

## Annex 5

### Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

#### SUMMARY OF ALLEGED FACTS

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (CORE - which submitted an *amicus curiae* brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.
2. The Complainants allege that the Government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.
3. The Complainants state that the Endorois are a community of approximately 60,000 people<sup>52</sup> who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.
4. The Complainants state that apart from a confrontation with the Masai over the Lake Bogoria region approximately three hundred years ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of the land and that they continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.
5. The Complainants state that at independence in 1963, the British Crown's claim to Endorois land was passed on to the respective County Councils. However, under Section 115 of the Kenyan Constitution, the Country Councils held this land in trust, on behalf of the

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<sup>52</sup> The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.

Endorois community, who remained on the land and continued to hold, use and enjoy it. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya. The Complainants state that the act of gazetting and, therefore, dispossession of the land is central to the present Communication.

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The Complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. 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. The Complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The Complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the Respondent State, the Kenyan Wildlife Service (hereinafter 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, according to the Complainants, that the community would receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by the Respondent State.

8. The complainants allege that 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. The Complainants allege that none of these terms have been implemented and that only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. The Complainants state that the money given to the 170 families was always understood to be a means of facilitating relocation rather than compensation for the Endorois' loss.

9. The Complainants state that to reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Daniel Arap Moi, who was their local Member of Parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel.

10. The Complainants state that as a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and directed that 25% of annual income towards community projects be given to the Endorois. In November of the following

year, upon being notified by the Endorois community that nothing had been implemented, the Complainants state that President Moi again ordered that his directives be followed.

11. The Complainants state that following the non-implementation of the directives of President Moi, the Endorois began legal action against Baringo and Koibatek County Councils. Judgment was given on 19 April 2002 dismissing the application.<sup>53</sup> 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 money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land.

12. The Complainants state that the High 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". The Complainants also claim that the High Court stated that it did not believe Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights.

13. The Complainants allege that since the Kenyan High Court case in 2000, the Endorois community has become aware that parts of their ancestral land have been demarcated and sold by the Respondent State<sup>54</sup> to third parties.

14. The Complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock. Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present Communication.

15. The Complainants state that following the commencement of legal action on behalf of the community, some improvements were made to the community members' access to the Lake. For example, they are no longer required to pay Game Reserve entrance fees. The Complainants, nevertheless, allege that this access is subject to the Game Reserve authority's discretion. They claim that the Endorois still have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for collecting traditional herbs. They also state that the lack of legal certainty surrounding access rights and rights of usage renders the Endorois

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<sup>53</sup> *William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council*, High Court Judgment of 19 April 2002, Civil Case No. 183 of 2000, p. 6.

<sup>54</sup> Depending on the context, *Kenyan Authorities* and *Respondent State* are used in this text interchangeably to mean the Government of Kenya.

completely dependent on the Game Reserve authority's discretion to grant these rights on an *ad hoc* basis.

16. The Complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people. The Complainants claim that the Endorois health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.

17. The Complainants claim that at present the Endorois live in a number of locations on the periphery of the Reserve – that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The Complainants claim that for the Endorois, access to the Lake Bogoria region, is a right for the community and the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

18. The Complainants further allege that the right to legal representation for the Endorois is limited, in that Juma Kiplenge, the lawyer and human rights defender who was representing the 20,000 Endorois nomadic pastoralists, was arrested in August 1996 and accused of “belonging to an unlawful society”. They claim that he has also received death threats.

19. The Complainants allege that the Government’s decision to gazette Endorois traditional land as a Game Reserve, which in turn denies the Endorois access to the area, has jeopardized the community’s pastoral enterprise and imperilled its cultural integrity. The Complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The Complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, 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. This failure to register the Endorois Welfare Committee, according to the Complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent ‘on behalf’ of the community. The Complainants further submit that 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 African Charter. The Complainants state that the Endorois community claims these violations both for themselves as a people and on behalf of all the individuals affected.

21. The Complainants allege that in the creation of the Game Reserve, the Respondent State disregarded national law, Kenyan Constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development.

### **Articles Alleged to Have Been Violated**

22. The Complainants seek a declaration that the Republic of Kenya is in violation of Articles 8, 14, 17, 21 and 22 of the African Charter. The Complainants are also seeking:

- **Restitution** of their land, with legal title and clear demarcation.
- **Compensation** to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

### **PROCEDURE**

23. On 22 May 2003, the Centre for Minority Rights and Development (CEMIRIDE) forwarded to the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) a formal letter of intent regarding the forthcoming submission of a Communication on behalf of the Endorois community.

24. On 9 June 2003, the Secretariat wrote a letter to the Centre for Minority Rights and Development, acknowledging receipt of the same.

25. On 23 June 2003, the Secretariat wrote a letter to Cynthia Morel of Minority Rights Group International, who is assisting the Centre for Minority Rights Development, acknowledging her Communication and informed her that the complaint would be presented to the upcoming 34<sup>th</sup> Ordinary Session of the African Commission.

26. A copy of the Complaint, dated 28 August 2003, was sent to the Secretariat on 29 August 2003.

27. At its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission examined the Complaint and decided to be seized thereof.

28. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward their written submissions on Admissibility before the 35<sup>th</sup> Ordinary Session.

29. As the Complainants had already sent their submissions, when the Communication was being sent to the Secretariat, the Secretariat wrote a reminder to the Respondent State to forward its written submissions on Admissibility.

30. By a letter of 14 April 2004, the Complainants requested the African Commission on Human and Peoples' Rights (the African Commission) to be allowed to present their oral submissions on the matter at the Session.
31. On 29 April 2004, the Secretariat sent a reminder to the Respondent State to forward its written submissions on Admissibility of the Communication.
32. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the Complaint and decided to defer its decision on Admissibility to the next Session. The African Commission also decided to issue an Urgent Appeal to the Government of the Republic of Kenya, requesting it to stay any action or measure by the State in respect of the subject matter of this Communication, pending the decision of the African Commission, which was forwarded on 9 August 2004.
33. At the same Session, a copy of the Complaint was handed over to the delegation of the Respondent State.
34. On 17 June 2004, the Secretariat wrote to both parties informing them of this decision and requesting the Respondent State to forward its submissions on Admissibility before the 36<sup>th</sup> Ordinary Session.
35. A copy of the same Communication was forwarded to the Respondent State's High Commission in Addis Ababa, Ethiopia on 22 June 2004.
36. On 24 June 2004, the Kenyan High Commission in Addis Ababa, Ethiopia, informed the Secretariat that it had conveyed the African Commission's Communication to the Ministry of Foreign Affairs of Kenya.
37. The Secretariat sent a similar reminder to the Respondent State on 7 September 2004, requesting it to forward its written submissions on the Admissibility of the Communication before the 36<sup>th</sup> Ordinary Session.
38. During the 36<sup>th</sup> Ordinary Session held in Dakar, Senegal, from 23 November to 7 December 2004, the Secretariat received a hand-written request from the Respondent State for a postponement of the matter to the next Session. At the same Session, the African Commission deferred the case to the next session to allow the Respondent State more time to forward its submissions on Admissibility.
39. On 23 December 2004, the Secretariat wrote to the Respondent State informing it of this decision and requesting it to forward its submissions on Admissibility as soon as possible.
40. Similar reminders were sent out to the Respondent State on 2 February and 4 April 2005.
41. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission considered this Communication and declared it Admissible after the Respondent State had failed to cooperate with the African Commission on the Admissibility procedure despite numerous letters and reminders of its obligations under the Charter.

42. On 7 May 2005, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their arguments on the Merits.
43. On 21 May 2005, the Chairperson of the African Commission addressed an urgent appeal to the President of the Republic of Kenya on reports received alleging the harassment of the Chairperson of the Endorois Assistance Council who is involved in this Communication.
44. On 11 and 19 July 2005, the Secretariat received the Complainants' submissions on the Merits, which were forwarded to the Respondent State.
45. On 12 September 2005, the Secretariat wrote a reminder to the Respondent State.
46. On 10 November 2005, the Secretariat received an *amicus-curiae* brief on the case from COHRE.
47. At its 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the Merits to the 39<sup>th</sup> Ordinary Session.
48. On 30 January 2006, the Secretariat informed the Complainants of this decision.
49. By a Note Verbale of 5 February 2006, which was delivered by hand to the Ministry of Foreign Affairs of the Republic of Kenya through a member of staff of the Secretariat who travelled to the country in March 2006, the Secretariat informed the Respondent State of this decision by the African Commission. Copies of all the submissions by the Complainants since the opening of this file were enclosed thereto.
50. By an email of 4 May 2006, the Senior Principal State Counsel in the Office of the Attorney General of the Respondent State requested the African Commission to defer the consideration of this Communication on the basis that the Respondent State was still preparing a response to the matter which it claimed to be quite protracted and involved many departments.
51. By a Note Verbale of 4 May 2006, which was received by the Secretariat on the same day, the Solicitor General of the Respondent State formally requested the African Commission to defer the matter to the next Session noting mainly that due to the wide range of issues contained in the Communication, its response would not be ready for submission before the 39<sup>th</sup> Ordinary Session.
52. At its 39<sup>th</sup> Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the Communication and deferred its consideration of the same to its 40<sup>th</sup> Ordinary Session to await the outcome of amicable settlement negotiations underway between the Complainants and the Respondent State.
53. The Secretariat of the African Commission notified the parties of this decision accordingly.

54. On 31 October 2006, the Secretariat of the African Commission received a letter from the Complainants reporting that the parties had had constructive exchanges on the matter and that the matter should be heard on the Merits in November 2006 by the African Commission. The Complainants also applied for leave to have an expert witness heard during the 40<sup>th</sup> Ordinary Session.

55. At the 40<sup>th</sup> Ordinary Session, the African Commission deferred its decision on the Merits of the Communication after having heard the expert witness called in by the Complainant. The Respondent State also made presentations. Further documents were submitted at the session and, later on, during the intersession; more documentation was received from both parties before the 41<sup>st</sup> Ordinary Session.

56. During the 41<sup>st</sup> Ordinary Session, the Complainants submitted their final comments on the last submission by the Respondent State.

### **DECISION ON ADMISSIBILITY**

57. The Respondent State has been given ample opportunity to forward its submissions on Admissibility on the matter. Its delegates at the previous two Ordinary Sessions of the African Commission were supplied with hard copies of the Complaint. There was no response from the Respondent State. The African Commission has no option but to proceed with considering the Admissibility of the Communication based on the information at its disposal.

58. The Admissibility of Communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a complainant for a Communication to be Admissible.

59. In the present Communication, the Complaint indicates its authors (Article 56(1)), is compatible with the Organisation of African Unity / African Union Charters and that of the African Charter on Human and Peoples' Rights (Article 56(2)), and it is not written in disparaging language (Article 56(3)). Due to lack of information that the Respondent State should have supplied, if any, the African Commission is not in a position to question whether the Complaint is exclusively based on news disseminated through the mass media (Article 56(4)), has exhausted local remedies (Article 56(5)), and has been settled elsewhere per Article 56(7) of the African Charter. With respect to the requirement of exhaustion of local remedies, in particular, the Complainants approached the High Court in Nakuru, Kenya, in November 1998. The matter was struck out on procedural grounds. A similar claim was made before the same Court in 2000 as a constitutional reference case, in which order was sought as in the previous case. The matter was, however, dismissed on the grounds that it lacked merits and held that the Complainants had been properly consulted and compensated for their loss. The Complainants thus claim that as constitutional reference cases could not be appealed, all possible domestic remedies have been exhausted.

