

**The challenges surrounding the
implementation of the right to development in the
African charter of human and peoples' rights in
light of the Endorois case'**

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**THE CHALLENGES SURROUNDING THE
IMPLEMENTATION OF THE RIGHT TO
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OF HUMAN AND PEOPLES' RIGHTS IN LIGHT
OF THE ENDOROIS CASE'**

AMANDA MMARI

Chapter one

Title:

‘The Challenges surrounding the Implementation of the right to development in the African Charter of Human and Peoples’ Rights in light of the Endorois case’

Background

The Declaration to the right to Development¹ came almost thirty eight years after the adoption of the Universal Declaration of Human Rights², which encompasses both civil and political rights as well as economic, social and cultural rights. Credit for the emergence and development of this right should rightfully go to Mrs. Eleanor Roosevelt, who was the head of the U.S. delegation during the drafting of the Universal Declaration, for having first identified and advocated for the right to development when she stated, “We are writing a bill of rights for the world, and . . . one of the most important rights is the opportunity for development.”³ In this paper I would like to examine some of the challenges relating to the implementation of the right to development, although the right to development is described in detail in the 1986 Declaration, like all documents, what is usually stated in theory, does not always function as adequately in practice. This paper aims to analyse the Implementation or lack thereof of the right to development.

A critical analysis of this right will be done using the recent decision of the Endorois⁴ case decided in Kenya. The African Union has approved a decision of the African

¹ The Declaration on the Right to Development was adopted by the United Nations General Assembly, resolution 4/128 on December 4, 1986.

² The Universal Declaration of Human Rights was adopted by UN General Assembly Resolution 217 (A) II on December 10, 1948.

³ M. Glen Johnson, “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights,” *Human Rights Quarterly* 9.1 (1987): 19–48.

⁴ African Commission on Human and Peoples Rights, Communication 276/2003, *Centre for Minority*

Commission on Human and Peoples rights (ACHPR) which found the Kenyan Government guilty of violating the rights of the indigenous Endorois community, by evicting them from their land to make way for a wild life reserve. The ruling creates a major legal precedent by recognising, for the first time in Africa, indigenous peoples' rights over traditionally owned land and their right to development.⁵ "Kenya has to grant registration to the Endorois Welfare Committee, engage in dialogue with the complainants for the effective implementation of these recommendations," the ruling reads in part.⁶ This purpose of this paper is to evaluate whether this ruling will be implemented effectively and if not, it aims to look at what steps should be taken to ensure effective implementation.

Problem Statement

The objective of this research is to critically analyse the implement-ability of the right to development, in other words the aim of the study is to examine the various challenges States incur when trying to enforce the right to development. One of the problems facing the effective implementation of this right and other rights enshrined in the African Charter is the failure of African States to comply with the decisions or recommendations by the Commission. In The Endorois case⁷ the African Commission had an opportunity to assess the meaning of the right to religion, property, culture, natural resources and development as applied to an indigenous community. The right to development is enshrined in several international instruments, including Part I, paragraph 10 of the *Vienna Declaration and Program of*

Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v Kenya.

⁵ <http://allafrica.com/stories/201002091147.html> (accessed 21 July 2011).

⁶ (n 4 above).

⁷ As above)

Action (which was adopted by 171 countries, including the USA and nearly every Western state) and declared quite clearly that the right to development is a universal and inalienable right and an integral part of the corpus of fundamental human rights,⁸ however there are still challenges facing its implementation and enforcement.

In February 2010, the African Commission published its decision in the Endorois Case, and among a number of recommendations made, included that the Kenyan Government should:

- I. Pay royalties to the Endorois people from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- II. Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- III. Report on the implementation of these recommendations within three months from the date of notification.

To date the recommendations by the Commission have not yet been complied with by the Kenyan State. And the objective of this study is to make an inquiry as to what challenges the Kenyan Government is facing with regards to implementation and how this challenges can be overcome. The Endorois communication at the African Commission has attracted the attention, not just of the Commission, but also the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Populations, and some treaty bodies, notably, the Human Rights Committee and the Committee on Economic Social and Cultural Rights. The UN Permanent Forum on Indigenous People has also taken cognisance of Endorois case, and is following up

⁸ Obiora Chinedu Okafor, "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North 'Entente'" *African Journal of International and Comparative Law*, vol. 7 (1995), p.878

its progress.⁹ Needless to say the internationalization of the matter brings third party pressure to bear, which states in Africa are usually keen to avoid. The publication and exposure of state and corporate conduct by international bodies, is something that most states and corporations in Africa eschew, despite this pressure the Kenyan government has not yet taken effective measures to ensure the implementation of the violated human rights or complied with the Commission's recommendations.

Research Questions

The main issue this research aims to tackle is to investigate:

- ✓ What are the challenges faced in the implementation of the right to development in the Endorois decision in Kenya?
- ✓ Which indicators can be used to measure implementation of the right to development?

Other questions that will also be tackled are;

- ✓ Who are the right holders contemplated by Article 22?
- ✓ Who are the duty bearers envisaged by Article 22?
- ✓ What is the nature of the legal obligation imposed by Article 22? And
- ✓ How can this right be protected more effectively?

All these questions will be analysed in light of the Endorois decision in order to come to a well rounded conclusion. This research also aims to look at suitable options for a legal framework for implementing the right to development.

Research Methodology

⁹ Korir Sing'Oei *Founding Trustee, Centre for Minority Rights Development, Kenya, PhD Candidate, Tilburg Law School, Netherlands* A The Endorois Legal case and its impacts on State and Corporate Conduct in Africa 25.

The methodology to be adopted in this research will be Desk/ Library research. The use of statutes, treaties, soft instruments and case law will be applied. The Library Research method aims to be analytical, descriptive and comparative.

Limitations of the Study

This Study will focus on the implement-ability of the right to development, using the recently decided Endorois case to discuss and analyse the issue. The main and obvious limitation is that the study will be conducted via desk research only and no field research will be done. Interviews with the Endorois people/ person would have enhanced the nature of the study, as one would get a subjective view of the human rights that were violated. Also conducting interviews with the relevant Kenyan authorities may have assisted the research to get an overview of the mechanisms they would like to put in place in order to ensure the Endorois decision is implemented. However due to financial and time constraints, library based research will suffice

Literature Overview

Arjun Sengupta is currently the independent expert for the right to development in the Human rights Commission Geneva. He is of the view that implement-ability is often more important than enforcement. He states: 'Designing a program of action that would facilitate the realization of the right might be a better way of going about it than trying to legislate on those rights.'¹⁰ He believes that what is required is a monitoring authority or a form of dispute settlement agency as opposed to a court of law. He makes mention of the fact that human rights treaty bodies are more often than not inadequate as they operate only on reporting methods, and thus what is

¹⁰ Arjun Sengupta *The Right to Development as a Human Right 1987 11*.

needed for effective implementation is a forum where international agencies and concerned governments could get together and talk to each other. In his article on *Obligations to Implement The Right to Development: Philosophical, Political, and Legal Rationales*,¹¹ Stephen P Marks argues that ‘the assumption of the Declaration on the Right to Development is that states have obligations with respect to this putative right. In fact, the Declaration enumerates four duties and responsibilities of states...’¹² The four duties Marks refers to are;

- ‘The duty to formulate appropriate national development policies...’¹³
- ‘The primary responsibility for the creation of national and international conditions favourable to the realization of the right to development’¹⁴
- ‘The duty to cooperate with each other in ensuring development and eliminating obstacles to development’¹⁵
- ‘The duty to take steps, individually and collectively to formulate international development policies with a view to facilitating the full realization of the right to development’¹⁶

Marks’ believes that the basis for states complying with the human right to development is based on a legitimate and enforceable claim by right holders against duty bearers. He looks at the philosophical theory of natural rights, using examples of theorists such as: Thomas Aquinas, William Blackstone and Ronald Dworkin who believed that all humans are equally endowed with natural rights and therefore have

¹¹ Bard A. Andreassen and Stephen P. Marks (eds.) *Development as a Human Right; Legal Political and Economic Dimensions 2010* 73.

¹² (As above)

¹³ Declaration on the Right to Development, UN GAOR, 41ST Sess., Supp No. 53, at 183, UN DOC. A/RES/41/128 (1986), Article 2(3).

¹⁴ (As above) Article 3(1).

¹⁵ (As above) Article 3(3).

¹⁶ (As above) Article 4(1).

an equal entitlement to benefit from liberty and equality.¹⁷ However he also takes the view that there is a political rationale for the right to development, which varies according to interests and relative power of the country concerned.¹⁸ It must be noted that there are different views among states as to whether the commitment enshrined in the Declaration was a vague moral commitment to support developing states or whether it is a legal obligation to transfer resources from richer countries to poorer ones. Mention of resources is also made by Limburg who argues that; “lack of resources should never be used by states as an excuse for not progressing with a human rights programme: ‘the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.’”¹⁹ And thus Limburg does not believe that lack of resources is a justifiable argument by states for their inability to comply with the right to development.

Rajeev Malhotra gives mention to the fact with regards to the right to development the debate on its notion and content is far from settled, he raises the issue that identification and the use of suitable quantitative indicators could help in clarifying the content of the right, which could facilitate its implementation.²⁰ He further argues that; ‘The move from advocacy to an implementation framework for universal realization of human rights is inextricably linked to the issue of identifying and devising indicators and monitoring methodologies that are reflective of the relevant human rights norms.’²¹ Malhotra believes that we need targets or benchmarks consistent with the given objectives together with an identification of policy instruments and mechanisms which translate into the desired outcomes. His main argument is the need to measure performance and to monitor

¹⁷ (n 12 above) 74.

¹⁸ (As above) 86.

¹⁹ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights Human Rights Quarterly 9 122 1987.

²⁰ (n 18 above) 246.

