the principle that pre-existing rights were abolished upon colonization unless expressly recognized by the colonising state.

[44] *Amodu Tijani v. Southern Nigeria,* United Kingdom Privy Council, 2 AC 399, (1921).

[45] *Calder et al v. Attorney-General of British Columbia,* Supreme Court of Canada, 34 D.L.R. (3d) 145 (1973).

[46] *Mabo v. Queensland*, High Court of Australia, 107 A.L.R. 1, (1992).

[47] *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003).

68. In law, 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. Although for 10 years they were able to exercise their traditional rights without restriction the trust land system has proved inadequate to protect their rights.[48]

69. In 1973/1974 the creation of the Lake Hannington/Lake Bogoria Game Reserve effectively completed what the British authorities had begun in extinguishing the Endorois last remaining legal rights in Kenyan law over their territory. (However, as argued below, even under Kenyan law, this should not have been the case.)

70. Upon the gazetting of the land, the Endorois people were informed that the Endorois families then living within Lake Bogoria Game Reserve would have to move outside of Game Reserve boundaries. Over the following years, several hundred families living around Lake Bogoria were displaced by the Kenyan authorities. The authorities further prevented, by force, an attempt by the Community in 1974 (including those families displaced in 1973) to resettle in their ancestral lands in the Mochongoi forest. In 1984, a further Community endeavour to resettle within the Mochongoi forest was met again with the use of force by the Kenyan authorities, the burning of Endorois houses, and the arrest of hundreds of Community members. With no other option available, the Endorois have been forced to live in crowded and far less fertile lands around the periphery of their traditional land.

71. The Endorois have lost possessions on the lands from which the Community had been evicted, including dwellings, religious sites and beehives.

72. Access to the Endorois traditional lands became heavily restricted for all Endorois after 1974, effectively expropriating their communal property through denying the Community land use.[49] The Endorois families who lived on land outside the Game Reserve, but who used all the historic Endorois land for pastoralism, religious purposes, and other benefits, were permanently prevented from returning to traditional places of habitation, grazing, and religion on the shores of the Lake.

73. Prevented from grazing their cattle herds within the Game Reserve and without access to *Ngenta* salt licks and abundant pastures, large numbers of Endorois livestock died, destroying the backbone of the Endorois people's livelihood. The Endorois people also lost access to their traditional medicinal plants found around the shores of Lake Bogoria and from difficulties in accessing clean drinking water caused by their expulsion from the Lake area.[50]

74. Access roads, gates, game lodges and a large hotel have been built on the traditional land of the Endorois people around Lake Bogoria. As noted by the Honourable Commission in issuing provisional measures addressed to the Kenyan

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[48] Arguably the "trust" system was based on the colonial idea that certain "native peoples" were backward and in need of special protection through a trust land system.

[49] With respect to the principle of *de* facto expropriation of property, see e.g. *Papamichalopoulos v Greece,* European Court of Human Rights, Case No. 18/1992/363/437, (1993).

[50] World Wildlife Federation Report, p.17, paras. 2.2.1, 2.2.3.

authorities during the course of its 35th Ordinary Session, imminent mining operations also now threaten to irreparably damage the integrity of the land. In both instances as well as damaging the Endorois property (their land) their have also lost the potential wealth of their property in both tourism and mining revenues.

75. Also as noted by the Honourable Commission in issuing provisional measures, the Kenyan authorities at present are engaged in the demarcation and sale of parts of Endorois historic lands to third parties (with the financial benefit retained by the Government of Kenya). Such irrevocable creation of freehold title risks irreparable damage to the traditional land of the Community.

76. Today, Endorois people are still not permitted to live in the Game Reserve. Access to Lake Bogoria for the Community is at the discretion of the local authorities, and is not as of right. Endorois cattle herds are severely reduced and the ability of the Endorois people to practice their traditional form of nomadic pastoralism on the lands around the Lake is severely curtailed.

77. The Kenyan justice system has not provided any protection of the Endorois' property right. The High Court stated clearly that it could not address the issue of a Community's right to property, referring throughout to "individuals" affected and stating that "there is no proper identity of the people who were affected by the setting aside of the land … that has been shown to the court". In this case by "people" it meant individual persons.

78. The judgment of the Kenyan High Court also stated in effect that the Endorois had lost any rights under the trust, without the need for compensation beyond the minimal amounts actually granted as costs of resettlement for 170 families. The judgment actually also denies that the Endorois have rights under the trust, despite being "ordinarily resident" on the land. The court stated that:

> *What is in issue is a National natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.*

79. In doing so, the High Court dismissed those arguments based not just on the trust, but also on the Endorois' rights to the land as a people, on the protection of the Community's culture and as a result of their historic occupation of Lake Bogoria. In sum, the High Court has been clear that Kenyan law does not recognise indigenous property rights.

Summary of Encroachments on Endorois Property Rights

80. The encroachments on the Endorois people's property are particularly severe as they go to the core of the Community's identity as a people. The predominant encroachments are:

    a. the failure to provide adequate recognition and protection in domestic law of the Community's rights over the land, in particular the failure of Kenyan law to acknowledge collective ownership of land;

b. the declaration of the Game Reserve in 1973/74, which purported to remove the Community's remaining property rights over the land, including their rights as beneficiaries of a trust under Kenyan law;

c. the lack of prompt and full compensation to the Endorois Community for the loss of their ability to use and benefit from their property in the years after 1974;

d. the eviction of the Endorois people from their land, both in the physical removal of Endorois families living on the land and the denial of the land to the rest of the Endorois Community, and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives;

e. the significant loss by the Endorois of cattle as a result of the eviction;

f. the denial of benefit, use of and interests in their traditional lands since eviction, including the denial of any financial benefit from the lands' resources, such as that generated by tourism;

g. the awarding of title to land to private individuals; and

h. the awarding of mining concessions on the disputed land.

Public Need or in the General Interest of the Community

81. An encroachment upon property will constitute a violation of Article 14 of the Charter unless it is shown that it is:

> *in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

82. This 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.

83. Limitations on rights, such as the limitation allowed in Article 14, "the interest of public need or in the general interest of the community", must be reviewed under the principle of proportionality. The Honourable Commission has established that,

> *The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.*[51]

84. The principle of proportionality emphasised by this Honourable Commission is also well established in the jurisprudence of other international courts. In a seminal case, the European Court of Human Rights stated that any condition or restriction imposed

[51] Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), para. 42 (hereinafter *The Constitutional Rights Project Case 1999*).

upon a right must be "proportionate to the legitimate aim pursued".[52] Proportionality is now considered a general principle of the European Court.[53]

85. The Inter-American Commission on Human Rights has likewise held that limitations on rights must be "proportionate and reasonable".[54]

86. Any limitations on rights should therefore be proportionate to a legitimate need, and should be the least restrictive measures possible. In the instant case, in the name of creating a game reserve, the Kenyan authorities have removed the Endorois from their land, and destroyed their possessions, including houses, religious constructions, and beehives. The upheaval and displacement of an entire community, and absolute denial of their property rights over their ancestral lands is disproportionate to any public need served by the Game Reserve.

87. Even assuming that the creation of the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. As the Endorois were willing to work with the Kenyan authorities, the Game Reserve could have been created and managed in way that respected their property rights.

88. Furthermore, the Honourable Commission has stated, with respect to proportionality and restrictions on rights, "Most important, a limitation may not erode a right such that the right itself becomes *illusory*".[55] At the point where the right has become illusory, the limitation cannot be considered proportionate – the limitation is simply a violation of the right.

89. The Kenyan authorities have denied the Endorois Community all legal rights in their ancestral lands, rendering their property rights essentially illusory. In other words, the Government 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".

Not in Accordance with Appropriate Laws

90. As noted above, the encroachment onto Endorois property rights must be carried out in accordance with "appropriate laws" in order to avoid a violation of Article 14. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected.

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

53 See, e.g. *Belgian Linguistics v. Belgium*, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (23 July 1968); Case of Open Door & Dublin Well Women v. Ireland Nos. 14234, 14235/88, Series A-246-A (29 October 1992); *Kokkinakis v. Greece,* European Court for Human Rights, Case No. 14307/88 (1993), or *Case of Supreme Holy Council of the Muslim Community v. Bulgaria,* European Court of Human Rights, Case No. 39023/97 (2004).

54 *X & Y v. Argentina*, Report No. 38/96, Case 10.506 (15 October 1996), para. 60.

55 *The Constitutional Rights Project Case*, para. 42.

91. The violation of the Endorois rights failed to respect Kenyan law on at least three levels: (i) there was no power to expel them from the land; (ii) the trust in their favour was never legally extinguished, but simply ignored; and (iii) adequate compensation was never paid.

92. As noted in paragraphs 50 to 51 above, the traditional lands of the Endorois people are classified as Trust Land under s.115 of the Constitution. This obliges the county council to give effect to "such rights, interest or other benefits in respect of the land as may, under the African customary law for the time being, be in force". It clearly created a beneficial right for the Endorois over their ancestral land.

93. The Kenyan authorities created the Lake Hannington Game Reserve, including the Endorois people's indigenous lands, on 9 November 1973. The name was changed to Lake Bogoria Game Reserve in a second notice in 1974.[56] The 1974 Notice was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act ("WAPA").[57] WAPA applied to Trust Land as it did to any other land, and did not require that the land be taken out of the Trust before a Game Reserve could be declared over that land.

94. The relevant legislation did not give authority for the removal of any individual or group occupying the land in a game reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the game reserve.[58] Yet, despite a lack of legal justification, the Endorois community were informed from 1973 onwards that they would have to leave their ancestral lands.

