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EXTENDING INDIGENOUS RIGHTS BY WAY OF THE AFRICAN CHARTER

Judith Murphy*

I. INTRODUCTION

Indigenous peoples make up 350 million of the world's population.¹ While the meaning of indigeneity is contentious for both academics and lawmakers,² "[t]he term *indigenous* [is] derived from the Latin *indigena*" and connotes societies with longstanding ties to particular areas of the world.³ Ancestral origins and traditional systems of tenure define customary indigenous relationships with land,⁴ relationships that have proven historically to be problematic. Because indigenous peoples organize their society's access to land communally, their practices are not acknowledged or valued by many national governments.⁵ Prevailing "[e]urocentric notions of individual property ownership tied primarily to economic value"⁶ foster

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¹ Michaela Pelican, *Complexities of Indigeneity and Autochthony: An African Example*, 36 AFR. ETHNOLOGIST 52, 56 (2009).

² *Id.*

³ Dorothy L. Hodgson, *Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas*, 104 AM. ANTHROPOLOGIST 1037, 1038 (2002).

⁴ See Chairperson-Rapporteur of the Sub-Comm'n on the Promotion & Prot. of Minorities, *Standard-Setting Activities: Evolutions of Standards Concerning the Rights of Indigenous Peoples*, Comm'n on Human Rights, ¶ 24, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (by Erica-Irene A. Daes) [hereinafter *Standard-Setting Activities*].

⁵ William van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29, 33 (2010); see AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS & INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS /COMMUNITIES 21 (2005) [hereinafter REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS].

⁶ Lilian Aponte Miranda, *Uploading the Local: Assessing the*

“[a]dherence by many states’ legal systems to [notions of] individual property rights”⁷ and contribute to a common reality of indigenous peoples being forced off their land “to give way for the economic interests of . . . large-scale development initiatives that tend to destroy their lives and cultures.”⁸ Land dispossession is a major source of difficulty for indigenous peoples.⁹ Its implications are acute and, in recent years, there has developed, particularly within the international legal field, human rights discourses related to the protection of indigenous ways of life.

This Note discusses indigeneity through the prism of the Endorois tribe’s experiences in Kenya. The Endorois are an indigenous group whose traditional pastoralist mode of life in the Lake Bogoria region of Kenya’s Rift Valley¹⁰ saw profound changes with the colonization of the British in the late 19th century. The colonial implementation of a legal system anchoring property rights in the colonial Kenyan state¹¹ had grave implications for the Endorois, as Kenya’s post-colonial adoption of British jurisprudential mores¹² legalized the conversion of their land for state purposes as well as their eviction from the area surrounding Lake Bogoria.¹³

This Note discusses the Endorois’ endeavor to reclaim their land through the African Commission on Human and Peoples’ Rights’ 2010 decision: *Centre for Minority Rights Development (Kenya) v. Kenya*. In this case, the African Commission applied provisions of the African Charter on Human and Peoples’ Rights and afforded the Endorois, vis-à-vis this treaty, legal entitlement to claims of religion, property, culture, natural

Contemporary Relationship Between Indigenous Peoples’ Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America, 10 OR. REV. INT’L LAW 419, 428 (2008).

⁷ van Genugten, *supra* note 5, at 33.

⁸ *Id.* at 33–34.

⁹ *Id.* at 32.

¹⁰ Cynthia Morel, *Defending Human Rights in Africa: The Case for Minority and Indigenous Rights*, 1 ESSEX HUM. RTS. REV. 54, 56 (2003).

¹¹ Korir Sing’ Oei A. & Jared Shepard, *In Land We Trust: The Endorois’ Communication and the Quest for Indigenous Peoples’ Rights in Africa*, 16 BUFF. HUM. RTS. L. REV. 57, 60 (2010).

¹² *Id.*

¹³ Morel, *supra* note 10, at 56.

resources, and development in their traditional lands.¹⁴

Part II of this Note discusses indigenous rights in the historical context. Part III discusses indigenous rights in the African context. Part IV discusses indigenous rights in the Kenyan context. Part V discusses the Endorois rights' apropos these discussions. Finally, Part VI draws conclusions, observing that the Endorois' case represents an extension of developing international law related to indigenous peoples.

II. INDIGENOUS RIGHTS HISTORICALLY

A. *The Doctrines of Discovery and Terra Nullis*

Legal proscription of indigenous rights to land had its nascence in colonial jurisprudence. When European sovereigns began sending ships overseas on missions of colonization in the fifteenth and sixteenth centuries, they adopted the Doctrine of Discovery, a legal maxim espousing the idea that "discovering [European] countr[ies] automatically gained sovereign and property rights in the lands" they found.¹⁵ Discovery conferred title to European nations and, in this respect, it meant that Europeans overwrote patterns of tenancy in land "already owned, occupied, and used" by native peoples.¹⁶ At first, though "debates ensued regarding the appropriate relationship between . . . [the colonies' original inhabitants] and [the] colonizing powers . . . [, ultimately, the former] were . . . constructed as irrational, uncivilized savages"¹⁷ in European systems of thought and, thus, became "legally irrelevant" to European rationales of conquest.¹⁸ Because native religions did

¹⁴ Ctr. for Minority Rights Dev. (Kenya) v. Kenya, Commc'n No. 276/03, Afr. Comm'n H.P.R. (Feb. 10, 2010).

¹⁵ Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005); see also *Johnson v. M'Intosh*, 21 U.S. 543, 562 (1823) (holding "[d]iscovery [to be] the original foundation of titles to land on the American continent as between the different European nations, by whom conquests and settlements were made.").

¹⁶ Miller, *supra* note 15, at 5.

¹⁷ Miranda, *supra* note 6, at 425.

¹⁸ Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1153 (2008).

not fit within Christian norms¹⁹ and because native societies “did not resemble the contours of the territorial [European] state, indigenous peoples were not considered [to be the proper] subjects of . . . [the] law.”²⁰ According to European jurisprudence, indigenous peoples had no basis for exercising legal authority, as the law itself was applicable only to “civilized states,”²¹ colonial dominion over native lands resting on the “legal fiction that indigenous territory was unoccupied . . . terra nullius,”²² or vacant land.

In the African context, the Doctrine of Discovery proved particularly egregious. Although, at the time of European colonization, African societies were already organized into nations defined by ethnic communities sharing common territories, languages, cultures, and traditions,²³ Africans were construed in the European imagination to be stateless, “‘pre-law’ people[s] who were [conquerable as] morally inferior and intellectually immature.”²⁴ European colonial powers depicted the African continent to be “a lawless basket case,”²⁵ avowing that “Africa had no history prior to direct contact with Europe”²⁶ in order to support “the notion that Africa was terra nullius—a no-man’s historical and cultural wasteland ready to

¹⁹ Robert A. Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 12 (1999) (noting that, according to European conceptions, “[t]he State, being of earthly origin and therefore without the ‘power to raise itself above the insufficiency of a piece of human handiwork,’ required the authority of the divinely willed Church ‘to acquire the divine sanction as a legitimate part of that Human Society which God ha[d] willed.’”).

²⁰ Miranda, *supra* note 6, at 426.

²¹ Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 4 (1999).

²² Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 20 MICH. J. INT’L L. 177, 184 (2008).

²³ Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT’L L. 339, 365 (1995).

²⁴ Makau Mutua, *Africa: Mapping the Boundaries in International Law*, 104 AM. J. INT’L L. 532, 535 (2010) [hereinafter Mutua, *Mapping the Boundaries*] (book review).

²⁵ Jeremy I. Levitt, *Introduction—Africa: A Maker of International Law*, in AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW 1 (Jeremy I. Levitt ed., 2008).