²¹ (As above)

progress using suitable indicators. He states that ‘It can be argued that appropriate quantitative indicators, by virtue of their definition, presentation, and the data generating methodologies, can provide the means to translate the narrative on the normative content of human rights, as defined in the legal or other relevant instruments, into tools that can help the policy planners and development practitioners in implementing these rights.’²² In the words of Douglas N ‘...the bridge between intent and result is built, brick by brick, with information.’²³

In an article by Felix Kerchmeier, Monika Luke and Britt Kalla²⁴, they argue that the right to development has become universally accepted in theory, but there aren’t enough practical examples to support its application. In the context of the UN, the work on the right to development is currently mostly advanced through the open-ended intergovernmental Working Group on the Right to Development (‘Working Group’) and it’s High-level Task Force on the Right to Development (HLTF). These two bodies were set up in the UN human rights framework to explore further ways to implement the RTD.²⁵ Kirchmeier et al speak of how recently the ‘Working Group’ as a piloting exercise, has started to focus on the implementation of the right to development on certain global partnerships, in order to bring the right to development from ‘conceptual debates to operationalization’²⁶ an example of such a partnership is the Kenyan-German development partnership.²⁷ Kirchmeier et al argues that it is hoped that using this bilateral agreement, and others like it, will

²² (As above).

²³ Douglas N Draft Chief Executive Officer of Coca Cola United Nations Development Programme, Human Rights Development Report: *Human Rights and Human Development* (New York: UNDP and Oxford Press, 2000) 126.

²⁴ Felix Kirchmeier, Monika Lüke, and Britt Kalla *Towards the Implementation of the Right to Development* Field-testing and Fine-tuning the UN-Criteria on the Right to Development in the Kenyan-German Partnership 84 <http://www.fes-globalization.org/geneva/publications.htm>. (accessed on 25 July 2011).

²⁵ As above.

²⁶ (As above)

²⁷ Report of the Working Group on the Right to Development. UN Doc. A/HRC/4/47, para. 47 (2007).

move the debate further so as to lead to the full implementation of the right to development, which will in turn lead it to be a reality for all.

This study will mainly include all the views and arguments of the above mentioned authors, together with other relevant authors and sources, in order to arrive at a well rounded study of the implement-ability of the right to development.

Chapterization

- I. Chapter one deals with a general introduction of the topic and the significance of the research.
- II. Chapter two aims to introduce the reader to the right to development with a look at the strengths and weaknesses and meaning of this right under Article 22 of the African Charter, together with what is understood by the emergence of this right, whilst looking at what are the challenges facing the enforcement and advancement of this human right.
- III. Chapter three will look at the history, background and facts of the Endorois case, together with how the right to development was seen to have been infringed upon. A look at the Endorois' judicial journey from domestic Courts to the African Commission will be addressed. This chapter will also look at previous cases which have dealt with the issue of development and whether or not the right holders will benefit from the decision passed by the Commission.
- IV. Chapter four will look at the weaknesses within the African system which lead to ineffective implementation of decisions passed by the African Commission together with what steps the Kenyan government has and should take to

ensure the effective implementation of this right in order for the Endorois people to benefit from the recommendation passed by the African Commission.

- V. Chapter five will stand as the concluding chapter which aims to look at suitable options for the legal framework for implementing the right to development together with concluding observations and recommendations.

Chapter Two: Introduction to the Right to Development

The Origin of the Right to Development

Since the adoption of the Universal Declaration of Human Rights (UDHR)²⁸, the relationship between human rights and economic development has been one of nearly parallel tracks²⁹ however in the last decade development philosophy has shifted from a growth oriented model to a human development model, which has been defined as a process of enhancing human capabilities.³⁰ The Right to Development was affirmed in the Declaration on the Right to Development³¹ of 1986 and reaffirmed in the Vienna Declaration of the 1993 World Conference on Human Rights as a human right, thus reiterating the expectation that it can be made operational and implemented with the same vigour as other human rights.³² As a result of this broad based support, the right to development can now be said to enjoy a general international recognition.³³ Even though the Declaration on the Right to Development cannot be described as binding on all states because it is not yet a part of an international convention or established customary law, one could claim that there is a presumption that the principles embodied in this declaration constitute law.³⁴ The text of the Declaration is widely accepted among states, however It is the

²⁸ The Universal Declaration of Human Rights was adopted by UN General Assembly Resolution 217 (A) II on December 10, 1948.

²⁹ Bard A Anderson Stephen P Marks *Development as a Human Right* Legal Political and Economical Dimensions xxiii 2010.

³⁰ (As above).

³¹ The Declaration on the Right to Development was adopted by the United Nations General Assembly, resolution 4/128 on December 4, 1986.

³² (n 3 above) xxiv.

³³ (n 5 above) 14.

³⁴ Arjun Sengupta *On the Theory and Practice of the Right to Development* Human Rights quarterly volume 24 no. 4 2002.

lack of concrete mechanisms for implementation together with the lack of criteria and indicators for measuring the degree of fulfilment that have so far prevented the right to development from obtain binding legal force.

The right to development is a rather undefined and amorphous subject, and up until two decades ago little thought was given to any concept embodying the right to development. Most African leaders, politicians, lawyers, academics and others believed or thought that the attainment of political independence under a Constitution which made provision for the entrenchment of Fundamental Human Rights was bound to bring about 'development'.³⁵ However the hope that political independence would bring about rapid social and economic development such as to rid our generation of poverty, illiteracy and endemic diseases continues to be nothing but a mirage.³⁶

In 1972 Keba Mbaye, the Chief Justice of Senegal and President of the International Commission on Jurists, entitled his inaugural lecture to the International Institute of Human Rights in Strabourg *The Right to Development a Human Right*.³⁷ Karel Vasak, the director of the same institute, around the same time also developed his theory of a 'third generation of human rights' in the nature of 'the right to development'. It was largely due to Keba Mbaye and Karel Vasak that the Commission was in a position to accept the existence of the right to development, and in 1977 called for a study of the international dimensions of the right, following which in 1979 the Commission accepted the existence of such a right.³⁸ The General Assembly of the United Nations passed Resolution 34/46 of 1979 in which it

³⁵ Dr T Akinola Aguuda Human Rights and The Right to Development in Africa Lecture Series NO. 55 1989 13.

³⁶ (n 8 above) 19.

³⁷ Keba Mbaye's Opening remarks at the International Commission of Jurists Conference on Development, Human Rights and the Rule of Law held at the Hague April 27-May 1981.

³⁸ (n 9 above) 14.

emphasised that ‘The right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations.’

The definition of the right to development provided in the Independent Expert’s reports on the basis of the preamble and Article 1 of the Declaration of the Right to Development can be presented as follows: ‘The Right to Development, which is an inalienable human right, is the right to a particular process of development in which all human rights and fundamental freedoms can be fully and progressively realised.’³⁹The conventional definition of development is understood to mean the simple expansion of Gross National Product, industrialization, exports-growth, or capital inflows, however the definition as expressed in the Preamble of the Declaration is a process that goes beyond economics, and extends as far as social, cultural and political spheres, aiming at continuous improvement on a progressive scale; ‘constant improvement of well-being.’⁴⁰ Thus when per capita real income was insufficient to secure the fulfilment of a certain minimum requirement for improving the living conditions of the people, the well being function was extended to include some indicators of basic needs, and thus corresponding development policy aimed specifically at increasing the provision of basic needs as well as per capita real income.⁴¹This approach was associated with the McNamara World Banks ‘minimum needs’ program and the International Labour Organizations ‘basic needs’ for development programs where policies for accelerating the growth of per capita income were supplemented and adjusted with policies for increasing the provision of

³⁹ (n 6 above) 15.

⁴⁰(n 4 above) Preamble.

⁴¹ (n 12 above) 17.

basic needs and for re distributing income and changing institutions to make it possible for the poor to satisfy these basic needs.⁴²

Thus the human development approach can be looked at as an extension of the 'basic needs' approach in the sense that development is measured not in terms of commodities but in terms of realization of increased life expectancy, infant survival and adult literacy. It must be noted however that without economic development, the realization of human rights within a country cannot be realised, this applies both to civil and political rights as well as economic, social and cultural rights. However the Limburg principles states that lack of resources should never be used by states as an excuse for not progressing with a human rights programme: 'the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.'⁴³ Despite Limburg's notion, it is almost impossible to imagine the effective realization of human rights in a country with severe economic underdevelopment and societal impoverishment.

⁴² Paul Streeten et al *First Things First: Meeting Basic Human Needs in the Developing Countries* Oxford University Press 1981.

⁴³ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights Human Rights Quarterly 9 122 1987.

The intricacies of the Right to Development

Like the collective right to self determination which precedes the right to development, it has both internal and external dimensions.⁴⁴The external dimension relates to the international political economy between states and the internal dimensions focuses on the duties of each state to ensure domestic policies that seek to contribute to the realization of the fundamental human rights of all its subjects.⁴⁵ As reflected in the 1986 Declaration, states have both the right and the duty to formulate appropriate national development policies, the right being exercisable against the international community.⁴⁶The Declaration is also characterized by a 'responsibilities approach' which focuses on delineating duties rather than detailing rights. This element reinforces the appreciation that the right to development is less about establishing a new substantive right, and more about framing a system of duties that might give better effect to existing rights.⁴⁷Article 4(2) of the Declaration states that: 'effective international cooperation is essential...'. Furthermore in the years following the adoption of the Declaration, Ian Brownlie concluded that: 'the right constitutes a general affirmation of a need for a programme of international economic justice.'⁴⁸Other binding human rights instruments where an obligation for international assistance is required include the International Covenant on Economic Social and Cultural Rights of 1966, Article 2 (1) as well as the Convention on the Rights of the Child of 1989, which explicitly includes the requirement that 'particular account shall be taken of the needs of developing countries'. We also see the requirement for international cooperation in the Convention on the rights of persons

⁴⁴ Margot E Salomon The Right to Development as a legal norm; Legal Cosmopolitanism and the Normative Contribution of the Right to Development 17.

⁴⁵ (n 17 above) 18.

⁴⁶ (n 13 above) Article 2(3)

⁴⁷ (n 17 above) 18.

⁴⁸ I Brownlie *The Human Right to Development* Commonwealth Secretariat 1 (1989).

with Disabilities of 2008. These articulations provide that the dominant members of the international community of states, or, in the words of the Committee on Economic, Social and Cultural Rights (CESCR), “all those in a position to assist,” have not only a role but also a responsibility in contributing to the immediate realization of the minimum essential level of socio- economic rights globally.⁴⁹ The Declaration was created as a response to the call by developing countries for an international order in which effective international cooperation would reduce the perceived unfairness of the prevailing economic scheme,⁵⁰this reaffirmed commitments for international cooperation because the Declaration gave legal expression to the notion that the ability of states to develop, and to fulfil their human rights obligations, are constrained by the structural economic arrangements and actions of the international community, more especially the powerful members. The Declaration places the claims of developing countries suffering from underdevelopment at the centre of the global political economy, where their calls for a structural environment conducive to the fulfilment of human rights might be heeded. As such, the Declaration demands not merely cooperation for the achievement of human rights central to the alleviation of poverty, but also changes to the system of structural disadvantage that characterizes the current international order.⁵¹

Controversies surrounding the realization of Right to Development

Massive violations of human rights has been identified as one of the main stumbling blocks to the realization of the right to development, it was pointed out that these arise from aggression and occupation of foreign territories, policies of genocide and

⁴⁹ (n 20 above) 19.