95. Moreover, the declaration of Lake Bogoria Game Reserve by way of the 1974 Notice did not affect the status of the Endorois people's land as Trust Land. The obligation of Baringo and Koibatek County councils to give effect to the rights and interests of the Endorois people continued.

96. The only way under Kenyan law in which the Endorois people's benefits under the Trust could have been dissolved is if the county council or the President of Kenya had "set apart" the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.[59]

97. As far as the Community is aware, no such notice has been published. Until this is done, the Trust Land encompassing Lake Bogoria cannot have been set apart and

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[56] Pursuant to Kenyan law, the authorities published notice 239/1973 in the Kenya Reserve to declare the creation of "Lake Hannington Game Reserve." Gazette notice 270/1974 was published to revoke the earlier notice and change the name of the Game Reserve on 12 October 1974: "the area set forth in the schedule hereto to be a Game Reserve known as Lake Bogoria Game Reserve."

[57] See section 3(2) for relevant parts of WAPA. Section 3(2) was subsequently revoked on 13 February 1976 by s.68 of the Wildlife Conservation and Management Act.

[58] See section 3(20) of WAPA, which did not allow the Kenyan Minister for Tourism and Wildlife to remove present occupiers.

[59] The mechanics of such a 'setting apart' of Trust Land under s.117 or s.118 of the Constitution are laid down by the Kenyan Trust Land Act. Publication is required by s.13(3) and (4) of the Trust Land Act in respect of s.117 Constitution, and by s.7(1) and (4) of the Trust land Act in respect of s.118 Constitution.

the African customary law rights of the Endorois people continue under Kenyan law.[60]

98. The Kenyan High Court failed to protect the Endorois' rights under the Trust to a beneficial property right. It stated that: "The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource."[61]

99. In conclusion, the displacement of the Endorois people, the denial of access to Lake Bogoria Game Reserve, the granting of mining concessions and the denial of any benefit to the Community from the revenue raised from their lands are incompatible with the obligations of the County councils to give effect to the Trust and to respect the land ownership of the Endorois people in African customary law. The instruction given to the Endorois to leave their ancestral lands was also not authorised by Kenyan law.

100. As a result, the Kenyan authorities have acted in breach of trust and not in 'accordance with the provisions of law' for the purposes of Article 14 of the Charter.

Violation of Kenyan laws – No Adequate Compensation

101. Even if the Endorois land had been set apart, Kenyan law still requires the compensation of residents of lands that are set apart. The Kenyan Constitution states that where Trust Land is set apart, the government must ensure[62]:

> [T*]he prompt payment of full compensation to any resident of the land set apart who – (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land.*

102. The Kenyan Land Acquisition Act outlines factors that should be considered in determining the compensation to be paid,[63] starting with the basic principle that compensation should be based on the market value of the land at the time of the acquisition. Other considerations include: damage to the interested person caused by the removal from the land and other damages including lost earnings, relocation expenses, any diminution of profits of the land. The Land Acquisition Act provides for an additional 15% of the market value to be added to compensate for disturbances. Under Kenyan law if a court finds the amount of compensation to be insufficient, 6% interest per year must be paid on the difference owed to the interested parties.[64]

103. Only one hundred and seventy families of at least four hundred families forced to leave Endorois traditional lands by the Kenyan authorities have received any form of

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60 More recently the area has been referred to as Lake Bogoria National Reserve. Even if there has been a legal change in title, this still would not mean that the Endorois trust has been ended under Kenyan law without the "setting aside".

61 High Court Judgement (2002), p. 7.

62 Constitution of the State of Kenya, section 117(4).

63 Land Acquisition Act, "Principles on which Compensation is to be determined".

64 Land Acquisition Act, Part IV, paragraph 29(3).

monetary assistance. In 1986 one hundred and seventy families evicted in late 1973 from homes within the Lake Bogoria Game Reserve, each received around 3,150 Kshs. At the time, this was equivalent to approximately £30.

104. Further amounts in compensation for the value of the land lost, together with revenue and employment opportunities from the Game Reserve were promised by the Kenyan authorities, but these have never been received by the Endorois Community.

105. The Kenyan authorities have themselves recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and did not constitute full compensation for loss of land. The fact that such payment was made some 13 years after the first eviction, and that it does not represent the market value of the land gazetted as Lake Bogoria Game Reserve, means that the Kenyan authorities would not have paid "prompt, full compensation" as required by the Constitution on setting apart of Trust Land. Therefore Kenyan law has not been complied with.

106. Moreover, the fact that members of the Endorois community accepted the very limited monetary compensation does not mean that they accepted this as full compensation, or indeed that they accepted the loss of their lands.

107. Thus, *even had* the Kenyan authorities formally set apart the Trust Land by way of Gazette notice, the test of "in accordance with the provisions of law" required by Article 14 of the Charter would not have been satisfied, due to the payment of inadequate compensation.

International law

108. Moreover, the requirement that any encroachment on property rights be in accordance with the "appropriate laws" must also include relevant international laws. The Endorois argue that their rights under international law have not been recognised in both the failure to recognise their legal rights as an indigenous people and in the failure to provide adequate compensation.

109. The Kenyan authorities, including the courts, have failed to apply the international law on the protection of indigenous land rights. As set out above, this includes the need to recognise the collective nature of the land right, to recognise the historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. Instead the Kenyan law gives only a very limited acknowledgement to African customary law. The Trust Land system provides in reality only minimal rights, as a trust (and therefore African customary law rights, such as those of the Endorois) can be extinguished by a simple decision of the executive. The crucial issue of recognition of the collective ownership of land by the Endorois is not acknowledged at all in the Kenyan law, as is clearly shown by the High Court judgment. Encroachment on the Endorois' property did not therefore comply with the appropriate international laws on indigenous peoples' rights.

110. International law also lays down a strict requirement for compensation in the case of expropriation of property.[65] Article 21 (2) of the Charter itself refers to the right to compensation in the case of spoliation:

> *…dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*

111. With respect to indigenous communities, the Inter-American Commission on Human Rights considers that the general international legal principles applicable in the context of indigenous peoples include:

> *recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied… This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.* [66]

112. The Inter-American Court of Human Rights – in the case of a traditional peoples group threatened with loss of land by logging concessions – has also held:

> *[that] under the circumstances of the case it is necessary to resort to this type of compensation, setting it in accordance with equity and based on a prudent estimate of the immaterial damage.* [67]

113. Detailed recommendations regarding compensation payable to displaced or evicted persons have been developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[68] These recommendations, which have been considered and applied by the European Court of Human Rights[69], set out the following principles for compensation on loss of land:

> *Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them.*

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65 In the European Court of Human Rights, for instance, compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is found. See e.g. *Katikaridis and Others v. Greece*, European Court of Human Rights, Case No. 72/1995/578/664, (1996). Article 23(2) of the American Convention on Human Rights also provides that "no-one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

66 *Mary and Carrie Dann v United States,* Inter-American Commission on Human Rights, Report No. 75/02, Case No. 11/140, (2002).

67 *The Awas Tingni Case* (2001), para. 167.

68 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Guidelines on International Events and Forced Evictions, (Forty-seventh session, 1995), UN Doc. E/CN.4/Sub.2/1995/13. 17 July 1995, para. 16(b) and (e)

69 *Doğan v. Turkey* (2004), para. 154.

114. With particular concern for minorities and pastoralists, the recommendations also note:

> *Land, housing, infrastructure and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project.*

115. The right to property cannot effectively be guaranteed without recognition that expropriation of land by the state may only properly occur where it is proportionately in the public need or general interest of the Community, is in accordance with appropriate laws *and* accompanied by fair *compensation*.

116. Conversely, where fair compensation is *not* provided, a violation of the right to property must occur. This was acknowledged by the United States Supreme Court in 1937 with regard to an indigenous community. The court at that time was in sympathy with the view that the US government could hold land on trust for the indigenous community that actually occupied it (as it was believed that indigenous communities were not capable of developing land themselves). Despite this position the court stated that the government, even whilst holding legal title, did not have the right:

> *to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that 'would not be an exercise of guardianship, but an act of confiscation.*[70]

117. The payment of 3,150 Kshs to one hundred and seventy families was paid 13 years after the initial displacement, is an amount far less than the value of the Endorois people's traditional land now included within Lake Bogoria Game Reserve, and was paid only to a fraction of the total families experiencing encroachment upon their property rights.

118. The Endorois have also suffered significant property loss as a result of their displacement as detailed above, including the loss of cattle. The only "compensation" received was the eventual provision of two cattle dips. This does not compensate however for the loss of the salt licks around the Lake, nor the substantial loss of traditional lands. The Endorois people have not received any other form of assistance in restoring their former living standards or income generating capacity.

119. In light of international standards on compensation, it is clear that the Endorois people have not received fair compensation for the encroachment upon their property.

120. The fact that international standards on indigenous land rights and compensation were not met, as well as that provisions of Kenyan law were ignored, means that the

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[70] *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, (1937).

encroachment upon the property of the Endorois people was not in accordance with the “appropriate laws” for the purposes of Article 14 of the Charter.

Conclusion

121. Property of the Endorois people has been severely encroached upon and continues to be so encroached upon at this time. The encroachment is not proportionate to any public need and is not in accordance with national and international law.

122. Accordingly, the Endorois people suffer a violation of Article 14 of the Charter.

VIOLATION OF ARTICLE 21 – RIGHT TO FREE DISPOSITION OF NATURAL RESOURCES

123. Article 21 of the Charter states that:

> *1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
> *2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation*

124. The Endorois Community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve. The medicinal salt licks and fertile soil that kept the community's cattle healthy are now out of the community's reach. Mining concessions to the Endorois land have been granted without giving the Endorois a share in these resources. Consequently, the Endorois suffer a violation of Article 21.