²⁶ Mutua, *Mapping the Boundaries*, *supra* note 24, at 534.

be taken over.”²⁷ In 1884, when France, Britain, and Germany initiated the Berlin Conference in order to soothe colonial friction over African territorial disputes, the European sovereigns ended up parsing out title to the continent without reference to its indigenous inhabitants.²⁸ African peoples, in European law, “were too primitive to understand the concept of sovereignty and, hence, were unable to cede it by treaty” at the Berlin Conference.²⁹

Legally, only pacts between European states had import with respect to Africa.³⁰ Citing notions of terra nullis, “the colonial authorities in Africa bundled together all the incidents of property and assigned them to the . . . control of the state.”³¹ Under the Foreign Jurisdiction Act of 1890 in British African territories, for example, the crown seized control over all land whether there were native peoples on it or not.³² Colonial “administrators [asserted] that ‘native law and custom’ was merely a stage in the evolution of Africans societies . . . [that] would wither away as western civilization became progressi[vely] dominant in African social relations.”³³ There was, in European eyes, “no need to acknowledge . . . customary [African] land tenure as a system of rights and duties.”³⁴ Indigenous peoples were irrelevant to European schemes of law and any claims to land they recognized were deemed legally nonexistent and overwritten.

B. Postcolonial Mores and the United Nations Declaration on the Rights of Indigenous Peoples

After World War II, when colonial governments all over the world began to break up, the lack of recognition for indigenous peoples under the law remained largely unchanged.

²⁷ *Id.*

²⁸ See Anghie, *supra* note 21, at 58.

²⁹ *Id.*

³⁰ *Id.*

³¹ Oei & Shepard, *supra* note 11, at 78.

³² See H.W.O. Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, in LAND REFORM AND AGRARIAN CHANGE IN SOUTHERN AFRICA 6 (Programme for Land & Agrarian Studies, Occasional Paper Ser. No. 24, 2002).

³³ *Id.* at 8.

³⁴ *Id.*

Although new discourses on human rights and self-determination began to appear internationally in instruments like the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social, and Cultural Rights, these discourses were “focused on [the rights of] individuals [vis-à-vis states]—in part because talk of minorities and ethnic groups had been tarnished by Nazi ideology.”³⁵ Overall, at the beginning of colonial independence in the 1960s, while decolonization projects advanced the right of peoples to shape their own realities, the concept of self-determination “applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of indigenous peoples existing within the colonial territories and colonizing states.”³⁶ Legally, there was no focus on an idea of collective rights for peoples within the territory of discrete nations.

It was not until the last three decades of the 20th century that indigenous peoples began to receive the attention of international lawmakers.³⁷ In the 1960s and 1970s, after having gained momentum from decolonization and the proliferation of non-governmental organizations,

a great number of indigenous peoples’ organizations[] were established at [both] national and international level[s] . . . [and an indigenous movement was born.] The issues that fuelled the movement ranged from broken treaties and loss of land to discrimination, marginalization, conflict and gross violations of human rights . . . Although most of the activities of the . . . movement took place outside the environs of the United Nations, . . . [i]n 1971, the U.N. Sub-Commission on the Prevention and Protection of Minorities commissioned a study on ‘discrimination against indigenous populations.’³⁸

The study, named the Cobo Report after Jose Martinez Cobo, the Special Rapporteur to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, took over ten years to complete, examined the economic, social, cultural, political, and legal circumstances that indigenous peoples faced, and

³⁵ John R. Bowen, *Should We Have a Universal Concept of 'Indigenous Peoples' Rights?: Ethnicity and Essentialism in the Twenty-first Century*, 16 ANTHROPOLOGY TODAY 12 (2000).

³⁶ Miranda, *supra* note 6, at 426.

³⁷ Macklem, *supra* note 22, at 198.

³⁸ *Id.*

made recommendations as to their rights to health, housing, education, language, culture, land, politics, religion, and equality.³⁹

Importantly, the Cobo Report established for the first time a working legal definition of indigenous peoples. They became:

those wh[o] have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, . . . and are determined to preserve, develop, and transmit to future generations their ancestral territories, a[s well as] their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁴⁰

As a result of the Cobo Report, indigenous peoples began to enter legal parlance and receive greater attention from international law bodies. After reviewing the Cobo Report, the U.N. Sub-Commission on the Prevention and Protection of Minorities established a Working Group of its own on indigenous peoples. For its part, the Working Group undertook a second study on indigeneity.⁴¹ Concluding that

no single legal definition could account for the complexity and regional variation of the concept [of indigeneity and] . . . focusing on key factors [such as] . . . priority in time, voluntary perpetuation of cultural distinctiveness, self-identification, and a historic or present experience in subjugation, marginalization, dispossession, exclusion, [and] discrimination [, the Working Group] . . . confirmed the . . . definition [of indigeneity] that Cobo had introduced.⁴²

In 1993, as a result of its efforts, the Working Group sent a first draft of what would become the United Nations Declaration on the Rights of Indigenous Peoples through the Sub-Commission to the Commission on Human Rights.⁴³ In

³⁹ *Id.* at 199. *See generally* Special Rapporteur to the Sub-Comm'n on the Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.4 (July 14, 1983) (by José Martínez Cobo).

⁴⁰ *Standard-Setting Activities*, *supra* note 4, ¶ 24.

⁴¹ Wiessner, *supra* note 18, at 1153.

⁴² Pelican, *supra* note 1, at 56.

⁴³ *Id.* at 55.

turn, the Commission revised the draft for submission to the General Assembly.⁴⁴ By 2006, the draft was accepted and, by 2007, the Declaration entered into force as a multilateral treaty under international law.⁴⁵

Sensitive to the initial Cobo Report and creating affirmative rights for indigenous peoples in accordance with its recommendations, the Declaration called on states to preserve “the right of indigenous peoples to own, develop, control, and use the lands and territories that they have traditionally owned or otherwise occupied.”⁴⁶ In addition, the Declaration enshrined “the right of self-determination as its overarching normative commitment.”⁴⁷ The treaty’s substantive language declares that “indigenous peoples have the right to self-determination [and states that, b]y virtue of th[is] right[,] they [can] freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁸ While it was years in the making, the Declaration thus concretized a legal recognition of indigenous peoples in ways that sharply broke with the principles of law that initially marginalized them.

III. INDIGENOUS RIGHTS IN THE AFRICAN CONTEXT

A. African Mores and the United Nations Declaration on the Rights of Indigenous Peoples

Despite the positive strides of the Declaration, it was not initially accepted with unanimity. In June of 2006, when the finalized draft of the Declaration came before the Human Rights Council, “it soon emerged that a group of African states . . . took exception to some [of its] formulations.”⁴⁹ The African Group, made up of the full bloc of fifty-three African

⁴⁴ *Id.*

⁴⁵ Macklem, *supra* note 22, at 200.

⁴⁶ *Id.* at 201.

⁴⁷ *Id.* at 200.

⁴⁸ United Nations Declaration on the Rights of Indigenous Peoples art. 3, U.N. G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sep. 13, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples].

⁴⁹ Pelican, *supra* note 1, at 55.