⁵⁰ (As above) 23.

⁵¹ As above.

apartheid, racism and racial discrimination, colonialism and the denial of the right of peoples to self determination and development without external interference.⁵² Different forms of slavery as well as pollution to the environment have also been seen as threats to development. The Declaration specifically requires international peace and security as essential elements to realize the right to development, and thus there is a need for the elimination of massive violations of human rights in order for the human right to development to be accomplished. It has been observed that the uneven character of economic development among countries and peoples, which in the case of developing countries is further exacerbated by the external debt burden, and in addition unemployment, starvation, poverty and the absence of access to health services and education constitutes human rights violations. And in order for the right to development to be realized, the basic task of the international community is to make available to all peoples the right to development under conditions of peace and security.⁵³ It has been suggested that the United Nations should adopt a binding and comprehensive instrument embodying the right to development; this instrument should envisage the creation of corresponding mechanism to evaluate the levels of development of states and to monitor the realization of agreed upon obligations.⁵⁴ The design and implementation of such an instrument shall be discussed in the Chapters to follow.

Is The Right to Development a Legally Enforceable Right?

Having discussed the nature and ‘meaning’ of the right to development, this chapter will go on to discuss whether or not this right is in actual fact an enforceable right,

⁵² Centre for Human Rights Geneva The Realization of the Right to Development Global Consultation on the Right to Development as a Human Right HR/PUB/91/2 27.

⁵³ (As above) 28.

⁵⁴ As above.

and will assess what the challenges are facing its acceptance as a defined human right by the international community.

If a given state were too weak to grant the enjoyment of human rights to its citizens, the international community would have to take steps to enable it to do so; (in light of the 1986 Declaration). This shows that there is a somewhat dualistic nature to the right to development in that it is a right within the state as well as a right between states. This remains one of the biggest obstacles to the acceptance of this right by the international community, which fears that it may be interpreted as a right to development assistance; this remains the reason why a lot of clarifying work still needs to be done.⁵⁵ The unease about the right to development also stems from the fact that like the right to peace, environment or self determination, these rights are solidarity rights which sets them apart from the traditional and widely accepted individual human rights, and thus the duty bearer for the enforcement of these rights is no longer the nation state which they belong to but becomes the obligation of the international community as a whole.

*'We will spare no effort, to free our fellow men women and children from the object and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.'*⁵⁶

Although the 1986 Declaration remains soft law and is persuasive as opposed to legally binding, the African Charter on Human and Peoples Rights is a legally binding

⁵⁵ Felix Kirchmeier *The Right To Development Where Do We Stand? State of the Debate on The Right To Development* 3 <http://library.fes.de/pdf-files/iez/global/50288.pdf> (accessed 27 July 2011).

⁵⁶ A/RES/55/2 Millennium Declaration paragraph 11. (The Millennium Declaration was adopted unanimously at the UN Millennium Summit, the largest gathering of heads of state in history).

document which has been signed and ratified by all African States. It must be noted that the exercise of the right to development presupposes the existence of and compliance with rights such as the right to self determination, education, work, life, health, food, housing, liberty and security of the person etc. And thus the right to development calls for an environment which is conducive for the realization of all these rights.⁵⁷ Therefore when the creation of this environment lies beyond the possibilities of any given state like in the instances of bad governance or corruption, the duties of the international community comes into play. Thus the right holders are seen as the individuals within the state, and the duty bearers is the state itself. According to Kirchmeier the duties of the state are three fold;

1. There is an obligation on the state to abstain from undertaking actions that could violate human rights;
2. There is a duty to protect its citizens from actions that violate their human rights;
3. There is a duty to fulfil; which implies that the state must create a framework which enables the realization of those human rights.⁵⁸

Having now established that the right to development is a legally enforceable right, and that the right holders are the citizens of the state and the duty bearers are the nation state itself; unless the nation state is too weak, unwilling or beyond its reach, the duty then falls onto the international community. As well as having established what the duties of the state are, we can now ask the question: what does the full implementation of the right to development entail? One of the fears that developed countries face is that the right to development is in actual fact a 'right to everything'

⁵⁷ (n 28 above) 11.

⁵⁸ (As above).

and thus states or individuals from under developed countries can claim or 'sue' developed countries for the fulfilment of what is perceived to be necessary for the enjoyment of the right to development.⁵⁹ However the developing countries do not have an unlimited access to the resources of developed countries, they do have an obligation however to abstain from action that would violate a poor nations right to development i.e. in instances of international trade and they also have a duty to fund activities and programmes that are out of financial reach of developing countries, in order to provide realistic chances for development. However it must be noted that without further interpretation and agreement on the scope and legal content of the right to development, no legally binding agreement can be reached and no monitoring or enforcement mechanism can be put into place.⁶⁰

Due to the controversy and ambiguity surrounding this right, it is essential to look at the different views and definitions amongst particular states, to get a clearer definition of where the international community stands with respect to development.

The following reflects some of the most prominent views.

Germany agrees to the concept of the right to development, but stresses that it should not focus merely on international cooperation and that the primary duty should remain with developing states. In its development policy action plan on human rights 2004-2007⁶¹ the German Federal Ministry for Economic Cooperation and Development (BMZ) laid out its policy approach towards mainstreaming human rights in development cooperation. However there was a reluctance to refer to a right

⁵⁹ (As above) 12.

⁶⁰ (As above) 13.

⁶¹ BMZ Concepts Development Policy Action Plan on Human Rights 2004-2007 Every person has a right to development (<http://www.bmz.de/en/service/infothek/fach/konzepte/konzept128engl.pdf>) accessed 27 July 2011).

that is understood differently by different stakeholders, thus the German policy follows the right to development principles without acknowledging them as such.⁶²

The United States on the other hand understands the right to development to mean 'Each individual should enjoy the right to develop his or her intellectual or other capabilities to the maximum extent possible through the exercise of the full range of civil and political rights...'⁶³ In a statement by Lino J Piedra, he stated that the US is willing to talk about the individual's right to development but not a nations, for the simple reason that nations do not have human rights.'⁶⁴

However the African union approach is that the right to development is the right of peoples and not individuals. The AU believes that national action together with international cooperation should reinforce each other.⁶⁵ This view is somewhat supported by the European Union and the UK view which is that development cooperation is moving away from classic notions of conditionality to a broader understanding of partnership. For example: 'The UK is committed to supporting partner governments to fulfil their human rights obligations and will agree with governments on how to assess progress in this area'⁶⁶ Therefore the European Union believes that while an action taken may be grounded in and be in line with the right to development, the European Union donor countries prefer to keep their commitments on a voluntary basis.⁶⁷

From the aforesaid, it is clear that different states have contradicting and juxtaposing views on the right to development, while some are reluctant to view it as a right

⁶² (n 33 above) 14.

⁶³ Joel Danies US Delegation to the 61st Commission on Human Rights April 12 2005, Explanation of vote on right to development.

⁶⁴ Lino J Piedra Public Member of the US Delegation March 22 2005.

⁶⁵ As above.

⁶⁶ E/CN.4/2005/WG.18/TF/CRP.3.

⁶⁷ (n 35 above).

which requires international cooperation; others are of the view that international cooperation should be voluntary and based on partnership agreements as opposed to legally binding commitments. Despite the controversy surrounding the implementation and enforceability of this right, there is a global consent to achieve consensus across the board. In the words of Kofi A. Anann “...*We cannot win overnight. Success will require sustained action...it takes time to train the teachers, nurses and engineers to build the roads, schools and hospitals; to grow the small and large businesses able to create the jobs and income needed... we must more than double global development assistance...Nothing less will help to achieve the goals.*”⁶⁸

In Conclusion therefore; the right to development is indeed a universal and inalienable right and despite the different views on how it should be enforced or implemented, there is one common consensus among all, and that is the fact that the right to development is an obligation that should be met by all nation states whether alone or with international cooperation. I strongly support the view of the African Union in that I believe in the idea of partnership cooperation and the notion of more developed countries assisting the underdeveloped, because our world has now become one global village and the negative impacts one country may face, will have a tantamount ripple effect on the other side of the globe, and thus the only way to attain peace, security and continuous development is to encourage global development assistance.

⁶⁸ Kofi A Anann Ex united Nations Secretary General <http://www.un.org/millenniumgoals/inndex.html> (accessed July 2006).

Chapter 3: The Endorois Case

The Endorois Case and the Right to Development

This Chapter aims to give insight into the background of the Endorois case, and the facts surrounding it. A look at the judicial struggle throughout the Endorois will be discussed, in order to follow the Endorois' journey from the Kenyan National Courts to the African Commission on Human and Peoples Rights, which resulted in a decision being passed in their favour. A detailed look at how the African Commission came to the conclusion that the right to development had been violated will also be discussed. I will simultaneously address previous cases that have addressed the issue of development in order to contrast and compare them with the decision passed in Endorois.

Brief Facts of Endorois

The Endorois are a community of approximately sixty thousand people who have lived in the Lake Bogoria area for centuries. They have been classified by some as the bona fide owners of the land by their neighbours and surrounding communities. They continued to occupy and enjoy undisturbed use of the land under the British colonial administration, even though the British claimed title to the land in the name of the British Crown. When Kenya gained 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 then Kenyan Constitution, the Country Councils held this land in trust, on behalf of the Endorois community, who remained on the land and

continued to hold, use and enjoy it.⁶⁹ The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya, when they created the Lake Hannington Game Reserve and the subsequent re-gazetting of the Lake Bogoria Game reserve in 1978. 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.

