9-1-2010

In Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa

Korir Sing' Oei A.  
Centre for Minority Rights Development

Jared Shepherd  
American Civil Liberties Union of Alabama

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bhrlr

Part of the Human Rights Law Commons, and the Indian and Aboriginal Law Commons

Recommended Citation

Available at: https://digitalcommons.law.buffalo.edu/bhrlr/vol16/iss1/2

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Human Rights Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
This article examines Communication 276/2003, Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya, argued before the African Commission on Human and Peoples’ Rights. The Endorois Communication is one of the first indigenous rights claims to be examined by an international body after the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

This article begins by placing the Communication within the context of the international indigenous rights movement. The authors then explore the Commission’s historical use of Articles 60 and 61 of the African Charter on Human and Peoples’ Rights. The authors contend that the Commission, while liberally deploying comparative jurisprudence from the European and Inter-American Human Rights systems, failed to articulate the bounds and import of Articles 60 and 61 of the African Charter. Finally, the authors propose that the Commission should have grafted the United Nations Declaration on the Rights of Indigenous Peoples into its understanding of long-standing African Charter rights through Articles 60 and 61. Despite the
Commission’s significant finding that Kenya violated the rights of the Endorois Community, the authors conclude that the Commission missed an opportunity to declare that the Charter’s rights are only adequately applied to indigenous populations, through the framework of the Declaration on the Rights of Indigenous Peoples.

INTRODUCTION

In 1974, the government of the Republic of Kenya ordered the Endorois community out of their ancestral land in the Lake Bogoria area. The government, without consulting the group, gazetted their land as a wildlife reserve, and promised the Endorois compensation. The government never fulfilled its promise. Instead, it continued to deny the community access to their pristine pasturelands while subjecting its leaders to harassment, arbitrary arrests and intimidation. The Endorois Community’s case, argued before the African Commission on Human and Peoples’ Rights (African Commission), is the product of the community’s sustained campaign for recognition of their identity and restoration of their ancestral land. In its Decision on the Merits, the African Commission found that Kenya violated Articles 1, 8, 14, 17, 21,


and 22 of the African Charter. The Endorois Communication and the African Commission’s Decision on the Merits provide an opportunity to examine indigenous rights in Africa against ongoing developments in contemporary international human rights law. Specifically, the Communication provides an opportunity to examine the utility of the United Nations Declaration on the Rights of Indigenous Peoples as a tool for the co-realization of the States’ and indigenous communities’ rights to development and natural resources in Africa. Furthermore, the Endorois case provided the African Commission with an ideal case to elaborate and clarify the group rights provisions of the Charter.

This paper addresses two interrelated questions. First, it discusses whether the Endorois Communication enhances the understanding and recognition of indigenous peoples’ rights in Africa. Second, it assesses whether the African Commission capitalized on the opportunities afforded it to deepen the development of indigenous peoples’ rights on the content. Part I reviews the Endorois litigation at national courts in Kenya and its ultimate seizure, admissibility, and hearing by the African Commission. Part II analyzes the relevant human rights issues raised by the Endorois claim at the African Commission. Consequently, it also highlights the contentious issues surrounding indigenous rights in international human rights law.

Part III frames the Endorois Communication as an opportunity presented to the African Commission to accelerate its standard setting processes on indigenous rights in tandem with international developments. The paper advocates the Commission’s greater utilization of the United Nations Declaration on the Rights of Indigenous Peoples to expound on the African Charter’s rights to development and natural resources beyond a mere comparative framework. Specifically, the paper examines how the Af-

---

5 Endorois Decision, supra note 3, at 80. The Endorois alleged violation of five African Charter rights, namely: Article 8 (right to free practice of religion); Article 14 (right to property); Article 17 (cultural rights); Article 21 (right to free disposition of natural resources); and Article 22 (right to development). See African Charter, supra note 4. The African Commission affirmed the Endorois’ claims. In addition, the Commission found a violation of Article 1, essentially finding a failure of the state to adopt legislative measures to protect the enumerated rights. Article 1 states, “The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.” African Charter, supra note 4, art. 1.