60. The African Commission notes that there was a lack of cooperation from the Respondent State to submit arguments on the Admissibility of the Communication despite numerous reminders. In the absence of such a submission, given the face value of the Complainants'

submission, the African Commission holds that the Complaint complies with Article 56 of the African Charter and hence declares the Communication Admissible.

61. In its submission on the Merits, the Respondent State requested the African Commission to review its decision on Admissibility. It argued that even though the African Commission had gone ahead to Admit the Communication, it would nevertheless, proceed to submit arguments why the African Commission should not be precluded from re-examining the Admissibility of the Communication, after the oral testimony of the Respondent State, and dismissing the Communication.

62. In arguing that the African Commission should not be a tribunal of first instance, the Respondent State argues that the remedies sought by the Complainants in the High Court of Kenya could not be the same as those sought from the African Commission.

63. For the benefit of the African Commission, the Respondent State outlined the issues put before the Court in Misc, Civil Case No: 183 of 2002:

(a) A Declaration that the land around Lake Baringo is the property of the Endorois community, held in trust for its benefit by the County Council of Baringo and the County Council of Koibatek, under Sections 114 and 115 of the Constitution of Kenya.

(b) A Declaration that the County Council of Baringo and the County Council of Koibatek are in breach of fiduciary duty of trust to the Endorois community, because of their failure to utilise benefits accruing from the Game Reserve to the benefit of the community contrary to Sections 114 and 115 of the Constitution of Kenya.

(c) A Declaration that the Complainants and the Endorois community are entitled to all the benefits generated through the Game Reserve exclusively and / or in the alternative the land under the Game Reserve should revert to the community under the management of Trustees appointed by the community to receive and invest the benefits in the interest of the community under Section 117 of the Constitution of Kenya.

(d) An award of exemplary damages arising from the breach of the Applicants' Constitutional rights under Section 115 of the Constitution of Kenya.

64. The Respondent State informs the African Commission that the Court held that procedures governing the setting apart of the Game Reserve were followed. The Respondent State further states that it went further to advise the Complainants that they should have exercised their right of appeal under Sections 10, 11 and 12 of the Trust Land Act, Chapter 288, Laws of Kenya, in the event that they felt that the award of compensation was not fairly handled. None of the Applicants had appealed, and the High Court was of the view that it was too late to complain.

65. The Respondent State also states that the Court opined that the application did not fall under Section 84 (Enforcement of Constitutional Rights) since the application did not plead any violations or likelihood of violations of their rights under Sections 70 – 83 of the Constitution.

66. It further argues that the Communication irregularly came before the African Commission as the Applicants did not exhaust local remedies regarding the alleged violations. This is because:

(a) The Complainants did not plead that their rights had been contravened or likely to be contravened by the High Court Misc. Civil Case 183 of 2002. It states that the issue of alleged violations of any of the rights claimed under the present Communication has, therefore, not been addressed by the local courts. This means that the African Commission will be acting as a court of first instance. The Respondent State argues that the Applicants should, therefore, be asked to exhaust local remedies before approaching the African Commission.

(b) The Complainants did not pursue other administrative remedies available to them. The Respondent State argues that the allegations that the Kenyan legal system has no adequate remedies to address the case of the Endorois are untrue and unsubstantiated. It argues that in matters of human rights the Kenya High Court has been willing to apply international human rights instruments to protect the rights of the individual.

67. The Respondent State further says that the Kenyan legal system has a very comprehensive description of property rights, and provides for the protection of all forms of property in the Constitution. It argues that while various international human rights instruments, including the African Charter, recognise the right to property, these instruments have a minimalist approach and do not satisfy the kind of property protected. The Respondent State asserts that the Kenyan legal system goes further than provided for in international human rights instruments.

68. The Respondent State further states that land as property is recognised under the Kenyan legal system and various methods of ownership are recognised and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land, which is also called the Group Ranches or the Trust Lands managed by the County Council, within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land. The State avers that the Land Group Act gives effect to such right of ownership, interests or other benefits of the land as may be available, under African customary law.

69. The Respondent State concludes that Trust Lands are established under the Constitution of Kenya and administered under an Act of Parliament and that the Constitution provides that Trust Land may be alienated through:

- Registration to another person other than the County Council;
- An Act of Parliament providing for the County Council to set apart an area of Trust Land.

70. Rule 118(2) of the African Commission's Rules of Procedure states that:

If the Commission has declared a Communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.

The African Commission notes the arguments advanced by the Respondent State to reopen its decision on admissibility. However, after careful consideration of the Respondent State's arguments, the African Commission is not convinced that it should reopen arguments on the Admissibility of the Communication. It therefore declines the Respondent State's request.

## SUBMISSIONS ON MERITS

### Complainants' Submission on the Merits

71. The arguments below are the submissions of the Complainants, taking also into consideration their oral testimony at the 40<sup>th</sup> Ordinary Session, all their written submissions, including letters and supporting affidavits.

72. The Complainants argue that the Endorois have always been the *bona fide* owners of the land around Lake Bogoria.<sup>55</sup> They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. The Complainants state that the Endorois community have 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 to the area.<sup>56</sup>

73. They also argue that the Endorois have always considered themselves to be a distinct community. They argue that 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 season, and turning to the Monchongoi Forest during the dry season. They claim that the Endorois have traditionally relied on beekeeping for honey and that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. They argue that Lake Bogoria is also the centre of the community's religious and traditional practices: around the Lake are found the community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. 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.

74. The Complainants argue that the Endorois believe that spirits of all former Endorois, no matter where they are buried, live on in the Lake. Annual festivals at the Lake took place with the participation of Endorois from the whole region. They say that Monchongoi forest is considered the birthplace of the Endorois people and the settlement of the first Endorois community. They also state that the Endorois community's leadership is traditionally based

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<sup>55</sup> Op cit, paras 3, 4 and 5 of this Communication, where the Complainants advance arguments to prove ownership of their land.

<sup>56</sup> Op cit, paras 3, 4 and 5.

on elders. Though under the British colonial administration, chiefs were appointed, this did not continue after Kenyan independence. They state that more recently, the community formed the Endorois Welfare Committee (EWC) to represent its interests. However, the local authorities have refused to register the EWC despite two separate efforts to do so since its creation in 1996.

75. The Complainants argue that the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Complainants argue that the African Commission has affirmed the rights of "peoples" to bring claims under the African Charter in the case of *'The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria'*, (the Ogoni Case) stating: "The African Charter in 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."<sup>57</sup> They further argue that the African Commission noted that when there is a large number of individual victims, it may be impractical for each individual Complainant to go before domestic courts. In such situations, as was with the *Ogoni case*, the African Commission can adjudicate the rights of a people as a collective. They therefore argue that the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

### **Alleged Violation of Article 8 – The Right to Practice Religion**

Article 8 of the African Charter states:

*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.*

76. The Complainants allege violation to practice their religion. They claim that the Kenyan Authorities' continual refusal to give the community a right of access to religious sites to worship freely amounts to a violation of Article 8.

77. The Complainants argue that the African 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*, they argue that the African Commission held that the practices of the Jehovah's Witnesses were protected under Article 8.<sup>58</sup> In the present Communication, the Complainants state that the Endorois' religion and 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 Mochongi Forest. After a period of excess and luxury, the Endorois believe that God

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<sup>57</sup> *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001), para. 40.

<sup>58</sup> *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 45.

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.

78. They state that 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 these locations for key cultural and religious ceremonies, such as weddings, funerals, circumcisions, and traditional initiations.<sup>59</sup>

79. The Complainants argue that the Endorois, as an indigenous group whose religion is intimately tied to the land, require special protection. Lake Bogoria, they argue, is of fundamental religious significance to all Endorois. The religious sites of the Endorois people are situated around the Lake, where the Endorois pray, and religious ceremonies are regularly connected with the Lake. Ancestors are buried near the Lake, and as stated above, they claim that Lake Bogoria is considered the spiritual home of all Endorois, living and dead. The Lake, the Complainants argue, is therefore essential to the religious practices and beliefs of the Endorois.

80. The Complainants argue that by evicting the Endorois from their land, and by refusing the Endorois community 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 violation of Article 8 of the African Charter, the Complainants argue that religious sites within the Game Reserve have not been properly demarcated and protected. They further argue that 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 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.

81. Citing the African Commission's jurisprudence in *Amnesty International v. Sudan*, the Complainants argue that the African Commission recognised the centrality of practice to religious freedom, noting that the State Party violated the authors' right to practice religion because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion.<sup>60</sup> In addition, they argue, the 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..."<sup>61</sup> They

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<sup>59</sup> See World Wildlife Federation Report, p. 18, para. 2.2.7.

<sup>60</sup> *Amnesty International and Others v. Sudan*, (1999) African Commission on Human and Peoples' Rights, Comm No. 48/90, 50/91, 52/91, 89/93 (hereinafter *Amnesty International v. Sudan*).

<sup>61</sup> See Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Article 13.

state that only through unfettered access will the Endorois be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

82. Citing the case of *Loren Laroye Riebe Star*,<sup>62</sup> the Complainants argue that the Inter-American Commission on Human Rights (IACmHR) has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the above case, the Complainants argue that the IACmHR held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes. They further state that the IACmHR came to a similar conclusion in *Dianna Ortiz v. Guatemala*. This was a case concerning a Catholic nun who fled Guatemala after state actions prevented her from freely exercising her religion.<sup>63</sup> Here, the IACmHR decided that her right to freely practice her religion had been violated, because she was denied access to the lands most significant to her.<sup>64</sup>

83. The Complainants argue that the current management of the Game Reserve has failed both to fully demarcate the sacred sites within the Reserve and to maintain sites that are known to be sacred to the Endorois.<sup>65</sup> They argue that 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. Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed. They cite "The UN Declaration on the Rights of Indigenous Peoples" which state in part 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."<sup>66</sup>

84. The Complainants also accuse the Kenyan Authorities of interfering with the Endorois' right to freely practice their religion by evicting them from their land, and then refusing to grant them free access to their sacred sites. This separation from their land, they argue, prevents the Endorois from carrying out sacred practices central to their religion.

85. They argue that even though 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

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<sup>62</sup> *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/Mexico*, (1999) Inter-American Commission on Human Rights, Report No. 49/99, Case 11.610.

<sup>63</sup> *Dianna Ortiz v. Guatemala*, (1997) Inter-American Commission on Human Rights, Report 31/96, Case No. 10.526.

<sup>64</sup> Ibid.

<sup>65</sup> World Wildlife Federation, Lake Bogoria National Reserve Draft Management Plan, July 2004

<sup>66</sup> Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Article 13.

and order, and thus there is no justification for the interference. They argue that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. In *Amnesty International v. Zambia*, the Complainants argue that the African Commission noted that it was "of the view that the 'claw-back' 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."<sup>67</sup>

### **Alleged Violation of Article 14 - The Right to Property**

Article 14 of the African Charter states:

*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.*

86. The Complainants argue that the Endorois community has a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. They argue that these property rights are derived both from Kenyan law and the African Charter, which recognise indigenous peoples' property rights over their ancestral land. The Complainants argue that the Endorois' property rights have been violated by the continuing dispossession of the Lake Bogoria land area. They argue that the impact on the community has been disproportionate to any public need or general community interest.

87. Presenting arguments that Article 14 of the Charter has been violated, the Complainants argue that for centuries the Endorois have constructed homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods around the Lake. They argue that in doing so, the Endorois exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title, but was, nevertheless, understood through mutual recognition and respect between landholders. 'Land transactions' would take place only by way of conquest of land.