Union nations,⁵⁰ put together an Aide Memoire that laid out its trepidations about the draft's offered definition of indigeneity and focus on self-determination rights.⁵¹ In its Aide Memoire, the African Group took the position that any principle of self-determination exercised by indigenous peoples should apply only to those "under colonial and/or foreign occupation."⁵² Otherwise, it opined, the right to self-determination could be misinterpreted so as to justify secession and threaten "the political unity and [] territorial integrity" of nation states.⁵³

The African Group was not alone in its misgivings. The African Commission on Human and Peoples' Rights, the highest operating judicial body on the African continent,⁵⁴ issued an Advisory Opinion on the proposed Declaration that highlighted additional concerns.⁵⁵ In its opinion, the Commission emphasized that when it comes to indigeneity, rather than espouse a set legal definition, it is "much more . . . constructive to try to bring out the main characteristics" of indigenous peoples so as not to diminish cultural differences.⁵⁶ For its part, the African Commission defined indigeneity, in contrast to the Cobo Report, simply. Indicating a marked break with the proposed Declaration's idea of indigenous peoples, the Commission noted that it considered only "self-identification, a special attachment to and use of . . . traditional lands, [and] a state of marginalization" to be legally dispositive.⁵⁷

B. African Mores and the African Charter on Human and Peoples' Rights

The factious history of the Declaration can be explained by

⁵⁰ Wiessner, *supra* note 18, at 1159.

⁵¹ Pelican, *supra* note 1, at 55.

⁵² African Grp., Draft Aide Memoire ¶ 3.1 (2006).

⁵³ *Id.* ¶ 3.2.

⁵⁴ See Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. INT'L L. REV. 679, 685 (2004).

⁵⁵ Pelican, *supra* note 1, at 55.

⁵⁶ Advisory Op. of the Afr. Comm'n of Human & Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Afr. Comm'n H.P.R., ¶ 10 (2007).

⁵⁷ *Id.* ¶ 12.

Africa's unique experience with indigeneity itself. In Africa, the concept of indigeneity "differ[s] considerably from its meaning on other continents."⁵⁸ Lengthy "histories of conquest, assimilation, migration, and movement . . . make the criteria for deciding who is 'indigenous' far murkier"⁵⁹ in Africa than elsewhere due to the fact that a "central historical feature of [African] colonialism and decolonization was the [formation] of an African state system established around rigid borders . . . that had little regard to prior existing communities and identities."⁶⁰ Today, "African societies tend to reproduce themselves at their internal frontiers, . . . [as they are] continuously creating and re-creating a dichotomy between original inhabitants and latecomers."⁶¹ Thus, many African governments are opposed to the concept of indigeneity and argue "that all Africans are indigenous and should have equal" rights as such.⁶² Referring to this sentiment specifically in its Advisory Opinion, in fact, the African Commission noted that, "in Africa, the term indigenous populations does not mean 'first peoples' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere."⁶³ This understanding, however, was manifested in the Declaration's final version only vaguely in its preamble, which states: "the situation of indigenous peoples varies from region to region and from country to country."⁶⁴

As a matter of law, thus, while regard for African cultural contexts played a great role in shaping the African reaction to the Declaration, it also played a great role in shaping the signing and ratification of another international treaty pertinent to Africa: the African Charter on Human and Peoples' Rights. With the formation of the Organization of African Unity in 1963, "independent African states affirmed

⁵⁸ Pelican, *supra* note 1, at 56.

⁵⁹ Hodgson, *supra* note 3, at 1037.

⁶⁰ Dwight G. Newman, *The Law and Politics of Indigenous Rights in the Postcolonial African State*, 102 AM. SOC'Y INT'L L. PROC. 69, 70 (2008).

⁶¹ Pelican, *supra* note 1, at 52–53.

⁶² *Id.* at 53.

⁶³ *Id.*

⁶⁴ Declaration on the Rights of Indigenous Peoples, *supra* note 48, at pmbl.

their solidarity in the quest for [a] better life of the 'African peoples.'"⁶⁵ In 1981, this solidarity was implemented through the adoption of the African Charter.⁶⁶ The Charter, which takes "an integrated approach towards the concept of . . . rights, enshrining [at once] . . . civil and political rights (libertarian rights); . . . economic, social, and cultural rights (egalitarian rights); and . . . peoples' or group rights (solidarity rights),"⁶⁷ was passed with "a remarkable degree of consensus" on the part of African states.⁶⁸ Ratified very quickly, the African Charter entered into force only five years after its initial drafting,⁶⁹ all fifty-three member states of the African Union becoming parties to it.⁷⁰

Although Article 1 of the Charter almost forbiddingly provides that state parties are obligated, in binding fashion, to "recognize the rights, duties and freedoms [laid out under the treaty] and . . . [to] undertake to adopt . . . measures to give [them] effect,"⁷¹ African states did not withhold ratification. Because the Charter expressly requires state parties to take "into consideration the virtues of their historical tradition[s] and the values of African civilization[,] which [, the treaty emphasizes,] should inspire and characterize their reflection on the concept of human and [p]eoples rights,"⁷² the Charter was, as a whole, set up to be responsive to African contexts in its intents and purposes. Indeed, the Charter's irresistible "implication . . . is that African traditional values . . . are key to the realization of human rights" under a concept—with pertinence to this Note—much more broadly construed than

⁶⁵ Lawrence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 486 (2002).

⁶⁶ Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 104 (2002).

⁶⁷ Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 112 (2004).

⁶⁸ *Id.* at 107.

⁶⁹ *Id.*

⁷⁰ Heyns, *supra* note 54, at 682.

⁷¹ African [Banjul] Charter on Human and Peoples' Rights art. 1, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 [hereinafter African Charter].

⁷² *Id.* at pmbl.

that of indigenous rights alone.⁷³ Although the term “peoples” is nowhere defined in the African Charter, its use within its provisions ensures that “the beneficiaries of the rights enshrined in the [treaty] are both individuals and . . . groups,”⁷⁴ namely the indigenous.⁷⁵

Despite the Charter’s emphasis on African values, however, the African Charter encompasses “a very expansive approach [with] respect to [its own] interpretation.”⁷⁶ Even as indigenous rights are inherent under the African Charter, they are not exclusive. Ultimately, under the treaty’s provisions, African mores do not function independently of those espoused internationally. Articles 60 and 61 of the Charter “bring the African human rights mechanism within the positive influence of . . . other regional human rights experiences” because these provisions ensure that the Charter’s legal interpretation relies extensively on international sources of law.⁷⁷ For its part, Article 60 requires the African Commission, the judicial body responsible for determining the treaty’s legal scope,⁷⁸ to:

draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations.⁷⁹

Similarly, Article 61 requires the African Commission to:

take into consideration, as subsidiary measures to determine [] principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s

⁷³ Juma, *supra* note 65, at 478.

⁷⁴ Udombana, *supra* note 67, at 124.

⁷⁵ Oei & Shepard, *supra* note 11, at 96; *see also* REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS, *supra* note 5, at 79.

⁷⁶ Heyns, *supra* note 54, at 688.

⁷⁷ Oei & Shepard, *supra* note 11, at 87.

⁷⁸ Heyns, *supra* note 54, at 693.

⁷⁹ African Charter, *supra* note 71, art. 60.

rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.⁸⁰

Overall, in construing the Charter, the African Commission is bound to “accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms, and standards.”⁸¹

IV. INDIGENOUS RIGHTS IN THE KENYAN CONTEXT

Even as the Charter provides a highly pertinent body of rights, like the Declaration, it was not initially met with unanimity. Although the Charter “suggests [in Article 1] at least a formal commitment by African [s]tates to conform their national law and practice to international standards . . . , most African states have fallen short of what is expected of them” in this respect.⁸² Legally, the applicability of the African Charter is determined within the African context at the domestic law level by lingering colonial jurisprudence.⁸³ While Africans states with a civil law colonial heritage are generally legal “monists [that] insist that international law and internal law are part of the same order, [African states with a common law colonial heritage are legal] . . . dualists [that] insist that ‘international law and internal law are two separate legal orders, existing independently of one another.’”⁸⁴ In the former British colony of Kenya, where the Endorois tribe was displaced from their land, the enforcement of international treaties like the African Charter “require[s] as a prerequisite] the passing of an enabling Act of Parliament” along the lines of Anglophone common law tradition.⁸⁵ In Kenya, because such an enabling Act was never forthcoming, British schemes of law proved instrumental to the way in which the Charter impacted, or rather failed to impact, indigenous groups like the Endorois.