6 See Endorois Decision, supra note 3.

American Commission should have brought the Declaration into Africa’s expanding human rights system through articles 60 and 61 of the Charter.\(^8\)

II. **The Endorois Communication: An Overview**

A. *The Claim in Kenyan Courts*

The Endorois are the traditional inhabitants of the Lake Bogoria area within Kenya’s Rift Valley Province.\(^9\) The community numbers approximately 400 families and is a sub-group of the larger Kalenjin speaking ethnic group. These families practice pastoralism. The Endorois graze their animals near Lake Bogoria during the rainy seasons and move to the Monchongoi forest in the dry seasons. The Endorois depend upon their livestock for survival. The fertile land surrounding Lake Bogoria provides green pastures and medicinal salt licks vital for their livestock’s health. Ad-

---


\(^9\) Others question this assertion and argue that the Endorois are not a distinct group but only a sub-group of the Tugen community in Baringo. See, e.g., Response of Kenya Government, ¶1.1.5 (July 31, 2006) [hereinafter Kenya Response]. See also Bill Ruto & Korir Sing’oeie, *The Endorois and their Lost Heritage*, 4 *Indigenous Affairs* 47, 49 (2004). This paper adopts the prevalent self-identification standard reflected in several international human rights instruments, most specifically: ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples. See ILO Decision, infra note 57; Declaration, supra note 8. The Endorois’ perception of distinctiveness, therefore, serves as the legitimate basis for their identification as a unique indigenous community. See S. James Anaya & Claudio Grossman, *The Case of the Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 *Arizona J. Int’l L.* 1 (2002) (the classification of the Awas Tingni of Nicaragua as a sub-group of the larger Mayagna or Sumo group did not negate their indigenous rights claims before the Inter-American Court of Human Rights); see also Yakye Axa Indigenous Community v Paraguay, Case 12.313, Inter-Am. C.H.R., 125/05, OEA/Ser.C/125 ¶ 82 (2005) [hereinafter Yakye Axa]. Notably, the Inter-American Court of Human Rights holds the recognition of juridical personality by a state of its indigenous peoples is a mere formality because indigenous rights do not stem from state recognition of the legal status of an indigenous community.
ditionally, Lake Bogoria is essential to the community’s religious and cultural practices.

The Endorois community’s battle over their ancestral land commenced on the heels of Kenya’s independence in 1964. By adopting the colonial land and natural resource regime unchanged, Kenya’s post independence state presented unique problems to semi-nomadic communities, including the Endorois. For example, the Colonial government promulgated the Native Trust Lands Ordinances in 1939, creating 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 which sat in London. Under the Native Trust Lands Ordinance, the British government demarcated each recognized ethnic group’s “native land area,” and allowed it to be governed under customary tenure. At independence, radical title to these native reserves was transferred to the local authorities (County Council), obliged to hold the land in trust for the use and benefit of the local community. Notably, most lands occupied by no-

11 The legal designation of African territory as “waste and unoccupied land” is rooted in the internationally notorious concept of *terra nullius* or vacant land, which was behind European annexation of territory in new lands, including Africa. The validity of the doctrine of *terra nullius*, however, is now discredited. See, e.g., Western Sahara Case (Advisory Opinion) 1975 I.C.J No.61, at 86 (Oct. 16). The Court held that “the concept of *res nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned.”
12 The land discussed in the Endorois communication is classified as part of the Suk, Kamasia, Marakwet, Elgeyo and Njems Native Reserve.
13 See Constitution, Chapter IX, §115(1) (1992) (Kenya). The Constitution provides: “All Trust land shall vest in the county council within whose area of jurisdiction it is situated.” Section 115 (2) also provides: “Each 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 the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.” These provisions excluded water masses and mineral deposits from the general control of local authorities. This section also subjected the application of African customary law to statutory law as well as the dictates of public morality and health. Kenya’s Trust doctrine has dubious foundations in paternalism. One political unit is viewed to lack the capacity to fully manage its own affairs is subjected to some measure of supervision and control by a higher authority. For instance, colonization of Africa
Madic communities in Kenya—the sites of most national parks and reserves—are held under the Trust Lands Act. This guardianship relationship is often abused by the central government, which colludes with local authorities to convert trust lands into private land or to utilize for national development priorities in total disregard of the needs of local communities. Calestus Juma indicts the state’s conception of public trust:

One of the main problems with the Kenya constitution is that it articulates the notion of public trust in such a way that it works against local communities. The constitutional provisions and laws pertaining to trust lands, for example, have worked expressly against the interest of trust lands inhabitants.

The Endorois community first launched their campaign in Kenya’s domestic courts, challenging the manner in which the Baringo and Koibatek County Councils—the joint trustees of the Lake Bogoria land—managed and controlled the game reserve. Specifically, the community questioned the allocation of revenue collected from the park, which left the community out of the profit structure. The Community also challenged the legality of their eviction from the park. Furthermore, the Community contended that the government abridged their constitutional rights by denying them access to grazing land, cultural and religious sites.


was predicated on the principle that colonial powers would “watch over the preservation of native population and the improvement of the conditions of the moral and material well being.” General Act of the Berlin Conference, art. 6, Feb. 26, 1885, reprinted in 3 AM. J. INT’L L. 7, 12 (Supp. 1909). The League of Nations internationalized and legitimized trusteeship as a sacred trust that civilization owed to those “peoples not yet able to stand by themselves under the strenuous conditions of the modern world.” Covenant of the League of Nations, art. 22, para.1.


17 Id.
The Kenyan High Court dismissed the Endorois claim upon a finding that, “the law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.” The court failed to engage the broader issues raised by the Endorois claim. In particular, it failed to assess the scope of duties on the State under the Trust Lands Act or the corresponding rights of communities governed by the statute. Additionally, the court failed to clarify whether the procedural requirements under the Trust Land Act were complied with nor addressed what human violations had resulted from the community’s forced eviction.

The Endorois community appealed the High Court judgment, but uncertainty as to a right of appeal and the sheer inefficiency of the Kenyan court system conspired to deny the community further national remedies. Consequently, the Endorois sought redress at the African Commission. The Endorois placed their claim solidly within the protective jurisdiction of the African Commission by a Letter of Intent forwarded in May 2003 and an Admissibility Petition submitted in August 2003. The crux of the Endorois claim at the Commission is that the Kenyan state breached the African Charter through violations of their rights to property, culture, religion, natural resources and development.

---

18 Id.

19 The African Commission’s Decision on the Merits took note of the High Court’s position that it could not “address the issue of a community’s collective right to property” and “that it did not believe Kenyan law should address any special protection to a people’s land based on historical occupation and cultural rights. Endorois Decision, supra note 3, at ¶ 12.

20 The Kenyan Constitution provides for a right of appeal “against determinations of the High Court . . . as of right.” Supra note 13, at §84 (7). This section of the Constitution was introduced in 1997 as an amendment to the Constitution of Kenya, effectively overruling common law decisions, such as Anarita Karimi Njeru v The Republic (1979) 1 K.L.R 162 (Kenya), which had suggested that there was no right of appeal. Even with this amendment, the courts were still reluctant to consider appeals on human rights issues.

21 In Kenya, court proceedings are hand written and have to be typed after judgement is issued. The aggrieved party must request a copy and pay the cost. No certified copies of proceedings in relation to the Endorois high court case were prepared until two years after the Notice of Appeal was lodged, which effectively froze any possible appeal. CEMIRIDE on behalf of the Endorois Community v. Kenya, (Submissions on Admissibility), Comm. No. 276/2003, ¶¶ 5, 16.5, Afr. Comm’n on Human and Peoples’ Rts. [hereinafter Admissibility Submissions].