Even though the Endorois community were unaware of what had been decided by the Kenyan government they were informed by the Kenyan Wildlife Service or 'promised' rather that shortly after the creation of the Game Reserve, 400 Endorois families would be compensated with plots of "fertile land." They were also informed 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 Kenyan government. After several meetings to determine financial compensation for the relocation of the 400 families, the Kenyan Wildlife Service stated it would provide 3,150 Kenya Shillings per family. However it has been alleged that to date 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 money given to the 170 families was however understood to be a means of facilitating relocation rather than compensation for the displacement of the Endorois community.

On the 28th of December 1994, in an attempt to reach an agreement regarding compensation, the Endorois people had a meeting with President Arap Moi who was their

⁶⁹ As above.

local member of parliament at the time, 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 community. However by November of the following year the President's directives had not yet been implemented. 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.⁷⁰ 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 1974. The Court stated 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 alleged loss of their ancestral land. The Court further stated that it did not believe that Kenyan law should give special regard to a people's land based on historical occupation and cultural rights.⁷¹ Following the case being dismissed by the Court, parts of the ancestral land was demarcated and sold by Kenyan authorities. And furthermore concessions for mining on the land were granted to a private company in 2002. The Endorois were not only being forced from fertile lands to semi-arid areas, but were also divided as a community and displaced from their traditional and ancestral lands, furthermore the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, which is in violation of their right to development.

⁷⁰ *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.

⁷¹ (As above),

The complaint was 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.⁷² The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, they also allege that there was a 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. The Complainants also allege that the Government of Kenya was in violation of the African Charter on Human and Peoples' Rights, the Constitution of Kenya as well as international law, because they forcibly removed the Endorois people 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 or adequate and effective compensation.⁷³

The Complainants allege that the Government's decision to gazette Endorois traditional land as a Game Reserve not only denies the Endorois access to the area, but has jeopardized the community's pastoral enterprise and put their cultural integrity at risk. The Complainants also claim that 30 years after the evictions; the Endorois people still do not have full and fair compensation for the loss of their land and their indigenous 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. The complainants stressed that the Endorois people have had no

⁷² 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

⁷³ (As above).

say in the management of their ancestral land and have been denied legitimate consultation. And thus the claim that in the creation of the Game Reserve, the Kenyan government (Respondent State) disregarded firstly; 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.

Judicial Struggle of the Endorois

By the early 1990s, it was obvious that none of the informal commitments made by the Kenyan government to compensate the Endorois for the creation of the Game reserve would be met. In the twenty years of waiting for the state to fulfil its promises, a community which was once self dependent in its food security, had been reduced to a state-dependent group of internally displaced persons.⁷⁴

The Endorois community first launched their campaign in Kenya's domestic courts, challenging the manner in which the Baringo and Koibatek county Councils—the joint trustees of the Lake Bogoria land—exercised their trusteeship . Specifically, the community questioned the allocation of revenue collected from the park, which left the community out of the profit structure and, consequently, poor and destitute.⁷⁵ The Community also challenged the legality of their eviction from the park. Furthermore, the community contended that continuous denial of access to grazing land as well as cultural and religious sites within the park violated their constitutional and statutory rights.⁷⁶

⁷⁴ The Endorois' Legal Case And Its Impacts On State And Corporate Conduct In Africa. *Korir Sing'Oei A., Founding Trustee, Centre for Minority Rights Development, Kenya, PhD Candidate, Tilburg Law School, Netherlands.*

⁷⁵ (As above).

⁷⁶ (As above).

Specifically, the Endorois sought the following orders:

- I. A declaration that the land around Lake Baringo is property of the Endorois community held in trust for their benefit by the county council of Baringo and the County Council of Koibatek under Sections 114 and 115 of the Constitution of Kenya;
- II. A declaration that the County Council of Baringo and County Council of Koibatek are in breach of fiduciary duty of Trust to the Endorois community because of their failure to utilize benefits accruing from the game reserve to the benefit of the community contrary to Sections 114 and 115 of the Constitution of Kenya;
- III. A declaration that the Applicants and the Endorois community are entitled to all the benefits generated through the game reserve exclusively and/or in the alternative the land under game reserve should revert to the community under the management of Trustee appointed by the community to receive and invest the benefits to the interest of the community under section 117 of the constitution of Kenya;
- IV. An award of exemplary damages arising from the breach of the Applicants constitutional rights under Section 115 of the Constitution of Kenya.⁷⁷

Kenyan Court's Ruling

Rather than attack the entire Trust Land framework, the Endorois strategy was to use principles of the law of trusts to provide some form of limited remedy to the community's grievances.⁷⁸ The Endorois community first launched their campaign in Kenya's domestic courts challenging the legality of their eviction from the park.

⁷⁷ (n 69 above).

⁷⁸ (n 75 above).

However the Kenyan High Court dismissed the Endorois claim upon a finding that, “The law did not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource”⁷⁹ The conclusions which the Court came to indicate the extent of the court’s failure to engage with the many of the broader issues raised by the Endorois claim, in particular:

- i. The nature of trust duties arising under the Trust Lands Act, including the corresponding rights of communities there under;
- ii. The status of Endorois’ native title whether it was extinguished by the setting apart;
- iii. The entire gamut of human rights violations claimed to have arisen following the community’s eviction⁸⁰

Arguments have been made to the effect that the court failed to address many of the legal issues which had been raised by the Endorois community, in particular the entire gamut of human rights violations claimed to have arisen following the community’s eviction.⁸¹ While the Endorois community appealed against the High Court judgement, uncertainty as to the existence of right to appeal and the sheer inefficiency of the Kenyan court system conspired to deny the community further national remedy⁸²

Recognizing the ineffectiveness of pursuing remedies at the domestic level, the Endorois community sought redress at the African Commission on Human and

⁷⁹ *William Ngasia and Others v Baringo County Council and Others*, High Court Miscellaneous Civil Case No. 159 of 1999.

⁸⁰ (n 77 above).

⁸¹ (As above).

⁸² In Kenya, court proceedings are hand written and have to be typed after judgement has been issued, and only on request by an aggrieved party and at their cost. No certified copies of proceedings in relation to the Endorois High Court case had been prepared two years after the Notice of Appeal had been lodged, which effectively froze any possible appeal.

Peoples' Rights. The Endorois placed their claim firmly within the jurisdiction of the African Commission.

Violation of the Right to Development- Article 22 of the African Charter, Complainant's submissions

The complaint was 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 argued that due to the state's failure to include the community in the development process of the land as well as failing to ensure their continued well being, amounted to a violation of their right to development. Furthermore due to their eviction from the land they have had no access to the lake and as such no longer had access to salt licks and the usual pastures which they used to graze their cattle. As a result of this displacement many of their cattle died in large numbers which led to numerous community members not being able to pay their taxes which led to their cattle being taken away from them by Kenyan authorities and as a result they were unable to pay for school fees for their children. The complainants further argue that the development of the game reserve by no means increased the capabilities or well being of the Endorois which amounts to a violation of their right to development. The Complainants also argue 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.⁸³ The complainants also argue that the consultations taken by the Kenyan Authorities with the Endorois were inadequate as many families were of the idea that they would have re-entry into the land at a later stage after the development of the game reserve. They state 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 or that they had been misled regarding their displacement.

The Complainants are also of the view that the State violated the Endorois' right to development by engaging in coercive and intimidating activity that has violated the community's right to meaningful participation and freely given consent. They state further that such coercion has continued to the present day. The Complainants say that one Mr Charles Kamuren, who is 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 from Kenyan authorities especially when the community objected to the issue of the granting of mining concessions.

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.⁸⁴ Thus in conclusion the complainants assert that the Endorois' development as a people has suffered economically, socially and culturally and that the Endorois community suffered

⁸³ (As above).

⁸⁴ (As above).

a violation of Article 22 of the Charter which clearly 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’.*

Respondent State’s (Kenya’s) Submissions

In response to the complainant’s 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. They argued that the country councils that were appointed were not only representing numerous clans including the Endorois, and in order to avoid the issue of one community domineering 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.⁸⁵

The Respondent State also submits it has instituted a promising programme for free primary education and an agricultural recovery programme which is aimed at increasing the household incomes of the Endorois; and has also put into place an initiated programmes for the equitable distribution of budgetary resources through the Constituency Development Fund, Constituency Bursary Funds, Constituency Aids Committees and District Roads Board, all of which will serve to benefit communities in the surrounding areas, including the livelihoods of the Endorois community.

Further rebutting the allegations of the Complainants, the Respondent State argues that on the Complainants submission 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

⁸⁵ As above.

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.” The Respondent alleges that this submission is “utterly erroneous” as tax is charged on income. According to the Respondent State if the Endorois were not able to raise income which amounts to the taxable brackets from their animal husbandry, they were obviously not taxed.⁸⁶ The Respondent State adds that this allegation is false and was intended to portray the Government in bad light to benefit the complainants.

With regards to the complainant’s allegations that the consultations which took place were in bad faith and that furthermore that the Respondent State failed to honour the promises made to the Endorois community with respect to revenue sharing from the Game Reserve, the respondent state responded by alleging that the complainants were trying to mislead the African Commission because in actual fact, 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, and thus it is misleading of the complainants to allege that they received no revenue sharing from the game reserve. The Respondent state also denied the fact that the Endoroise community were not unaware of the mining concessions granted to third parties or that they did not benefit from same. 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 were not only fully aware of all decisions made in this regard but were very well informed of same. In light of the above Kenya was of the view that the complainants had no right not allege that their

⁸⁶ As above.

right to development had been infringed as the State had complied with all the necessary requirements of consultation, and had compensated them accordingly.

Supporting Case Law

It must be duly noted that the right to development is a human right by virtue of which “every human person and all peoples are entitled to participate in, contribute to and enjoy” that processes of development.⁸⁷ Article 2 clause 3 of the Declaration on the right to Development states that “the constant improvement of the well-being of the entire population and of all individuals, on the basis of *their active free and meaningful participation* in development and in *the fair distribution of benefits* resulting from same”.⁸⁸ Article 5 goes on to state that States are also expected to take resolute steps to “eliminate the massive and flagrant violation of human rights” resulting from apartheid, racial discrimination, colonialism, foreign domination and occupation, etc⁸⁹

In order to critically evaluate the decision passed in Endorois, this paper will compare and contrast the Endorois decision to domestic cases which have been decided on the matter of land tenure and customary land reform both on an African plane as well as on an international Level, in order to ascertain how the issue of development is dealt with at different domestic levels in comparison to how the African Commission chose to deal with same.

⁸⁷ (n 10 above) 3.