Legally, British jurisprudence was first imposed on Kenya

⁸⁰ *Id.* art. 61.

⁸¹ Oei & Shepard, *supra* note 11, at 93.

⁸² Udombana, *supra* note 67, at 107–08.

⁸³ Adjami, *supra* note 66, at 110.

⁸⁴ Udombana, *supra* note 67, at 125.

⁸⁵ Juma, *supra* note 65, at 493.

when the country became a protectorate in 1895.⁸⁶ Kenya's status as a protectorate "conferred on the British . . . the power to exercise full jurisdiction in the colony and to set up a system of government therein."⁸⁷ Concerned particularly with questions of land ownership, in 1915, the British passed the Native Trust Lands Ordinances, which, taken together,

creat[ed] two separate property domains. The first regime, 'Crown Land,' constituted radical title over all 'waste and unoccupied land' and vested it in the colonial sovereign. The second regime, 'Native Areas,' vested ultimate control of all other land actually occupied by African communities in a Native Lands Trust Board . . . [sitting] in London.⁸⁸

Under the Ordinances, British authorities exercised full governance over Kenyan territory. Indigenous peoples had claim to their land by trust alone, a fact that remained unaltered even upon independence, as, after the colonial government was dismantled, the British passed title to indigenous reserves into the hands of local Kenyan County Councils, which continued to implement the trust system.⁸⁹

Indeed, upon independence, Kenya "embraced the political blueprint of colonial territoriality in terms of both space and power."⁹⁰ Though, during the independence period, Kenyan political parties vied for different approaches to land legislation, ultimately, the colonial model won out. At independence, Kenya became "a one-party state."⁹¹ The clash between Kenya's political parties: the Kenya African Democratic Party ("KADU") and the Kenya African National Union ("KANU"), ended with KADU's defeat. Though KADU advocated "for [the] restoration of pre-colonial land spheres that ethnic groups inhabited"⁹² and wanted to "give Kenya's politics

⁸⁶ *Id.* at 477.

⁸⁷ *Id.*

⁸⁸ Oei & Shepard, *supra* note 11, at 61.

⁸⁹ *Id.*

⁹⁰ David M. Anderson, 'Yours in the Struggle for Majimbo'. *Nationalism and the Party Politics of Decolonization in Kenya, 1955-64*, 40 J. CONTEMP. HIST. 547, 558 (2005).

⁹¹ *Id.* at 563.

⁹² Karuti Kanyinga, *The Legacy of the White Highlands: Land Rights, Ethnicity, and the Post-2007 Election Violence in Kenya*, 27 J. CONTEMP. AFR. STUD. 325, 329 (2009).

a 'tribal foundation,'"⁹³ its policies did not make it to the political fore. KANU, which advocated for a "federal structure of government in which regions were responsible for administration of land in their territories"⁹⁴—and which "derided [KADU] as [being comprised of] tribalists who opposed the broader goals of nationalism"⁹⁵—was better financed and won the pre-independence elections.⁹⁶

After independence, instead of facing KADU's plans for a Constitution creating six regions operating with their own civil services to implement local legislation,⁹⁷ Kenyan indigenous groups, like the Endorois, faced a Constitution that mirrored the laws left over by the British. The Kenyan Constitution read all through the post-colonial period: "trust Land shall vest in the county council in whose area of jurisdiction it is situated."⁹⁸ The Constitution's express language stated:

[e]ach county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under . . . African customary law . . . , be vested in any tribe, group, family or individual: [p]rovided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law.⁹⁹

Overall, the Kenyan Constitution privileged the state's right to land over the community's, as it even further allowed Kenya to set aside and expropriate trust land as a means of serving governmental purposes.¹⁰⁰

⁹³ Anderson, *supra* note 90, at 554.

⁹⁴ Kanyinga, *supra* note 92, at 328.

⁹⁵ Anderson, *supra* note 90, at 547.

⁹⁶ Kanyinga, *supra* note 92, at 561. Moreover, KANU effectively contributed to KADU's demise, as, after the elections, it "co-opted its leadership by appointing some [of its members] into [its] cabinet [in order to] . . . put the land question under the carpet." *Id.*

⁹⁷ Anderson, *supra* note 90, at 556.

⁹⁸ CONSTITUTION, art. 115(1) (2009).

⁹⁹ *Id.* art. 115(2).

¹⁰⁰ *Id.* art. 118.

V. INDIGENOUS RIGHTS OF THE ENDOROIS COMMUNITY

A. *The Endorios' Postcolonial Experience*

Thrust into a disadvantageous Constitutional framework, the Endorios experienced an increasingly unsettled relationship to their land in the postcolonial period. A community comprised of roughly 400 families of Kalenjin-speaking peoples—and a sub-group of the Tugen tribe that traditionally inhabited the Lake Bogoria region of Kenya's Rift Valley—the Endorios are dependent on their cattle, goat, and sheep livestock for survival.¹⁰¹ Needing to graze these animals in Lake Bogoria's lowlands during the rainy season and in the Monchongoi forest during the dry season in order to ensure yearlong access to fertile pastures, medicinal salt licks, and the lakefront for their pastoralist and religious practices,¹⁰² the Endorios underwent at independence a systematic marginalization from their indigenous ways of life.

While British colonial rule vested legal control over their land in a trust held by the local Baringo and Koibatek County Councils,¹⁰³ actual "challenges to the Endorios' . . . rights [to occupy] the Lake Bogoria region were made [upon] the gazettement of the area as a game reserve" during the 1970s.¹⁰⁴ In 1973, Kenya removed the Endorios "from their traditional areas so that tourists [could] enjoy game viewing without disturbance by 'backwards natives.'"¹⁰⁵ Without being consulted about the state's decision to make their land into a protected area and without being notified of the gazettement until after its implementation in 1977, the Endorios were summarily evicted from Lake Bogoria,¹⁰⁶ displaced to a semi-arid location that was unsuitable to support their cultural practices,¹⁰⁷ and denied compensation for their loss.¹⁰⁸

After years of seeking redress and being met only with

¹⁰¹ Morel, *supra* note 10, at 56.

¹⁰² *Id.*

¹⁰³ Oei & Shepard, *supra* note 11, at 62.

¹⁰⁴ Morel, *supra* note 10, at 56.

¹⁰⁵ Oei & Shepard, *supra* note 11, at 110.

¹⁰⁶ Morel, *supra* note 10, at 56.

¹⁰⁷ *Id.*

¹⁰⁸ Oei & Shepard, *supra* note 11, at 57.

“harassment, arbitrary arrests and intimidation,”¹⁰⁹ eventually, the Endorois brought suit to challenge the legality of their eviction. In 2002, the Kenyan High Court at Nakuru ruled on initial Endorois’ pleadings alleging constitutional violations associated with the restrictive trust management of the Baringo and Koibatek County Councils.¹¹⁰ In its opinion, the High Court stated that it could not address the community’s collective right to property. Finding (1) that there was “no proper identity of the [Endorois] people who were affected by the setting aside of the[ir] land,”¹¹¹ and (2) that “the law does not allow individuals to benefit from . . . a resource simply because they happen to be born close to” it,¹¹² the High Court dismissed the Endorois’ case without ruling on whether any violations had resulted from their eviction.¹¹³ Relying merely on a statement that the Endorois had no legal claims available to them because the Trust Land Act affirmed a constitutional right under Kenyan law for the state to alienate land,¹¹⁴ the High Court stated that “it was too late [for the Endorois] to complain,”¹¹⁵ as they could not establish legal entitlement to territory properly set aside by the government.¹¹⁶

In the face of the High Court’s judgment, though the Endorois first considered an appeal, because “the sheer inefficiency of the Kenyan court system conspired to deny the[ir] community further national remedies . . . [they] sought redress [with] the African Commission” on Human and Peoples’ Rights.¹¹⁷ As part of Minority Rights Group International’s legal cases program, the Endorois initiated an entirely distinct case with an entirely distinct focus.¹¹⁸

¹⁰⁹ *Id.*

¹¹⁰ *Sitetalia v. Baringo Country Council*, (2002) 183 eK.L.R. 1, 2 (H.C.K.), available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=66504631278573495228921&words=).

