

Landmark ruling provides major victory to Kenya's indigenous Endorois

Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v The Republic of Kenya

By Lucy Claridge

The Endorois indigenous community in Kenya has successfully contested their eviction from their ancestral land by the Kenyan government. In a landmark decision adopted by the African Union on 2 February 2010, the African Commission on Human and Peoples' Rights ('the African Commission') declared the expulsion of Endorois from their ancestral lands illegal.¹ The African Commission found that the Kenyan government had violated certain fundamental rights of the Endorois community protected under the African Charter on Human and Peoples' Rights (the 'African Charter') and other international instruments.

Endorois' ancestral land was originally appropriated by the Kenyan government in the 1970s to create the Lake

Bogoria National Reserve. Prior to this interference with Endorois' title and enjoyment of the land, the community had been accepted as the owners of the land by all neighbouring tribes, and had enjoyed undisturbed possession of the land for more than 300 years. Endorois are firmly linked to Lake Bogoria and the surrounding area, known as Mochongoi forest, through cultural and religious practices.

MRG and Kenyan non-governmental organization Centre for Minority Rights Development (CEMIRIDE) lodged a complaint with the African Commission in 2003, claiming that the Kenyan government had violated the African Charter by failing to recognize and protect



Members of Kenya's pastoralist Endorois community. Emma Eastwood/MRG

Endorois' ancestral land rights and refusing to compensate the community adequately for the appropriation of the land, or to grant restitution of their land.

The African Commission decision creates a significant legal precedent. It represents the first time that an African indigenous people's rights over traditionally owned land have been legally recognized. In affirming Endorois' collective right to ancestral lands, the Commission's decision has not only awarded a full remedy to the Endorois community but has also significantly contributed to a better understanding and greater acceptance of indigenous rights in Africa.

The decision also represents the first case globally in which a ruling has been made on the right to development. The Commission found that the Kenyan government's failure to consult or compensate Endorois in relation to the use of their land amounted to a violation of this right. In doing so, the body has provided a strong incentive to all governments to regard their indigenous peoples as stakeholders in their development projects and to involve them in the development process. Together, the Commission's rulings constitute a milestone in the progress of indigenous rights in Africa.

Endorois: dispossession of their traditional land

Endorois are a semi-nomadic indigenous community of approximately 60,000 people who for centuries have earned their livelihoods from herding cattle and goats in the Lake Bogoria area of Kenya's Rift Valley.² They have established and practised a sustainable way of life that is inextricably linked to their ancestral land. They occupied and enjoyed undisturbed use of the land for more than 300 years, even under British colonial administration.

Endorois have a strong attachment to the area surrounding Lake Bogoria, which is both fertile land providing pasture and medicinal salt licks for their cattle, and central to their religious and cultural practices. The community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are situated around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. Endorois also believe that the spirits of all their community, no matter where they are buried, live on in Lake Bogoria. The Mochongi forest is considered to be the birthplace of Endorois and the settlement of the first Endorois community.

When Kenya gained independence in 1963, ownership of Endorois land, previously designated as a native land under the management of the Native Lands Trust Board in London, was transferred to the relevant county council, who held the land in trust and for the benefit of the Endorois community.³ Endorois remained on the land and continued

to hold, use and enjoy it. In 1973, however, the Endorois people were dispossessed of their land by the Kenyan government through the creation of the Lake Hannington Game Reserve in the Central Rift Valley – subsequently renamed Lake Bogoria Game Reserve in 1978.

Endorois challenged their eviction with the Kenyan authorities. They were assured that 400 Endorois families would be compensated with plots of fertile land, that the community would receive 25 per cent of the tourist revenue from the Game Reserve and 85 per cent of the employment generated, and that cattle dips and fresh water dams would be constructed. None of these terms was ever implemented: only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. This money was always understood to be a means of facilitating relocation rather than compensation for Endorois' loss.