⁸⁸ (n 1 above).

⁸⁹ (As above).

Cameroon

When Cameroon became a German Protectorate in 1884, the Germans realized that the area around Mount Cameroon, home of the indigenous Bakweri ethnic group, was an agricultural paradise. They immediately instituted a policy of wholesale confiscation of native lands for large-scale commercial agriculture. Through the use of coercion, brute force, and a series of repressive laws, the German colonial Government forced local indigenous communities to give up vast expanses of native lands without compensation.⁹⁰ In total, the Germans alienated about 400 square miles of the most fertile land around the Mount Fako area alone, and stripped the Bakweri of over 200,000 acres of their most fertile lands with tragic results.⁹¹ According to the 1922 British Annual Report to the League of Nations: “Uprooted from the homes of their forebears, settled willy-nilly on strange soil, deprived of their old-time hunting grounds, and fishing rights, the Bakweri have retained but a small sense of tribal unity or cohesion.” In September 2002, the BLCC filed a complaint with the *African Commission on Human and Peoples' Rights*⁹² under Articles 55, 56 and 58 of the African Charter on Human and Peoples' Rights concerning the violation of the land rights of indigenous people. In its complaint the BLCC had called on the Commission to recommend, among other things, that the government of Cameroon affirm the lands occupied by the CDC are private property; that the Bakweri be fully involved in any CDC privatization negotiations; and that ground rents owed to the Bakweri dating back to 1947 be paid to a Bakweri Land Trust Fund.⁹³ Nonetheless, because African Commission did not want to serve as a “Court

⁹⁰ Dibussi Tande A Brief History of the Bakweri Land Problem <http://www.blccarchives.org> (accessed 16 November 2011)

⁹¹ (As above).

⁹² Cameroon: Bakweri Land Claims Committee v Cameroon (2004) AHRLR 43 (ACHPR 2004).

⁹³ (As above).

of First Instance” in the matter, it recommended that the BLCC and the Government of Cameroon “settle the matter amicably”, and to this end, availed its good offices to both parties.⁹⁴ Although the BLCC has officially accepted the African Commission’s mediation offer, the Government of Cameroon has to date not yet responded, despite the Commission’s ruling, and justice has not been served to the indigenous people of Cameroon. This case is a clear example of how the African Charter’s provisions do not cater for all and that development for the indigenous people of Cameroon is only a reality in theory and not in practice. Ripped from familiar surroundings on which their entire traditional culture derived its strength and origin, the Bakweri people have had an alarming downward spiral that has continued for over half a century.

Congo

In March 1999, the DRC filed a complaint against Burundi, Rwanda and Uganda⁹⁵ alleging that these countries had invaded its borders and committed massive human rights violations and had also invaded a hydroelectric dam. The invasion on the dam interrupted electricity supply which resulted to the deaths of patients in hospital due to a lack of electricity. The Complainant’s claimed the respondent’s had violated numerous articles of the African Charter but included in this was Article 22; the right to development. Burundi and Rwanda both refused to participate where as Uganda denied all allegations. Despite the Respondents refusal to acknowledge any wrong on their part, the Commission found them guilty of the alleged provisions of the African Charter. The African Commission found the respondents guilty of violating the right to development on two grounds, firstly:

⁹⁴ (As above).

⁹⁵ Communication 227/99, Democratic Republic of Congo v Burundi, Rwanda and Uganda Annex IV, 20th Annual Report of the African Commission 111.

- On the dumping and mass burial of victims, and
- Killings orchestrated against the people of DRC,

The commission stated, 'The Commission finds these acts barbaric and in reckless violation of the Congolese peoples' rights to cultural development guaranteed by Article 22 of the African Charter...'⁹⁶ it must be noted however that the African Commission failed to explain the link between barbaric killings and mass murders to the right to cultural development, however the Commission did state that the inability of the Congolese people to dispose of their wealth and natural resources is a violation of their economic social and cultural development which is directly linked to their right to development and thus is a violation of their right to development. Thus we see how in this case the African Commission did not find a direct violation to the right to development but realised the violation of same through the direct violation of other rights, for example the right to wealth and natural resources.

South Africa

The extent to which indigenous people were dispossessed of their land by white people in South Africa under colonial rule and apartheid has no parallels on the African continent. It was only in 1994 at the advent of democracy, when the issue of large scale land distribution was addressed in order to tackle the problem of development and poverty alleviation. One of the key challenges facing the post 1994 South African state is how to reverse the racial inequalities in land resulting from colonial conquest and the violent dispossession of indigenous people of their land.⁹⁷

⁹⁶ (As above) para 87.

⁹⁷ Lungisile Ntsebeza and Ruth Hall *The Land Question In South Africa* 2007 125.

The South African government has developed policies and passed several pieces of legislation with a view to redress inequalities in land distribution resulting from the unjust laws of the colonial and apartheid governments.⁹⁸ In 1994, the government adopted the Reconstruction and Development Programme (RDP) which provided for the re-distribution of 30 per cent of agricultural land over five years.⁹⁹

Section 25 (1) of the South African Constitution is explicit in providing that no person 'may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'¹⁰⁰In a famous South African Case known as the Grootboom¹⁰¹ case, the Constitution recognised access to land as a socio economic right. In this case the Constitutional Court declared that that the State has an obligation to take reasonable measures to ensure the "progressive realisation of the right to adequate housing;" and it was established that this right can only be realised when the right of access to land is itself realised. By the creation of the Reconstruction and Development Programme, South Africa has shown its concern in tackling the injustices of the past, and ensuring development for previously disadvantaged racial groups.

Zimbabwe

Land Reform in Zimbabwe began in 1979 in an effort to more equitably distribute land between the historically disenfranchised blacks and the minority-whites. The Zimbabwean Government-orchestrated land invasions beginning in February

⁹⁸ http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_3.pdf (accessed 27 September 2011)

⁹⁹ The Reconstruction and Development Programme: A Policy Framework (1994).
<http://www.polity.org.za/govdocs/rdp/> (accessed 31 May 2002.)

¹⁰⁰ The Constitution of the Republic of South Africa, 1996.

¹⁰¹ *Government of the Republic of South Africa v Grootboom and others 2000* (11) BCLR 1169.

2000.¹⁰² The Zimbabwean government formally announced a "fast track" resettlement program in July 2000, stating that it would acquire more than 3,000 farms for redistribution.¹⁰³ In 2003 Zimbabwe's parliament passed Amendment 17 to the constitution, allowing presidential appointees to expropriate farms without compensation or judicial review.¹⁰⁴ Amid these violent land grabs, production on Zimbabwe's white-owned farms—which had accounted for three-quarters of the State's agricultural output came to a complete standstill. The violence displaced more than 4000 of Zimbabwe's white farm owners and approximately one million black farm workers.¹⁰⁵ Mike Campbell, a white Zimbabwean farmer, challenged the constitutionality of Amendment 17 to the Constitution, on the grounds that it was not in line with the core values and central features of the Constitution.¹⁰⁶ However in March 2007, the Supreme Court of Zimbabwe reserved judgement in the matter (but ultimately dismissed that matter) and Campbell took the matter to the SADC Tribunal in order to seek an injunction to protect his ownership rights. The tribunal ordered Zimbabwe to compensate three of the farmers who had already been evicted and "to ensure that no action be taken" to oust Campbell and the seventy-four others from their lands.¹⁰⁷ The Zimbabwean government scoffed at the SADC Tribunal's order. President Mugabe described the decision as "absolute nonsense."¹⁰⁸ In April 2009, pro-Mugabe militants forcibly evicted Campbell from his farm.

¹⁰² Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe [2008] SADCT 2 (28 November 2008), SADC Tribunal (SADC).

¹⁰³ Fast Track Land Reform in Zimbabwe, Human Rights Watch, March 2002.

¹⁰⁴ CONST. OF ZIMB. § 16B, *amended by* Constitution of Zimbabwe Amendment (No. 17) Act, 2005, *available at* <http://www.parl.zim.gov.zw/cms/UsefulResources/ZimbabweConstitution.pdf>.

¹⁰⁵ *Zim White Farmers' Struggle*, NEWS24.COM (S. Afr.), Feb. 23, 2010, http://www.news24.com/Content/Africa/Zimbabwe/966/385966c8893e495fbd34652d93ed98ae/23-02-2010-10-06/Zim_white_farmers_struggle.

¹⁰⁶ Mike Campbell (Pvt) Ltd. v. Minister of Nat'l Sec. Responsible for Land, Land Reform & Resettlement, [2008] ZWSC 1, at 2, <http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf>

¹⁰⁷ (n 99 above).

¹⁰⁸ Cris Chinaka, *Mugabe Says Zimbabwe Land Seizures Will Continue*, MAIL & GUARDIAN

This case is one that caused wide spread controversy throughout the Africa Continent, and despite Campbell's (and others' efforts) he was displaced from his land unfairly. This case is a clear example that Courts seemingly cannot compel heads of State to Act when political will is absent, and furthermore the case of expelling people, both indigenous and settlers, from land, whether it be for economic expansion or for land redistribution is a serious violation of various forms of Human rights and is completely out of line with the right to development enshrined in our African Charter, but needless to say it is continuing on the African Continent daily and very few receive restitution from our courts, and unfortunately for those who do, it is usually too late. The Right to Development in this regard has to be addressed. Domestic Courts need to ensure not that in trying to curtail injustices from the past, they do not violate the human rights of individuals in the present.

Nigeria

One of the first socio-economic rights cases to be dealt with by the African Commission known as the Ogoni Case, is *SERAC v Nigeria*.¹⁰⁹ The communication alleges that the military government of Nigeria had been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people.¹¹⁰ The communication alleged violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. The Commission found the Federal Republic of Nigeria in violation of articles 2,

(S. Afr.), Feb. 28, 2009, *available at* <http://www.mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue>.

¹⁰⁹ (n 55 above).

¹¹⁰ (As above).

4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights and appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland.¹¹¹ This was a landmark decision which propelled African jurisprudence on socio-economic rights; sadly however the Ogoni people are still waiting for implementation of the decision of the African Commission.

Thus if we consider both the Ogoni Case as well as the Endorois case, together with the various case law mentioned above, we see that although the Commission passes decisions and gives recommendations, it is still powerless to enforce same. And as such this remains one of the core weaknesses in the African human rights protection system, and only until the nucleus of the problem has been dealt with, recommendations will continue to be fairytale.

