

CONSERVATION AND INDIGENOUS PEOPLES' RIGHTS: MUST ONE NECESSARILY COME AT THE EXPENSE OF THE OTHER?

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Abstract

This article explores the compatibility of the United Nations Convention on Biological Diversity (CBD) with the protection of Indigenous peoples' rights. While the CBD has yet to fully address existing gaps of protection that adversely affect Indigenous peoples, there are emerging standards under the African Commission on Human and Peoples' Rights (ACHPR) that help strike a new balance between the realization of Indigenous peoples' rights and the conservation of biodiversity as mutually reinforcing objectives. The standards in question are largely drawn from the recent landmark ruling of *The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, adopted by the African Union in February, 2010. This case, which entrenches many of the underlying principles of the United Nations Declaration on the Rights of Indigenous Peoples, constitutes the first Indigenous land rights case to be successfully adjudicated before the ACHPR.

The concept of setting aside land for recreation and the conservation of natural species can be traced back to Mesopotamia in the first millennium B.C.² Until very recently, the creation of conservation areas has been characterized by a top-down approach, leading to the dispossession of countless Indigenous peoples.³ The consequent denial of access to resources vital to Indigenous peoples' welfare and survival has resulted in a long history of marginalization, poverty, and disease that violates their most fundamental human rights. In Africa alone, it has been estimated that the creation of protected areas has expropriated communities from approximately 1 million square kilometers of forest, pastures, and farmlands.⁴

The Indigenous Endorois community has been living on the banks of Lake Bogoria in the heart of Kenya's Rift Valley since time immemorial. In 1973, the community was forcibly evicted for the creation of a wildlife sanctuary called the Lake Bogoria Game reserve. The failure to consult the Endorois, to involve them in the management and benefit-sharing of the reserve, or to compensate them with adequate grazing land to sustain their livestock rapidly forced them into abject poverty from which they have yet to recover. In the decades following their eviction, members of the community faced arrest for allegedly 'trespassing' on the reserve for religious or medicinal purposes. Consequently, as in the case of many other Indigenous peoples, the severed ties with their ancestral land not only threatened their health and socio-economic well-being, but also their spiritual and cultural survival and their ability to contribute to the conservation and sustainable use of the area's biodiversity.



Figure 1. Map of Kenya.
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1 The author's conclusions expressed in this paper are hers alone and should not be attributed to the Minority Rights Group International, the organization for which she worked as co-counsel for the Endorois case, or to the Open Society Justice Initiative, her current employer. The author thanks Viktoriia Nagorna for her research assistance towards this paper.

2 Colchester, M., 2004. "Conservation policy and indigenous peoples". *Environmental Science & Policy*, 7: 145-153, page 145.

3 Traditional Indigenous territories encompass up to 22 percent of the world's land surface and they coincide with areas that hold 80 percent of the planet's biodiversity. See Sobrevila, C., 2008. *The Role of Indigenous People in Biodiversity Conservation: The Natural but Often Forgotten Partners*. World Bank: Washington, D. C., page 5.

4 Colchester, 2004, page 146. Also see Nelson, J., and L. Hossack (eds.), 2003. *From Principles to Practice: Indigenous Peoples and Protected Areas in Africa*. Forest Peoples Programme: Moreton-in-Marsh.

Against this backdrop, the recent landmark ruling of *The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, formally adopted by the African Union on February 2, 2010, is the culmination of nearly 40 years of struggle. It constitutes the first African Commission on Human and Peoples' Rights (ACHPR) ruling to recognize that those maintaining a traditional way of life dependent on ancestral land are Indigenous in the African context and that adequate protection must be afforded accordingly. In this light, the Commission called for the recognition of the Endorois' ownership over their ancestral land and its restitution. It also called for the protection of the community's natural resources and its right to development. This present article will highlight the key findings of the decision and assess the scope of its impact in the context of conservation and the management of biodiversity.⁵