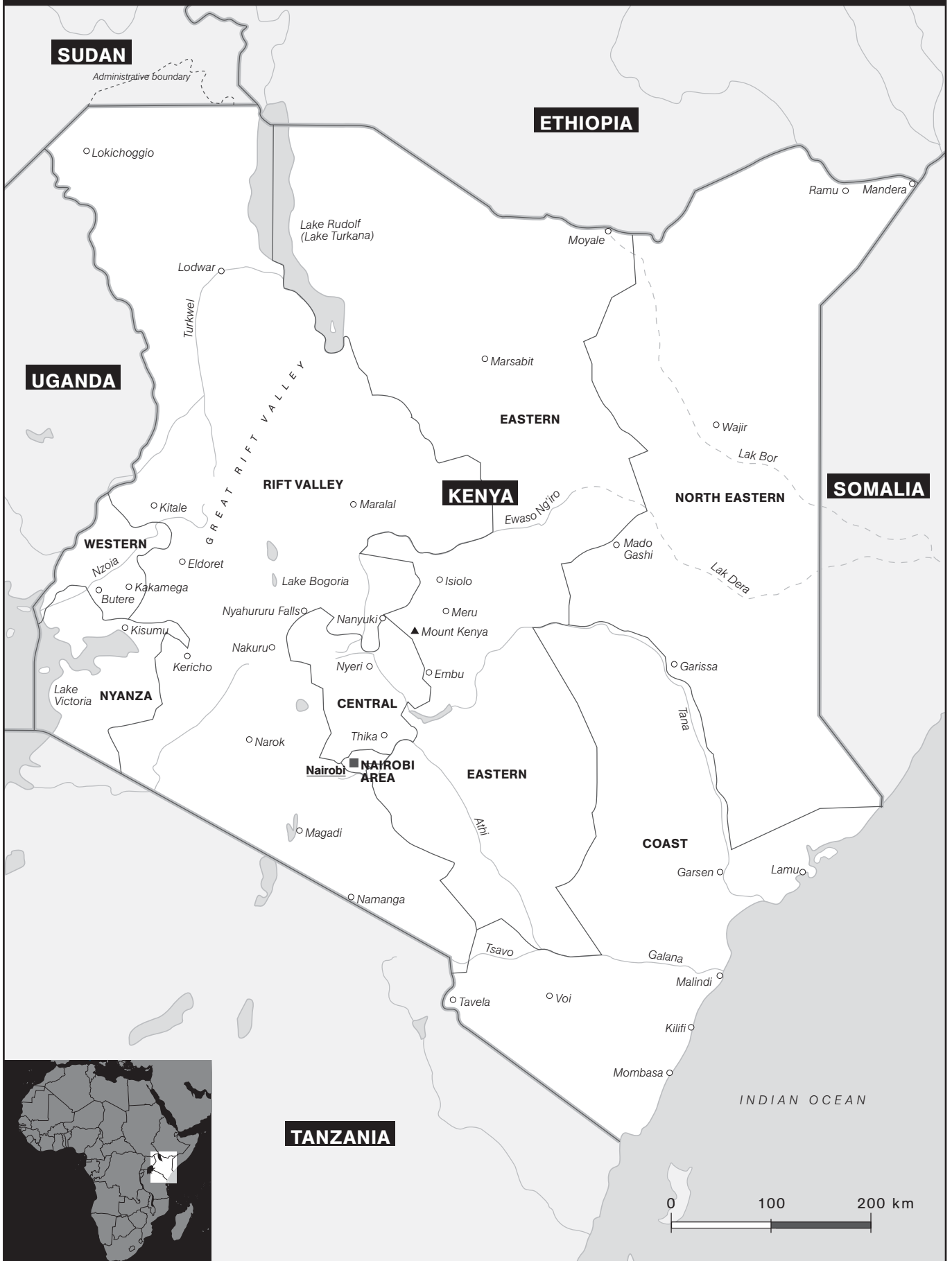
The Endorois community took their case to the Kenyan High Court in 2000. The High Court gave judgement against them in 2002, finding that although Endorois were the former bona fide occupants of the land, their customary claim to the land had been extinguished as a result of the designation of the land as a game reserve in 1973 and 1978. It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities towards Endorois for the loss of their ancestral land. The High Court also stated that it could not address the issue of a community's collective right to property, and that it did not believe Kenyan law should address the issue of special protection to a people's land based on historical occupation and cultural rights. The court also viewed the Lake Bogoria reserve as a national resource, so a community, such as Endorois, was precluded from laying claim to any revenue from such an asset.

Having had no success in the Kenyan courts, the Endorois community – represented by CEMIRIDE and MRG ('the Complainants') – took the matter to the African Commission in 2003.