Right to Natural Resources

125. The right of all peoples to the free disposition of wealth and natural resources is an absolute right. As the Charter makes explicit, "In no case shall a people be deprived of it".

126. The Honourable 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.[71]

127. As the Honourable Commission highlighted, Article 21 originated with the legacy of colonialism. Furthermore:

> …The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.[72]

128. The right to freely dispose of natural resources is of critical importance to indigenous peoples and their way of life. The report of the Commission's Working Group of Experts on Indigenous Populations/Communities states:

> *Dispossession of land and natural resources is a major human rights problem for indigenous peoples … The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them … This [the loss of fundamental natural resources] is a serious violation of the African Charter*

[71] The Ogoni Case (2001), paras 56-58.
[72] Id.

(article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property.[73]

129. Moreover, the World Bank's Operational Directive 4.10 states that "Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction."[74]

130. The African Charter creates two distinct rights, to both property (Article 14) and the free disposal of wealth and natural resources (Article 21). In the context of traditional lands the two rights are very closely linked and violated in similar ways. Article 21 of the ACHPR is, however, wider in its scope than Article 14, and requires respect for a people's right to use natural resources, even where a people does not have title to the land.

Violation of the Endorois' Right to Natural Resources

131. The Endorois people enjoy the protection of Article 21 with respect to Lake Bogoria and the wealth and natural resources arising from it. For the Endorois, the natural resources include traditional medicines made from herbs found around the Lake and the resources, such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralist way of life. These were clearly natural resources from which the Community benefited before the eviction from their traditional lands.[75]

132. In addition, however, Article 21 also protects the right of the Community to the potential wealth of their land, including tourism, rubies, and other possible resources.

133. Since their eviction from Lake Bogoria, the Endorois have been denied unhindered access to the land and its natural resources. They can no longer benefit from the natural resources and potential wealth, including that generated by recent exploitation of the land, such as the revenues and employment created by the Game Reserve and the product of mining operations. This is in violation of Article 21.

Article 21(2)

134. Article 21(2) states that "[I]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation". As stated above, the Working Group has stated that depriving indigenous peoples of their lands and natural resources, through *inter alia*, the creation of parks and displacement of the peoples amounts to a violation of Article 21(2). Spoliation, in this sense, must have the meaning of "the taking of a benefit properly belonging to another".[76]

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73 Report of the African Commission's Working Group of Experts, p. 20.
74 World Bank Operational Directive 4.10.
75 World Wildlife Federation Report, p. 17 et seq.
76 Black's Law Dictionary (2004).

135. Given the violation of Article 21, therefore, the Endorois are entitled to lawful recovery of their property as well as to adequate compensation for the losses they have suffered.

Conclusion

136. Under Article 21, the Endorois have the right to freely dispose of their wealth and natural resources. Since their expulsion from the Lake Bogoria area, the Endorois have been denied control and use of the natural resources of their traditional land. Furthermore, the Kenyan authorities have refused to allow the Endorois Community a right of access to Lake Bogoria. The Community has therefore been unable to access resources traditionally used for medicinal and nutritional purposes as well as to sustain their cattle.

137. Article 21(2) concerns the obligations of a State party to the Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation nor restitution of their lands.

138. Accordingly, the Endorois people suffer a violation of Article 21 of the Charter.

VIOLATION OF ARTICLE 8 – THE RIGHT TO FREE PRACTICE OF RELIGION

139. Article 8 of the Charter states that:

> *Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.*

140. The Endorois' right to freely practice their religion has been violated by the creation of the Game Reserve, their displacement from the land, and the Kenyan authorities' continuing refusal to give the Community a right of access. The Endorois have not been able to practice the prayers and ceremonies that are intimately connected to the Lake, nor have they been able to freely visit the spiritual home of all Endorois, living and dead.

Right to Practice Religion

141. The Endorois' spiritual beliefs and ceremonial practices constitute a religion under international law. The term "religion" in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. The Human Rights Committee (HRC) has stated that the right to freedom of religion in the International Covenant on Civil and Political Rights (ICCPR):

> *protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.*[77]

142. Freedom of conscience and religion includes *inter alia* the right to worship, engage in ritual, observe days of rest, and wear religious garb.[78] The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief notes that the right to freedom of conscience allows for individuals or groups "to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes", as well as "to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief".[79]

143. Similarly, the HRC has noted that the freedom to worship and engage in ceremonial acts is at the centre of the freedom of religion. The HRC stated:

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[77] 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.

[78] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), U.N. GA Res. 36/55, (1981).

[79] Id.

> *The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest.*[80]

144. The Honourable Commission has embraced the broad discretion required by international law in defining and protecting religion. In the case of *Free Legal Assistance Group and Others v. Zaire,* this Commission held that the practices of the Jehovah's Witnesses were protected under Article 8.[81]

145. The religion of indigenous groups, such as the Endorois, is directly linked to their culture and land and therefore requires special protection. The Inter-American Commission on Human Rights approved the Proposed American Declaration on the Rights of Indigenous Peoples in 1997, which recognises the specific needs of indigenous communities and the right to practice their spiritual beliefs as an individual and collective human right. Article II of the Proposed Declaration reads:

> *Indigenous people have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize inter alia the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages.*[82]

146. The Proposed Declaration, in Article XIV, establishes a wide definition of the right to practice religion, stating that indigenous peoples have the right to use their sacred and ceremonial areas and the right of expression in accordance with their values, usages, customs, ancestral traditions, beliefs and religions. Article X obliges the state to encourage universal respect for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.

147. The Endorois' beliefs are protected by Article 8 of the African Charter and constitute a religion under international law. The Endorois believe that the Great Ancestor, *Dorios*, came from the Heavens and settled in the Mochongoi Forest. After a period of excess and luxury, the Endorois believe that God became angry and, as punishment, sank the ground one night, forming Lake Bogoria. The Endorois believe themselves to be descendants of the families who survived that event.

148. Each season the water of the Lake turns red and the hot springs emit a strong odour. At this time, the Community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake. The Endorois regard both Mochongoi Forest and Lake Bogoria as sacred grounds, and have always used

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[80] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93. para. 4.

[81] *Free Legal Assistance Group v. Zaire,* African Commission on Human and Peoples Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 45.

[82] Article 2, *Proposed American Declaration on the Rights of Indigenous Peoples*, Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

these locations for key cultural and religious ceremonies, such as weddings, funerals, circumcisions, and traditional initiations.[83]

149. The Endorois, as an indigenous group whose religion is intimately tied with the land, require special protections. Lake Bogoria is of central religious significance to all Endorois. The religious sites of the Endorois people are situated around the Lake; here the Endorois pray, and religious ceremonies are regularly connected with the Lake. Ancestors are buried near the Lake, and as stated above, Lake Bogoria is considered the spiritual home of all Endorois, living and dead. The Lake is therefore essential to the religious practices and beliefs focusing on the Endorois' ancestors.

150. Based on these international norms and the Honourable Commission's jurisprudence, the practices and beliefs of the Endorois constitute a religion for the purposes of both international law and Article 8 of the African Charter.

Interference with Religious Freedoms

151. The Kenyan authorities have interfered with the Endorois' right to religious freedom. By evicting the Endorois from their land, and refusing access to the Lake and other surrounding religious sites, the Kenyan authorities have interfered with the Endorois' ability to practice and worship as their faith dictates. In a further violation, religious sites within the Game Reserve have not been properly demarcated and protected.

152. Since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. Access as of right for religious rituals – such as circumcisions, marital rituals, and initiation rights – has been denied for the Community. Similarly, the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the Lake undergoes seasonal changes.

153. The right to worship and to practice particular rituals is an integral part of religious freedom. In *Boodoo v. Trinidad & Tobago,* concerning an applicant prevented from wearing a beard, from having access to prayer beads, and from worshipping at religious services, the HRC was clear that interference with ritual and ceremonial acts constituted a violation of the author's religious freedoms. The HRC stated:

> *that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts.*[84]

154. In *Amnesty International v. Sudan,* the Honourable Commission recognised the centrality of practice to religious freedom.[85] Here, the Commission noted that the State party violated the authors' right to practice religion because non-Muslims did

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[83] World Wildlife Federation Report, p. 18, para. 2.2.7.

[84] *Mr. Clement Boodoo v. Trinidad and Tobago,* Communication No. 721/1996, UN Doc. CCPR/C/74/D/721/1996 (2002).

[85] *Amnesty International and Others v. Sudan,* African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 52/91, 89/93 (1999) (hereinafter *Amnesty International v. Sudan)*.

not have the right to preach or build their churches and were subject to harassment, arbitrary arrest, and expulsion.

155. In addition, the Draft UN Declaration on the Rights of Indigenous Peoples gives indigenous peoples the right "to maintain, protect and have access in privacy to their religious and cultural sites…"[86] Only through unfettered access will the Endorois be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

Expulsion from Sacred Lands

156. The Endorois' inability to practice their religion is a direct result of their expulsion from their land. The Endorois' forced eviction from their ancestral lands by the Kenyan authorities removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.