INDIGENOUS PEOPLES' RIGHTS TO FORMAL RECOGNITION

The formal recognition of Indigenous peoples in accordance with existing provisions in international human rights law is arguably the first step to the realization of their fundamental rights. In the recent *Endorois* ruling, the ACHPR expressly underscored the importance of formally recognizing Indigenous peoples precisely as such.⁶ In doing so, it pointed to the violation of Indigenous peoples' collective property rights as "a natural consequence of the lack of recognition of their juridical personality".⁷ The Commission ensured this recognition by tackling the distinction between 'indigenoussness' and 'indigeneity', which had proven to be contentious among African States in the lead-up to the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly. It drew on both the ACHPR's Working Group on Indigenous Populations/Communities' 2005 report⁸ and the ACHPR's Advisory Opinion on UNDRIP to clarify that, while all original inhabitants of the continent correspond to the categorization of 'indigeneity', 'indigenoussness' is more narrowly defined according to the following criteria: (a) the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness; (c) self-identification as a distinct collectivity, as well as recognition by other groups; and (d) an experience of subjugation, marginalization, dispossession, exclusion, or discrimination.⁹ The Commission also accepted that Indigenous cultures, like all others, are dynamic. Accordingly, it rejected the Kenyan Government objections that the inclusion of certain members of the Endorois community into mainstream society had affected the wider group's cultural distinctiveness as Indigenous peoples.¹⁰



Figure 2. The Endorois community was forcibly evicted from their ancestral land in Kenya's Rift Valley for the creation of a wildlife reserve in 1973. They were displaced from the lush banks of Lake Bogoria and from Mochongoi Forest to arid land. © Minority Rights Group International

The Commission thus set a legal precedent through the *Endorois* decision for the formal recognition of Indigenous peoples as such. This development stands in sharp contrast to the recognition ascribed under the United Nations Convention on Biological Diversity (CBD), which is generally considered to be the most important international agreement designed both to protect the world's biodiversity and to ensure that the use of it is sustainable.¹¹ The CBD expressly refers to "indigenous and local communities" rather than "Indigenous peoples". Far from mere semantics, the latter term carries with it an extensive body of international law that is invaluable

5 For a detailed overview and analysis of the *Endorois* decision, see Morel, C., 2010. "Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya". *Housing and ESC Rights Law Quarterly*, Vol. 7 – No. 1 March 2010. Last accessed July 14, 2010, at: <http://www.cohre.org>.

6 *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights (hereafter, '*Endorois* case').

7 *Endorois* case, paragraph 192.

8 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, 2005. Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa". Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session (hereafter, 'WGIP report'). Last accessed August 30, 2010, at: <http://www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/Books/AfricanCommissionbookEnglish.pdf>.

9 *Endorois* case, paragraph 150, citing the WGIP report, 2005, page 93.

10 *Endorois* case, paragraphs 161-162.

11 **The United Nations CBD, which was adopted in 1992 and entered into force in 1993, has the following principal objectives: to conserve biological diversity; to encourage the sustainable use of biological resources; and to ensure the fair and equitable sharing of benefits derived from such use.**

to the effective protection of Indigenous peoples, whereas the former term does not.¹² The CBD further limits its scope to “indigenous and local communities *embodying traditional lifestyles*”.¹³ This narrow recognition has been vociferously challenged by Indigenous lobby groups in view of the implication that Article 8(j) only applies to Indigenous peoples “who are fossilized in cultural time-warps and living in a never-changing present” and excludes those who have adapted their lifestyles to reflect the contemporary and continuing colonial situations in which they find themselves.¹⁴

In failing to appropriately recognize Indigenous peoples, the CBD in turn neglects to acknowledge them as stakeholders and rights-holders integral to the implementation of its three aims. While the Preamble of the CBD recognizes the close and traditional dependence of indigenous and local communities embodying traditional lifestyles on biological resources, as well as the contribution that their traditional knowledge can make to both the conservation and sustainable use of biodiversity, the Convention itself constrains their involvement to that of potential beneficiaries, rather than as veritable stakeholders. This is partly rooted in the Convention’s over-arching emphasis on the State’s “*sovereign rights* to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”, as stipulated by Article 3.¹⁵ It is equally rooted in the further recognition under Article 15(1) of the so-called “sovereign rights” of States over “their” natural resources, with the authority to determine access to genetic resources resting with the national governments and being subject to national legislation.¹⁶

By limiting its scope to ‘indigenous and local communities embodying traditional lifestyles’, the CBD arguably fails to effectively protect Indigenous peoples’ rights.