88. The Complainants argue that even under colonial rule when the British Crown claimed formal possession of Endorois land, the colonial authorities recognised the Endorois' right to occupy and use the land and its resources. They argue that in law, the land was recognised as the "Endorois Location" and in practice the Endorois were left largely undisturbed during colonial rule. They aver that the Endorois community continued to hold such traditional rights, interests and benefits in the land surrounding Lake Bogoria even upon the creation of

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<sup>67</sup> *Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Communication No. 212/98 (1999).

the independent Republic of Kenya in 1963. They state that on 1 May 1963, the Endorois 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, interests 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.*

89. They argue that through centuries of living and working on the land, the Endorois were "ordinarily resident on [the] land", and their traditional form of collective ownership of the land 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). They, therefore, argue that as a result, under Kenyan law, the Baringo and Koibatek County Councils were – and indeed still are – obligated to give effect to the rights and interests of the Endorois as concerns the land.

#### *Property Rights and Indigenous Communities*

90. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which 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. They state that this situation 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.

91. In pursuing that line of reasoning, the Complainants argue that the African Commission itself has recognised the problems faced by traditional communities in the case of dispossession of their land in a Report of the Working Group on Indigenous Populations/Communities, where it states:

*[...] 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.<sup>68</sup>*

92. They argue that the jurisprudence of the African Commission notes that Article 14 includes the right to property both individually and collectively.

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<sup>68</sup> 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 28<sup>th</sup> Ordinary Session (2003).

93. Quoting the case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>69</sup> they argue that indigenous property rights have been legally recognised as being communal property rights, where the Inter-American Court of Human Rights (IActHR) 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.”<sup>70</sup>

94. The Complainants further argue that the 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. They state that national courts have recognised that right. Such decisions were made by the United Kingdom Privy Council as far back as 1921,<sup>71</sup> the Canadian Supreme Court<sup>72</sup> and the High Court of Australia.<sup>73</sup> Quoting the *Richtersveld* case, they argue that 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.<sup>74</sup>

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

96. They argue that as a result of the actions of the Kenyan Authorities, the Endorois’ property has been encroached upon, in particular by the expropriation, and in turn, the effective denial of ownership of their land. They also state that the Kenyan justice system has not provided any protection of the Endorois’ property rights. Referring to the High Court of Kenya, they argue that it stated that it could not address the issue of a community’s right to property.<sup>75</sup>

97. The Complainants argue that 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. They

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<sup>69</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>70</sup> *Ibid* at para. 148.

<sup>71</sup> See *Amodu Tijani v. Southern Nigeria*, United Kingdom Privy Council, 2 AC 399, (1921).

<sup>72</sup> *Calder et al v. Attorney-General of British Columbia*, Supreme Court of Canada, 34 D.L.R. (3d) 145 (1973).

<sup>73</sup> *Mabo v. Queensland*, High Court of Australia, 107 A.L.R. 1, (1992).

<sup>74</sup> *Alexkor Ltd v Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03, (2003).

<sup>75</sup> *Op cit*, para 12.

argue that the judgment also denies that the Endorois have rights under the trust, despite being “ordinarily resident” on the land. The Court, they claimed, stated:

*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.*

98. They argue that 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’ and as a result of their historic occupation of Lake Bogoria.

99. The Complainants cite a number of encroachments, they claim, that go to the core of the community’s identity as a ‘people’, including:

(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 its rights as beneficiary of a trust under Kenyan law;

(c) the lack of 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 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 land since eviction, including the denial of any financial benefit from the lands resources, such as that generated by tourism;

(g) the awarding of land to title to private individuals and the awarding of mining concessions on the disputed land.

100. The Complainants argue that an encroachment upon property will constitute a violation of Article 14, unless it is shown that it is in the general or public interest of the community and in accordance with the provisions of appropriate laws. They further argue that the test laid out in Article 14 of the Charter is *conjunctive*, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out

in accordance with appropriate laws and must be proportional. Quoting the Commission's own case law, the Complainants argue that: *'The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.'*<sup>76</sup> They argue that both the European Court of Human Rights<sup>77</sup> and the IAcHR have held that limitations on rights must be "proportionate and reasonable."<sup>78</sup>

101. They argue that in the present Communication, 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. They argue that the upheaval and displacement of an entire community and denial of their property rights over their ancestral lands are disproportionate to any public need served by the Game Reserve. They state that 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.

102. They further argue that the encroachment on to Endorois property rights must be carried out in accordance with "appropriate laws" in order to avoid a violation of Article 14, and that this provision must, at the minimum mean that both Kenyan law and the relevant provisions of international law were respected. They argue that 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.

103. The Complainants state that the traditional land of the Endorois is classified as Trust Land under Section 115 of the Constitution, and that this obliges the County Council to give effect to "such rights, interests or other benefits in respect of the land as may under the African customary law, for the time being in force." They argue that it created a beneficial right for the Endorois over their ancestral land.

104. They further argue that the Kenyan Authorities created the Lake Hannington Game Reserve, including the Endorois indigenous land, on 9 November 1973, but changed the name to Lake Bogoria Game Reserve in a Second Notice in 1974.<sup>79</sup> The 1974 'Notice' was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).<sup>80</sup> WAPA, the Complainants informs the African Commission, applied to Trust

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<sup>76</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, (1999), African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95, para. 42 (*The Constitutional Rights Project Case*).

<sup>77</sup> *Handyside v. United Kingdom*, No. 5493/72 (1976) Series A.24 (7 December), para. 49.

<sup>78</sup> *X & Y v. Argentina*, (1996) Report No. 38/96, Case 10.506 (15 October), para. 60.

<sup>79</sup>They state that 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 changed 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."

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. They argue that 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.<sup>81</sup> Yet, the Complainants argue, despite a lack of legal justification, the Endorois Community were informed from 1973 onwards that they would have to leave their ancestral lands.

105. Moreover, they argue, the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois' land as Trust Land. The obligation of Baringo and Koibatek County Councils to give effect to the rights and interests of the Endorois community continued. They state that the only way under Kenyan law in which the Endorois benefits under the Trust could have been dissolved is through the County Council or the President of Kenya having to "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*.<sup>82</sup>

106. The Complainants argue that as far as the Community is aware, no such notice was published. Until this is done, they argue, Trust Land encompassing Lake Bogoria cannot have been set apart and the African customary law rights of the Endorois people continue under Kenyan law.<sup>83</sup> They state that the Kenyan High Court failed to protect the Endorois' rights under the Trust to a beneficial property right, and the instruction given to the Endorois to leave their ancestral lands was also not authorised by Kenyan law.

107. They conclude that as a result, the Kenyan Authorities have acted in breach of trust and not in 'accordance with the provisions of the law' for the purposes of Article 14 of the Charter.

108. They further argue that even if Endorois land had been set apart, Kenyan law still requires the compensation of residents of lands that are set apart; that the Kenyan Constitution states that where Trust Land is set apart, the Government must ensure:

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<sup>80</sup>The Complainants state that Section 3(2) of WAPA was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.

<sup>81</sup> The Complainants argue that Section 3(20) of WAPA did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

<sup>82</sup> The Complainants argue that the process 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. They state that 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.

<sup>83</sup> They also argue that 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".

*[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.*<sup>84</sup>

109. Citing Kenyan law, the Complainants argue that the Kenyan Land Acquisition Act outlines factors that should be considered in determining the compensation to be paid,<sup>85</sup> 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: damages to the interested person caused by the removal from the land and other damages including lost earnings, relocation expenses and 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.<sup>86</sup>

110. They state that only 170 families of at least 400 families forced to leave Endorois traditional land by the Kenyan Authorities have received some form of monetary assistance. In 1986, 170 families evicted in late 1973 from their homes within the Lake Bogoria Game Reserve, each received around 3,150 Kshs. At the time, this was equivalent to approximately £30.

111. They state that 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 community.

112. They argue that the Respondent State has itself 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 Complainants argue that international law also lays down strict requirements for compensation in the case of expropriation of property.<sup>87</sup> They argue that 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 Respondent State would not have paid "prompt, full compensation" as required by the Constitution on the setting apart of the Trust Land. Therefore Kenyan law

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<sup>84</sup> Constitution of the State of Kenya, Section 117(4).

<sup>85</sup> Land Acquisition Act, "Principles on which Compensation is to be determined".

<sup>86</sup> See Kenya Land Acquisition Act, Part IV, para 29(3).

<sup>87</sup> The Complainants argue that 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. They cite the case of *Katkaridis and Others v. Greece*, European Court of Human Rights, Case No. 72/1995/578/664, (1996). The Complainants also cite Article 23(2) of the American Convention on Human Rights which 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."

has not been complied with. Moreover, the Complainants argue, 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 land. They state that *even if* the Respondent State had 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.

113. The Complainants argue that the requirement that any encroachment on property rights be in accordance with the “appropriate laws” must also include relevant international laws. They argue that the Respondent State, including the courts, has failed to apply international law on the protection of indigenous land rights, which includes the need to recognise the collective nature of land rights, to recognise historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. Instead, Kenyan law gives only limited acknowledgement to African customary law. The Trust Land system in Kenya 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. They argue that the crucial issue of recognition of the collective ownership of land by the Endorois is not acknowledged at all in 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. They state that the Endorois have also suffered significant property loss as a result of their displacement as detailed above, including the loss of cattle, and that the only “compensation” received was the eventual provision of two cattle dips, which does not compensate for the loss of the salt licks around the Lake or the substantial loss of traditional lands.

114. They conclude that 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 encroachment upon the property of the Endorois community was not in accordance with the “appropriate laws” for the purposes of Article 14 of the Charter.

### **Alleged Violations of Article 17(2) and (3) – The Right to Culture**

Article 17(2) and (3) states 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.*

115. The Complainants argue that the Endorois community’s cultural rights have been violated as a result of the 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 practice. After defining culture to mean the sum total of the material and spiritual

activities and products of a given social group that distinguishes it from other similar groups,<sup>88</sup> they argue that the protection of Article 17 can be invoked by any group that identifies with a particular culture within a state. But they argue that it does more than that. They argue that Article 17 extends to the protection of indigenous cultures and ways of life.

116. They argue that the Endorois 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. The community's attempts to access their historic land for these purposes was described as "trespassing" and met with intimidation and detention. Secondly, and separately, the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

117. With mining concessions now underway in proximity to Lake Bogoria, the Complainants argue that further threat is posed to the cultural and spiritual integrity of the ancestral land of the Endorois.

118. They also argue that unlike Articles 8 and 14 of the African Charter, Article 17 does not have an express clause allowing restrictions on the right under certain circumstances. They state that 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. However, if there is any restriction, the restriction must be proportionate to a legitimate aim and in line with principles of international law on human and peoples' rights. The Complainants argue that the principle of proportionality requires that limitations be the least restrictive possible to meet the legitimate aim.

119. The Complainants thus argue that even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State's failure to secure access by right for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim.

### **Alleged Violation of Article 21 – Rights to Free Disposition of Natural Resources**

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.*

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<sup>88</sup> The Complainants refer to Rodolfo Stavenhagen et al. eds, (2001), "Cultural Rights: A Social Science, Perspective," in *Economic, Social and Cultural Rights*, (Asbjørn Eide) 2nd ed., pp. 85, 86-88. see also Rachel Murray and Steven Wheatley (2003), 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 25, p. 222.

120. The Complainants argue that the Endorois community are 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 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.

121. They argue that in the Ogoni case the right to natural resources contained within their traditional land was vested in the indigenous people and that a people inhabiting a specific region within a state can claim the protection of Article 21.<sup>89</sup> They argue that the right to freely dispose of natural resources is of crucial importance to indigenous peoples and their way of life. They quote from the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities which 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 (Article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property.<sup>90</sup>*

122. Citing the African Charter, the Complainants argue that the Charter creates two distinct rights to both property (Article 14) and the free disposal of wealth and natural resources (Article 21). They argue that in the context of traditional land, the two rights are very closely linked and violated in similar ways. They state that Article 21 of the African Charter 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.