157. The Inter-American Commission on Human Rights has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the case of *Loren Laroye Riebe Star,* the court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.[87] The Commission came to a similar conclusion in a case concerning a Catholic nun who fled Guatemala after State actions prevented her from freely exercising her religion.[88] Here, the Commission decided that her right to freely practice her religion had been violated, because she was denied access to the lands most significant to her.[89]

158. Similarly, in the Mayagna (Sumo) *Awas Tingni* case*,* the Inter-American Court of Human Rights directly identified the religious element of land for indigenous peoples. The Court held that:

> *the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of… their spiritual life.… For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy.*[90]

159. The HRC has indirectly addressed expulsion from sacred grounds as violation of a group's right to religious freedom.[91] In a case concerning the construction of a hotel in Tahiti on the site of a pre-European occupation burial ground, the authors of the

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86 Draft UN Declaration on the Rights of Indigneous Peoples, Article 13.

87 *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).

88 *Dianna Ortiz v. Guatemala,* Inter-American Commission on Human Rights, Report 31/96, Case 10.526, (1997).

89 Id.

90 *The Awas Tingni Case* (2001), para. 149.

91 *Francis Hopu and Tepoaitu Bessert v. France*, Human Rights Committee, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997).

submission did not raise an Article 18 (freedom of thought, conscience, and religion) claim due to admissibility complications. However, dissenting judges recognised that the permanent denial of access to ancestral burial grounds may involve "denial of the right of religious or ethnic minorities, in Community with other members of their group, to enjoy their own culture or to practise their own religion".[92]

160. The centrality of land to the practice of certain religions, which has been recognised by the Inter-American Commission, is even more important in the instant case. The Lake Bogoria region is the sole site of religious significance to the Endorois, and cannot be replaced by worship and practice at an alternate site. Only the Lake region has the ancestral and religious meaning necessary for the practice of the religion of the Community.

Failure to Demarcate Religious Sites

161. The current management of the Game Reserve has both failed to fully demarcate the sacred sites within the Reserve and to maintain sites that are known to be sacred to the Endorois.[93] Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed.

162. The Draft UN Declaration on the Rights of Indigenous Peoples emphasizes that "States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected".[94] The Kenyan authorities have thus far failed to take effective measures to ensure the full preservation of Endorois religious sites.

163. The Kenyan authorities have interfered with the Endorois' right to freely practice their religion by evicting them from their lands, and then refusing to grant free access to their sacred sites. This separation from their land prevents the Endorois from carrying out sacred practices central to their religion. The Kenyan authorities' failure to demarcate and protect religious sites within the Game Reserve constitutes a severe and permanent interference with the Endorois' right to practice their religion.

No Justification for Interference

164. Article 8 provides that states may interfere with religious practices "subject to law and order". The Endorois religious practices are not a threat to law and order and thus there is no justification for the interference.

165. The limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. The Honourable Commission, in *Amnesty International v. Zambia,* noted that it was "of the view that the 'claw-back'

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92 Id. See dissent by David Kretzmer and Thomas Buergenthal with Nisuke Ando and Lord Coville, para. 3.

93 World Wildlife Federation Report, para. 3.4.3.

94 Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Article 13.

clauses must not be interpreted against the principles of the Charter… Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter".[95]

166. The HRC has echoed the Honourable Commission's desire to hold states to strict limits in their ability to restrict religious freedoms. The Committee noted that "limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights… 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".[96]

167. The principle of proportionality, as detailed in paragraphs 83 through 88 above, requires that a restriction on a right must be the least restrictive possible to meet the legitimate aim. A very severe restriction on the right to practice religion, such as that suffered by the Endorois, must therefore have strong justifications as to its necessity.

168. The Honourable Commission invoked the principle of proportionality in *Amnesty International v. Sudan.* Here, the Commission decided that a general prohibition on Christian association was "disproportionate to the measures required by the Government to maintain public order, security, and safety". Restrictions placed on the freedom to practice one's religion should be as minimal as possible; in the instant case, complete and total expulsion from the land for religious ceremonies is not minimal.[97]

169. Denying the Endorois people access to the Lake is a restriction on their freedom to practice religion wholly disproportionate to any other aim. The prohibition of the Endorois to access the Lake for peaceful religious ceremonies is not necessitated by a significant public security interest or other justification. The Kenyan authorities have not argued or established that the practice of the religion of the Endorois people in any way threatens law and order or interferes with the rights of others.

170. Moreover, the eviction of the Endorois from the Game Reserve was not a legitimate step in pursuit of economic development or environmental protection.[98] Allowing the Endorois to use the land to practice their religion would not detract from such a goal. The near-total prohibition on free Endorois access to the Lake does not adversely affect the environmental conservation or economic development objectives of the Game Reserve. Indeed, the Honourable Commission has previously rejected limiting the Charter based on alleged "special circumstances".[99]

171. The Honourable Commission decided in the communication *Free Legal Assistance Group and Others v. Zaire* that where there is an interference with a right it is for the

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95 *Amnesty International v. Zambia,* African Commission on Human and Peoples Rights, Communication 212/98 (1999).

96 Human Rights Committee, General Comment 22. supra n 78, para. 8.

97 *Amnesty International v. Sudan* (1999), para. 82 and 80.

98 It should also be noted that these are not valid reasons for restricting rights under Article 8 of the African Charter.

99 *The Constitutional Rights Project Case,* (1999), para. 41.

government to justify the interference. Any justification offered must, moreover, be tested on the grounds of proportionality.[100]

172. Furthermore, limitations cannot destroy the essence of a right, or render it illusory.[101] The religion of the Endorois Community is centred upon Lake Bogoria and the surrounding areas. Without access to their traditional lands, the Endorois' right to religion is denied.

Conclusion

173. Article 8 of the Charter guarantees the right to the free practice of religion. This right can only be limited "subject to law and order". The restrictions on the Endorois' access to their sacred sites, which severely limits their ability to practice their religion, cannot be justified on grounds of law and order. The exercise of their religion is entirely peaceful and can be maintained without disruption to the Game Reserve.

174. Accordingly, the Endorois people suffer a violation of Article 8 of the Charter.

[100] *Free Legal Assistance Group and Others v. Zaire* (1995).
[101] *The Constitutional Rights Project Case* (1999), para. 42.

VIOLATION OF ARTICLES 17(2) AND 17(3) – THE RIGHT TO CULTURE

175. Articles 17(2) and 17(3) state that:

> *(2) Every individual may freely take part in the cultural life of his Community.*
> *(3) The promotion and protection of morals and traditional values recognized by the Community shall be the duty of the State.*

176. The Endorois Community's cultural rights have been violated as a result of the Kenyan authorities' creation of a Game Reserve. By restricting access to Lake Bogoria, the Kenyan authorities have denied the Community access to a central element of Endorois cultural practices. The Kenyan authorities have also created a major threat to the Endorois' pastoralist way of life 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.

Defining Culture

177. The Preamble of the African Cultural Charter (1976) states that:

> *[A]ny human society is necessarily governed by rules and principles based on traditions, languages, ways of life and thought, in other words on a set of cultural values which reflect its distinctive character and personality.*[102]

178. The same Charter recognises cultural diversity to be a source of mutual enrichment for various communities.[103]

179. The African Cultural Charter, for its part, highlights "the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas".[104]

180. The African Commission has understood cultural identity to encompass a group's religion, language, and other defining characteristics.[105] Culture, in this sense, is the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups.[106]

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[102] African Cultural Charter (1976), para 6 of the Preamble. [Emphasis added].
[103] Id., Article 3.
[104] African Cultural Charter, Preamble, Para. 8.
[105] Rachel Murray and Steven Wheatley, 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, 25 (2003), p. 224.
[106] Rodolfo Stavenhagen, "Cultural Rights: A Social Science, Perspective," in Economic, Social and Cultural Rights, A Textbook (Asbjørn Eide et al. eds., 2nd ed. 2001), p. 85, 86-88.

Culture and Indigenous Peoples' Relationship to Land

181. The protection of Article 17 can be invoked by any group that identifies with a particular culture within a state.[107] Article 17, moreover, extends to the protection of indigenous cultures and ways of life.

182. The importance of land to indigenous cultures and ways of life has been widely acknowledged. Indeed, dispossession of land and natural resources has been deemed by the Working Group on Indigenous Populations/Communities to be "a major human rights problem for indigenous peoples".[108]

183. In its landmark report, the WGIP has also emphasized that dispossession "threatens both the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities".[109]

184. The intimate connection between the cultural survival of indigenous peoples (including pastoralists) and their land has also been strongly emphasised by UN Special Rapporteur Erica-Irene Daes.

185. In her 2001 report "Indigenous People and their Relationship to Land", Daes strongly emphasises "the need for recognition of the cultural differences that exist between [indigenous] and non-indigenous people" as well as the need "to attach positive value to this distinct relationship".[110] She further notes that:

> *[A]s indigenous peoples have explained, it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies.*[111]

Endorois Culture

186. Whilst essential elements of the Endorois history and systems of belief have been outlined in the section under Article 8 (religion),[112] it is important to highlight the recognition of the traditional ways of life as a culture in and of itself.

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[107] Guidelines for National Periodic Reports, supra note 34, ¶ III.14.

[108] Report of the African Commission's Working Group on Indigenous Populations/Committees (2005), p.20.

[109] Id., p.20.

[110] Erica-Irene Daes, Special Rapporteur, *Indigenous Peoples and their Relationship to Land*, Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/21, (2001), para. 12.

[111] Id., para 13. The spiritual and material foundations of indigenous peoples' cultural identities with land is reiterated by numerous academics, UN experts and normative instruments. See also Robert A. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *Duke Law Journal* (1990), page 981; José R. Martínez Cobo, Special Rapporteur, *The Study of the Problem of Discrimination against Indigenous Populations*, Volume 5, U.N. Doc. No. E.86.XIV.3; ILO Convention 169; United Nations Declaration on the Rights of Indigenous Peoples, Article 25.