The down-casting of Indigenous peoples as passive beneficiaries, rather than legitimate stakeholders, is further illustrated by the wording of the provisions of the CBD that notably underscore the “desirability” of sharing equitable benefits with them rather than an express obligation to do so. It is also evidenced by the extent to which the exercise of consultation with Indigenous peoples is subject to caveats that ultimately eclipse the right to free, prior and informed consent.¹⁷

These factors arguably illustrate that the shortcomings of the CBD to effectively protect Indigenous peoples’ rights largely lie in its failure to recognize their identity as Indigenous peoples. The CBD thus fails to adhere to the rights-based approach to which Indigenous peoples are entitled under international law. In doing so, the CBD ignores the inalienable rights that Indigenous peoples have over their ancestral lands and resources since prior to the creation of these States, as well as the corresponding sovereignty that they retain as a result.¹⁸ Taking concrete steps towards the formal recognition of

12 This factor has been raised by various Indigenous alliances. For one such critique, see International Alliance of the Indigenous Peoples of the Tropical Forests, 1996. “The Biodiversity Convention: The Concerns of Indigenous Peoples”. *Australian Indigenous Law Reporter*, 84. Last accessed July 14, 2010, at: <http://www.austlii.edu.au/au/journals/AILR/1996/84.html>.

13 This language can be found in Preambular paragraph 12 and in Article 8(j) of the CBD.

14 See International Alliance of the Indigenous Peoples of the Tropical Forests, 1996, Section 2(2).

15 Emphasis added. Also see Preambular paragraph 4: “Reaffirming that States have sovereign rights over their own biological resources”; Article 4: “Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party: (a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.”; Article 9(a): “Each Contracting Party shall ... Adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components”; Article 9(b): “Each Contracting Party shall ... Establish and maintain facilities for ex-situ conservation of and research on plants, animals and micro-organisms, preferably in the country of origin of genetic resources”; and Article 14(2): “The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.”

16 Similar wording is found in Article 8: “Each Contracting Party shall, as far as possible and as appropriate: (j) *Subject to its national legislation*, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices” (emphasis added).

17 Preambular paragraph 12 of the CBD: “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the *desirability* of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components” (emphasis added). Also see Article 8(j) of the CBD.

18 Critics to this effect include the Barcelona-based Genetics Resources Action International (GRAIN), which maintains that the sovereignty principle does not adequately take into account the rightful place of Indigenous peoples – in essence, the constituency acknowledged to have played a crucial role in sustaining and nurturing the world’s biodiversity resources. Additional perspectives are outlined in Bengwayan, M., 2003. *Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia*. Minority Rights Group International: UK, pages 13-14.

Indigenous peoples as intended under international law would dramatically shift the scope and application of the CBD away from a State-centric instrument towards one in which the rights and benefits that Indigenous peoples are entitled to are fully protected in the context of the conservation and sustainable use of biodiversity.¹⁹



Figure 3. The Endorois depend upon sacred geysers found in their traditional lands for religious ceremonies. © Minority Rights Group International

maintain property rights thereto, even though they lack legal title.²² Moreover, the Commission stressed that for members of Indigenous communities who had unwillingly lost possession of their lands, when those lands had been lawfully transferred to innocent third parties, they remained entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, it was held that possession does not constitute a requisite condition for the existence of Indigenous land restitution rights.²³

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:

[I]f 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*.²⁴

The Commission clearly established that restitution of Indigenous peoples' ancestral lands further required demarcation of the land in consultation with the Endorois and neighbouring communities, with a view to then granting legal title.²⁵ The restitution of the actual ancestral land itself was also said to be obligatory unless factually impossible. In the particular case of the Endorois, the Commission stressed that the community's ancestral knowledge of Lake Bogoria's ecosystems made their guardianship of the reserve not only desirable, but ideal for its preservation. The fact that no other community had settled on the land and that the land had not been spoliated further facilitated full restitution.