¹¹¹ *Id.* at 4.

¹¹² *Id.* at 5.

¹¹³ Oei & Shepard, *supra* note 11, at 63.

¹¹⁴ *Ctr. for Minority Rights Dev. (Kenya) v. Kenya*, Comm’n No. 276/03, Afr. Comm’n H.P.R., ¶ 69 (Feb. 10, 2010). Compare The Trust Land Act, (2009) Cap. 288 §§ 7–8, with CONSTITUTION, art. 117 (2009).

¹¹⁵ *Sitetalia*, 182 eK.L.R. at 4.

¹¹⁶ *Ctr. for Minority Rights Dev. (Kenya)*, Comm’n No. 276/03, ¶ 12.

¹¹⁷ Oei & Shepard, *supra* note 11, at 63.

¹¹⁸ Morel, *supra* note 10, at 55.

*B. The Endorois' Case Before the African Commission:
Preliminary Matters*

In their pleadings before the African Commission, the Endorois put aside domestic Kenyan law and raised the issue of their eviction by way of the African Charter.¹¹⁹ Focusing on the African Commission case: *Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, which dealt with Nigerian state actors permitting oil companies to destroy land owned by local citizens,¹²⁰ the Endorois argued that the Charter “provides for peoples [legal claims] to retain their rights . . . as collectives.”¹²¹ In their complaint, the Endorois alleged that Kenya violated African Charter Articles 8, which guarantees rights to religion;¹²² 14, which guarantees rights to property;¹²³ 16, which guarantees rights to health;¹²⁴ 17, which guarantees rights to culture;¹²⁵ 20, which guarantees rights to self-determination;¹²⁶ 21, which guarantees rights to natural resources;¹²⁷ and 22, which guarantees rights to development,¹²⁸ in displacing them from Lake Bogoria.¹²⁹

Established in 1987, a year after the African Charter came into force,¹³⁰ the African Commission represented the best possible forum before which the Endorois could bring suit. Whereas the High Court at Nakuru examined the Endorois' claims pursuant to domestic Kenyan law, the African Commission did not. For “[t]he main mechanisms employed by the Commission to fulfill its task of supervising compliance with Charter norms,”¹³¹ are not bound by domestic law considerations. As mentioned above, though many African

¹¹⁹ *Id.* at 57.

¹²⁰ Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria, Commc'n No. 155/96, Afr. Comm'n H.P.R., ¶ 7 (2001).

¹²¹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 75.

¹²² African Charter, *supra* note 71, art. 8.

¹²³ *Id.* art. 14.

¹²⁴ *Id.* art. 16.

¹²⁵ *Id.* art. 17.

¹²⁶ *Id.* art. 20.

¹²⁷ *Id.* art. 21.

¹²⁸ *Id.* art. 22.

¹²⁹ Morel, *supra* note 10, at 57.

¹³⁰ Udombana, *supra* note 67, at 119.

¹³¹ Heyns, *supra* note 54, at 693.

states, like Kenya, do not enforce the African Charter in their national courts because they do not accept it as a source of binding law absent implementing domestic legislation, the African Commission has

focused on the principle of *pacta sunt servanda*: simply, the principle that agreements are binding and are to be implemented in good faith. Under this principle, an African state's ratification of the African Charter creates, for that state, an obligation that demands concrete results . . . A state cannot . . . invoke the provisions of its domestic legislation, including its [C]onstitution, to evade its treaty obligations.¹³²

In this respect, the Endorois prevailed at their case's outset: the Commission was not deterred from hearing their claims. Although Kenya, as the respondent state, initially tried to dismiss the Endorois' pleadings on the grounds that Article 56 of the African Charter establishes admissibility requirements barring the Commission from hearing a case if local remedies have yet not been exhausted,¹³³ the Commission did not find itself constrained. Despite the fact that the Endorois did not try their case on appeal all the way through the Kenyan legal system, the Commission noted that because the Endorois "premised [their claims] admissibility on two recognized exceptions to [Article 56's local remedies] rule: the substantial nature of the violations and the non-existence of 'effective, available and efficient' remedies within the Kenyan legal system,"¹³⁴ the local remedies requirement did not apply to their case.¹³⁵

The first substantive aspect of the pleadings that the Commission analyzed, therefore, was the Endorois' claim to indigenous identity itself. Unlike the Kenyan High Court, the Commission found the Endorois to be a recognizable indigenous group. While noting, at the outset, that "there is no universal and unambiguous definition of the concept" of indigeneity and that the concept of 'peoples' under the African Charter is

¹³² Udombana, *supra* note 67, at 126–27; *see also* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 311.

¹³³ African Charter, *supra* note 71, art. 56.

¹³⁴ Oei & Shepard, *supra* note 11, at 65.

¹³⁵ Heyns, *supra* note 54, at 695.

similarly indefinite,¹³⁶ the Commission drew on its adopted Report of the Working Group of Experts on Indigenous Populations/Communities to hold that the African “notion of ‘peoples’ is closely related to collective rights”¹³⁷ and that collective rights, in turn, are an important criteria for identifying indigenous groups, as “self-identification as a distinct collectivity”¹³⁸ is part of the internationally recognized legal definition of indigeneity under the Cobo Report.¹³⁹

In its opinion, the Commission dispelled Kenya’s argument that indigeneity ought to be narrowly defined and that the Endorois, as a mere Kalenjin-speaking sub-group of the Tugen tribe, could not qualify.¹⁴⁰ The Commission relied on the case of *Saramaka People v. Suriname*, in which the Inter-American Court of Human Rights recognized—via the American Convention on Human Rights, which guarantees the respective rights of all persons subject to the jurisdiction of the treaty, without regard to national or social origin¹⁴¹—the collective land rights of a tribal community, some of whose members did not occupy the same precise history, territory, or customs of the larger super-class of which they were a part.¹⁴² Supplementing the Charter’s notion of ‘peoples’ with international case law, the Commission adopted an expansive definition of indigeneity and found the Endorois to possess legitimate claims to group identity under the African Charter.¹⁴³

¹³⁶ Ctr. for Minority Rights Dev. (Kenya) v. Kenya, Comm’n No. 276/03, Afr. Comm’n H.P.R., ¶ 147 (Feb. 10, 2010).

¹³⁷ *Id.* ¶ 149.

¹³⁸ *Id.* ¶ 150.

¹³⁹ *See id.* ¶ 152.

¹⁴⁰ *Id.* ¶ 145.

¹⁴¹ American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

¹⁴² *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 79–86 (Nov. 28, 2007).

¹⁴³ *Ctr. for Minority Rights Dev. (Kenya)*, Comm’n No. 276/03, ¶ 162.