[112] See paras 147 and 148.

187. This was made evident in the case of *Länsman v. Finland*, where the UN Human Rights Committee stated that it was "undisputed that reindeer husbandry is an essential element of [the Sami] culture".[113] In this context, the Committee recalled that "economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community".[114]

188. Recognition of pastoralism as a culture and way of life is also clearly established throughout the Report of the Working Group on Indigenous Populations/Communities.

Rights and Obligations in Relation to Culture

189. The right to enjoy one's culture, practice one's religion, or use one's language cannot be enjoyed if the group no longer exists. The protection of minorities' cultural existence includes protecting their physical existence, the existence of the territories on which they live, and access to the material resources required to maintain their existence on those territories.[115]

190. Protection of existence goes beyond the duty not to destroy or deliberately weaken minority groups, but "requires respect for and protection of their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples, synagogues and the like."[116]

191. Article 17 recognises the dual nature of culture in its individual and collective dimensions, protecting on the one hand the individual's participation in the cultural life of his community; and, on the other hand obliging the state to promote and protect traditional values recognised by a community.

192. Article 17(3) sets out a distinctive African rendering of cultural rights that amplifies the state's responsibility for cultural rights protection.[117]

193. This state responsibility is in line with the overall duty to respect, protect, and fulfil the realisation of economic, social and cultural rights, as understood in international human rights law. In the context of cultural rights, the following obligations on states have been developed:

    - The *duty to respect* requires the state to tolerate diversity;[118]

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[113] Ilmari Länsman et al. v. Finland, Communication No. 511/1992, Views of 26 October 1994, U.N. Doc. CCPR/C/52/D/511/1992 (1994), para. 9.2 (hereinafter *Länsman v. Finland*)

[114] Id, para 9.2 .

[115] Rachel Murray and Steven Wheatley, 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, 25 (2003), p. 222.

[116] Asbjorn Eide, cited in Rachel Murray and Steven Wheatley, 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, 25 (2003), p. 222.

[117] Shyllon, The right to a cultural past: African viewpoints in: Cultural Rights and Wrongs, UNESCO 1998.

[118] UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, (Fifty-first session, 1997), Rights of Indigenous Peoples, U.N. Doc/ A/52/18. Article 4(a) mandates that states

- The *duty to protect* obliges states to take positive steps towards protecting identity groups;[119]

- Finally, *the duty to fulfil* or promote cultural rights includes the obligation to create policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop, and prosper.[120]

194. In its interpretation of the African Charter, the Honourable Commission has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from that 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.[121]

195. The African Commission's WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

> *indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more*

"Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation". See also Article 27 of the International Covenant on Civil and Political Rights: *'*"minorities shall not be denied the right, in Community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language"*;* Article 15(1)(a) International Covenant on Economic, Social and Cultural Rights. See also, Principle 2 (Trust and Respect) of the Dana Declaration on Mobile Peoples and Conservation, 2003.

[119] 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).

[120] Human Rights Committee, General Comment 23, (Fiftieth session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, Article 27 (1994). Para. 7 states: "with regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them". See also Principle 4 (Adaptive Management) and Principle 5 (Collaborative Management) of the Dana Declaration on Mobile Peoples and Conservation, 2003.

[121] 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.

dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.[122]

196. The Committee on the Elimination of Racial Discrimination has also drawn a clear link between dispossession of land and the violation of cultural rights. In its review of a periodic state report:

> *[The Committee] expresse[d] concern that the ongoing dispossession of Basarwa/San People from their land and about reports stating that their resettlement outside the Central Kalahari Game Reserve does not respect their political, economic, social and cultural rights.*[123]

197. In line with this position, the World Parks Congress has stated that in the context of conservationist programmes, extreme caution must be taken not to infringe upon the rights of indigenous peoples. In the Congress's support of the 2003 Dana Declaration on Mobile Peoples and Conservation, which coincided with the World Conference Against Racism, it firmly stated that:

> *Conservation of biodiversity and natural resources within areas inhabited or used by mobile peoples requires the application of adaptive management approaches. Such approaches should build on traditional / existing cultural models and incorporate mobile peoples' worldviews, aspirations and customary law. They should work towards the physical and cultural survival of mobile peoples and the long-term conservation of biodiversity.*[124]

198. The Human Rights Committee has also held that development projects expropriating ancestral lands threaten cultural survival. In *Lubicon Lake Band v. Canada*, industrialisation, as well as gas and oil exploration, resulted in the environmental degradation of traditional lands and threatened the band's ability to rely on the land for their economic well-being.

199. The Committee found a violation of the community's right to culture as provided by ICCPR Article 27, and emphasised the need to protect indigenous cultures in the face of development. It held that "historical inequities […] and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue*".* [125] The Committee thus equated traditional way of life with culture.

200. Additional jurisprudence from the Human Rights Committee, developing clear criteria for determining whether development projects are compatible with the

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[122] Report of the African Commission's Working Group on Indigenous Populations/Committees (2005), p. 20. [Emphasis added]

[123] Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, Botswana, A/57/18, paras. 292-314 (2002), para. 304. [Emphasis added].

[124] Principle 4, Adaptive Management, Dana Declaration on Mobile Peoples and Conservation. Adopted during September 2003 World Park Congress sessions.

[125] *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Human Rights Committee, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990), para. 33.

ICCPR's protection of culture, includes the case of *Länsman v Finland*.[126] In this case, the Committee examined whether logging concessions infringed upon indigenous peoples' traditional practice of reindeer husbandry. Much like pastoralism, reindeer herding is at the centre of the Sami cultural and economic way of life. The HRC clearly stated that development imperatives could not deny the right to enjoy culture:

> *A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27.*[127]

201. The *Länsman v. Finland* case also notes that the state has a duty to protect and fulfil cultural rights in approving development projects. In its decision, the Human Rights Committee stated that:

> *[E]conomic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities (…) were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.*[128]

Violation of the Right to Culture

202. The Endorois people have suffered violations of their cultural rights on two counts. In the first instance, the Community has faced systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations.[129] The Community's attempts to access their historic lands for these purposes were described as "trespassing" and met with intimidation and detention.

203. Secondly, and separately, the cultural rights of the Community have been violated by the serious damage caused by the Kenyan authorities to the pastoralist way of life. The curtailment of the sustainability of this way of life resulted from the eviction from

[127] Länsman v. Finland (1994), para. 9.4. The paragraph finishes: "However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."

[127] Länsman v. Finland (1994), para. 9.4. The paragraph finishes: "However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."

[128] Länsman v. Finland (1994), para 9.8. See also *Ivan Kitok v. Sweden,* Communication No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (1988). [Emphasis added].

[129] World Wildlife Federation Report, p. 42.

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Lake Bogoria and the failure to provide necessary infrastructure to compensate for lost medicinal, grazing and water resources inside the Game Reserve.

204. Loss of these resources has been further exacerbated by the Kenyan authorities' additional restrictions on access to neighbouring Endorois traditional land such as the Mochongoi forest. This area has been used by the Community since time immemorial during the dry seasons, but is now increasingly been demarcated and sold to third parties.

205. With mining concessions now underway in proximity to Lake Bogoria, further threat is posed to the cultural and spiritual integrity of the ancestral land. Provisional measures issued by the African Commission in this regard in May 2004 continue to be ignored by the Kenyan authorities.

206. Finally, the Kenyan authorities' failure to allow or enable the Community to co-exist in a sustainable manner with the Game Reserve, in line with the requirements set out in the above standards and jurisprudence, has further contributed to the serious threat to the pastoralist way of life.

Proportionality

207. Unlike Articles 8 and 14 of African Charter, Article 17 does not have an express clause allowing restrictions on the right under certain circumstances. The absence of such a clause is a strong 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.

208. Nevertheless, in respect of any limitation, the restriction must be proportionate to a legitimate aim, as stipulated by the jurisprudence of the Honourable Commission[130] and the international law on human and people's rights. The principle of proportionality, as detailed above in paragraphs 75 to 80, requires that limitations be the least restrictive possible to meet the legitimate aim.

209. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Kenyan authorities' failure to secure access by right for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim.

210. The cultural activities of the Endorois Community pose no harm to the ecosystem of the Reserve and the restriction of cultural rights would not therefore be justified on such a basis. In addition, the practice of Endorois cultural ceremonies could not be considered to affect the profits of the Game Reserve. Human interest in the cultural richness of the Endorois culture would, if anything, attract greater tourist attention.

211. The limitations placed on the Endorois - removal from and restricted access to their cultural home - threaten to destroy the cultural life of the community. Their pastoralist way of life has been severely damaged by relegation to unsuitable lands, and their

[130] See *The Constitutional Rights Project Case* (1999), para. 42.

inability to access religious and cultural sites interferes with the practice and transmission of their culture. The very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory.

212. Furthermore, the restrictions on the Endorois' right to culture are not the least restrictive possible. The Endorois Community are willing to co-exist with the Game Reserve and believe that the Community can work alongside the Kenyan authorities in pursuit of the same conservation goals.

213. In the case of *Lovelace v. Canada*, the HRC held that, although it was important to protect the integrity of indigenous communities from non-Native settlers, refusing to reinstate the right for a Native woman, previously married to a non-Native, to live on her Reserve could not be deemed a proportionate measure, as this Reserve was the only place in existence where she could enjoy her culture.[131] The Lake Bogoria region holds the same central importance for the Endorois.