The key arguments

First, the Complainants argued that Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. Relying on previous case law,⁴ they argued that the African Commission had affirmed the rights of 'peoples' to bring claims under the African Charter. They further argued that the African Commission had already stated that, in the case of a large number of individual victims, it may be impractical for each individual complainant to take a case before domestic courts. In such situations, the African Commission can decide the rights of a people as a collective. They therefore argued that Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

Kenya



The Complainants alleged a breach of Endorois' right to property, as guaranteed under Article 14 of the African Charter, with regard to the continuing dispossession of their ancestral land. They argued that these property rights are derived both from Kenyan law and the African Charter, which recognize indigenous peoples' property rights to their ancestral lands. They also argued that the impact on the community had been disproportionate to any public need or general community interest.

Furthermore, they argued that a provision in Article 14 of the African Charter stating that any encroachment on land should be 'in accordance with the provisions of appropriate laws' referred not only to Kenyan law but also to international law on the protection of indigenous land rights. Whereas Kenyan law does not recognize the collective nature of land rights, international law does. The Complainants relied on case law from the Inter-American Court of Human Rights,⁵ affirming that indigenous property rights have been legally recognized as communal property rights. They concluded, therefore, that encroachment on Endorois lands was not in accordance with 'appropriate laws' for the purposes of Article 14.

In relation to religious links with the Lake Bogoria area, the Complainants argued that the continual refusal of the Kenyan authorities to give the community access to the religious sites to worship freely amounted to a violation of Article 8 of the African Charter, which provides for freedom to practise religion without unnecessary restrictions. As an indigenous community, Endorois' religion is ultimately tied to the land; religious sites are located around the lake, where they pray and carry out regular religious ceremonies. The lake area is the spiritual home of all Endorois, living and dead, and it is where their ancestors' burial grounds exist. They therefore claimed that the refusal to grant them access was a violation of their right to practise religion.

In addition, Endorois also claimed a violation of their right to culture protected under Article 17 of the African Charter. They argued that the continuous restriction of their access to Lake Bogoria, a central element in Endorois cultural practice, meant that they could not practise their way of life by holding cultural rites and celebrations that distinguished them as a people from other similar groups. Further, the restriction of access for grazing, which affected their pastoralist way of life, and the granting of mining concessions in the proximity of Lake Bogoria, posed a threat to the cultural and spiritual integrity of the ancestral land of Endorois.

The Complainants also alleged a breach of Article 21 of the African Charter, which guarantees the right to natural resources. They claimed that the lack of access to the medicinal salt licks and fertile soil essential for their livestock violated their right to free disposition of their natural resources. This lack of access was further aggravated by mining concessions on the land, which were granted

without consultation and without any share of the benefits passing to Endorois.

Finally, in a novel argument, the Complainants claimed a violation of their right to development under Article 22 of the African Charter.⁶ The Kenyan government had failed to consult Endorois in the development process that saw the creation of the game reserve, totally disregarding the need to ensure the continued improvement of the community's well-being. They claimed that due to the denial of access to the lake, the salt licks and their usual pasture, their cattle had been dying in large numbers and they had become poorer. Thus, due to their exclusion from sharing in the benefits of development on their ancestral land, they had suffered a loss of well-being, which constituted a violation of their right to development.

The Kenyan government's response

The government argued that Endorois had no legal standing before the Commission, on the basis that they were not a distinct community. They claimed the land around Lake Bogoria was occupied by the Tugen tribe, which is made up of four clans: Endorois, Lebus, Somor and Alor. All these groups co-exist in one geographical area and share the same language. The government therefore argued that it was incumbent on the Complainants to prove that Endorois are distinct from the other Tugen groups.

The government also argued that the Endorois community was no longer living in the Lake Bogoria area. They claimed that most of the tribes around the lake, including Endorois, had moved from their ancestral land due to other factors such as the search for pasture for their livestock and for arable land to carry out agriculture. In addition, they had been relocated by the government to facilitate development in the form of the creation of irrigation schemes, national parks, game reserves and forests and for the extraction of natural resources.

The government further claimed that it had instituted a programme of universal free primary education and an agricultural recovery programme. The intention of these programmes was to increase the household income of the rural poor, including Endorois.