19 The right to self-determination is outlined in common Article 1 of the International Covenant on Civil and Political Rights, UN/Doc. A/6316/993/ U.N.T.S. 3, 1966, and the International Covenant on Economic, Social and Cultural Rights, UN/Doc. A/6316/993/ U.N.T.S. 3, 1996. It is also given express recognition in UNDRIP Preambular paragraphs 16 and 17, as well as in Articles 3 and 4.

20 Characteristics of Indigenous peoples in Africa are outlined in ACHPR and International Work Group for Indigenous Affairs (IWGIA), 2006. *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on Indigenous Peoples in Africa*. Transaction Publishers: New Jersey, pages 9-11.

21 *Endorois* case, paragraph 190, citing the case of *The Mayagna Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights, 2001, paragraph 151. The Commission also quoted *Dogan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paragraphs 138-139.

22 *Endorois* case, paragraph 209.

23 *Endorois* case, paragraph 209.

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

25 *Endorois* case, paragraph 206.

INDIGENOUS PEOPLES' RIGHTS TO LAND

For the first time since the adoption of the African Charter nearly thirty years ago, the *Endorois* case has established that those maintaining a traditional way of life dependent on ancestral land are Indigenous in the African context, and thus require adequate protection.²⁰

Given Indigenous peoples' long history of dispossession throughout the colonial and post-colonial period, the African Commission swiftly determined that the Endorois property claims could be examined despite their lack of formal title. In this respect, it drew on the principle adopted by the Inter-American Court of Human Rights that "possession" of the land should suffice for Indigenous communities lacking real title to obtain official recognition of that property.²¹ The Commission further added that, while traditional possession entitled Indigenous peoples to demand official recognition and registration of property title, members of Indigenous communities who had unwillingly left their traditional lands or lost possession thereof

Finally, the Commission held that the threat posed to the Endorois' cultural survival and way of life as a result of the continued dispossession and alienation from their ancestral land rendered that very dispossession disproportionate under international law.²⁶ In a similar vein, it dismissed the Kenyan Government's position that the alleged lack of clarity governing the Endorois land tenure system presented an insurmountable obstacle to the State. The Commission instead stressed that in the event of any lack of clarity, the State had a duty to consult with the members of the community and seek clarifications from them in order to comply with the State's obligations under the Charter.²⁷ Kenya was thus called upon to recognize the right to property of members of the Endorois community within the framework of a communal property system and to establish the mechanisms necessary to give domestic legal effect to such a right recognized in the Charter and international law.²⁸

INDIGENOUS PEOPLES' RIGHTS TO NATURAL RESOURCES

The *Endorois* case focused primarily on the State's obligations of compensation and restitution of ancestral land following the community's forced eviction for the creation of the wildlife reserve in 1973. However, separate attention was also dedicated to the community's rights to the natural resources located on this land, including consideration of the community's rights of ownership of rubies that were recently discovered through prospective mining. In the early stages of litigation, the African Commission issued provisional measures halting the prospective mining efforts on two grounds. The first was reasoned on the basis that the mining had been initiated without consultation or consent of the Endorois community; the second resulted from the fact that the mining activity polluted the only remaining water source accessible to its members.