Conclusion

214. In light of the central and singular importance of Lake Bogoria to a variety of cultural ceremonies and rites, and of the Game Reserve's resources for the sustainability of pastoralism, the Endorois' rights have been and continue to be interfered with. Any interference with the Endorois Community's right to culture should have been strictly proportionate to the aim of creating a Game Reserve. The limitations, however, have been sufficiently severe that the right to culture is entirely vitiated.

215. Accordingly, the Endorois people suffer a violation of Articles 17(2) and 17(3) of the Charter.

[131] *Sandra Lovelace v. Canada*, Human Rights Committee, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 10, (1985), para. 15.

VIOLATION OF ARTICLE 22 – THE RIGHT TO DEVELOPMENT

216. Article 22 of the African Charter states that:

> *All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*

217. The Endorois peoples' right to development has been violated as a result of the Kenyan authorities' creation of a Game Reserve. The failure to adequately involve the Endorois in the development process and the failure to ensure the continued improvement of the Endorois Community's well-being together constitute a violation of the right to development.

Right to Development

218. The African Charter legally binds states to respect the rights of peoples to development. Though the African Charter is the only treaty to do this, the Charter draws inspiration for the right to development from the 1986 UN Declaration on the Right to Development (the "Declaration") and the work of the UN Independent Expert on Development.

219. The Honourable Commission has held that:

> *The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.*[132]

This includes the right to development.

220. The Declaration highlights two important parts of the right to development:

a. the right to participate in the development process; and
b. the right to a substantive improvement in well-being.

221. Article 2(3) of the Declaration notes that the right to development includes "active, free and meaningful participation in development".[133] Peoples shall experience "constant improvement of the well being of the entire population and of all individuals".[134]

222. Thus the right to development is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element

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[132] *The Ogoni Case,* (2001), para. 71.
[133] U.N. Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986), Article 2.3. (hereinafter Declaration on Development).
[134] Id.

constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.

223. The state, acting at the national level, bears the primary duty for ensuring the realisation of the right to development. As the African Charter makes clear, the state must act individually or collectively.[135]

224. Recognising the right to development requires fulfilling five main criteria. Development must be equitable, non-discriminatory, participatory, accountable, and transparent. Equity is an especially important, "over-arching theme" in the right to development. The income or other benefits derived from development must be equally distributed.[136] Similarly, the UN Task Force on the Implementation of the Right to Development stated that "development had to be grounded in sound economic policies that fostered growth with equity".[137]

225. Consequently, economic growth alone is not enough to constitute the right to development. "For economic growth to be included as an element of the claims representing the right to development, it must satisfy the basic condition of facilitating the realization of all other rights…. In other words, policies adopted to increase economic growth must be consistent with human rights standards".[138]

Right to Economic, Social and Cultural Development

226. The African Charter guarantees all peoples the right to social, economic and cultural development. All three strands are equally important.

227. The UN Independent Expert on the Right to Development, Arjun Sengupta[139], has also noted that the right to development necessitates the fulfilment of civil, political, economic, social, and cultural rights and freedoms. Sengupta notes that "all these rights are interrelated and independent".[140]

228. The UN Declaration reiterates that "all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection

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135 ACHPR Article 22(2).

136 Arjun Sengupta, "Development Cooperation and the Right to Development," Francois-Xavier Bagnoud Center Working Paper No. 12, (2003), available at www.hsph.harvard.edu/fxbcenter/working_papers.htm.

137 Review of the Progress in the Promotion and Impact of the Right to Development: Considerations of the Report of the High Level Task Force on the Impact of the Right to Development, Commission on Human Rights, U.N. Doc. E/CN.4/2005/WG.18/2 (2001), para. 10.

138 Arjun Sengupta, Independent Expert, Fifth Report of the Independent Expert on the Right to Development, Commission on Human Rights, U.N. Doc. E/CN.4/2002/WG.18/6 (2002).

139 Sengupta was appointed as the Independent Expert on the right to development in 1998 by the UN Commission on Human Rights. He also co-directs the Right to Development Project at Harvard University's Francois-Xavier Bagnoud Center,

140 Arjun Sengupta, Independent Expert, Third report of the independent expert on the right to development, Committee on Human Rights, U.N. Doc. E/CN.4/2001/WG.18/2 (2001) p. 3.

of civil, political, economic, social and cultural rights".[141] The right to development cannot be viewed in isolation.

229. The UN Independent Expert also highlighted the interdependent nature of the right to development and other rights.

> The right to development, while sensitive to human development and inclusive of the rights-based approach, takes the development formula one step further by treating all rights as an integrated whole and the right to development as a comprehensive process for their treatment.[142]

Violation of the Endorois' rights

230. The Endorois have suffered a violation of their economic, social and cultural development. Many of the details have been set out above, notably under the right to religion and culture (cultural development) and property and natural resources (economic development). A finding of a violation of the Charter in the above rights would be a very strong indication that the right to development has been violated. However Article 22 stands alone and needs to be examined separately.

Development as Choice and Increasing Capabilities

231. Nobel laureate Amartya Sen has conceptualised economic, social and cultural development as an increase in overall well-being.[143] Sen has developed a framework of capabilities and functionings where a people's overall well-being should be measured not by what they do, but what they are able to do.[144] The realisation of the right to development results in increased capabilities and therefore an increased range of choice for the beneficiary.

232. The right to development is a corollary of the right to self-determination.[145] The African Charter particularly highlights the importance of using development to enhance "freedom and identity", inserting Sen's conception of development as improving capabilities into the text of the African Charter itself.

233. The UN Independent Expert uses the example of housing to illustrate the importance of choice and self-determination. Development is not simply the state providing housing for particular individuals or peoples; development is instead about providing peoples with the ability to choose where to live. "The state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of

[141] Declaration on the Right to Development, Article 6.2.
[142] Margot E. Salomon with Arjun Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Minority Rights Group International, (2003), p. 5.
[143] Amartya Sen, *Development as Freedom,* (2000).
[143] Amartya Sen, *Development as Freedom,* (2000).
[144] Id.
[145] Declaration on the Right to Development, Article 22(2).

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such housing are made available". Freedom of choice must be present as a part of the right to development.[146]

234. Increasing capabilities is an integral part of development. Development is a "right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value".[147]

235. Capabilities can also be measured in more concrete terms, such as the right to food, health, or education. Therefore the concept of capabilities encompasses to the ability to secure these needs in ways desirable to the beneficiaries of development. In this respect, the Declaration states that the right to development incorporates "equality of opportunity for all in their access to basic resources, education, health services, good housing, employment, and fair distribution of income".[148]

236. Since development is understood as an improvement in well-being (as measured by capabilities), the right to development ensures the provision of resources essential for survival and well-being. Traditional indigenous land use systems have been recognised as crucial to well-being. The Inter-American Commission on Human Rights noted in 1997, for example, that:

> *For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to the geographical space necessary for the cultural and social reproduction of the group.*[149]

237. Thus, as control over land is central to well-being, control over land is crucial to ensuring the right to development.

Violation of Choice and Capabilities

238. The Endorois Community has seen the set of choices and capabilities open to them shrink since their eviction from the Game Reserve. Efforts to use their historic land have frequently been met with arrest, physical violence, and intimidation. The poor quality of land given to the Endorois after their eviction, the unavailability of salt licks, and inadequate compensation all narrowed down the range of capabilities within the Endorois Community.

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

[147] Arjun Sengupta, Third Report of the independent expert on the right to development, E/CN.4/2001/WG.18/2 2 January 2001. Additionally, in its 2000 Human Development Report, the UNDP articulated an understanding of development based on choice and capacity: "Human Development, in turn, is a process of enhancing human capabilities – to expand choices and opportunities." United Nations Development Programme, *Human Development Report 2000*, (2000), page 2.

[148] Declaration on the Right to Development, Article 8.

[149] Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

239. Due to the lack of access to the Lake, the salt licks and their usual pasture, the cattle of the Endorois died in large numbers. Consequently, the Endorois were not able to pay their taxes and, as a result, the Kenyan authorities took away more cattle. The consequential decrease in income made it difficult for the Endorois to pay for primary and secondary education. The disruption in education faced by the Endorois has destroyed a significant part of the Community's capabilities.

240. The Endorois believed that they had no choice but to leave the Lake. When they tried to remain or return to their historic land, Endorois families endured the burning of their houses, beatings, and forced relocations. This lack of choice directly contradicts the guarantees of the right to development. Had the Kenyan authorities been providing the right to development as promised by 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 movement eliminated any choice as to where they would live.

241. The Honourable Commission has noted the importance of choice to well-being. In the *Ogoni case*, the Commission noted that the state must respect rights holders and the "liberty of their action".[150] The liberty recognised by the Honourable Commission is tantamount to the choice embodied in the right to development. By recognising such liberty, the Commission has started to embrace the right to development as choice.

242. The same liberty of action principle can be applied to the Endorois Community in the instant case, and is part of the Endorois' right to development. The difficulty the Endorois face in accessing the Game Reserve, together with the threats faced by the Community, drastically undermine their liberty of action and, hence, their right to development.

243. Choice and self-determination also includes the ability to dispose of natural resources as a Community wishes, thereby requiring a measure of control over the land. For the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner of self-determination.

244. It is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. The realisation of the right to development requires the improvement and increase in capacities and choices. "An improvement in the realization of the right to development in that programme implies that the realization of some rights has improved while no other right is violated or has deteriorated".[151]

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[150] *The Ogoni case*, (2001) para. 46.

[151] Arjun Sengupta, Independent Expert, Fourth Report of the Independent Expert on the Right to Development, Commission on Human Rights, E/CN.4/2002/WG.18/2 (2001), page 5. Sengupta has formulated a development vector to measure the right to development by social indicators – such as food, health, education and housing – to represent economic, social, cultural, political and civil rights as well as economic growth (measured in per capita consumption, output and employment). The total

245. The Endorois have suffered a loss of well-being through the limitations on their choice and capacities. This loss of choice and capabilities constitutes a violation of the right to development.