123. The Complainants point out that 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."<sup>91</sup>

124. They state that the Endorois as a people enjoy the protection of Article 21 with respect to Lake Bogoria and the wealth and natural resources arising from it. They argue that 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

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<sup>89</sup> The Ogoni Case (2001), paras 56-58.

<sup>90</sup> Report of the African Commission's Working Group of Experts, p. 20.

<sup>91</sup> World Bank Operational Directive 4.10.  
27<sup>th</sup> Activity Report of the ACHPR

for their cattle and therefore their pastoralist way of life. These, the Complainants argue, were natural resources from which the community benefited before their eviction from their traditional land. In addition, Article 21 also protects the right of the community to the potential wealth of their land, including tourism, rubies, and other possible resources. They state that since their eviction from Lake Bogoria, the Endorois, in violation of Article 21, have been denied unhindered access to the land and its natural resources, as 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.

### **Alleged Violation of Article 22 – The Right to Development**

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.*

125. On the issue of the right to development, the Complainants argue that the Endorois' right to development has been violated as a result of the Respondent State's 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.

126. The Complainants argue that the Endorois have seen the set of choices and capabilities open to them shrink since their eviction from the Game Reserve. They argue that 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, they were not able to pay their taxes and, as a result, the Kenyan Authorities took away more cattle.

127. They stress the point that the Endorois had no choice but to leave the Lake. They argue that this lack of choice for the community directly contradicts the guarantees of the right to development. They state that if the Kenyan Authorities had 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.

128. Citing the Ogoni Case, the Complainants argue that the African Commission has noted the importance of choice to well-being. They state that the African Commission noted that the state must respect rights holders and the "liberty of their action."<sup>92</sup> They argue that the liberty recognised by the Commission is tantamount to the choice embodied in the right to development. By recognising such liberty, they argue, the African Commission has started to embrace the right to development as a choice. Elaborating further on the right to development, they argue that the same 'liberty of action' principle can be applied to the Endorois community in the instant Communication.

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<sup>92</sup> *The Ogoni Case*, (2001), para. 46.

129. They argue that choice and self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land. They further argue that for the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner (the Endorois community) of self-determination. In that regard, the Complainants argue, 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, they say, requires the improvement and increase in capacities and choices. They argue that the Endorois have suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.

130. Citing the Human Rights Committee (HRC), they argue that the Committee addressed the effectiveness of consultation procedures in *Mazurka v. New Zealand*.<sup>93</sup> The Complainants argue that the HRC 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 New Zealand authorities had negotiated with Maori representatives and then allowed the resulting Memorandum of Understanding to be debated extensively by Maoris throughout the country.<sup>94</sup> The Complainants argue that 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 terms of the final Settlement.

131. The inadequacy of the consultations undertaken by the Kenyan Authorities, the Complainants argue, is underscored by Endorois actions after the creation of the Game Reserve. The Complainants inform the African Commission that the Endorois believed, and continue 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 into their land. They assert that in failing to understand the reasons for their permanent eviction, many families did not leave the location until 1986.

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

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<sup>93</sup> *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.

<sup>94</sup> *Apirana Mahuika et al v. New Zealand* (2000) Human Rights Committee, Comm. No. 547/1993, UN Doc. CCPR/C/70/D/547/1993, paras. 5.7-5.9.

would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.

133. They further say that the requirement of prior, informed consent has also been delineated in the case law of the IAcMHR. Referring the African Commission to the case of *Mary and Carrie Dan v. USA*, they argue that the IAcMHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.<sup>95</sup> They state that 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.”<sup>96</sup>

134. The Complainants are also of the view that the Respondent State 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. They state that such coercion has continued to the present day. The Complainants say that Mr Charles Kamuren, the Chair of the Endorois Welfare Council, had informed the African Commission of details of threats and harassment he and his family and other members of the community have received, especially when they objected to the issue of the granting of mining concessions.

135. The Complainants further argue that the Endorois have been excluded from participating or sharing in the benefits of development. They argue that the Respondent State 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 through adequate and prior consultation. They assert that the Endorois’ development as a people has suffered economically, socially and culturally. They further conclude that the Endorois community suffered a violation of Article 22 of the Charter.

### **Respondent State Submissions on Merits**

136. In response to the brief submitted by the Complainants on the Merits including the *Amicus Curiae Brief* by COHRE, the Respondent State, the Republic of Kenya, submitted its reply on the Merits of the Communication to the African Commission.

137. The arguments below are the submissions of the Respondent State, taking into consideration their oral testimony at the 40<sup>th</sup> Ordinary Session of the African Commission,

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<sup>95</sup> *Mary and Carrie Dann vs. USA* (2002), para. 136.

<sup>96</sup> *Ibid* at para. 140. 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).

all their written submissions, including letters, supporting affidavits, video evidence and the 'Respondents Submissions and Further Clarifications Arising Out of the Questions by the Commissioner During the Merits Hearing of the Communication.'

138. The Respondent State argues that most of the tribes do not reside in their ancestral lands owing to movements made due to a number of factors, including search for pastures for their livestock; search for arable land to carry out agriculture; relocation by Government to facilitate development; creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.

139. The Respondent State argues that it has instituted a programme for universal free primary education and an agricultural recovery programme, which aims at increasing the household income of the rural poor, including the Endorois. It states that it has not only initiated programmes for the equitable distribution of budgetary resources, but has also formulated an economic recovery strategy for wealth and employment creation, which seeks to eradicate poverty and secure the economic and social rights of the poor and the marginalised, including the Endorois.

140. The Respondent State argues that the land around the Lake Bogoria area is occupied by the **Tugen** tribe, which comprises four clans:

141. The **Endorois** - who have settled around **Mangot, Mochongoi** and **Tangulmbei**;

**The Lebus** - who have settled around Koibatek District;

**The Somor** - who live around Maringati, Sacho, Tenges and Kakarnet and,

**The Alor** - living around Kaborchayo, Paratapwa, Kipsalalar and Buluwesa.

142. The Respondent State argues that all the clans co-exist in one geographical area. It states that it is noteworthy that they all share the same language and names, which means that they have a lot in common. The Respondent State disputes that the Endorois are indeed a community / sub-tribe or clan on their own, and it argues that it is incumbent on the Complainants to prove that the Endorois are distinct from the other **Tugen** sub-tribe or indeed the larger Kalenjin tribe before they can proceed to make a case before the African Commission.

143. The Respondent State maintains that following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a re-settlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. It argues that this was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted. It further states that there is no such thing as *Mochongoi Forest in Kenya* and the only forest in the area is Ol Arabel Forest.

### **Decision on Merits**

144. The present Communication alleges that the Respondent State has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from

their ancestral land, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

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

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

147. Before responding to the above questions, the African Commission notes that the concepts of "peoples" and "indigenous peoples / communities" are contested terms.<sup>97</sup> As far as "indigenous peoples" are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of "peoples." The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of "people(s)."<sup>98</sup> In its Report of the Working Group of Experts on Indigenous Populations/Communities,<sup>99</sup> the African Commission describes its dilemma of defining the concept of "peoples" in the following terms:

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

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<sup>97</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on "Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3, 26 February 2007: "Mission to Kenya" from 4 to 14 December 2006, at ¶ 9.

<sup>98</sup> See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rpt. Rpt (II)), p.4.

<sup>99</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

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

149. The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of “peoples.”<sup>100</sup> It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three “generations” of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights. In that regard, the African Commission notes its own observation that the term “indigenous” is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.<sup>101</sup> In the context of the African Charter, the Working Group notes that the notion of “peoples” is closely related to collective rights.<sup>102</sup>

150. The African Commission also notes that the African Charter, in Articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives.<sup>103</sup> The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.<sup>104</sup> These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or

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<sup>100</sup> The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image .

<sup>101</sup> Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *supra* n. 47.

<sup>102</sup> *Ibid.*

<sup>103</sup> See *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*. (SERAC and CESR) or *The Ogoni case 2001*. African Commission on Human and Peoples’ Rights, Decision 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria* (27 May 2002), *Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, 2001-2002*.

<sup>104</sup> Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

*... first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists...*

*... A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.<sup>105</sup>*

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as “peoples”, viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.<sup>106</sup>

152. As far as the present matter is concerned, the African Commission is also enjoined under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter.<sup>107</sup> It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

*... that indigenous peoples are ...those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>108</sup>*

153. But this working definition should be read in conjunction with the 2003 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, which is the basis of its ‘definition’ of indigenous

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<sup>105</sup>Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

<sup>106</sup> Ibid.

<sup>107</sup> See Article 60 of the African Charter.

<sup>108</sup> Jose Martinez Cobo (1986), Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.

populations.<sup>109</sup> Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries:<sup>110</sup>

*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.*<sup>111</sup>

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/communities include pastoralist communities such as the *Endorois*,<sup>112</sup> Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. The UN Special Rapporteur further observed that the Endorois community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.<sup>113</sup>

155. In the present Communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.<sup>114</sup> The Complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that

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<sup>109</sup> The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of “first or original occupant” of territory, which is not always relevant to Africa.

<sup>110</sup> 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).

<sup>111</sup> 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).

<sup>112</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *Supra* n. 47 - Emphasis added.

<sup>113</sup> See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *supra* note 47.

<sup>114</sup> The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*. Here the Commission stated: “The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives.”

protect collective rights. The Respondent State disagrees.<sup>115</sup> The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

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

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.<sup>116</sup> The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous.<sup>117</sup> The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as 'peoples' is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.<sup>118</sup> The African Commission further notes that the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples' self-identification is an important ingredient to the concept of peoples' rights as laid out in the Charter. It agrees

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<sup>115</sup> The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the *Ogoni case*, the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

<sup>116</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

<sup>117</sup> See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 53.

<sup>118</sup> See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), U.N. Doc. A/45/18 at 79 (1991). "The Committee", in General Recommendation VIII stated that membership in a group, "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned".

that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that Self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.<sup>119</sup>

158. Furthermore, in drawing inspiration from international law on human and peoples’ rights, the African Commission notes that the IACtHR has dealt with cases of self-identification where Afro-descendent communities were living in a collective manner, and had, for over 2-3 centuries, developed an ancestral link to their land. Moreover, the way of life of these communities depended heavily on the traditional use of their land, as did their cultural and spiritual survival due to the existence of ancestral graves on these lands.<sup>120</sup>

159. The African Commission notes that while it has already accepted the existence of indigenous peoples in Africa through its WGIP reports, and through the adoption of its Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, it notes the fact that the Inter-American Court has not hesitated in granting the collective rights protection to groups beyond the “narrow/aboriginal/pre-Colombian” understanding of indigenous peoples traditionally adopted in the Americas. In that regard, the African Commission notes two relevant decisions from the IACtHR: *Moiwana v Suriname*<sup>121</sup> and *Saramaka v Suriname*. The Saramaka case is of particular relevance to the Endorois case, given the views expressed by the Respondent State during the oral hearings on the Merits.<sup>122</sup>

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<sup>119</sup> See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 100, where he argues that self-identification is a key criterion for determining who is indeed indigenous.

<sup>120</sup> Op. cit, *infra* n. 71.