C. The Endorois' Case Before the African Commission: Charter Violations

1. Article 8: The Right to Religion

Upon acknowledging the Endorois as a recognizable indigenous group, the Commission was free to address Kenya's alleged Charter violations. The Commission started its analysis with Article 8 and the Endorois' claims that Kenya violated its guarantee of the right to the "free practice of religion"¹⁴⁴ by expelling them from their land and religious sites.¹⁴⁵ Looking to the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights ("ICCPR")¹⁴⁶—which states that "everyone shall have the right to freedom of thought, conscience and religion"¹⁴⁷—the Commission first established that the Endorois' cultural practices constituted a religion under international law.¹⁴⁸ It relied on the Human Rights Committee's interpretation of the ICCPR, which holds that it "protects theistic, non-theistic and atheistic beliefs,"¹⁴⁹ as well as its own jurisprudence in *Free Legal Assistance Group v. Zaire*, which held, in the context of a case about the state persecution of Jehovah's Witnesses,¹⁵⁰ that religious freedom is associated with groups that assemble "in connection with a belief" under the broad scope of Charter Article 8.¹⁵¹

In addition, the Commission relied on its own case law in *Amnesty International v. Sudan*, about the state persecution of

¹⁴⁴ African Charter, *supra* note 71, art. 8.

¹⁴⁵ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 163.

¹⁴⁶ *Id.* ¶ 164.

¹⁴⁷ International Covenant on Civil and Political Rights art. 18(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁴⁸ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 168.

¹⁴⁹ *Id.* ¶ 164; accord Human Rights Comm., *General Comment No. 22*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (July 30, 1993).

¹⁵⁰ *Free Legal Assistance Grp. v. Zaire*, Commc'n Nos. 25/89, 47/90, 56/91, 100/93, Afr. Comm'n H.P.R., ¶ 3 (1995).

¹⁵¹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 165; see *Free Legal Assistance Grp.*, Commc'n Nos. 25/89, 47/90, 56/91, 100/93, ¶ 45.

non-Muslims,¹⁵² to hold that any government restriction on religious practices pursuant to Article 8 must be “proportionate to the specific need on which [it is] predicated.”¹⁵³ In terms of the Endorois, the Commission noted that Kenya did not contest the community’s religious claims to the area around Lake Bogoria¹⁵⁴ and that the state’s reasons for their “complete and total expulsion”¹⁵⁵ from it were insufficient to show that it had “any significant . . . interest[s] . . . [, as] allowing . . . [the Endorois to] practice [their] religion [on the game reserve] would not detract from [the state’s] goal of conservation or developing the areas [of Lake Bogoria] for economic reasons.”¹⁵⁶ Thus, in evicting the Endorois from their land, the Commission held Kenya to be in violation of Article 8 of the African Charter.¹⁵⁷

2. Article 14: The Right to Property

After having ruled on the Endorois’ right to religion, the Commission proceeded to examine Article 14 of the African Charter and the applicability of its provision stating: “the right to property shall be guaranteed.”¹⁵⁸ In the face of Kenya’s argument that the creation of the game reserve was legal under domestic Kenyan law,¹⁵⁹ the Commission accepted the Endorois’ claim that “property rights have an autonomous meaning under international human rights law [that] supersede national legal definitions.”¹⁶⁰ In its opinion, the Commission looked to its own jurisprudence, to the cases of *Malawi African Association v. Mauritania*, about the state’s discrimination against black Mauritanian ethnic groups,¹⁶¹ and

¹⁵² Amnesty Int’l v. Sudan, Commc’n Nos. 48/90, 50/91, 52/91, 89/93, Afr. Comm’n H.P.R., ¶ 76 (1999).

¹⁵³ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 172; see *Amnesty Int’l*, Commc’n Nos. 48/90, 50/91, 52/91, 89/93, ¶ 80.

¹⁵⁴ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 167.

¹⁵⁵ *Id.* ¶ 172.

¹⁵⁶ *Id.* ¶ 173.

¹⁵⁷ *Id.*

¹⁵⁸ African Charter, *supra* note 71, art. 14.

¹⁵⁹ See *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/2003, ¶¶ 176–77.

¹⁶⁰ *Id.* ¶ 185.

¹⁶¹ *Malawi African Ass’n v. Mauritania*, Commc’n Nos. 54/91, 61/91,

Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, about the state's seizure of local land for oil development projects,¹⁶² to establish that the right to property under Article 14 "includes not only the right to have access to one's property . . . , but also the right to [have] undisturbed possession, use and control of such property."¹⁶³

Supplementing its own case law with that from the European Court of Human Rights and the Inter-American Court of Human Rights, the Commission drew on the cases of *Doğan v. Turkey* and *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* to rule that, under international law, even groups that are unable to produce legal title to land, such as the villagers in the first case¹⁶⁴ and the indigenous group in the second case,¹⁶⁵ have rights to property because such rights are born out of possession alone under precepts established by such treaties as the Protocol to the Convention on Human Rights and Fundamental Freedoms¹⁶⁶—which states that "every natural person is entitled to the peaceful enjoyment of his possessions"¹⁶⁷—and the American Convention on Human Rights¹⁶⁸—which states that "everyone has the right to the use and enjoyment of his property."¹⁶⁹

Indeed, focusing on indigenous case law, the Commission went on to analyze the case of *Saramaka People v. Suriname*, which discussed Suriname's failure to recognize tribal rights to

98/93, 164/97 à 196/97, 210/98, Afr. Comm'n H.P.R., ¶ 3 (2000).

¹⁶² Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria, Commc'n No. 155/96, Afr. Comm'n H.P.R., ¶ 6 (2001).

¹⁶³ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/2003, ¶ 186 (expansively construing the right to property discussed in these cases). See *Malawi African Ass'n*, Commc'n Nos. 54/91, 61/91, 98/93, 164/97 à 196/97, 210/98, ¶ 128; *Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights*, Commc'n No. 155/96, ¶¶ 60–62.

¹⁶⁴ *Doğan v. Turkey*, 2004-VI Eur. Ct. H.R. 231, 263.

¹⁶⁵ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001).

¹⁶⁶ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶¶ 188–189; see *Doğan*, 2004-VI Eur. Ct. H.R. at 266.

¹⁶⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

¹⁶⁸ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 190; see *Mayagna (Sumo) Awas Tingni Cmty.*, (ser. C) No. 79, ¶¶ 151, 154.

¹⁶⁹ American Convention, *supra* note 141, art. 21.

land under the American Convention,¹⁷⁰ and held that a state's failure to recognize such claims "becomes a [wholesale] violation of the 'right to property.'"¹⁷¹ Based on *Saramaka People*, the Commission found that the gazetting of the Endorois' land was "inadequate" under the African Charter despite domestic Kenyan law.¹⁷² Noting that the United Nations Declaration on the Rights of Indigenous Peoples "bestows the right of [land] ownership rather than mere access . . . [and] ensures that indigenous peoples can engage with the state . . . as active stakeholders rather than as passive beneficiaries,"¹⁷³ the Commission ruled: "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."¹⁷⁴

With respect to the right to property, the Commission also ruled that African legal norms mandate a two-pronged test that Kenya was required to meet before it could legally deprive

¹⁷⁰ *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 3 (Nov. 28, 2007).

¹⁷¹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 192.

¹⁷² *Id.* ¶ 199.

¹⁷³ *Id.* ¶ 204. See Declaration on the Rights of Indigenous Peoples, *supra* note 48, art. 8(2)(b) (stating that "[s]tates shall provide effective mechanisms for prevention of, and redress for: [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources."); *id.* art. 10 (stating that "[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."); *id.* art. 25 (stating that "[i]ndigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."); *id.* art. 26(3) (stating that "[s]tates shall give legal recognition and protection to th[e] lands, territories and resources [of indigenous peoples and that s]uch recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."); *id.* art. 27 (stating that "[s]tates shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used [and that i]ndigenous peoples shall have the right to participate in this process.").