Failure to Adequately Include the Endorois in the Development Process

246. The right to development requires that the beneficiaries of development participate in the process. The U.N. Independent Expert and the Declaration both focus on the inclusion of beneficiaries. Article 1(1) of the Declaration identifies the need to "participate in, contribute to, and enjoy" the development process. The UN Independent Expert likewise affirmed the requirement of "schemes formulated and implemented at the grassroots level with the beneficiaries participating in the decision-making and implementation, as well as sharing equitably in the benefits" and added that this "implies planning that empowers the beneficiaries".

247. The right to development requires first that the State involve communities in the planning and implementation of projects that will affect their development. The state must obtain the prior and informed consent of communities affected by significant development projects. The communities involved must freely give their consent and participation – coercion, pressure and intimidation violate the right to development.

Effective Participation and Meaningful Consultation

248. The right to development requires that individuals and communities participate in the planning and parameters of proposals that will affect them. Effective participation means that communities have the power to meaningfully affect the outcome of a project through informed consultations.

249. The African governments established this principle in the 1990 African Charter on Popular Participation in Development and Transformation. The 1990 African Charter defines "popular participation" as "the empowerment of the people to effectively involve themselves in creating the structures and designing the policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits".[152]

250. The Human Rights Committee addressed the effectiveness of consultation procedures in *Mahuika* v. *New Zealand*. The Committee found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the Maori people in determining fishing rights. The authorities of New Zealand had negotiated with Maori representatives, and then allowed the resulting Memorandum of Understanding to be debated extensively by Maoris

development vector only increases if at least one right increases and no rights decrease; if any single right is infringed upon, the vector contracts.

[152] African Charter on Popular Participation in Development and Transformation, U.N. Doc. A/45/427 (1990) para.11

throughout the country. The signatories of the Deed of Settlement included the official negotiators, as well as an additional 106 Maori signatories.[153] The Committee specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the Maori people, and that the Maori representatives were able to affect the design of the final Settlement.[154]

251. Additionally, international development organisations have begun adopting participation and consultation standards with respect to indigenous peoples. A U.N. Development Programme Policy paper notes that participation is "essential in securing all other rights in development processes".[155] The World Bank has recently updated its Operational Policies on Indigenous People, now requiring that all borrowers from the Bank "engage in a process of free, prior and informed consultation… [that] results in broad Community support" by the indigenous peoples affected.[156]

252. The International Labour Organisation (ILO) delineated consultation standards with respect to indigenous peoples in Convention No. 169. The relevant text of the Convention states: "The 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".[157]

253. The meagre consultations that the Kenyan Authorities did undertake with the Community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the ILO Convention No. 169 standard of consultations "in a form appropriate to the circumstances". Community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.

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[153] *Apirana Mahuika et al v. New Zealand,* Human Rights Committee, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), paras. 5.7-5.9

[154] Id. at para 9.6, 9.8. The Inter-American Court for Human Rights addressed the issue of participation with regard to the Awas Tingni people of Nicaragua. The Court held that the State must "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community… with full participation by the community and taking into account its customary law, values, customs and mores". *The Awas Tingni Case, (2001), para. 164.*

[155] *Integrating Human Rights with Development: A UNDP Policy Document*, United Nations Development Programme (1998), Sec. 2 available at http://magnet.undp.org/Docs/policy5.html. The standards have been more fully delineated in *UNDP and Indigenous Peoples: A Practice Note on Engagement*, United Nations Development Programme available at http://www.undp.org/cso/policies/doc/IPPolicyEnglish.

[156] *Revised Draft Operational Policies on Indigenous Peoples 4.10*, World Bank (2004), para. 1. The Inter-American Development Bank is in the process of developing a similar standard. The policy will require "meaningful participation," set out standards for consultation and participation, and may include the principle of free, prior, informed consent, in accordance with developing international standards. *Indigenous Issues Report* to the Human Rights Commission E/CN.4/2003/90 (2004), paras. 9-10.

[157] ILO Convention 169, Article 6, para. 2.

254. Furthermore, the Community representatives were in an unequal bargaining position, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan authorities. It was incumbent upon the Kenyan authorities 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.

255. Additionally, the consultations that did take place were not in "good faith" or with the "objective of achieving agreement or consent", two additional requirements of ILO Convention 169. This is clear from the Kenyan authorities' refusal, which continues to the present day, to honour the promises made to the Endorois people with respect to revenue-sharing from the Game Reserve, a percentage of jobs in the Game Reserve, relocation to equally fertile land, and compensation for their losses.

256. The ILO Committee responsible for examining alleged breaches of the Convention No. 169 has found that meetings convened after the granting of a petroleum exploration license failed to constitute consultation because the Community was not given the opportunity to participate and provide input on the proposed exploration prior to the granting of the license.[158] In a separate case, the Committee found that a government's practice of consulting with several smaller groups within a Community and creating separate agreements created divisiveness and militated against an effective participation process for the entire group.[159]

257. The inadequacy of the consultation undertaken by the Kenyan Authorities 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 onto their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

258. Ultimately, the inadequacy of the consultations left the Endorois feeling

[158] International Labour Organisation, *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution and by the Central Unitary Workers' Union (CUT)* ILO Doc. GB. 276/17/1, GB. 282/14/3 (2001), paras. 32-4, 88.

[159] International Labour Organisation, *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution and by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association* ILO Doc. GB. 277/18/1, GB. 282/14/3 (2001), para. 63. The Committee made very similar remarks in a case against Ecuador, *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution and by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)* ILO Doc. GB. 277/18/4, GB. 282/14/2 (2001), para. 15, 17.

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 Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, andprotest the actions in peaceful demonstrations. Had consultations been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.

Prior, Informed Consent

259. In the context of large development projects, such as the creation of Lake Bogoria, the State has a duty to obtain the prior, informed consent of communities affected by projects. The most developed explanation of what prior, informed consent means has been made by the Committee on the Elimination of Racial Discrimination (CERD). CERD adopted General Recommendation XXIII Concerning Indigenous Peoples, which emphasises that no decisions directly relating to the rights or interests of indigenous people should be taken without their "informed consent".[160] The Committee has reiterated this duty in its Concluding Observations to States parties.[161]

260. The Committee on Economic, Social and Cultural Rights has reminded States parties to "consult and seek the consent of the indigenous peoples concerned prior to the implementation of… any public policy affecting them".[162] Therefore, at a minimum, the State should negotiate with the intent of seeking consent.

261. The requirement of prior, informed consent has also been delineated in the case law of the Inter-American Commission on Human Rights. In *Mary and Carrie Dann v. USA*, the Commission noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.[163] To have a process of consent that is fully informed "requires at a minimum that *all* of the members of the Community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives" (emphasis added).[164]

262. The Kenyan Authorities did not obtain the prior, informed consent of all of the

[160] CERD General Recommendation 23 at para 4(d).
[161] See Concluding Observations of the Committee on the Elimination of Racial Discrimination, Costa Rica, U.N. Doc. CERD/C/60/CO/3 (2002), para. 13; Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States, U.N. Doc. A/56/18 (2001), paras. 380-407; Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia, U.N. Doc. CERD/C/304/Add.101, (2000), para. 9.
[162] Concluding Observations of the Committee on Economic, Social and Cultural Rights, Colombia. U.N. Doc. E/C.12/Add.1/74, (2001), at para. 33.
[163] *Mary and Carrie Dann vs. USA* (2002), para. 136.
[164] Id. at para. 140.

Endorois before designating their land as a Game Reserve and commencing their eviction. The Kenyan Authorities did not impress upon the Endorois any understanding that they would be denied all rights of return to their land. Even after their initial eviction, the Community continued to believe that they would be allowed access to their land for religious ceremonies and medicinal purposes.

263. Furthermore, the Endorois representatives who represented the Community in discussions with the Kenyan Authorities were illiterate, which seriously compromised their ability to understand the documents produced by the Kenyan Authorities. The Kenyan Authorities did not ensure that the Endorois were accurately informed of the nature and consequences of the process, a minimum requirement set out by the Inter-American Commission in the *Dann* case.

Prohibition against Coercion, Pressure or Intimidation

264. Inherent in the process component of the right to development is the requirement that the Kenyan Authorities fulfil their duties of fostering effective participation and obtaining informed consent without placing pressure on communities to accept an unsatisfactory settlement. To be legally effective, consent must be given freely. A Report produced for the UN Working Group on Indigenous Populations required that "indigenous peoples are not coerced, pressured or intimidated in their choices of development".[165]

265. The Kenyan Authorities violated the Endorois' right to development by engaging in coercive and intimidating activity that has abrogated the Community's right to meaningful participation and freely given consent. In the original consultations, the elders did not believe that they could bargain equally with the Kenyan Authorities and receive a better settlement. They felt that they were under duress to accept the project drawn up on the Kenyan Authorities' terms.[166]

266. Furthermore, after eviction, the Kenyan Authorities continued to refuse to address the concerns of the Endorois. In 1994 members of the Community organized a peaceful demonstration at Lake Bogoria Game Reserve Gate to draw attention to the slow pace at which the provincial administration and the Local Authority were moving to address the Community's problems. As a result, eleven members of the Community were arrested, charged, and placed in prison.[167] Through such heavy-handed tactics, the Kenyan Authorities transmitted its refusal to negotiate with the Endorois on a fair basis.