<sup>121</sup> See *Moiwana Village v Suriname*, Judgment of June 15, 2005. Series C No. 124, paras 85 and 134-135. On 29 November 1986, the Suriname army attacked the N’djuka Maroon village of Moiwana and massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack fled into the surrounding forest, and then into exile or internal displacement. On 12 November 1987, almost a year later, Suriname simultaneously ratified the American Convention on Human Rights and recognized the jurisdiction of the Inter-American Court of Human Rights (IACtHR). Almost ten years later, on 27 June 1997, a petition was filed with the Inter-American Commission on Human Rights (IACmHR) and later on lodged with the IACtHR. The Commission stated that, while the attack itself predated Suriname’s ratification of the American Convention and its recognition of the Court’s jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application. In this case the IACtHR recognised collective land rights, despite being an Afro-descendent community (i.e. not a traditional pre-Colombian / ‘autochtonous’ understanding of indigenusness in the Americas).

<sup>122</sup> The Respondent State during the oral hearings at the 40<sup>th</sup> Ordinary Session in Banjul, The Gambia, stated that: (a) the Endorois do not deserve special treatment since they are no different from the other Tungen sub-group, and that (b) inclusion of some of the members of the Endorois in “modern society” has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality (c) representation of the Endorois by the Endorois Welfare Council is allegedly not legitimate. See Inter-American Commission on Human Rights (IACHmR), Report No.9/06 *The Twelve Saramaka Clans (Los) v Suriname* (March 2, 2006) ; Inter-American Court of Human Rights (IACtHR), *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007) at paras 80-84.

160. In the Saramaka case, according to the evidence submitted by the Complainants, the Saramaka people are one of six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century. The IACtHR considered that the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

161. Like the State of Suriname, the Respondent State (Kenya) in the instant Communication is arguing that the inclusion of the Endorois in 'modern society' has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct group that is very different from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe. That is, the Respondent State is questioning whether the Endorois can be defined in a way that takes into account the different degrees to which various members of the Endorois community adhere to traditional laws, customs, and economy, particularly those living within the Lake Bogoria area. In the Saramaka case, the IACtHR disagreed with the State of Suriname that the Saramaka could not be considered a distinct group of people just because a few members do not identify with the larger group. In the instant case, the African Commission, from all the evidence submitted to it, is satisfied that the Endorois can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the **Tugen** sub-tribe or indeed the larger Kalenjin tribe.

162. The IACtHR also noted that the fact that some individual members of the Saramaka community may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group, nor its communal use and enjoyment of their property. In the case of the Endorois, the African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.

*From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of 'distinctiveness.' The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that 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.*

### **Alleged Violation of Article 8**

163. The Complainants allege that Endorois' right to freely practice their religion has been violated by the Respondent State's action of evicting the Endorois from their land, and refusing them access to Lake Bogoria and other surrounding religious sites. They further allege that the Respondent State's has interfered with the Endorois' ability to practice and worship as their faith dictates; that religious sites within the Game Reserve have not been properly demarcated and protected and since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. They claim that access as of right for religious rituals - such as circumcisions, marital rituals, and initiation rights - has been denied the community. Similarly, they state that 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.

164. The Complainants further argue that the Endorois have neither 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. They argue that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under international law. They point out that the term "religion" in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. They argue that the HRC states 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.*<sup>123</sup>

To rebut the allegation of a violation of Article 8 of the African Charter, the Respondent State argues that the Complainants have failed to show that the action of the Government to gazette the Game Reserve for purposes of conserving the environment and wildlife and to a great extent the Complainants' cultural grounds fails the test of the constitution of reasonableness and justifiability. It argues that through the gazetting of various areas as protected areas, National Parks or Game Reserves or falling under the National Museums, it has been possible to conserve some of the areas which are threatened by encroachment due to modernisation. The Respondent State argues that some of these areas include 'Kayas' (forests used as religious ritual grounds by communities from the coast province of Kenya) which has been highly effective while the communities have continued to access these grounds without fear of encroachment.

165. Before deciding whether the Respondent State has indeed violated Article 8 of the Charter, the Commission wishes to establish whether the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law.

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<sup>123</sup> 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.

In that regard, the African Commission notes the observation of the HRC in paragraph 164 (above). It is of the view that freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb.<sup>124</sup> The African Commission notes its own observation in *Free Legal Assistance Group v. Zaire*, that it has held 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 ceremonies in accordance with the precepts of one's religion or belief.<sup>125</sup>

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

167. It further notes that one of the beliefs of the Endorois is that their Great Ancestor, *Dorios*, came from the Heavens and settled in the Mochongoi Forest.<sup>126</sup> It notes the Complainants' arguments, which have not been contested by the Respondent State, that the Endorois believe that each season the water of the Lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake.

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

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

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

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<sup>124</sup> 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.

<sup>125</sup> See *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. See also the 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.

<sup>126</sup> See paras 73 and 74.

171. It is worth noting that in *Amnesty International v. Sudan*, the African Commission recognised the centrality of practice to religious freedom.<sup>127</sup> The African Commission noted that the State Party violated the authors' right to practice their religion, because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. The African Commission also notes the case of *Loren Laroye Riebe Star* from the IACmHR, which determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. It notes that the Court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.<sup>128</sup>

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.<sup>129</sup> The *raison d'être* for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the Respondent State to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v. Sudan*, the African Commission stated that a wide-ranging ban on Christian associations was "disproportionate to the measures required by the Government to maintain public order, security, and safety." The African Commission further went on to state that any restrictions placed on the rights to practice one's religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.<sup>130</sup>

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

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<sup>127</sup> *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*).

<sup>128</sup> *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/Mexico*, Inter-American Commission on Human Rights, Report No. 49/99, Case 11.610, (1999). *Dianna Ortiz v. Guatemala*, Inter-American Commission on Human Rights, Report 31/96, Case 10.526, (1997).

<sup>129</sup> Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 (1994), 35, para. 8.

<sup>130</sup> The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v. Zambia*, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v. Sudan* (1999), paras. 82 and 80.

Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

*The African Commission therefore finds against the Respondent State a violation of Article 8 of the African Charter. The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and 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.*

*The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in Amnesty International v. Zambia, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter."<sup>131</sup>*

#### **Alleged Violation of Article 14**

174. The Complainants argue that the Endorois community have a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. The Respondent State denies the allegation.

175. The Respondent State further argues that the land in question fell under the definition of Trust Land and was administered by the Baringo County Council for the benefit of all the people who were ordinarily resident in their jurisdiction which comprised mainly the four Tungen tribes. It argues that Trust Land is not only established under the Constitution of Kenya and administered under an Act of Parliament, but that the Constitution of Kenya provides that Trust Land may be alienated through registration to another person other than the County Council; an Act of Parliament providing for the County Council to set apart an area of Trust Land vested in it for use and occupation of public body or authority for public purposes; person or persons or purposes which, in the opinion of the Council, is likely to benefit the persons ordinarily resident in that area; by the President in consultation with the Council. It argues that Trust Land may be set apart as government land for government purposes or private land.

176. The Respondent State argues that when Trust Land is set apart for whatever purpose, the interest or other benefits in respect of that land that was previously vested in any tribe, group, family or individual under African customary law are extinguished. It, however, states that the Constitution and the Trust Land Act provide for adequate and prompt compensation for all residents. The Respondent State, in both its oral and written submissions, is arguing that the Trust Land Act provides a comprehensive procedure for assessment of compensation where the Endorois should have applied to the District Commissioner and lodged an appeal if they were dissatisfied. The Respondent State further

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<sup>131</sup>*Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Communication No. 212/98 (1999).

argues that the Endorois have a right of access to the High Court of Kenya by the Constitution to determine whether their rights have been violated.

177. According to the Respondent State, with the creation of more local authorities, the land in question now comprises parts of Baringo and Koibatek County Councils, and through Gazette Notice No 239 of 1973, the land was first set apart as Lake Hannington Game Reserve, which was later revoked by Gazette Notice No 270 of 1974, where the Game Reserve was renamed Lake Baringo Game Reserve, and the boundaries and purpose of setting apart this area specified in the Gazette Notices as required by the Trust Land Act. It argues that the Government offered adequate and prompt compensation to the affected people, “a fact which the Applicants agree with.”<sup>132</sup>

178. In its oral and written testimonies, the Respondent State argues that the gazettelement of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation. The Respondent State also argues that National Reserves unlike National Parks, where the Act expressly excludes human interference save for instances where one has got authorisation, are subject to agreements as to restrictions or conditions relating to the provisions of the area covered by the reserve. It also states that communities living around the National Reserves *have in some instances* been allowed to drive their cattle to the Reserve for the purposes of grazing, so long as they do not cause harm to the environment and the natural habitats of the wild animals. It states that with the establishment of a National Reserve particularly from Trust Land, it is apparent that the community’s right of access is not extinguished, but rather its propriety right as recognised under the law (that is, the right to deal with property as it pleases) is the one which is minimised and hence the requirement to compensate the affected people.

179. Rebutting the claim of the Complainants that the Kenyan Authorities prevented them from occupying their other ancestral land, Muchongoi Forest, the Respondent State argued that the land in question was gazetted as a forest in 1941, by the name of Ol Arabel Forest, which means that the land ceased being communal land by virtue of the gazettelement. It states that some excisions have been made from the Ol Arabel Forest to create the Muchongoi Settlement Scheme to settle members of the four Tungen tribes of the Baringo district, one of which is the Endorois.

180. The Respondent State also argues that it has also gone a step further to formulate “Rules”, namely the “The Forests (Tugen-Kamasia) Rules” to enable the inhabitants of the Baringo District, including the Endorois to enjoy some privileges through access to the Ol Arabel Forest for some purposes. The Rules, it states, allow the community to collect dead wood for firewood, pick wild berries and fruits, take or collect the bark of dead trees for thatching beehives, cut and remove creepers and lianes for building purposes, take stock, including goats, to such watering places within the Central Forests as may be approved by the District Commissioner in consultation with the Forest Officer, enter the Forest for the purpose of holding customary ceremonies and rites, but no damage shall be done to any

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<sup>132</sup> See para 3.3.3 of the Respondent’s Merits brief.

tree, graze sheep within the Forest, graze cattle for specified periods during the dry season with the written permission of the District Commissioner or the Forest Officer and to retain or construct huts within the Forest by approved forest cultivators among others.

181. The Respondent State argues further that the above Rules ensure that the livelihoods of the community are not compromised by the gazettelement, in the sense that the people could obtain food and building materials, as well as run some economic activities such as beekeeping and grazing livestock in the Forest. They also say they were at liberty to practice their religion and culture. Further, it states that the due process of law regarding compensation was followed at the time of the said gazettelement.

182. Regarding the issue of dispossession of ancestral land in the alleged Mochongoi Forest, the Respondent State did not address it, as it argues that it was not part of the matters addressed by the High Court case, and therefore the African Commission would be acting as a tribunal of first instance if it did so.

183. The Respondent State does not dispute that the Lake Bogoria area of the Baringo and Koibatek Administrative Districts is the Endorois' ancestral land. One of the issues the Respondent State is disputing is whether the Endorois are indeed a distinct Community. That question has already been answered supra. In para 1.1.6 of the Respondent State Merits brief, the State said: "Following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a resettlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. *This was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted.*"<sup>133</sup>

184. It is thus clear that the land surrounding Lake Bogoria is the traditional land of the Endorois people. In para 1 of the Merits brief, submitted by the Complainants, they write: "The Endorois are a community of approximately 60, 000 people who, from time immemorial, have lived in the *Lake Bogoria area* of the Baringo and Koibatek Administrative Districts."<sup>134</sup> In para 47, the Complainants also state that: "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 land to sustain their livelihoods." The Complainants argue that apart from a confrontation with the Masai over the Lake Bogoria region three hundred years ago, the Endorois have been accepted by all neighbouring tribes, including the British Crown, as *bona fide* owners of their land. The Respondent State does not challenge those statements of the Complainants. The only conclusion that could be reached is that the Endorois community has a right to property with regard to its ancestral land, the possessions attached to it, and their animals.