¹¹¹ (As above).

Chapter Four: Strengths and weaknesses in the African Human Rights System

The African Commission

The African Human Rights system is anchored by the Banjul Charter and monitored by the African Commission. The Commission is vested largely with promotional functions and a protective function. The Principal function of the Commission include collecting documents, undertaking research, organizing seminars, disseminating information, collaborating with relevant organizations as well as laying down principals and giving recommendations to governments.¹¹² Reduced to its core, ratification of the African Charter requires states to 'give effect; to its provisions.¹¹³ State reporting, which is aimed at assessing whether and to what extent states have adhered to this obligation, may therefore be regarded as the 'backbone of the mission' of the African Commission.¹¹⁴ Through the interrelated process of introspection and inspection, that state is held accountable to its treaty obligations at the national level, and before the international community.¹¹⁵

Article 62 of the Banjul Charter¹¹⁶ deals with the examination of periodic reports submitted by States which has to be done every two years by the state party. This examination provides it with a system of questions and answers between the State and the African Commission. States are required to report on the legislative and other measures that they have taken to implement the Banjul Charter. At a national level, the reporting process provides a state with an opportunity to take an account of

¹¹² J Dougard *International Law a South African Perspective* 557

¹¹³ African Charter on Human and Peoples Rights Article 1.

¹¹⁴ Frans Viljoen *International Human Rights Law in Africa* 2007 369.

¹¹⁵ (As above).

¹¹⁶ The African Charter on Human and People's Rights

its achievement and failures in making the guarantees in the Charter a reality. To date no state has met the prescription of article 62, critiques have argued that the period of two years is unrealistically short in comparison with other human rights treaties. This poor record of submission leaves only 23 member states having submitted their original reports, and many states are behind in their obligations in this regard. Non- submission, more than late submission, seriously erodes the effectiveness of the state reporting procedure.¹¹⁷ Aligned with this difficulty is that the Commission does not have a well developed follow up system, but merely has an approach whereby they engage with states in 'constructive dialogue' by way of questions put to State representatives who attend the meetings.¹¹⁸

The Commission should however be commended on for its implementation of special rapporteurs on summary and extra judicial executions, these are not only country specific but thematic resolutions which raise visibility and engage states directly. The position of state rapporteurs allows the Commission to take the initiative and to be more proactive. Since 1994 the Commission established a number of Special Rapporteurs to provide focal points for the Commission on issues arising from the Charter.¹¹⁹The Commission has also established a number of working groups. Working groups differ from Special Rapporteurs in their establishment, mandate, and composition.¹²⁰While Special Rapporteurs investigate specific issues with a view to making recommendations, working groups are more exploratory and research directed, focusing on emerging issues or matters internal to the Commission's functioning. Working groups usually consist of NGO's and individual

¹¹⁷ (n 126 above) 375.

¹¹⁸ (n 90 above).

¹¹⁹ M Evans and R Murray The special Rapporteurs in the African System 280.

¹²⁰ (n 128 above) 400.

experts.¹²¹ The first working group established dealing with the ‘rights of indigenous peoples or ethnic communities in Africa’, was set up at the Commission’s 28th session,¹²² its mandate is to examine the concept of indigenous people and communities in Africa and to report to the Commission. Its major accomplishment is the drafting of a comprehensive document, the ‘Report of the African Commission’s Working Group of Experts on Indigenous peoples and communities in Africa’ adopted in November 2003.¹²³ Like Special Rapporteurs, working groups pay particular attention to social economic and cultural rights in the discharge of their functions. A further positive and constructive aspect of the Commission is that the African Commission is alone among regional human rights bodies in undertaking ‘promotional visits’. On a continent where many states still frown upon the inspection of their internal affairs, promotional visits may be an important first step to securing some form of engagement.¹²⁴ Mention must be made of the fact that consent from the country in question is required for visits and states are more than likely to permit non-confrontational and non-investigative visits. Promotional visits unfortunately occur infrequently and this is mostly due to lack of adequate financial resources. Nevertheless when promotional visits do occur, they encourage states that are lagging behind with their obligations under the Charter and to monitor situations of uncertainty or conflict.¹²⁵

During its life span of over 20 years, the Commission has made significant progress and has exceeded initial expectations. The Commission can be commended for interpreting the Charter progressively and generously whilst reading important socio

¹²¹ (As above).

¹²² 23 October- 6 November 2000; see annual 14th Annual Activity Report, Annex IV.

¹²³ At the Commission’s 34th session (17 Annual Activity Report paragraph 41).

¹²⁴ (n 132 above) 401.

¹²⁵ (As above).

economic rights into the Charter. By adopting 'general comments' elaborating the substantive provisions of the Charter, it further expanded the scope of the Charter.¹²⁶ Also compared to most other international human rights bodies, the Commission has declared a high percentage of its cases admissible, and found violations in almost all admissible cases, and as such has built up a sizeable jurisprudence. Furthermore its recent decision to require states to supply information about the implementation of its findings, and to include this information in its Activity Reports, is a giant leap towards a more effective complaints mechanism.

On the downside, the Commission has not always dealt effectively with complaints. Often multiple postponements and long delays have characterized its procedure, leading to situations in which final decisions were taken long after the event in a less charged political environment where the immediate impact of the decision was lost.¹²⁷ Although the Commission has taken it upon itself to examine reports submitted by states, it has however failed to establish a credible practice for examining these reports, with the main problem being the lack of real dialogue between the Commission and states.¹²⁸ Furthermore effective action has not been taken against states that have never submitted reports or those that lag far behind in submitting reports. In addition the Commission has unfortunately adopted a differential attitude towards states by allowing them to evade accountability. And a further downfall of the Commission is the negligible impact of its decisions. Critiques view of the African System is that it is one that serves a primarily promotional function and not an adjudicative one. However due to lack of funding, even the

¹²⁶ (As above) 414.

¹²⁷ (As above) 415.

¹²⁸ (As above).

promotional aspect has been effectively sidelined. In addition the Commission's findings (or reports') are not regarded as final; they are merely 'recommendations'. This has weakened the impact of the findings of the Commission by inhibiting state compliance with findings¹²⁹ Although the creation of the Commission and the Charter was founded with the idea of creating an effective mechanism for the realisation of human rights and was created to establish an efficient body for victims of human rights violations to report to, some critiques are of the view that it has turned out to be weak and ineffectual.

The African Commission's findings pertaining to the Endorois case

The African Commission is of the view that the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*.¹³⁰ A violation of either the procedural or substantive element will constitute a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission noted 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.¹³¹ Sengupta believes that development is not simply the state providing for housing, development is about providing people with the ability to choose where to live. He states "... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are

¹²⁹ (As above) 424.

¹³⁰ Arjun Sengupta *Development Cooperation and the Right to Development* Francois-Xavier Bagnoud Centre Working Paper No. 12 (2003).

¹³¹ As above.

made available”. Freedom of choice must be present as a part of the right to development.¹³²

The African Commission also noted 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.”¹³³ Had Kenyan authorities 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.

The African Commission further noted that its own standards state that a Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.¹³⁴ The African Commission agrees with the Complainants that the consultations that the Respondent State undertook 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 merely informed of the impending project for procedural measures but were however not given an opportunity to shape the policies or their role in the Game Reserve. The basis for the African Commission finding in favour of the applicants in light of effective participation is secured in several human rights instruments. A clear example of same is in Article 27 of

¹³² As above.

¹³³ 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. 14a.

¹³⁴ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities Twenty-eighth session, 2003.

the ICCPR¹³⁵ which states that ‘In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language’ The right to participation is also found in the Universal Declaration of the Right to Development, which states that the human being is at the centre of development and should therefore be the participant and beneficiary.¹³⁶

The Commission also noted that the community was in an unequal bargaining position not only because of the fact that they are illiterate, but also because of their lack of understanding of property usage and ownership.

The African Commission made important notice of the fact that Article 2(3) of the UN Declaration on Development notes that the right to development includes “active, free and meaningful participation in development”.¹³⁷ 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, of which was not the case in this instance. Video evidence from the Complainants was shown to the Commission which showed 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. Furthermore, their traditional means of subsistence in the form of grazing their animals had been curtailed due to lack of access to the green pastures of their traditional land. Elders have complained of having lost more than half of their cattle since the displacement.¹³⁸ The African Commission is of the view that Kenya has done very little to provide necessary assistance in these respects and as a result has

¹³⁵ International convention for Civil and Political Rights 1966.

¹³⁶ 1986 UNDRTD Article 2(1).

¹³⁷ U.N Declaration on the Right to Development U.N. GAOR 41st Sess.Doc. [A/RES/41/128](#) (1986), Article 2.3.

¹³⁸ Affidavit of Richard Yegon, (one of the Elders of the Endorois community).

severely violated the Communities right to development. Thus the Commission is convinced that the Kenyan Authorities did not obtain the prior, informed consent of all the Endorois people before designating their land as a Game Reserve and proceeding to evict them. Additionally, the African Commission is of the view that the Kenyan authorities had a duty not only to consult with the community, but also to obtain their free prior and informed consent with regards to any development or investment projects that would have had a major impact within the Endorois territory.

Basis for the Commission's Findings

From the aforesaid one can conclude that the basis of the African Commission findings was firstly that Kenya (Respondent State) bears the burden for creating conditions favourable to a people's development, which is in line with Article 3 of the Declaration on the Right to Development. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. Secondly 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 and thus the Commission *finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*¹³⁹ Also with regards to the Applicants claim that they were not afforded effective participation, the African Commission looked to various international instruments such as the Universal Declaration on the Right to Development, the Rio

¹³⁹ (n 44 above).

Declaration,¹⁴⁰ Article 13 of the African Charter, together with the Declaration on the Rights of Indigenous People; in all these instruments the right to participation of indigenous peoples is recognised and thus Kenya as a state was in violation of same.

In accordance with the above, the Commission found that Kenya's obligations towards the Endorois community required both compensation and restitution of ancestral land. In doing so, it specified that this meant restoring the ownership of the land to the community, rather than limiting its compliance to rights of access. The Commission based its reasoning on the fact 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*.¹⁴¹

The impact of the Endorois decision in Kenya and the African Human Rights System

The Constitution of Kenya incorporates the principle of non-discrimination and guarantees civil and political rights, but fails to recognize economic, social and cultural rights as such, as well as group rights. The rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's

¹⁴⁰ Adopted at the Rio Conference on Environment and Development in Rio de Janeiro, Brazil 3-4 June 1992 para 21 and 22 underline the right to participation of indigenous people in development.