¹⁷⁴ *Ctr. for Minority Rights Dev. (Kenya)*, Commc'n No. 276/03, ¶ 205; see *Saramaka People*, (ser. C) No. 172, ¶ 110.

the Endorois of their land.¹⁷⁵ Holding that because Article 14 states that land encroachment must be performed “in the interest of the public need . . .” as well as “in accordance with appropriate laws,”¹⁷⁶ the Commission defined the “in the interest of the public need” test as a high threshold.¹⁷⁷ Drawing on the U.N. Sub-Commission for the Promotion and Protection of Human Rights, which drafted a report on indigenous peoples positing that “limitations, if any, on the right [of] indigenous peoples to their natural resources must flow only from the most urgent and compelling interest[s],”¹⁷⁸ the Commission held that limitations on the right to property under the African Charter “should be [interpreted to be] least restrictive.”¹⁷⁹ In the instant case, the Commission concluded that Kenya’s were not according its own ruling in *Constitutional Rights Project v. Nigeria*, which held that a state “may not erode a right such that the right itself becomes illusory,”¹⁸⁰ as the right to property became for the Endorois when they lost access to Lake Bogoria.

Furthermore, in terms of the “in accordance with the law” test, the Commission noted that two requirements are imposed on states like Kenya with respect to appropriated land: one of consultation and one of compensation.¹⁸¹ Returning to the logic of *Saramaka People*, which held that the American Convention guarantees indigenous groups the right to preserve their customary relationships with land,¹⁸² the Commission found that the “effective participation of the members of [indigenous] people [in the governance of their territories must be] in

¹⁷⁵ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 211.

¹⁷⁶ *Id.*; accord African Charter, *supra* note 71, art. 14 (stating that “[t]he right to property shall be guaranteed [and that i]t may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”).

¹⁷⁷ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 212.

¹⁷⁸ Special Rapporteur of Sub-Comm’n on the Promotion & Prot. of Human Rights, *The Prevention of Discrimination and Protection of Indigenous Peoples*, Comm’n on Human Rights, ¶ 48, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (by Erica-Irene A. Daes).

¹⁷⁹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 214.

¹⁸⁰ *Id.* ¶ 215; accord *Constitutional Rights Project v. Nigeria*, Commc’n Nos. 140/94, 141/94, 145/95, Afr. Comm’n H.P.R., ¶ 42 (1999).

¹⁸¹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 225.

¹⁸² *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 95–96 (Nov. 28, 2007).

conformity with their customs and traditions.”¹⁸³ Stating that Kenya failed to allow the Endorois to participate in the creation of the game reserve, the Commission relied on Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples and upheld its language affirming that indigenous groups have the right to restitution of or compensation for the lands they traditionally occupied or used.¹⁸⁴ Accordingly, the African Commission found Kenya to be in violation of Article 14 of the African Charter.¹⁸⁵

3. Article 17: The Right to Culture

Following its discussion of the right to property, the African Commission next analyzed the Endorois’ claim that Kenya denied the group cultural rights under African Charter Article 17. Article 17 states not only that “every individual may freely[] take part in the cultural life of his community,”¹⁸⁶ but that “[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”¹⁸⁷ In this respect, the Commission held that the Charter places a burden on African states to preserve the “cultural heritage essential to [indigenous] group identity.”¹⁸⁸ Relying on the Human Rights Committee’s statement—made in reference to ICCPR Article 25, which affirms: “minorities shall not be denied the right . . . to enjoy their own culture”¹⁸⁹—the Commission held that “culture manifests itself in many forms, including . . . way[s] of life associated with the use of land resources . . . in the case of indigenous peoples.”¹⁹⁰ The

¹⁸³ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 227.

¹⁸⁴ *Id.* ¶ 232; *accord* Declaration on the Rights of Indigenous Peoples, *supra* note 48, art. 28 (stating that “[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”).

¹⁸⁵ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 238.

¹⁸⁶ African Charter, *supra* note 71, art. 17(2).

¹⁸⁷ *Id.* art. 17(3).

¹⁸⁸ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 241.

¹⁸⁹ ICCPR, *supra* note 147, art. 27.

¹⁹⁰ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 243; *accord* Human Rights Comm., *General Comment No. 23*, ¶ 7, U.N. Doc. HRI/

Commission then examined the Report of the Working Group on Indigenous Populations/Communities, specifically focusing its attention on its idea that land dispossession is a major threat facing indigenous groups today,¹⁹¹ and concluded that states like Kenya are bound under international law to “creat[e] spaces for dominant and indigenous cultures to co-exist.”¹⁹²

In its opinion, the Commission ruled that Kenya had a high duty towards the Endorois with respect to the creation of the game reserve on their land.¹⁹³ The Commission noted in particular that Article 17 lacks a “claw-back clause,” interpreting this fact to mean that the Charter gives African states no leeway for failing to promote cultural rights. Indeed, the Commission found that Kenya’s responsibility to protect the Endorois’ culture was non-derogable and had to be proportionate to its legitimate aims as a state.¹⁹⁴ Explaining the rule of proportionality, the Commission asserted that Kenya deprived the Endorois of the right to culture because it “denied the community access to an integrated system of beliefs, values, norms, mores, traditions, and artifacts closely linked”¹⁹⁵ with Lake Bogoria despite the fact that such access would have posed no harm to the reserve or Kenya’s economic incentives to develop it.¹⁹⁶ All in all, the Commission ruled that Kenya violated Charter Article 17 by failing to adequately protect the Endorois’ indigenous practices.¹⁹⁷

4. Article 21: The Right to Resources

Once the Commission granted the Endorois cultural rights, it next turned its attention to their resource rights under Article 21 of the African Charter, which states that “all peoples

GEN/1/Rev.1 (Apr. 8, 1994).

¹⁹¹ See *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 244; see REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS, *supra* note 5, at 20.

¹⁹² *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 247.

¹⁹³ *Id.* ¶ 248.

¹⁹⁴ *Id.* ¶ 249.

¹⁹⁵ *Id.* ¶ 250.

¹⁹⁶ *Id.* ¶ 249.

¹⁹⁷ *Id.* ¶ 251.

shall freely dispose of their wealth and natural resources.”¹⁹⁸ Examining Kenya’s claims that the Endorois never fully lost access to their land because revenues from the game reserve went into financing local projects through distributions made by the Baringo and Koibatek County Councils,¹⁹⁹ the African Commission drew on the case of *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* to hold that indigenous communities have a general “right to natural resources contained within their traditional lands”²⁰⁰ because this case barred state oil drilling companies from destroying local property for economic development initiatives under the scope of Article 21.²⁰¹

Pursuant to the supplementary authority of *Saramaka People v. Suriname*—which interpreted the American Convention’s guarantee that “everyone has the right to the use and enjoyment of his property”²⁰² to mean that a state is precluded from interfering with the resources located on indigenous land without first consulting with the indigenous peoples and including them in benefits derived therefrom²⁰³—the Commission emphasized that international law holds that indigenous groups “have the [broad] right to the use and enjoyment of the natural resources that lie on and within the[ir] land”²⁰⁴ as long as these resources have some aggregate connection to their territories as a whole.²⁰⁵ Referencing the idea that Kenya had a duty not only to consult with the Endorois about the disposal of the resources found on their territory, but to give them a reasonable chance to participate in any resulting benefits,²⁰⁶ the Commission noted that because Kenya’s appropriation of Lake Bogoria had the composite effect of depriving the Endorois’ of wealth associated with the region,

¹⁹⁸ African Charter, *supra* note 71, art. 21.

¹⁹⁹ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 253.

²⁰⁰ *Id.* ¶ 255.

²⁰¹ See Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria, Commc’n No. 155/96, Afr. Comm’n H.P.R., ¶¶ 56–57 (2001).

²⁰² American Convention, *supra* note 141, art. 21.

²⁰³ *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 155 (Nov. 28, 2007).