185. Two issues that should be disposed of before going into the more substantive questions of whether the Respondent State has violated Article 14 are a determination of what is a 'property right' (within the context of indigenous populations) that accords with African and international law, and whether special measures are needed to protect such

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<sup>133</sup> Italics for emphasis.

<sup>134</sup> Italics for emphasis.

rights, if they exist and whether Endorois' land has been encroached upon by the Respondent State. The Complainants argue that "property rights" have an autonomous meaning under international human rights law, which supersedes national legal definitions. They state that both the European Court of Human Rights (ECHR) and IActHR have examined the specific facts of individual situations to determine what should be classified as 'property rights', particularly for displaced persons, instead of limiting themselves to formal requirements in national law.<sup>135</sup>

186. To determine that question, the African Commission will look, first, at its own jurisprudence and then at international case law. In [Malawi African Association and Others v. Mauritania](#), land was considered 'property' for the purposes of Article 14 of the Charter.<sup>136</sup> The African Commission in the *Ogoni* case also found that the 'right to property' includes not only the right to have access to one's property and not to have one's property invaded or encroached upon,<sup>137</sup> but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.<sup>138</sup> The African Commission also notes that the ECHR have recognised that 'property rights' could also include the economic resources and rights over the common land of the applicants.<sup>139</sup>

187. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of "formal" title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.<sup>140</sup> The African Commission is of the view that the first step in the protection of traditional African communities is the

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<sup>135</sup> 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.

<sup>136</sup> [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*, 13<sup>th</sup> Activity Report, para. 128.

<sup>137</sup> *The Ogoni Case* (2001), para. 54.

<sup>138</sup> Communication No. 225/98 v Nigeria, 14<sup>th</sup> Annual Report, para. 52.

<sup>139</sup> See *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

<sup>140</sup> See Report of the African Commission's Working Group of Experts, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> Ordinary Session (2005).

acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.

188. The case of *Doğan and others v Turkey*<sup>141</sup> is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that:

*[T]he notion 'possessions' 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.*<sup>142</sup>

189. Although they did not have registered property, they either had their own houses constructed on the land of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further noted that the Applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.

190. The African Commission also notes the observation of the IActHR in the seminal case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>143</sup> that the Inter-American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property and argued that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.

191. In the opinion of the African Commission, the Respondent State has an obligation under Article 14 of the African Charter not only to *respect* the 'right to property', but also to *protect* that right. In 'the *Mauritania Cases*',<sup>144</sup> the African Commission concluded that the confiscation and pillaging of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14. Similarly, in *The Ogoni case 2001* <sup>145</sup> the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their

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<sup>141</sup> *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

<sup>142</sup> *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para. 138-139.

<sup>143</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>144</sup> African Commission on Human and Peoples' Rights, Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

<sup>145</sup> African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, done at the 31st Ordinary Session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa.

homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.<sup>146</sup>

192. The Saramaka case also sets out how the failure to recognise an indigenous/tribal group becomes a violation of the 'right to property.'<sup>147</sup> In its analysis of whether the State of Suriname had adopted an appropriate framework to give domestic legal effect to the 'right to property', the IACtHR addressed the following issues:

*This controversy over who actually represents the Saramaka people is precisely a natural consequence of the lack of recognition of their juridical personality.*<sup>148</sup>

193. In the Saramaka case, the State of Suriname did not recognise that the Saramaka people can enjoy and exercise property rights as a community. The Court observed that other communities in Suriname have been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered they did not have the legal capacity necessary to request such protection. This, the Court opined, placed the Saramaka people in a vulnerable situation where individual 'property rights' may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their 'property rights' recognised under Article 21 of the Convention.

194. As is in the instant case before the African Commission, the State of Suriname acknowledged that its domestic legal framework did not recognise the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. It also went on to provide reasons, as to why it should not be held accountable for giving effect to the Saramaka claims to a right to property, for example because the land tenure system of the Saramaka people, particularly regarding who owns the land, presents a practical problem for state recognition of their right to communal property. The IACtHR rejected all of the State's arguments. In the present Communication, the High Court of Kenya similarly dismissed any claims based on historic occupation and cultural rights.<sup>149</sup>

195. The IACtHR went further to say that, in any case, the alleged lack of clarity as to the land tenure system of the Saramakas should not present an insurmountable obstacle for the State, which has the duty to consult with the members of the Saramaka people and seek

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<sup>146</sup> African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights - Nigeria (27 May 2002) (citing Committee on Economic, Social and Cultural Rights, General Comment No. 7, The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions, para. 4, U.N. Doc. E/C.12/1997/4 (1997)).

<sup>147</sup> Inter- American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

<sup>148</sup> Inter- American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

<sup>149</sup> *Op. cit.*, paras 11 and 12.

clarification of this issue, in order to comply with its obligations under Article 21 of the Convention.

196. In the present Communication, the Respondent State (the Kenyan Government) during the oral hearings argued that legislation or special treatment in favour of the Endorois might be perceived as being discriminatory. The African Commission rejects that view. The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance. The African Commission shares the Respondent State's concern over the difficulty involved; nevertheless, the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law. Besides, it is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.<sup>150</sup> Legislation that recognises said differences is therefore not necessarily discriminatory.

197. Again drawing on the *Saramaka v Suriname* case, which confirms earlier jurisprudence of the *Moiwana v Suriname*, *Yakye Axa v Paraguay*<sup>151</sup>, *Sawhoyamaxa v Paraguay*<sup>152</sup>, and *Mayagna Awas Tingni v Nicaragua*;<sup>153</sup> the *Saramaka* case has held that *Special measures of protection are owed to members of the tribal community to guarantee the full exercise of their rights*. The IACtHR stated that based on Article 1(1) of the Convention, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of 'property rights' in order to safeguard their physical and cultural survival.

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<sup>150</sup> See *ECHR, Connors v. The United Kingdom*, (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way of providing equality under the law). See also IACmHR Report on the Situation of Human Rights in Ecuador, (stating that "within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival - a right protected in a range of international instruments and conventions"). See also U.N. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4 (stating that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"), and UNCERD, General Recommendation No. 23, Rights of indigenous peoples, para. 4 (calling upon States to take certain measures in order to recognise and ensure the rights of indigenous peoples).

<sup>151</sup> *Indigenous Community Yakye Axa v. Paraguay* 17 June 2005, Inter American Court of Human Rights.

<sup>152</sup> Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006 Inter-American Court of Human Rights.

<sup>153</sup> See *The Mayagna Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights, (2001) hereinafter the *Awas Tingni Case 2001*.

198. Other sources of international law have similarly declared that such special measures are necessary. In the *Moiwana* case, the IACtHR determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had “a profound and all-encompassing relationship to their ancestral lands” that was centred, not “on the individual, but rather on the community as a whole.” This special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal Moiwana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention.

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

200. The African Commission also notes the views expressed by the Committee on Economic, Social and Cultural Rights which has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its ‘General Comment No. 4’ it states that “instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the *most exceptional circumstances*, and in accordance with the relevant principles of international law.”<sup>154</sup> This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross violations of human rights, and in particular the right to adequate housing.<sup>155</sup> The African Commission also notes General Comment No. 7 requiring States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.<sup>156</sup>

201. The African Commission is also inspired by the European Commission of Human Rights. Article 1 of Protocol 1 to the European Convention states:

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<sup>154</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

<sup>155</sup> See, Commission on Human Rights resolution 1993/77, UN Doc. E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28 (2004).

<sup>156</sup> See Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para. 14, U.N. Doc. E/1998/22, annex IV at 113 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

*Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*<sup>157</sup>

202. The African Commission also refers to *Akdivar and Others v. Turkey*. The European Court held that forced evictions constitute a violation of Article 1 of Protocol 1 to the European Convention. *Akdivar and Others* involved the destruction of housing in the context of the ongoing conflict between the Government of Turkey and Kurdish separatist forces. The petitioners were forcibly evicted from their properties, which were subsequently set on fire and destroyed. It was unclear which party to the conflict was responsible. Nonetheless, the European Court held that the Government of Turkey violated both Article 8 of the European Convention and Article 1 of Protocol 1 to the European Convention because it has a duty to *both respect and protect* the rights enshrined in the European Convention and its Protocols.

203. In the instant case, the Respondent State sets out the conditions when Trust Land is set apart for whatever purpose.<sup>158</sup>

204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.<sup>159</sup>

205. The Inter-American Court jurisprudence also makes it clear that mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples' effective protection.<sup>160</sup>

206. In the *Saramaka* case, the Court held that the State's legal framework merely grants the members of the *Saramaka* people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its

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<sup>157</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, 213 U.N.T.S. 262, entered into force 18 May 1954.

<sup>158</sup> See 3.2.0 of the Respondent State Brief on the Merits. See also para 178 of this judgment where the Respondent State argues that the community's rights of access is not extinguished.

<sup>159</sup> See Articles 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples.

<sup>160</sup> Para 110 of the *Saramaka* case.

legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples. The situation of the Endorois is not different. The Respondent State simply wants to grant them privileges such as restricted access to ceremonial sites. This, in the opinion of the Commission, falls below internationally recognised norms. The Respondent State must grant title to their territory in order to guarantee its permanent use and enjoyment.

207. The African Commission notes that that Articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term “occupied or otherwise used.” This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of *Awas Tingni v Nicaragua*. In the current leading international case on this issue, *The Mayagna (Sumo) Awas Tingni v Nicaragua*,<sup>161</sup> the IActHR 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.”<sup>162</sup> It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.<sup>163</sup>

208. The African Commission also notes that in the case of *Sawhoyamaya v Paraguay*, the IActHR, acting within the scope of its adjudicatory jurisdiction, decided on indigenous land possession in three different situations, viz: in the *Case of the Mayagna (Sumo) Awas Tingni Community*, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration;<sup>164</sup> in the *Case of the Moiwana Community*, the Court considered that the members of the N’djuka people were the “legitimate owners of their traditional lands”, although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them, though in this case, the traditional lands were not occupied by third parties.<sup>165</sup> Finally, in the *Case of the Indigenous Community Yakye Axa*, the Court considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualise those lands and transfer them on a no consideration basis.<sup>166</sup>

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to

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<sup>161</sup> *The Awas Tingni Case* (2001), paras. 140(b) and 151.

<sup>162</sup> *Ibid*, at para. 148.

<sup>163</sup> *Ibid*, at para. 151.

<sup>164</sup> See case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 184, para. 151.

<sup>165</sup> See case of the Moiwana Community. Judgment of 15 June 2005. Series C No. 124. para. 134.

<sup>166</sup> See case of the Indigenous Community Yakye Axa, *supra* note 1, paras. 124-131.

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

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

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

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

*Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.<sup>167</sup>*

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<sup>167</sup> Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples' Right to Land and Natural Resources' in Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

213. Limitations on rights, such as the limitation allowed in Article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that “... the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.”<sup>168</sup> The African Commission also notes the decisive case of *Handyside v. United Kingdom*, where the ECHR stated that any condition or restriction imposed upon a right must be “proportionate to the legitimate aim pursued.”<sup>169</sup>

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

215. It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the Government in a way that respected their property rights, even if a Game Reserve was being created. In that regard, the African Commission notes its own conclusion in the *Constitutional Rights Project Case*, where it says that “a limitation may not erode a right such that the right itself becomes *illusory*.”<sup>170</sup> At the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right. The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to “the general interest of the community” or a “public need.”