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[165] 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*. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

[166] Drawn from Centre for Minority Rights Development and Minority Rights Group International consultations with the Community in November 2003.

[167] Id.

267. Such coercion has continued to the present day. Mr Charles Kamuren, the Chair of the Endorois Welfare Council, has already informed the Honourable Commission of details of the harassment he and his family have received, particularly concerning the mining concessions. This included clear threats to the Endorois who were objecting to the granting of the concessions.

268. The Kenyan Authorities violated the Endorois' right to engage in the process of development by failing to obtain informed consent and involve them in the planning through meaningful consultations. Furthermore, the meagre consultations that did take place were rendered ineffective by tactics of coercion, pressure and intimidation. Finally, the agreement consented to, albeit after inadequate consultations plagued with problems of inequality and duress, was not agreed to in good faith by the Kenyan Authorities and has not been respected.

The Endorois did not share in the outcomes of development

269. The substantive losses of the Endorois fall into two categories: 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.

270. The loss of the Endorois' cultural development has already been set out above, under the sections under Articles 8 and 17.

271. The outcome of development should empower the Endorois so that their capabilities are constantly improving. It is insufficient for the Kenyan Authorities merely to give food aid to the Endorois; the capabilities and choices of the Endorois must improve in order for the right to development to be realised:

> If a group of destitute or deprived people has to have a minimum standard of well-being, a simple transfer of income through doles or subsidies may not be the right policy. They may have to be provided with the opportunity to work or to be self-employed, which may require generating activities that a simple reliance on market processes may not be able to ensure.[168]

Loss in Well-Being

272. The well-being of the Endorois has plummeted since the creation of the Game Reserve. There has been a constant decline in the health and standard of living of the Community over the last 20 years, and estimates put about 75 percent of the Community in severe poverty. Given the link between well-being and development, this decline in well-being – social, economic, and cultural – constitutes a violation of the right to development.

[168] Arjun Sengupta, Fourth Report, p. 6.

273. The Game Reserve made it particularly difficult for the Endorois to access the basic resources necessary for maintaining a healthy life. The Lake offers herbal medicine – such as chewing leaves, bark and tree roots – that help treat stomach aches, poisons, and sexually transmitted diseases; some of these species are now categorised as endangered.[169]

274. The Endorois were reliant on these natural remedies for their health care given the virtual absence of clinics and dispensaries for the Community.[170] The denial of access to these resources, crucial to the traditional health practices of the Endorois, has left many families unable to adequately tend to their medical needs, causing unnecessary suffering.

275. The Endorois' well-being was directly linked to the survival of their cattle, which were their major source of livelihood. The Lake area also provided the natural resources crucial to raising health and profitable stock of cattle. The Lake contained special soil that killed leeches and worms, and encouraged the cattle to eat more grass. The Endorois relied on a fattening salt lick containing important mineral supplements to keep the cattle healthy and constantly grazing.

276. The difficulty in accessing the Reserve for medicinal salt licks, grazing, and traditional water sources caused the death of cattle and subsequent decline in economic well-being.[171] The semi-arid land that the Endorois have relocated to offers none of these ecological resources. This violates the duty of governments to peoples to ensure an increased provision of resources to realise the right to development.[172]

277. The economic well-being of some Endorois was also tied to beekeeping; the honey was often sold for profit. Such beekeeping is one of the least environmentally destructive activities available.[173] Since eviction, the Endorois have lost their beehives, and thus an important source of economic activity.

278. When a state embarks on a development project violating the right of development of some groups – such as the Endorois – the state must compensate those whose rights were violated so as to put them in as good a position as if their rights had never been violated.[174]

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169 World Wildlife Federation Report, p. 18, para. 2.2.6.

170 Id., p. 17 para. 2.2.1.

171 Nearly half the cattle died in the immediate years after displacement. A steady decline continues to this day.

172 Arjun Sengupta, Third Report, p. 8.

173 World Wildlife Federation Report, p. 17, para 2.2.4.

174 Arjun Sengupta, Fourth Report, p. 14. "If a development project, such as constructing a dam, leads to the forced relocation of some people, that forced relocation constitutes a violation of their rights… In that case, compensation has to be paid, in whatever form, in order that losers or those affected can accept the 'nominal violation' of their rights and consent to the relocation. It is nominal because after their compensation there should be no real violation, so that those affected

279. The Kenyan authorities did not address the well-being of the Endorois when developing the Game Reserve. Only 170 families received any compensation for relocation, which was highly inadequate as it totalled a mere 30 pounds. This did not leave the Endorois so as they were essentially 'indifferent' to the situation before and after the creation of the Game Reserve. The Game Reserve did not provide 85 percent of jobs, as promised, to the Endorois, nor 25 percent of the proceeds. This development project violated the Endorois' own right to development as attention was not paid to improving, or at least maintaining, their well-being.

280. Providing for the well-being of the Endorois includes attention to the human rights of the Community. The state, when embarking on development projects, cannot violate the human rights of some groups in pursuit of development projects for all. Rights-based development, a corollary to the right to development, necessitates that any growth or development includes respect for human rights. The Working Group on the Right to Development noted that "a rights-based approach to economic growth and development contributes to the realization of the right to development".[175]

281. The Endorois experienced numerous rights violations in the process of creating the Game Reserve. The development process will not be acceptable if the process is accompanied by increasing inequity or a lack of improvement in indicators of social development, education, health, gender balance, and environmental protection.[176] Fewer Endorois go to school; the Endorois are increasingly unhealthy; logging and other activities have led to the possibility that the Lake would be entirely dry within 10 years. The violation of these rights constitutes a violation of the right to development, even if it occurs under the pretence of the development process.[177] Thus regardless of the utility of the nature reserve, the violation of the Endorois' rights means the development purpose is invalid and the right to development has been violated.

Denial of Benefits

282. The Endorois' right to development entitles them to a fair portion of the benefits of the Reserve. TheGame Reserve developed numerous jobs that could have been given to the Endorois, at campsites, hotels, the Endorois Community Cultural Centre, and an education centre. Furthermore, the Reserve's tourism generates a significant level of income that could have been distributed among the Endorois Community. Though the Endorois were promised a share in both the employment and revenue generated by the Reserve, neither has come to

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believe the they have not actually lost and are at least 'indifferent' between the pre-violation State and the post violations compensation situation."

175 Report of the High Level Task Force, para. 41.

176 Arjun Sengupta, Third Report, p. 3.

177 Id.

fruition despite repeated attempts to work with the Kenyan Authorities.

283. The right to development includes a right for the Endorois to share equally in the proceeds from the Reserve. In *Mahuika v. New Zealand,* the Human Rights Committee found that when New Zealand established a fisheries commission, the indigenous Maori had a development right to a reasonable share of the deepwater fisheries.[178] The outcome of Mahuika emphasizes the requirement of equity in the development process.

284. Applying the requirement of equity to the Endorois, the Endorois' right to development was violated in the denial of an equitable share of jobs or proceeds from the Game Reserve. The right to development would "imply providing for the equality of opportunity or capabilities, which could translate to equitable distribution of income or amount of benefits".[179] The Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve – which never came to fruition.

285. The Kenyan Authorities bear the burden of responsibility for creating conditions favourable to a people's development.[180] Consequently, it was not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Kenyan Authorities, instead, are obligated to ensure that the Endorois are not left out of the development process or benefits. The failure to provide adequate compensation, deliver the promised jobs or benefits, or provide suitable land for grazing all indicate that the Kenyan Authorities did not adequately provide for the Endorois in the development process.

286. The Kenyan Authorities have granted several mining and logging concessions to third parties since the eviction of the Endorois from the Lake. The Endorois have never received a share of these profitable ventures. Furthermore, the environmental destruction wrought by both activities erodes the utility of the Game Reserve and the resources previously available to the Endorois.[181]

Conclusion

287. The Endorois have been excluded from participating or sharing in the benefits of development. The Kenyan Authorities did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the right to development. The Kenyan Authorities did not adequately consult the Endorois in developing

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178 *Mahuika et al v. New Zealand,* (1992).

179 Arjun Sengupta, "Development Cooperation and the Right to Development," Francois-Xavier Bagnoud Center Working Paper, available at http://www.hsph.harvard.edu/fxbcenter/working_papers.htm 2000.

180 Declaration on the Right to Development, Article 3.

the Game Reserve, obtain their prior and informed consent or equitably distribute the benefits among the Community. The Endorois' development as a people has suffered economically, socially and culturally. They have suffered both in actual terms compared with their position before their eviction, and in loss of potential.

288. Accordingly, the Endorois people suffered a violation of Article 22 of the Charter.

Remedies

289. The Endorois people therefore, both individually and as a collective people, have suffered major violations of their rights under Articles 14, 21, 8, 17 and 22. CEMIRIDE, on behalf of the Endorois community, therefore seeks a declaration that the Republic of Kenya is in violation of all of these articles.

290. The essential cause of all of these violations is the removal, under duress, of the Endorois community from its historic lands and refusal to allow the community to use these lands in any meaningful way. This stems from the failure of the Kenyan authorities, in law and in practice, to grant the Endorois substantive rights over its lands, and in particular that the "trust land" system has been so weak in practice in protecting the Endorois' rights.

291. Therefore the essential remedy for the Endorois community for all of these violations is that set out in Article 21(2) of the Charter.

292. First, **restitution** of its historic land, with legal title and clear demarcation. Given the importance of this land for Endorois religion and culture, only the restitution of this particular land would allow them to fully enjoy their rights.

293. Second, **compensation** to the community for all the loss they have suffered through the loss of their property, development, natural resources but also freedom to practice their religion and culture.

ANNEX

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