The government also claimed that following the creation of the Lake Bogoria Game Reserve, it had complied with the appropriate law by resettling the majority of Endorois in the Mochongoi settlement scheme. This measure, they said, was in addition to the compensation they had already paid to Endorois when the land was initially designated as a game reserve.

Analysis of the Commission's decision and recommendations

In an unprecedented decision, the African Commission accepted all of the Complainants' arguments, finding that the Kenyan government had committed all the claimed violations of the African Charter. It also made a series of wide-reaching recommendations for the Kenyan government to follow.

Crucially, the African Commission found that Endorois are a distinct people whose culture, religion and traditional way of life are intimately intertwined with their ancestral lands. As a result, they are entitled to protection of the collective rights articulated in the African Charter.⁷

The Commission then concluded that the Government of Kenya had violated Endorois' rights to cultural and religious freedom in contravention of Articles 8 and 17 of the African Charter, by forcibly evicting them from their ancestral and sacred lands, including Lake Bogoria, thereby preventing them from maintaining their religious and cultural practices and threatening their way of life.⁸ In the view of the Commission, the conservation and economic development goals sought with the creation of the game reserve did not justify the government's infringement of Endorois' cultural and religious rights. Instead, the Commission noted that Endorois' access to Lake Bogoria, the medicinal salt licks and other ancestral and sacred lands would not 'detract' from those goals,⁹ nor would it 'pose any harm to the ecosystem of the Game Reserve'.¹⁰

To remedy this violation, the Commission recommended that the government '[e]nsure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle'.¹¹ Additionally, the government was directed to 'pay adequate compensation to the community for all the loss suffered',¹² which includes the loss caused by Endorois' inability to enjoy their cultural and religious practices on their ancestral and sacred lands over the past three decades.

In relation to the right to property, the African Commission considered whether the government's encroachment on Endorois land was permissible. Article 14 of the African Charter allows for encroachment on the right to property 'only...in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. The African Commission found that the government did not meet this test. It therefore concluded that the government's 'expropriation and the effective denial of ownership of their land' amounted to an infringement, or encroachment, of Endorois' right to property.¹³ It further held that the government 'has a duty to recognize the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right'.¹⁴

Having reached these findings, the African Commission stated that the government 'must grant title' to Endorois to 'guarantee [their] permanent use and enjoyment' of their lands,¹⁵ as well as to ensure that they 'can engage with the state and third parties as active stakeholders rather than as passive beneficiaries'.¹⁶ According to the Commission, 'simply...grant[ing] them privileges such as restricted access to ceremonial sites' does not meet 'internationally recognized norms'.¹⁷ Endorois' lands 'must first be delimited and demarcated, in consultation with [them] and other neighbouring peoples' and then legal title granted to them.¹⁸ Although the Commission calls on Kenya to provide Endorois with restitution of their lands, the government may offer Endorois 'other lands of equal extension and quality'.¹⁹

To remedy these violations, the African Commission recommended that Kenya '[r]ecognise rights of ownership to the Endorois and restitute Endorois ancestral land'.²⁰ This wide-reaching recommendation means that the Government of Kenya must now grant legal title to Endorois over their lands. During the process of granting title, the government must consult with Endorois and other affected communities. Additionally, the Commission recommended that Endorois be compensated for their losses associated with the government's infringement on their right to property.

The African Commission further found that the government violated Endorois' right to their natural resources located on their lands. The Commission reached its decision on the basis that the government failed to consult with Endorois, or to conduct an environmental assessment, and did not allow Endorois to share in the benefits of the mining concessions.

Finally, in the first decision to adjudicate upon the right to development, the African Commission held that the government infringed upon Endorois' right to development by leaving them 'out of the development process or benefits'.²¹ It concluded that the right to development imparts duties on the government to (1) consult with Endorois in a meaningful and culturally appropriate manner, (2) obtain their informed consent prior to any development or investment projects that may have a major impact on their lands, and (3) ensure that Endorois share in benefits and/or receive compensation resulting from a restriction or deprivation of their property and natural resource rights.²² Because the government failed to 'obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve',²³ and 'provide adequate compensation and benefits, or provide suitable land for grazing',²⁴ it violated Endorois' right to development under Article 22 of the African Charter.