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

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<sup>168</sup>*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*).

<sup>169</sup> *Handyside v. United Kingdom*, No. 5493/72, Series A.24 (7 December 1976), para. 49.

<sup>170</sup> *The Constitutional Rights Project Case*, para. 42.

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

218. The African Commission also notes that the 'disproportionate' nature of an encroachment on indigenous lands – therefore falling short of the test set out by the provisions of Article 14 of the African Charter – is to be considered an even greater violation of Article 14, when the displacement at hand was undertaken by force. Forced evictions, by their very definition, cannot be deemed to satisfy Article 14 of the Charter's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. The grave nature of forced evictions could amount to a gross violation of human rights. Indeed, the United Nations Commission on Human Rights, in Resolutions 1993/77 and 2004/28, has reaffirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing."<sup>171</sup> Where such removal was forced, this would in itself suggest that the 'proportionality' test has not been satisfied.

219. With respect to the 'in accordance with the law' test, the Respondent State should also be able to show that the removal of the Endorois was not only in the public interest, but their removal satisfied both Kenyan and international law. If it is settled that there was a trust in favour of the Endorois, was it legally extinguished? If it was, how was it satisfied? Was the community adequately compensated? Also, did the relevant legislation creating the Game Reserve, expressly required the removal of the Endorois from their land?

220. The African Commission notes that the Respondent State does not contest the claim that the traditional lands of the Endorois people are classified as Trust Land. In fact S. 115 of the Kenyan Constitution gives effect to that claim. In the opinion of the African Commission it created a beneficial right for the Endorois over their ancestral land. This should have meant that the County Council should give effect to such rights, interest or other benefits in respect of the land.

221. The Complainants argue that the Respondent State created the Lake Hannington Game Reserve, including the Endorois indigenous lands, on 9 November 1973. The name was changed to Lake Bogoria Game Reserve in a second notice in 1974.<sup>172</sup> The 1974 notice was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).<sup>173</sup> The Complainants argue that WAPA applied to Trust Land as it

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<sup>171</sup> See United Nations Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/1993/RES/77 and United Nations Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

<sup>172</sup> 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."

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.

222. They further argue that 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.<sup>174</sup> The Complainants argue that despite no clear legal order asking them to relocate to another land, the Endorois community was informed from 1973 onwards that they would have to leave their ancestral lands.

223. In rebuttal, the Respondent State argues that the Constitution of Kenya provides that Trust Land may be alienated. It also states that the “Government offered adequate and prompt compensation to the affected people...”<sup>175</sup> As regards the Complainants’ claim that the Respondent State prevented the Endorois community from accessing their other ancestral lands, Muchongoi forest, the Respondent State argues that the land in question was gazetted in 1941 by the name of Ol Arabel Forest with the implication that the land ceased being communal by virtue of the gazettelement.

224. The African Commission agrees that WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.<sup>176</sup> Additionally, the Respondent State has not been able to prove without doubt that the eviction of the Endorois community satisfied both Kenyan and international law. The African Commission is not convinced that the whole process of removing the Endorois from their ancestral land satisfied the very stringent international law provisions. Furthermore, the mere gazetting of Trust Land is not sufficient to legally extinguish the trust. WAPA should have required that the land be taken out of the Trust before a Game Reserve could be declared over that land. This means that the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois 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. That also has to be read in conjunction with the concept of adequate compensation. The African Commission is in agreement with the Complainants that the only way under Kenyan law in which Endorois benefit 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.<sup>177</sup>

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<sup>173</sup> 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.

<sup>174</sup> See section 3(20) of WAPA, which did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

<sup>175</sup> See para 3.3.3 of the Respondent State’s Merits brief.

<sup>176</sup> See note 125.

<sup>177</sup> 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.

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

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

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

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

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

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

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

232. The African Commission notes the observations of the United Nations Declaration on the Rights of Indigenous Peoples, which, amongst other provisions for restitutions and compensations, states:

*Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.*<sup>178</sup>

233. In the case of *Yakye Axa v Paraguay* the Court established that any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations.<sup>179</sup> To this end, Article 63(1) of the American Convention establishes that:

*[i]f the Court finds that there has been a violation of a right or freedom protected by th[e] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*

234. The Court said that once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them. However, as the Court has pointed out, when a State is unable, **on objective and reasonable grounds**, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.<sup>180</sup> This was not the case in respect of the Endorois. The land given them is not of equal quality.

235. The reasons of the Government in the instant Communication are questionable for several reasons including: (a) the contested land is the site of a conservation area, and the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work

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<sup>178</sup> Declaration on the Rights of Indigenous Peoples, preambular para. 5, E/CN.4/Sub.2/1994/2/Add.1 (1994).

<sup>179</sup> See *Case of Huilca Tecse*. Judgment of 3 March 2005. Series C No. 121, para. 86, and *Case of the Serrano Cruz Sisters*, para. 133.

<sup>180</sup> See case of the Indigenous Community *Yakye Axa*, para. 149.

begun by the Government; (c) no other community have settled on the land in question, and even if that is the case, the Respondent State is obliged to rectify that situation,<sup>181</sup> (d) the land has not been spoliated and is thus inhabitable; (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law.

236. It seems also to the African Commission that the amount of £30 as compensation for one's ancestral home land flies in the face of common sense and fairness.

237. The African Commission notes the detailed recommendations regarding compensation payable to displaced or evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>182</sup> These recommendations, which have been considered and applied by the European Court of Human Rights,<sup>183</sup> 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. These recommendations could be followed if the Respondent State is interested in giving a fair compensation to the Endorois.

238. *Taking all the submissions of both parties, the African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law. Accordingly, the African Commission finds for the Complainants that the Endorois as a distinct people have suffered a violation of Article 14 of the Charter.*

### **Alleged Violation of Article 17 (2) and (3)**

239. The Complainants allege that the Endorois' cultural rights have been violated on two counts: first, the community has faced systematic restrictions on access to cultural sites

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<sup>181</sup> Indeed, at para 140 of the *Sawhoyamaxa Indigenous Community v. Paraguay* case, the Inter-American Court stresses that: "Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.

<sup>182</sup> 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)

<sup>183</sup> *Doğan v. Turkey* (2004), para. 154.

and, second, that the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

240. The Respondent State denies the allegation claiming that access to the forest areas was always permitted, subject to administrative procedures. The Respondent State also submits that in some instances some communities have allowed political issues to be disguised as cultural practices and in the process they endanger the peaceful coexistence with other communities. The Respondent State does not substantiate who these “communities” or what these “political issues to be disguised as cultural practices” are.

241. The African Commission is of the view that protecting human rights 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 and synagogues. Both the Complainants and the Respondent State seem to agree on that. It notes that Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics.<sup>184</sup>

242. The African Commission notes that the preamble of the African Charter acknowledges that “civil and political rights cannot be dissociated from economic, social and cultural rights ... social, cultural rights are a guarantee for the enjoyment of civil and political rights”, ideas which influenced the 1976 African Cultural Charter which in its preamble highlights “the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas.<sup>185</sup> Article 3 of the same Charter states that culture is a source of mutual enrichment for various communities.<sup>186</sup>

243. This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. 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

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<sup>184</sup> Rachel Murray and Steven Wheatley (2003) ‘Groups and the African Charter on Human and Peoples’ Rights’, *Human Rights Quarterly*, 25, p. 224.

<sup>185</sup> African Cultural Charter (1976), para 6 of the Preamble.

<sup>186</sup> Ibid. Article 3.

positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>187</sup>

244. The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one’s ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is “a major human rights problem for indigenous peoples.”<sup>188</sup> It further notes that a Report from the Working Group has also emphasised that dispossession “threatens the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities.”<sup>189</sup>

245. In the case of indigenous communities in Kenya, the African Commission notes the critical ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya’ that “their *livelihoods and cultures have been traditionally discriminated against* and their lack of legal recognition and empowerment reflects their social, political and economic marginalization.”<sup>190</sup> He also said that the principal human rights issues they face “relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservationist policies have aggravated the violation of their economic, social and *cultural rights*.”<sup>191</sup>

246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted Article 17(2) as requiring governments to take measures “aimed at the conservation, development and diffusion of culture,” such as promoting “cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; . . . promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.”<sup>192</sup>

247. 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 dominant groups and to large scale*

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<sup>187</sup> Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, (1994). Para. 7.

<sup>188</sup> Report of the African Commission’s Working Group on Indigenous Populations/Committees (2003), p.20.

<sup>189</sup> Ibid. p.20.

<sup>190</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *supra* n. 47.

<sup>191</sup> Ibid. Italics added for emphasis.

<sup>192</sup> *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.*

*development initiatives that tend to destroy their lives and cultures rather than improve their situation.*<sup>193</sup>

248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,<sup>194</sup> but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.<sup>195</sup>

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

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

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<sup>193</sup> Report of the African Commission's Working Group on Indigenous Populations/Committees (2005), p. 20. [Emphasis added]

<sup>194</sup> See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, Article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, Article 15(3).

<sup>195</sup> See statement by Mr. Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item "Indigenous Issues" New York, 20 October 2008.

251. *By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter.*

### **Alleged Violation of Article 21**

252. The Complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve.

253. The Respondent State denies the allegation. It argues that it is of the view that the Complainants have immensely benefited from the tourism and mineral prospecting activities, noting for example:

a) Proceeds from the Game Reserve have been utilised to finance a number of projects in the area, such as schools, health facilities, wells and roads.

b) Since the discovery of ruby minerals in the Weseges area near Lake Bogoria, three companies have been issued with prospecting licences, noting that two out of three companies belong to the community, including the Endorois. In addition, the company which does not consist of the locals, namely Corby Ltd, entered into an agreement with the community, binding itself to deliver some benefits to the latter in terms of supporting community projects. It states that it is evident (from the minutes of a meeting of the community and the company) that the company is ready to undertake a project in the form of an access road to the prospecting site for the community's and prospecting company's use.

c) The Respondent State also argues that the mineral prospecting activities are taking place outside the Lake Bogoria Game Reserve, which means that the land is not the subject matter of the Applicants' complaint.

254. The Respondent State also argue that the community has been holding consultations with Corby Ltd., as evidence by the agreement between them is a clear manifestation of the extent to which the former participants in the decisions touch on the exploitation of the natural resources and the sharing of the benefits emanating therefrom.

255. The African Commission notes that in *The Ogoni case* the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under Article 21 of the African Charter.<sup>196</sup> The Respondent State does not give enough evidence to substantiate the claim that the Complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the Game Reserve have been used to finance a lot of useful projects, 'a fact' that the Complainants do not contest. The African

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<sup>196</sup> The Ogoni Case (2001), paras 56-58.

Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter's Article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (Article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The "test" in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

257. In the *Saramaka* case and Inter-American case law, an issue that flows from the IActHR assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the *Saramaka* case both the State and the members of the Saramaka people claim a right to these natural resources. The Saramakas claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under Article 21 of the Convention. The State argued that all rights to land, particularly its subsoil natural resources, are vested in the State, which it can freely dispose of these resources through concessions to third parties.

258. The IActHR addressed this complex issue in the following order: first, the right of the members of the Saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory; second, the State's grant of concessions for the exploration and extraction of natural resources, including subsoil resources found within Saramaka territory; and finally, the fulfilment of international law guarantees regarding the exploration extraction concessions already issued by the State.