Beyond the provisional measures themselves, the Commission refrained from explicitly granting ownership of rubies located on the Endorois ancestral land to the community. However, it did recognize that the cultural and economic survival of Indigenous peoples generally depended on their access and use of the natural resources in their territory.²⁹ It further held that limitations on the prerogative of the State would most likely apply when the extraction of one natural resource affected the use and enjoyment of other resources that are necessary for the survival of an Indigenous community.³⁰ In doing so, it emphasized the findings of Erica Daes, former Special Rapporteur on Indigenous Peoples and Their Relationship to Land, which underscored that:

Limitations, if any, on the right to indigenous peoples to their land and natural resources must flow only from the *most urgent and compelling interest of the state*. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.³¹

This position fills a rather sizeable gap of protection left by Article 15(1) of the CBD, which strictly limits recognition of natural resources to the "sovereign rights" of States alone and bestows upon them the sole authority to determine access to genetic resources, "subject to national legislation".³²



Figure 4. Prospective mining in 2003 poisoned the Endorois' only remaining water source. Provisional measures from the African Commission, combined with local advocacy led by the community, led to full-scale mining being abandoned. © Minority Rights Group International

26 *Endorois* case, paragraph 231-238.

27 *Endorois* case, paragraph 195.

28 *Endorois* case, paragraph 196.

29 *Endorois* case, paragraph 260.

30 *Endorois* case, paragraph 264.

31 *Endorois* case, paragraph 212, quoting Daes, E.-I., 2005. "Indigenous Peoples' Right to Land and Natural Resources", chapter 5 in Ghana, N., and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination*. Martinus Nijhoff Publishers: Leiden, the Netherlands (emphasis added).

32 Article 15(1), CBD: "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation."



Figure 5. Traditional Endorois dancers.
© Minority Rights Group International

In addition, Indigenous peoples' full and effective ownership of their ancestral land dramatically strengthens their ability to restrict arbitrary extraction of genetic and biological resources located on their territories. As formal owners of their ancestral lands, when recognized as such, Indigenous peoples gain legal standing as legitimate stakeholders to any activity concerning their land.³³ While this renders it obligatory for States and private entities to consult with Indigenous peoples and to seek their free, prior and informed consent, it follows that any infringement leading to the spoliation or unlawful extraction of resources from that land becomes subject to compensation. In this regard, the *Endorois* case and other relevant developments under international law pertaining to Indigenous rights are poised to fundamentally challenge provisions such as Article 14(2) of the CBD, which absolves State Parties from providing any restoration or compensation for damage to biological diversity, where liabilities solely constitute an 'internal matter'.³⁴

The Commission's strong emphasis on limitations needing to flow from the most urgent and compelling interests of the State suggests that the threshold upheld by the African Commission is significantly higher than the unilateral and arbitrary discretion afforded to State Parties under the CBD. Moreover, the fact that the African Commission expressly frames the extraction of natural resources in terms of its potential violation of non-derogable rights such as the right to life further accentuates the narrow and binding limitations that it aims to impose upon States in circumstances affecting Indigenous peoples. Negotiations undertaken under the ambit of the CBD should take note of such developments or, in failing to do so, risk being out of step with both international law and the basic needs and rights of Indigenous peoples.

CONSERVATION AND INDIGENOUS PEOPLES' RIGHT TO DEVELOPMENT

The right to development was formally acknowledged as an "inalienable" human right with the adoption of the Declaration on the Right to Development by the United Nations General Assembly in 1986.³⁵ The Declaration on the Right to Development recognizes all rights and freedoms as "indivisible and interdependent"³⁶ and explicitly refers to the failure to observe civil, political, economic, social, and cultural rights as an obstacle to development.³⁷ Development has been defined in the Preamble as "a comprehensive economic, social, cultural and political *process*, which aims at 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 therefrom."³⁸

The African Charter on Human and Peoples' Rights, through Article 22, stands as the only normative instrument that renders the right to development justiciable. The *Endorois* decision represents the first piece of jurisprudence to apply the normative scope of the right in practice. The inherent value of the *Endorois* decision in this particular respect stems from the fact that conservation efforts to date have been largely understood in opposition to Indigenous peoples' rights. At best, the protection of wildlife and biodiversity continues to result in planned resettlement, though most instances appear to

33 See, for example, Secretariat of the Convention on Biological Diversity, 2004. *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*. CBD Guidelines Series: Montreal.