¹⁴¹ *Endorois* case, paragraph 204 (emphasis added), citing Articles 8(2)(b), 10, 25, 26, and 27 of UNDRIP.

constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues.¹⁴²

The hunter-gatherer way of life of Kenya's indigenous peoples has come under heavy strains in recent decades. This is mainly the result of the historical legacy of colonialism, but also because of inappropriate land policies and developmental strategies, these policies entailed the systematic land-loss of rangelands and of forest reserves that underpinned the pastoralist and hunter-gatherer livelihoods and their cultural sustainability, leading to serious violations of economic, social and cultural rights¹⁴³ and persistent human rights violations.

The decision in Endorois revealed that the commission is willing to lift the veil over the hierarchies and diversities within a state in order to ensure equal protection of the law to all. By puncturing the juridical stranglehold of states over land, the Endorois decision requires states to engage in a robust conversation with indigenous groups in framing developmental options that encroach upon land traditionally occupied by communities.¹⁴⁴ By passing the decision the commission has revisited the post-colonial issues regarding the need to re-assess colonial land relations which have resulted in present human rights inequalities which have often lead to violent conflicts. In particular, the decision indicates the danger of game parks and reservations – albeit ripe for tourism dollars – represent far serious abrogation of human rights for marginalised communities residing on these lands.¹⁴⁵ Co counsel for the Endorois, Korir Songei, has stated that 'the Endorois decision has crafted clear contours for the protection of land rights of indigenous communities'. While

¹⁴² Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled Human Rights Council A/HRC/4/32/Add.3. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen.

¹⁴³ As above.

¹⁴⁴ Korir Sing'Oei Abraham, 2010 *The Endorois Of Kenya: From Non-Beneficiaries To Active Stakeholders* 19 April 2010 <http://indigenoupeoplesissues.com/index.php> (accessed 31 October 2011).

¹⁴⁵ As above.

acknowledging that the establishment of a game reserve was a legitimate aim and served a public need in terms of the proviso to article 14 of the charter, the commission found that the complete eviction and denial of the community from the land was disproportionate to this purpose. In other words, the commission was persuaded that the creation of the national park did not need to preclude the Endorois and could have been accomplished by alternative means proportionate to the public need for tourism infrastructure.¹⁴⁶ Asbjorn Eide, the long serving chair of the now defunct UN Working Group on Minorities, holds the view that internationalising human rights grievances has the potential to lead to the 'idealization, positivization and realization' of human rights by the state,¹⁴⁷ this has clearly been reflected by the internationalization of the Endorois decision and the impact it has had on the indigenous rights of Africans as a whole, who were reluctant to acknowledge same as Africans were of the view that 'everyone in Africa is indogenous'. However their success has led to fortuitous developments in the national, regional and international human rights terrain. This decision is a very good move towards the protection of indigenous peoples' rights in general and in making the law work for everyone.¹⁴⁸

The Endorois case defines the concept of "peoples", clarifies the beneficiaries of the Right to Development and stresses the role of the state as the primary duty bearer. It also explains the content of the right which is multifaceted as it comprises elements of non-discrimination, participation, accountability, transparency, equity and choices as well as capabilities.¹⁴⁹ The African Commission through the

¹⁴⁶ As above.

¹⁴⁷ As above.

¹⁴⁸ A Sengupta 'The political economy of legal empowerment of the poor' in D Banik (eds) Rights and Legal empowerment in eradicating poverty 2008 (31).

¹⁴⁹ Serges Alain Djoyou Kamga The right to development in the African human rights system: *The Endorois case 2011(2)* volume of the De Jure.

Endorois decision “has exorcised the ghosts of its previous wobbly conception of peoples”.¹⁵⁰ Indeed, “peoples” and specifically indigenous people are now clarified. Relying on the Report of the Working Group on Indigenous Peoples,¹⁵¹ the Commission highlighted the identification criteria of indigenous people to be:

- I. the occupation and use of a specific territory;
- II. the voluntary perpetuation of cultural distinctiveness;
- III. self-identification as a distinct collectivity, as well as recognition by other groups; and
- IV. an experience of subjugation, marginalisation, dispossession, exclusion or discrimination”¹⁵²

This case is important as it clearly identifies the beneficiaries or rights holders of the Right to development and stresses the role of the state as the primary duty bearer.¹⁵³ Through Endorois, the Commission went for the broad interpretation of the law which enabled it to consider the interdependency of the rights in protecting the Right to Development. As a result, the Commission highlighted the holistic character of the right which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.¹⁵⁴

¹⁵⁰ Sing’Oei Abraham “The Endorois Of Kenya: From Non-Beneficiaries To Active Stakeholders” - Indigenous Peoples Issues and Resources (2010) 2 available at http://indigenouspeoplesissues.com/index.php/components/components/plugins/content/attachments/index.php?option=com_content&view=article&id=4828:the-endorois-of-kenya-from-non-beneficiaries-to-active-stakeholders&catid=55:africa-indigenous-peoples&Itemid=77 (accessed 7 June 2011).

¹⁵¹ Report of the Working Group, ‘ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (Published by IWGIA, 2005), see Chapter 4.

¹⁵² Endorois case, par, 150.

¹⁵³ (n 153 above).

¹⁵⁴ *Endorois* case, par 128.

Furthermore In the Endorois decision however, there was no emphasis on the progressive realization. It could be argued that the Commission brought back the principle of immediate realization of human rights enshrined in the ACHPR by simply calling upon Kenya to remedy the violation of the rights of the Endorois community.¹⁵⁵ Thus it can be said that the Endorois decision provides guidance on how to ensure the justiciability of the Right to Development, a definite breakthrough in the African Human Rights jurisprudence.

African Court on Human and Peoples' Rights

Under the Protocol, the decisions of the African Court are final¹⁵⁶ and are not subject to appeal or to political confirmation. Thus state parties are not only obliged to comply with the judgement, but also to 'guarantee its execution.'¹⁵⁷ As the Court was established to complement only the 'protective' mandate of the Commission, the Commission retains its very important and extensive 'promotional' roles. Some commentators have called for the Court to completely take over the protective mandate under the Charter, leaving the Commission to focus on promotion.¹⁵⁸

The creation of the African Human Rights Court was intended to realise the shortcomings of the Commission in the form of a protective function as opposed to a promotional one, however critiques are of the view that the court may be just as paralyzed as the Commission and that the African human rights system would have been better off correcting the inadequacies of the already established institution as opposed to dissipating scarce resources which will result in another possibly

¹⁵⁵ (n 157 above).

¹⁵⁶ Court Protocol Article 28(2)

¹⁵⁷ Court Protocol, Article 30

¹⁵⁸ Mutua The African Human Rights System: its Laws, Practice, and Institutions Martinus Nijhoff 2001 307.

impotent institution.¹⁵⁹The burden of expectation on the Court is very high, driven primarily by frustration about the weaknesses of domestic courts and the African Commission. In order to fully exploit the ‘window of expectation’, it is important that the Courts effective operationalization is not unduly delays, that the Commission starts referring cases to the Court without delay, that individuals make use of the limited direct access possibilities and that the Courts advisory jurisdiction is explored.¹⁶⁰To date the African Court has not yet heard a matter and thus a sound critique of its functioning cannot be made, however enthusiasm for the Court should be tempered by the track record of the African Commission. And the reasons for the shortcomings of the Commission over the past 20 years, should be analysed because it is more likely than not that the same weaknesses seen in the Commission will be seen in the Court.

¹⁵⁹ (n 118 above).

¹⁶⁰ (n 140 above) 475.

Chapter Five

Conclusion and Recommendations

Summary of Findings

The objective of this research was to critically analyse the implementability of the right to development, and also to examine the various challenges States incur when trying to enforce the right to development, specifically the right to development in the context of the Endorois case in Kenya. In particular the study aimed to make an inquiry as to what challenges the Kenyan Government is facing with regards to implementation of the Endorois decision and how these challenges can be overcome.

As already mentioned in Chapter one, the right to development, though still controversial in the global context is in Africa regarded as an inalienable right and comprises of both civil, political, socio-economic and cultural rights as well as collective rights such as the right to hold land in a community. The Right to development is not only enshrined and secured by in the African Charter of Human and Peoples Rights, but is also found in other instruments such as; The Protocol on the Rights of Women in Africa as well as the African Charter on the Rights and Welfare of the Child, and as such is recognized in several African Countries across the continent. Thus one can safely say that the Right to Development has a secure place in the African Human Rights System.

Chapter two aimed at defining the right to development, and it was established that the right now has general international recognition. Chapter two also recognized that political independence does not automatically equate with development and that

development is measured not in terms of commodities but in terms of realization of increased life expectancy, infant survival and adult literacy. Further it was established that without economic development, the realization of human rights within a country cannot be realised. Chapter two confirmed that the right to development is indeed enforceable and that individuals as well as peoples i.e. communities and groups are both the duty bearers and beneficiaries of the right to development, and that the state has the role of the primary duty bearer of the right, and this right can be achieved through continuous global development assistance.

Chapter three sets out the facts of Endorois and the judicial struggle of the Endorois community that led to them to getting a decision passed in their favour from the Commission. The fact that the Right to Development is a secure part of African jurisprudence has been reflected with the numerous cases mentioned above i.e. The Bakweri case, where the right was broadly recognised and more especially the Endorois decision, where the African Commission highlighted the multifaceted character of the right to development which entails a holistic approach for its realisation¹⁶¹ and also provided guidance on how to ensure the controversial issue of the justiciability of the right to development.

The decision and observations viewed by the Commission consisted of extensive reference to international and regional human rights standards and jurisprudence, and particularly that of the Inter- American Court and Commission.¹⁶² Rhodiri C. Williams, in his article; *'Endorois Case' Toward a Global Doctrine of Customary Tenure* has stated that perhaps the Commission sensed the extent to which it was

¹⁶¹ (n 153 above).