²⁰⁴ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 257; see *Saramaka People*, (ser. C) No. 172, ¶ 155.

²⁰⁵ See *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 266.

²⁰⁶ *Id.* ¶ 268; accord *Saramaka People*, (ser. C) No. 172, ¶ 155.

Kenya was in violation of Article 21.²⁰⁷

5. Article 22: The Right to Development

As the final consideration of its opinion, the African Commission considered Article 22 of the African Charter, which affirms not only that “[a]ll peoples shall have the right to [] economic, social and cultural development,”²⁰⁸ but that “state[s] shall have the duty . . . to ensure” such right.²⁰⁹ Dismissing Kenya’s argument that the Endorois were given development rights because the Baringo and Koibatek County Councils allocated funds from the game reserve to local community programs,²¹⁰ the Commission held that the right to development is governed by a two pronged test of constitutive and instrumental elements.²¹¹ Noting that the right to development, which is still emerging in international law,²¹² “has been posited to require the fulfillment of five main criteria: that it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes,”²¹³ the Commission drew on the Working Group on Indigenous Populations’ statement²¹⁴ that “indigenous peoples [must] not [be] coerced, pressured or intimidated in their choice of development.”²¹⁵ Examining the Report of the Working Group of Experts on Indigenous Populations/Communities, the Commission then

²⁰⁷ See *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶¶ 255, 268.

²⁰⁸ African Charter, *supra* note 71, art. 22(1).

²⁰⁹ *Id.* art. 22(2).

²¹⁰ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 274.

²¹¹ *Id.* ¶ 277.

²¹² Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. REV. 137, 137 (2004).

²¹³ *Id.* See generally Arjun Sengupta, *Development Cooperation and the Right to Development* (Harvard School of Public Health, Working Paper No. 12, 2003).

²¹⁴ Anoanella-Iulia Motoc & The Tebtebba Found., 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 Would Serve as a Framework for the Drafting of a Legal Commentary by the Working Group on this Concept, Comm’n on Human Rights, U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (July 8, 2004).

²¹⁵ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 279; accord Motoc & The Tebtebba Found., *supra* note 214, ¶ 14(a).

asserted that “its own [legal] standards state that a [g]overnment must consult with . . . indigenous peoples . . . when dealing with sensitive issues [such] as land.”²¹⁶

In its opinion, the Commission ruled that Kenya, by presenting the game reserve to the Endorois “as a *fait accompli*,” failed to give the group a proper opportunity to have a say in the development of their land.²¹⁷ Supporting this analysis by relying on *Saramaka People v. Suriname*,²¹⁸ which held, as noted above, that indigenous groups must have a role in state plans developed for their territories,²¹⁹ the Commission ruled that “benefit sharing is key to the development process” under international law.²²⁰ Accordingly, the Commission found that Kenya was obligated under Charter Article 22 not only to allow the Endorois “to reasonably share in the benefits [accrued] as a result of [the state’s] . . . deprivation of their right to use and enjo[y]” Lake Bogoria,²²¹ but to ensure that favorable conditions at Lake Bogoria were protected so that the community could develop of its own accord there in the future.²²²

VI. IMPLICATIONS OF THE ENDOROIS’ CASE

At the end of *Centre for Minority Rights Development (Kenya) v. Kenya*, the African Commission found Kenya to have violated African Charter Articles 8, 14, 17, 21, and 22 by evicting the Endorois from Lake Bogoria. Based on this finding, the Commission urged Kenya to:

- (a) [r]ecognize rights of ownership to the Endorois and [r]estitute Endorois ancestral land[;]
- (b) [e]nsure that the Endorois community has unrestricted access to Lake Bogoria and surrounding religious sites for religious and culture rites . . . [;]
- (c) [p]ay adequate compensation to the community for all loss

²¹⁶ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 281; accord REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS, *supra* note 5, at 12.

²¹⁷ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 281.

²¹⁸ *Id.* ¶ 289.

²¹⁹ *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C), ¶ 155 (Nov. 28, 2007).

²²⁰ *Ctr. for Minority Rights Dev. (Kenya)*, Commc’n No. 276/03, ¶ 295.

²²¹ *Id.*

²²² *Id.* ¶ 298.

suffered[;] (d) [p]lay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve[;] (e) [g]rant registration to the Endorois Welfare Committee[;] (f) [e]ngage in dialogue with the Complainants for the effective implementation of these recommendations[; and] (g) [r]eport on the implementation of these recommendations within three months from the notification[.]²²³

exhorting the state to comply broadly with its obligations under the African Charter. Indeed, in its opinion, the Commission held Kenya to a high standard, one far surpassing that applicable to the Endorois under domestic Kenyan law alone. Making full use of African Charter Articles 60 and 61—particularly their permissive reinforcement of reliance on legal tenants established in both African and international law²²⁴—the African Commission engaged in expansive legal interpretation by granting the Endorois renewed access to their land.²²⁵

While the Commission thus provided a liberal basis for the restitution of the Endorois' rights, however, *Centre for Minority Rights Development (Kenya) v. Kenya* did not ultimately come down without limitations. It remains the case that the African Commission is not delegated the power to enforce its judgments vis-à-vis the African Charter under current law. The recommendations urged by the Commission are not effectively binding on Kenya. Because the Commission lacks enforcement mechanisms under the Charter, Kenya is merely encouraged to “adopt measures in conformity” with its

²²³ *Id.*

²²⁴ See African Charter, *supra* note 71, art. 60; *id.* art 61.

²²⁵ Indeed, by employing the African Charter, the African Commission engaged in a more expansive kind of legal reasoning than that espoused along traditional lines by the International Court of Justice (“ICJ”) under Article 38 of the Statute of the International Court of Justice. Article 38, which permits the ICJ to make its decisions, in ranked order, by applying: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; [and] d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations,” is less flexible than African Charter. Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993.

holdings;²²⁶ as a matter of law, Kenya is not necessarily bound to carry them out.²²⁷

Despite the unbinding nature of the decision, *Centre for Minority Rights Development (Kenya)* nonetheless represents a weighty indication of the way in which indigenous rights have advanced within international law. Through its own reliance on international legal authority with respect to indigeneity, the case reveals that “indigenous peoples [can] now allude to international norms supporting . . . claims” and advancing rights on issues extending in scope from religion to development.²²⁸

Moreover, the *Centre for Minority Rights Development (Kenya)* decision stands as a particularly salient view of indigenous rights in a broader sense. Though the case has been criticized for failing to explicitly extend the Endorois’ rights to land under the United Nations Declaration on the Rights of Indigenous Peoples,²²⁹ the African Commission did not need to rely on this treaty in order to rule in favor of the Endorois. In construing the African Charter, the Commission made it clear that the Endorois’ rights as indigenous peoples are extant not because the Endorois are indigenous per se, but because they are peoples under the broad language and scope of the African Charter,²³⁰ a legal mechanism that is simply flexible enough to encompass within its interpretative framework the means for protecting indigeneity as set out under international law.²³¹ The indigenous, in African jurisprudence anyway, do not need to be separately protected in order to have legally viable claims. On purely rhetorical grounds, therefore, *Centre for Minority Rights Development (Kenya)* exemplifies a pinnacle of legal recognition for indigenous peoples and a decisive rejection of the kind of lawmaking that once siloed their rights.

²²⁶ Heyns, *supra* note 54, at 695.

²²⁷ *Id.*

²²⁸ Seth Korman, Comment, *Indigenous Ancestral Lands and Customary International Law*, 32 HAWAII L. REV. 391, 393 (2010).

²²⁹ Oei & Shepard, *supra* note 11, at 58.

²³⁰ See African Charter, *supra* note 71, art. 19.

²³¹ See REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS, *supra* note 5, at 79.