34 The Inter-American Court of Human Rights has developed extensive relevant case law to this point. See, for example, the Inter-American Court of Human Rights cases of *The Mayagna Awas Tingni v. Nicaragua* (2001); *Moivana v Suriname* (2005); and the case of *Sawboyamaxa Indigenous Community v. Paraguay* (2006), among others.

35 Article 1 states: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Declaration on the Right to Development, GA res. 41/128, annex, 41 UN GAOR Supp. (No. 53), at 186, UN Doc. A/41/53, (1986).

36 Declaration on the Right to Development, Article 6(2).

37 Declaration on the Right to Development, Article 6(3).

38 Declaration on the Right to Development, Preambular paragraph 2 (emphasis added). This paragraph has been drawn from Salomon, M., and A. Sengupta, 2003. *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*. Minority Rights Group International: UK, page 6.

The Endorois decision is the first piece of jurisprudence to apply the right to development in practice under the African Charter.

be characterized by instances of forced evictions that severely threaten Indigenous peoples' socio-economic and cultural survival.³⁹ This largely reflects the experience of the Endorois community, whose forced eviction from the banks of Lake Bogoria to arid land – leading to the loss of the majority of their livestock – dramatically undermined virtually all aspects of the community's well-being, ranging from lack of food security to the inability to afford school fees through the bartering of its animals. In its assessment of these facts, the African Commission's findings serve to fill the notable normative gap of protection resulting from the disproportionately State-centric provisions under the CBD.

The African Commission's jurisprudence on the right to development through the *Endorois* case clearly establishes that development has to be equitable, non-discriminatory, participatory, accountable, and transparent.⁴⁰ Whatever the nature of the development in question, the Commission's ruling is equally emphatic on the requirement that it contributes to the empowerment of communities. In this regard, it held that both the choices and the capabilities of the Endorois had to improve in order for their right to development to be realized.⁴¹

Securing formal commitments in relation to benefit-sharing from normative instruments constitutes a vital step in ensuring that Indigenous peoples' choices and capabilities are improved upon. Furthermore, the Commission has made clear that their empowerment depends on more than becoming simple recipients of dividends.⁴² In this respect, much of the Commission's ruling in relation to choice hinged on the quality of consultation processes – in other words, the extent to which consultation processes sought to obtain the community's free, prior, and informed consent in accordance with their customs and traditions.⁴³ It was also held that the legitimacy of the consultation further depended on the extent to which Indigenous peoples could effectively help shape the outcome. In this regard, decisions presented as *faits accomplis* have been summarily rejected by the Commission.⁴⁴ The *Endorois* case thus once again emphasized under this facet the obligation upon States to treat Indigenous peoples as active stakeholders rather than passive beneficiaries. As such, it has established the right to development as not only a right of outcome, but also a right of process.

Obliging States to treat Indigenous peoples as active stakeholders rather than passive beneficiaries establishes the right to development as not only a right of outcome, but also a right of process.

CONCLUSION

The *Endorois* ruling is groundbreaking in several respects. It recognizes the concept of indigeneness in the African context, including the dynamic nature of these societies, rather than confining recognition to those 'embodying traditional lifestyles'. It also establishes land rights flowing from this recognition as the basis for full restoration of ownership, rather than mere access to land and resources managed and relied upon by Indigenous peoples since time immemorial. This, in turn, firmly repositions Indigenous peoples as active stakeholders in any decisions affecting their land and resources, rather than as passive beneficiaries. In this respect, the Commission's findings not only serve to strengthen the use of rights-based approaches in general terms, but the precedent is also poised to equally broaden the use of rights-based approaches in the specific context of the conservation and sustainable use of biodiversity.