259. First, the IActHR analysed whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory. The State did not contest that the Saramakas have traditionally used and occupied certain lands for centuries, or that the Saramakas have an "interest" in the territory they have traditionally used in accordance with their customs. The controversy was the nature and scope of the said interest. In accordance with Suriname's legal and constitutional framework, the Saramakas do not have property rights *per se*, but rather merely a privilege or permission to use and occupy the land in question. According to Article 41 of the Constitution of Suriname, and Article 2 of its 1986 Mining Decree, ownership rights of all natural resources are vested in the State. For this reason, the State claimed to have an inalienable right to the exploration and exploitation of those resources. On the other hand, the customary laws of the Saramaka people give them a right over all natural resources within its traditional territory.

260. The IActHR held that the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and use of the natural resources in their territory that are related to their culture and are found therein, and that Article 21 of the Inter-American Convention protects their right to such natural resources. The Court further said that in accordance with their previous jurisprudence as stated in the *Yakye Axa* and *Sawhoyamaxa* cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same

reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake;<sup>197</sup> hence, the Court opined, the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. It said that the aim and purpose of special measures required on behalf of members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states.

261. But the Court further said that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 (of the American Convention) are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.<sup>198</sup>

262. In the *Saramaka* case, the Court had to determine which natural resources found on and within the *Saramaka* people's territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention. This has direct relevance to the matter in front of the African Commission, given the ruby mining concessions which were taking place on lands, both ancestral and adjacent to *Endorois* ancestral land, and which the Complainants allege poisoned the only remaining water source to which the *Endorois* had access.

263. The African Commission notes the opinion of the IActHR in the *Saramaka* case as regards the issue of permissible limitations. The State of Suriname had argued that, should the Court recognise a right of the members of the *Saramaka* people to the natural resources found within traditionally owned lands, this right must be limited to those resources traditionally used for their subsistence, cultural and religious activities. According to the State, the alleged land rights of the *Saramakas* would not include any interests on forests or minerals beyond what the tribe traditionally possesses and uses for subsistence (agriculture, hunting, fishing etc), and the religious and cultural needs of its people.

264. The Court opined that while it is true that all exploration and extraction activity in the *Saramaka* territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the *Saramakas*, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within *Saramaka* territory. The Court observed that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the *Saramaka* community and, consequently, their members. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the *Saramakas*.

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<sup>197</sup> See case of the *Indigenous Community Yakye Axa, and the Case of the Indigenous Sawhoyamaya Community*.

<sup>198</sup> *Ibid.*

265. Nevertheless, the Court said that protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. The Court also recognised the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival but that these property rights, like many other rights recognised in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the “law may subordinate [the] use and enjoyment [of property] to the interest of society.” *But the Court also said that it had previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.*<sup>199</sup>

266. The Saramaka case is analogous to the instant case with respect to ruby mining. The IActHR analysed whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka community. According to the evidence submitted before the Court, the Saramaka community, traditionally, did not use gold as part of their cultural identity or economic system. Despite possible individual exceptions, the Saramaka community do not identify themselves with gold nor have demonstrated a particular relationship with this natural resource, other than claiming a general right to “own everything, from the very top of the trees to the very deepest place that you could go under the ground.” Nevertheless, the Court stated that, because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. The same analysis would apply regarding concessions in the instant case of the Endorois.

267. In the instant case of the Endorois, the Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to ruby. Nevertheless, it is instructive to note that the African Commission decided in *The Ogoni case* that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21.<sup>200</sup> Article 14 of the African Charter indicates that the two-pronged test of ‘in the interest

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<sup>199</sup> See case of the Indigenous Yakye Axa Community, paras. 144-145 citing (*mutatis mutandi*) Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96; Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 127, and Case of Iocher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 155. See also, Case of the Indigenous Sawhoyamaya Community, at para. 137.

<sup>200</sup> The Ogoni Case (2001), paras 56-58.

of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

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

### **Alleged Violation of Article 22**

269. The Complainants allege that the Endorois' right to development have been violated as a result of the Respondent State's creation of a Game Reserve and the Respondent State's failure to adequately involve the Endorois in the development process.

270. In rebutting the Complainants' allegations, the Respondent State argues that the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at the risk of others. It argues that the Baringo and Koibatek Country Councils are not only representing the Endorois, but other clans of the Tugen tribe, of which the Endorois are only a clan. However, to avoid the temptation of one community domineering the other, the Kenyan political system embraces the principle of a participatory model of community through regular competitive election for representatives in those councils. It states that elections are by adult suffrage and are free and fair.

271. The Respondent State also submits it has instituted an ambitious programme for universal free primary education and an agricultural recovery programme which is aimed at increasing the household incomes of the rural poor, including the Endorois; and initiated programmes for the equitable distribution of budgetary resources through the Constituency Development Fund, Constituency Bursary Funds, Constituency Aids Committees and District Roads Board.

272. It adds that for a long time, tourism in Kenya has been on the decline. This, it argues, has been occasioned primarily by the ethnic disturbance in the Coast and the Rift Valley provinces which are the major tourist circuits in Kenya, of which the complainants land falls and therefore it is expected that the Country Councils of Baringo and Koibatek were affected by the economic down turn.

273. Further rebutting the allegations of the Complainants, the Respondent State argues that the Complainants state in paragraph 239 of their Merits brief that due to lack of access to the salts licks and their usual pasture, their cattle died in large numbers, thereby making them unable to pay their taxes and that, consequently, the government took away more cattle in tax; and that they were also unable to pay for primary and secondary education for their children is utterly erroneous as tax is charged on income. According to the Respondent State it argues that if the Endorois were not able to raise income which amounts to the taxable brackets from their animal husbandry, they were obviously not

taxed. The Respondent State adds that this allegation is false and intended to portray the Government in bad light.

274. The Respondent State argues that the Complainants allege that the consultations that took place were not in 'good faith' or with the objective of achieving agreement or consent, and furthermore that the Respondent State failed to honour the promises made to the Endorois community with respect to revenue sharing from the Game Reserve, having a certain percentage of jobs, relocation to fertile land and compensation. The Respondent State accuses the Complainants of attempting to mislead the African Commission because the County Council collects all the revenues in the case of Game Reserves and such revenues are ploughed back to the communities within the jurisdictions of the County Council through development projects carried out by the County Council.

275. Responding to the allegation that the Game Reserve made it particularly difficult for the Endorois to access basic herbal medicine necessary for maintaining a healthy life, the Respondent State argues that the prime purpose of gazetting the National Reserve is conservation. Also responding to the claim that the Respondent State has granted several mining and logging concessions to third parties, and from which the Endorois have not benefited, the Respondent State asserts that the community has been well informed of those prospecting for minerals in the area. It further states that the community's mining committee had entered into an agreement with the Kenyan company prospecting for minerals, implying that the Endorois are fully involved in all community decisions.

276. The Respondent State also argues that the community is represented in the Country Council by its elected councillors, therefore presenting the community the opportunity to always be represented in the forum where decisions are made pertaining to development. The Respondent State argues that all the decisions complained about have had to be decided upon by a full council meeting.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.<sup>201</sup>

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to

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<sup>201</sup>Arjun Sengupta, "Development Cooperation and the Right to Development," Francois-Xavier Bagnoud Centre Working Paper No. 12, (2003), available at [www.hsph.harvard.edu/fxbcenter/working\\_papers.htm](http://www.hsph.harvard.edu/fxbcenter/working_papers.htm). See also U.N. Declaration on the Right to Development, U.N. GAOR, 41<sup>st</sup> Sess., Doc. [A/RES/41/128](http://www.unhcr.org/refugees/ref/4/RES/41/128.html) (1986), Article 2.3, which refers to "active, free and meaningful participation in development."

choose where to live. He states "... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available". Freedom of choice must be present as a part of the right to development.<sup>202</sup>

279. The Endorois believe that they had no choice but to leave the Lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The Complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a Report produced for the UN Working Group on Indigenous Populations requiring that "indigenous peoples are not coerced, pressured or intimidated in their choices of development."<sup>203</sup> Had the Respondent State allowed conditions to facilitate the right to development as in the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the Game Reserve. However, the forced evictions eliminated any choice as to where they would live.

280. The African Commission notes the Respondent State's submissions that the community is well represented in the decision making structure, but this is disputed by the Complainants. In paragraph 27 of the Complainants Merits brief, they allege that the Endorois have no say in the management of their ancestral land. The EWC, the representative body of the Endorois community, have been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. The Complainants further allege that 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.

281. The African Commission notes that its own standards state that a Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.<sup>204</sup> The African Commission agrees with the Complainants that the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending

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<sup>202</sup> Arjun Sengupta, "The Right to Development as a Human Right," Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at [http://www.hsph.harvard.edu/fxbcenter/working\\_papers.htm](http://www.hsph.harvard.edu/fxbcenter/working_papers.htm) 2000.

<sup>203</sup> 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).

<sup>204</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Twenty-eighth session, 2003). See also ILO Convention 169 which states: "Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

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

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

283. The African Commission wishes to draw the attention of the Respondent State that Article 2(3) of the UN Declaration on Development notes that the right to development includes "active, free and meaningful participation in development".<sup>205</sup> The result of development should be empowerment of the Endorois community. It is not sufficient 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.

284. The case of the Yakye Axa is instructive. The Inter-American Court found that the members of the Yakye Axa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that were the subject matter of proceedings in front of the Court as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim.

285. The IActHR noted that, according to statements from members of the Yakye Axa community during the public hearing, the members of that community might have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of 'in accordance with the law', as the law requires adequate compensation). The Endorois were

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<sup>205</sup> U.N. Declaration on the Right to Development, U.N. GAOR, 41<sup>st</sup> Sess., Doc. [A/RES/41/128](#) (1986), Article 2.3. (hereinafter Declaration on Development).

relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve.<sup>206</sup>

287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.

288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.<sup>207</sup> The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

289. Closely allied with the right to development is the issue of participation. The IActHR has stated that in ensuring the effective participation of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

290. In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the Complainants had a legitimate expectation that even

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<sup>206</sup> See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

<sup>207</sup> See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.

after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.

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

292. From the oral testimony and even the written brief submitted by the Complainants, the African Commission is informed that the Endorois representatives who represented the community in discussions with the Respondent State were illiterates, impairing their ability to understand the documents produced by the Respondent State. The Respondent State did not contest that statement. The African Commission agrees with the Complainants that the Respondent State 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.<sup>208</sup>

293. In this sense, it is important to note that the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that: “[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”<sup>209</sup> Consequently, the U.N. Special Rapporteur determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects.”<sup>210</sup>

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<sup>208</sup> In *Mary and Carrie Dann v. USA*, the IACmHR noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. 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.” *Mary and Carrie Dann vs. USA* (2002).

<sup>210</sup> The UNCERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”. Cf. UNCERD, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty Second Session, 2003)*, U.N. Doc. CERD/C/62/CO/2, 2 June 2003, para. 16.

294. In relation to benefit sharing, the IActHR in the Saramaka case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.

295. The African Commission further notes that in the 1990 'African Charter on Popular Participation in Development and Transformation' benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain "just compensation" in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

296. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also "that the equitable sharing of benefits to be derived from such exploitation be ensured." In the instant case, the Respondent State should ensure mutually acceptable benefit sharing. In this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community.

297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses - the actual loss in well-being and the denial of benefits accruing from the Game Reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve.

298. The African Commission is of the view that the Respondent State bears the burden for creating conditions favourable to a people's development.<sup>211</sup> It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that

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<sup>211</sup> Declaration on the Right to Development, Article 3.

the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*

### **Recommendations**

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

- (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- (e) Grant registration to the Endorois Welfare Committee.
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- (g) Report on the implementation of these recommendations within three months from the date of notification.

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

**Done in Banjul, The Gambia at the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 – 25 November 2009.**