¹⁶² Rhodiri C. Williams *The African Commission 'Endorois Case' Toward a Global Doctrine of Customary Tenure?* <http://terraOnullius.wordpress.com/2010/02/17/the-african-commission-endoroise-case-toward-a-global-doctrine-of-customary-tenure/> (accessed 26th January 2012).

breaking new ground and took pains to ground its decision as thoroughly as possible. International law is shifting from merely protecting land rights based on a formal finding that a community is indigenous, as in the Endorois Case, to protecting land rights based on the underlying dynamic and attachment to informally held land seen among many of the world's poorest and most vulnerable citizens, "indigenous" or not.¹⁶³ The effect of this decision will hopefully have a ripple effect throughout governments in Africa with regards to the word '*peoples*' in The African Charter on Human and Peoples Rights. However the main problem that remains unresolved, is no longer the existence of the right in question, but the difficulties arising with implementation.

Chapter four dealt with the strengths and weaknesses in the African human rights system, and deals with the African Court's protective mandate over the Commission. The decision in Endorois revealed that the commission is willing to lift the veil over the hierarchies and diversities within a state in order to ensure equal protection of the law to all. Most importantly it was established that this decision was a breakthrough in the African human rights jurisprudence.

Recent Developments Regarding Implementation of the Endorois Decision or Lack Thereof

According to Dann Okoth, Kenya risks sanctions from the African Union should it fail to implement an international court verdict on the rights of the Endorois,¹⁶⁴ as this would contravene the African Charter to which Kenya is a signatory. However regardless of the possible threat of sanctions, it has been almost two years since the

¹⁶³ As above.

¹⁶⁴ Dann Okoth *Cheers Turn To Tears for Endoise Waitng for Land* The Standard, Kenya's Bold Newspaper, Nairobi Kenya, 17 June 2011. <http://www.standardmedia.co.ke/specialreports/insidePage.php?id=2000037356>

ruling, and the Kenyan government is yet to take steps to implement the decision, leaving the community frustrated and anxious. However despite the threat of sanctions, the question remains what would these sanctions be and would they result in the desired outcome? I am of the opinion that if the Kenyan Government indeed felt that there was a possibility of sanctions being held against them, they may have taken it upon themselves to implement the decision promptly.

*“Being allowed to hold on to our land is a prerequisite to preserving our identity, at this rate, we might not hang on for much longer”*¹⁶⁵, those are the words of community youth leader Nelson Kipchumba Kibor. *“We thought we could access quick justice through the African Commission. That now seems far-fetched”*¹⁶⁶. Those are the words of Kibet Chebinbin, age 75, in kandai village in Baringo County. These examples of the attitudes and feelings of the Endorois community are a further indication of Kenya’s failure to implement a long sought after decision.

A report was put together in December 2011 by experts from Cemiride, Institute for Law and Environmental Governance (ILEG), Kenya National Commission on Human Rights, Kenya Land Alliance (KLA) and Katiba institute, which states that while it is alleged Kenya has committed itself to implement the Endorois decision and within the context of Universal Periodic Reporting of the UN Human Rights Council, the State has not taken tangible actions in pursuit of these commitments¹⁶⁷ Adenda Lumumba of KLA who helped compile the report states that there have been recent discussions by Parliament on the extent to which the Government is pursuing implementation of the Endorois decision, and it goes to show that there is a general

¹⁶⁵ As above.

¹⁶⁶ As above.

¹⁶⁷ As above.

lack of coordinated action on the part of the State.¹⁶⁸ However these Parliamentary discussions have not yielded tangible results precisely because Parliament is only in a position to legislate and not implement.

The overall delay in implementation falls as far behind as administrative delays, as the Ministry of Lands reported it was yet to receive a sealed copy of the verdict in order to allow it to take action, furthermore the Ministry of Foreign Affairs as well as the Ministry of Justice have failed to confirm before Parliament that they had received formal communication on the decision.¹⁶⁹ The main problem being that the State Law Office has also not advised relevant arms of Government of the Cabinet to facilitate enforcement of the decision.

Sadly despite the gravity of this landmark decision, the Kenyan Government continues to operate as if the Endorois decision is not legally binding. For instance, Kenya's Geothermal Development Company has invited bids for investment in electricity generating plants with capacity of 800 megawatts using underground steam in Bogoria-Silali block without consent from the Endorois community¹⁷⁰, which stems as a further violation of their right to development. Another example is that Kenya's Wildlife Service has recently sought the declaration of Lake Bogoria as a UNESCO world heritage site without consulting the Endorois.¹⁷¹

In light of the above, it is clear that the campaign for the implementation of the Endorois decision has received little support from the Kenyan government. From the lack of urgency that the matter has been given, it is apparent that the decision of the African Commission has somewhat fallen on deaf ears in the seat of government,

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ As above.

and the Endorois judicial battle is slowly proving to have been in vain and is a clear example of impunity. The Endorois are very concerned over government's reluctance to honour the landmark ruling. The Commission has unfortunately adopted a differential attitude towards states by allowing them to evade accountability. And a further downfall of the Commission is the negligible impact of its decisions. Critiques view of the African System is that it is one that serves a primarily promotional function and not an adjudicative one.

Recommendations

The question at the tip of everybody's tongue at this stage of the Endorois battle is what recourse does the Endorois community have if the Government fails to respect the ruling? James Mwenda of KNHCR says that because Kenya is a signatory to the African Charter, the judgement is legally binding; he goes on to say that should Kenya fail to implement the decision, the result would be a sanction from the African Community, however there is no provision for this in the African Charter. Conversely one must remember that the Commission's decision is not a judgement as such like with a national court, it merely stands as a recommendation or view. The stakeholders are looking at the possibility of approaching the local courts to enforce the ruling if the Government is reluctant to implement it.¹⁷²

Information

The above recommendation goes hand in hand with that of educating indigenous communities of their rights, not only as an individual citizen of a country but as an indigenous community as a whole, as well as their right to preserve their identity, culture and beliefs. Because in so far as indigenous communities are unaware of

¹⁷² As above.

the right to development together with other rights enshrined in the African Charter, those rights shall not serve the purpose for which they were created. In this sense a more robust method of information dissemination of the decision has to be implemented in order to get more public support. Human rights bodies together with NGO's need to educate the indigenous communities like the Endorois of the rights available to them and the different methods of ensuring they are not violated. This however requires an availability of resources, which shall be dealt with below.

Accountability

Another important aspect that needs to be looked into is a mechanism for monitoring the accountability of the implementation of the right to development. This would require a body that not only exists but functions within specified time limits, and consists of a cluster of experts and groups of civil society working towards a common goal. I would suggest that this mechanism be used to assist or back up regional bodies or groups that actually work on the right to development in order to learn from the experience from the Inter American, European and the African systems. In the UN system, they have 'Rapporteurs on Follow-ups' who follow up on committee and other recommendations, the African system could borrow from this strategy in order to ensure the correct bodies are held accountable and recommendations are followed through.

Availability of Resources

Both the State and the International community should be held accountable for inadequate resources, unfulfilled commitments towards aid as well as

unsustainable debt burdens, remains the greatest problem regarding implementation, and in this regard the task force stresses the importance of donor States keeping their commitments, and to increase assistance to developing countries.¹⁷³ Resources or lack thereof is the number one stumbling block in the way of Africa's Human rights system reaching heights like those of its counterparts. However States like Kenya should not use this as an excuse not to comply with binding decisions. However the issue of resources or lack thereof is a controversial one as one cannot make a recommendation for particular body to ensure that there are resources available for development. However I would recommend that the dominant members of the international community of states, or, in the words of the Committee on Economic, Social and Cultural Rights (CESCR), "all those in a position to assist," have not only a role but also a responsibility in contributing to the immediate realization of the minimum essential level of socio- economic rights globally.¹⁷⁴ Other binding human rights instruments where an obligation for international assistance is required include the International Covenant on Economic Social and Cultural Rights of 1966, Article 2 (1) as well as the Convention on the Rights of the Child of 1989, which explicitly includes the requirement that 'particular account shall be taken of the needs of developing countries'.¹⁷⁵

¹⁷³ Consolidation of Findings of the High Level Task Force on the Implementation of the Right to Development, a/HRC/15/WG.2/task force/2/Add.1, March, 2010. Paragraph 69

¹⁷⁴ (n 20 above) 19.

¹⁷⁵ Convention on the Rights of the Child 1989 Article 2(1).

Conclusion

Having answered the research questions referred to in Chapter one, and establishing in Chapter two who the right holders and duty bearers are envisaged by Article 22 of the African Charter on Human and Peoples Rights, and having ascertained the fact that the right to development is an obligation that should be met by all nation states whether alone or with international cooperation, it is safe to conclude that the Kenyan government has an obligation towards the Endorois community to ensure their right to development is protected, because as established in chapter two, the right to development is definitely a legally enforceable right. Chapter three takes us through the journey of the Endorois and their judicial struggle from being a disgruntled community whose voice will now echo throughout Africa for years to come. Furthermore with supporting case law from Nigeria, Zimbabwe, South Africa and Congo, it is evident that the struggle for the implementation of the right to development is a continental one. As stated in Chapter four, the African human rights system, despite having come a long way, is a far cry from the standards of its counterparts being the American and European Human rights systems. Needless to say the Endorois decision provides guidance on how to ensure the justiciability of the Right to Development, and is hopefully a step in the right direction for the African human rights system in dealing with the challenges surrounding implementation.

Kenya's lack of an efficient plan to comply with the Commission's recommendations since the passing of the decision is a clear example of their lack of urgency in the matter and not a lack of resources. Nevertheless Kenya's lack of compliance does not serve as a platform for other African Countries to

conduct themselves in the same manner. And needless to say with regards to the Endorois matter, the Commission performed its duties and other than naming and shaming has no way of enforcing State compliance with a decision. Thus as already mentioned above, a body solely monitoring accountability is desperately required to fill the gap in the African Human rights system. They too may not be able to enforce a State to comply but they can inform neighboring States of non-compliance as well as encourage sanctions, and could somewhat 'harass' States into compliance out of fear of ongoing public scrutiny from the international community. This will lighten the administrative load of the Commission so that they focus on the promotion of rights and not on the implementation of same.

The African system may not be as advanced as the Inter- American and European system, but advancement goes hand in hand with compliance and cooperation. African Heads of State need to take accountability for the Agreements, Conventions, Charters and Protocols signed, because intention to comply starts at the onset, and not only when a right has been violated, and as such governments will be hesitant to infringe upon a right they internationally promised to uphold. Perhaps the aforementioned recommendations could assist in the journey towards Kenya's implantation of this controversial right.

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