The *Endorois* decision thus offers a new framework through which biodiversity conservation initiatives can be negotiated

39 Leading civil society organizations such as Minority Rights Group International, Tourism Concern, and the Forest Peoples Programme, which have adopted a rights-based approach in their examination of such conservation efforts, have long-challenged the ethics and legality of these practices. For example, see Nelson, J., 2004. *Conservation and Communities in Central Africa: The need to secure indigenous rights and biodiversity*. Forest Peoples Project, Conférence sur les écosystèmes de forêts denses et humides d'Afrique centrale (5ième CEFDHAC). Last accessed July 14, 2010, at: http://www.forestpeoples.org/documents/africa/cefdhac_5_ip_rights_biodiversity_may04_eng.shtml; Minority Rights Group International, 2007. "Trouble in Paradise Campaign". Last accessed July 14, 2010, at: <http://www.minorityrights.org/6777/trouble-in-paradise/trouble-in-paradise.html>; and Tourism Concern (no date). Last accessed July 14, 2010, at: <http://www.tourismconcern.org.uk>.

40 *Endorois* case, paragraph 277.

41 *Endorois* case, paragraph 283.

42 *Endorois* case, paragraph 266 and Recommendations 1(c) and 1(d) at page 80. The Commission nonetheless clearly established that the community was indeed entitled to reasonably participate in the benefits (including royalties) derived from any mining concession or any other resource extraction.

43 *Endorois* case, paragraph 291.

44 *Endorois* case, paragraph 281. In the case of resource extraction, the Commission stated that adequate consultation included the obligation to allow the community to perform or supervise an environmental and social impact assessment prior to the commencement of any project (paragraph 266).

with Indigenous peoples as stakeholders and rights-holders in a manner that increases their choices and capabilities, rather than in one that leaves them dispossessed and further marginalized. This is a framework that also increases the possibility of greater trust to be established between Indigenous peoples and the private sector, creating the potential for science and ancestral knowledge to come together more effectively to increase sustainability and optimal management of the world's most fragile and complex ecosystems. This requires renewed efforts to ensure that Indigenous rights and normative standards on biodiversity be conceptualized as mutually reinforcing interests and that new practices be negotiated accordingly. It does not need to be a case of one being championed at the expense of the other.

Protecting Indigenous rights and biodiversity should be seen as mutually reinforcing interests with new frameworks to be negotiated accordingly.

Nevertheless, the extent to which UNDRIP or the principles upheld in the *Endorois* decision are incorporated into further developments associated with the CBD remains to be seen. In Africa, at the very least, the *Endorois* ruling constitutes a formal interpretation of the African Charter – a normative instrument that is binding upon all but one State of the continent.⁴⁵

As a landmark case, it therefore serves as a formal warning to all other State Parties to the CBD of their obligations under the Charter if similar fact patterns were to emerge under their respective jurisdictions. However, this warning must not be misconstrued as a threat. Instead, as highlighted above, it should be welcomed by States as a blueprint and an opportunity for the emergence of new frameworks that allow for mutually beneficial outcomes for both conservation and Indigenous peoples' rights.

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45 Morocco stands as the sole African country not to be party to the African Charter on Human and Peoples' Rights.

IMPLEMENTING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND INTERNATIONAL HUMAN RIGHTS LAW THROUGH THE RECOGNITION OF ICCAs

Stan Stevens

Abstract

Appropriate recognition and respect for Indigenous Peoples' Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs) are critical components of the International Union for Conservation of Nature's new protected area paradigm policies and contribute significantly to implementing the Convention on Biological Diversity's Articles 8(j) and 10(c) and Programme of Work on Protected Areas. ICCAs are also supported by and embody many internationally-affirmed human rights. As such, the appropriate and rights-based legal recognition of ICCAs should become an important means of 'best practice' implementation of the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as an important remedy and redress for violations of human rights associated with the establishment and governance of protected areas in Indigenous peoples' territories. An analysis of Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park and World Heritage Site illustrates the need for increased and appropriate recognition of ICCAs as a prerequisite to the realization of these rights.