

## Landmark decision rules Kenya's removal of indigenous people from ancestral land illegal

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In a landmark decision, an African regional body has found the Kenyan government guilty of violating the rights of the country's indigenous Endorois community, by evicting them from their lands to make way for a wildlife reserve.

The decision, by the African Commission on Human and Peoples' Rights, 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**. [emphasis added] ...

"Minority Rights Group International applauds the African Commission's ruling on this case. Aside from providing immediate remedy to the Endorois community by affirming their collective right to ancestral lands, the decision constitutes a milestone in the development of indigenous rights in Africa," says Lucy Claridge, Minority Rights Group International's (MRG) Head of Law. ...

"We are delighted that the African Commission has recognised the wrong that was done decades ago," says Wilson Kipsang Kipkazi, of the Endorois Welfare Council (EWC). "This decision is the result of a sustained campaign for the recognition of the Endorois as a distinct indigenous community and the restoration of our ancestral land." ...

In another first for Africa, the Commission also found that in failing to provide sufficient compensation, or provide suitable alternative land for grazing after the eviction of the Endorois, Kenya's government fell short of adequately providing for the community in the development process.

"This sends a clear message that development must be equitable, non-discriminatory, participatory, accountable and transparent", says Cynthia Morel, who litigated on behalf of the Endorois as former Senior Legal Advisor to MRG, and currently works for the Open Society Justice Initiative. "The ruling places an obligation upon States to treat indigenous peoples as active stakeholders rather than passive beneficiaries."

[full text of press release at <http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html>]

>>> [Download the decision \(PDF\)](#) or open attachment in "Word" above.

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### EXCERPTS FROM COURT DECISION

This landmark decision gives a real boost to the progressive development of international law regarding the rights of Indigenous peoples in several areas, such as:

#### "Special" Rights?

(196) In the present Communication, the Respondent State (the Kenyan Government) during the oral hearings argued that legislation or special treatment in favour of the Endorois might be perceived as being discriminatory. The African Commission rejects that view. ... It is of the view that in certain cases, *positive discrimination or affirmative action helps to redress imbalance*. The African Commission shares the Respondent State's concern over the difficulty involved; nevertheless, the State still *has a duty to recognise the right to property* of members of the Endorois community,

within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law. Besides, it is *a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination*. Legislation that recognises said differences is therefore not necessarily discriminatory. [emphasis added]

### Sacred places and Freedom of Conscience (or Religion)

(81) The Complainants argue ... “the UN Declaration on the Rights of Indigenous Peoples gives indigenous peoples the right ‘to maintain, protect and have access in privacy to their religious and cultural sites ...’”

(83) They cite ‘The UN Declaration on the Rights of Indigenous Peoples’ which state in part that “States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.” ...

(166) The [African] “Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion.”

### Lands and Resources

(113) The Complainants argue that the requirement that any encroachment on property rights be in accordance with the “appropriate laws” must also include relevant international laws. They argue that the Respondent State, including the courts, has failed to apply international law on the protection of indigenous land rights, which includes the need to recognise the collective nature of land rights, to recognise historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. ...”

(186) “The African Commission in the *Ogoni* case also found that the ‘right to property’ includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.”

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

(204) “The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The *jurisprudence under*

*international law bestows the right of ownership rather than mere access.* The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.” [emphasis added]

(205) “The Inter-American Court jurisprudence also makes it clear that mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples’ effective protection.”

(206) “ ... The Court held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, *members of indigenous and tribal peoples must obtain title to their territory* in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its legal certainty. ...” [emphasis added]

(207) “The African Commission notes that that Articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term “occupied or otherwise used.” This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of *Awes Tingni v Nicaragua*. In the current leading international case on this issue, *The Mayagna (Sumo) Awes Tingni v Nicaragua*, the IActHR recognised that the Inter-American Convention protected property rights “in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.” It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.” ...

(209) “In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.”

(238) “*Taking all the submissions of both parties, the African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law. ...*”

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

(268) *The Endorois have never received adequate compensation or restitution of their land.*

### Right to Culture

(241) “The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. ... It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics.”

(243) ”The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Both the Complainants and the Respondent State seem to agree on that. It notes that Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics.

(244) “The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one’s ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has

observed that dispossession of land and its resources is “a major human rights problem for indigenous peoples.” It further notes that a Report from the Working Group has also emphasised that dispossession “threatens the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities.”

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(249) “... It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community’s cultural rights. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State’s failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the Game Reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.”

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

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

### **“Public Need”**

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

home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.

### Right to Development

(129) They [the Complaints] argue that choice and self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land. They further argue that for the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner (the Endorois community) of self-determination. In that regard, the Complainants argue, it is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. ...”

(228) ... The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.

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

### Free, Prior and Informed Consent

(281) ... “It [the African Commission] is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.”

(282) ... “It [the African Commission] also agrees with the Complainants that the inadequacy of the consultation undertaken by the Respondent State is underscored by Endorois' actions after the creation of the Game Reserve. The Endorois believed, and continued to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

(283) “The African Commission wishes to draw the attention of the Respondent State that Article 2(3) of the UN Declaration on Development notes that the right to development includes “active, free and meaningful participation in development”.

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 realized.”

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

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

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

### Restitution and Compensation – Benefit Sharing

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

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

(294) “In relation to benefit sharing, the IActHR in the Saramaka case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to

duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.”

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

(297) ... “Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve.”

### Self-Identification

(157) “In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples. The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous. The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as ‘peoples’ is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems. ... It agrees that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.”