To remedy the part of the government's infringement that failed to obtain the consent of Endorois before conducting development activities on their lands, as well as its failure to include Endorois in a share of the benefits of those activities, the Commission recommended that the

government 'pay adequate compensation to the community for all the loss suffered', and 'pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve'.²⁵

The Commission's ruling in brief

- The African Commission found Kenya to be in breach of Articles 8, 14, 17, 21 and 22 of the African Charter.
- Article 8 provides for freedom of religion. By evicting Endorois from their ancestral lands, the Commission found that the Kenyan government had denied them access to sacred sites that were essential to the practice of their religion.
- Article 14: the right to property. The Commission found that Endorois had a right to legal ownership of their land. By forcibly removing them, the government had infringed this right. They had provided no lawful justification and had failed to provide compensation.
- Article 17: the right to culture. By forcing Endorois off their land and away from resources vital to the health of their livestock, the Kenyan government had threatened Endorois' pastoralist way of life. The Commission found that in doing so, the government had denied their right to culture.
- Article 21: a right to natural resources. On the basis that the Kenyan government had granted mining rights on Endorois land to a private company, and had failed to consult or share the benefits with Endorois, the Commission found that the government was in breach of the Article.
- Article 22: a right to development. The Commission found that by evicting Endorois from their land and failing to provide them with alternative land of sufficient quality to support their way of life and by failing to compensate them, the government had infringed Endorois' right to development.

Impact of the decision on indigenous groups in Kenya and beyond

The African Commission's decision is unique in its recognition of indigenous peoples' collective rights over ancestral land in Africa, and represents a major development in the protection and promotion of indigenous peoples' rights, both in Africa and worldwide, for several reasons.

First, the African Commission's recognition of indigenous rights to traditionally owned land sets an important precedent that can protect against the forced acquisition of land by government and its agencies, including local authorities, railways, wildlife services, or due to foreign investment, for example where land is sold to tourism companies or to grant hunting rights. It has the potential to assist many other indigenous communities across Africa who have been illegally forced from their homes or face eviction from their ancestral land.

Second, this is the first case in which any international human rights body has officially recognized the right to development. In holding that the Kenyan government's failure to consult or adequately compensate the Endorois community was a violation of the African Charter, the African Commission has established for the first time the need for governments to engage its people in their development policies. As a result, it is hoped that governments will consider indigenous communities as partners and beneficiaries of development projects, rather than ignoring and violating their traditional rights to land.

The decision sends a clear message that good government is that which takes account of the interests of minority groups, which have until now been routinely marginalized. It is particularly timely as Kenya is currently undergoing a constitutional review process. The decision can therefore be used by the Kenyan government to contribute to its wider goal of improving national cohesion. In fact, the government's response to the decision has been largely positive. In a public statement in March 2010, the Minister of Lands, Hon. James Orengo, declared his intention to engage with his colleagues and encourage its implementation.

Above all, the decision of the African Commission indicates a willingness to take seriously the rules laid down in the African Charter, and represents a valuable legal precedent for all minority and indigenous communities, not only in Kenya and Africa but also around the world.

Notes

- 1 *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya*, Communication 276/2003, <http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html>
- 2 Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, Endorois were counted as part of the Kalenjin group, made up of Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.
- 3 Kenyan Constitution, Section 115(2).
- 4 *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, (the Ogoni case), African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001), para. 40.
- 5 *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).
- 6 African Charter on Human and Peoples' Rights, Article 22, 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, and that, 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'
- 7 *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v The Republic of Kenya*, Communication 276/2003, para. 162.
- 8 *Ibid.*, paras. 173 and 251.
- 9 *Ibid.*, para. 173.
- 10 *Ibid.*, para. 249.
- 11 *Ibid.*, Recommendation 1(b).
- 12 *Ibid.*, Recommendation 1(c).
- 13 *Ibid.*, para. 199.
- 14 *Ibid.*, para. 196.
- 15 *Ibid.*, para. 206.
- 16 *Ibid.*, para. 204.
- 17 *Ibid.*, para. 206.
- 18 *Ibid.*
- 19 *Ibid.*, para. 209, see also para. 234.
- 20 *Ibid.*, Recommendation 1(a).
- 21 *Ibid.*, para. 298.
- 22 *Ibid.*, paras. 289–298.
- 23 *Ibid.*, para. 290.
- 24 *Ibid.*, para. 298.
- 25 *Ibid.*, Recommendations 1(c) and 1(d).

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