22 Articles 47 (interstate complaints) and 55 (other communications) of the African Charter are the sources of the African Commission’s protective jurisdiction. African Charter, supra note 4, arts. 47, 55.
B. The Endorois Address the African Commission on Human and Peoples' Rights

1. Procedural Requirements

Every claim before the African Commission must satisfy the mandates of Article 56 of the Charter. Groups self-identifying as indigenous communities have struggled to satisfy the requirements of Article 56. Two recent communications on indigenous rights were deemed inadmissible under Article 56. The Endorois Communication had to circumvent two

---

23 Article 56 outlines the admissibility requirements of a Communication. It provides:

Communications . . . shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

African Charter, supra note 4, at art. 56.

24 See, e.g., Anuak Justice Council v Ethiopia, Comm. No. 299/03, Afr. Comm’n on Humand & Peoples’ Rights, (2006); Bakweri Lands Claims Committee v. Cameroon, Comm. No. 260/02, Decision, Afr. Comm’n on Human & Peoples’ Rights, (2004). In particular, consideration of the Bakweri Communication would have raised serious issues. That complaint was the first time the Commission was seized of a complaint by an indigenous minority group over land once considered terra nullius rights (unoccupied land). If the Communication was admissible, the Commission would have had the rare opportunity to pronounce on one of the most contentious but yet unresolved issues from Africa’s painful colonial past. For a greater discussion, see Ndiva Kofele K., Asserting Permanent Sovereignty Over Ancestral Lands: The Bakweri Land Litigation Against Cameroon, 13 Annual Survey of Int’l & Comp. L. 107 (2007).
significant procedural hurdles arising from Article 56: the retroactivity prohibition and the exhaustion of local remedies.

State obligations under the African Charter, like in other treaties, arise only upon ratification. Due to the fact that the Endorois claim first arose in 1973 before the African Charter’s adoption and Kenya’s subsequent ratification, the Endorois relied on an exception to the retroactivity prohibition rooted in the continuing nature of the violation. In order to bypass the exhaustion of local remedies requirement, the Communication premised admissibility on two recognized exceptions to this rule: the substantial nature of the violations, and the non-existence of “effective, available and efficient” remedies within the Kenyan legal system. The Kenyan government argued that a domestic appeal of the Endorois’ constitutional application was not concluded and, therefore, forestalled the Community’s ability to approach the Commission. The Commission, however, deemed


The Commission has never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation. This is the situation here, given the vast and varied scope of the violations alleged. . .

28 See Sir Dawda K Jawara v The Gambia, Comm. No. 215/1998, ¶ 32,Afr. Comm’n on Human and Peoples’ Rights (2008) (noting that “[a] remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.”) (emphasis added).

29 The Kenyan government grounded its objection on the principle of exhaustion of local remedies expressed in the Ambatielos claim: “The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.” The Ambatielos Claim (Greece v U.K.) 12 R.Int’l Arb. Awards 83 (Comm’n of Arb.1956). To the
the Communication admissible, relying on the belief that the resolution of such an appeal, would fail to be effective. Presumably, the Commission noted that the notion of collective property rights is not recognized within Kenya's bill of rights.\textsuperscript{30}

From the outset, the Commission sought to secure a friendly settlement of the claim without success.\textsuperscript{31} The Commission sees its principal objective as creating a dialogue between the parties in order to amicably settle disputes.\textsuperscript{32} This position takes into account its lack of mechanisms for securing compliance with its decisions.\textsuperscript{33} The Commission's granting of provisional measures was a positive step in the process at Abuja. The Kenyan government's disadvantage, however, the same case presents an exception to this rule, namely "[that] remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action." \textit{Id.}\textsuperscript{30}


\textsuperscript{31} A meeting on August 24-26 2006, between representatives of the Kenyan government and the Endorois Community failed to yield any friendly settlement in terms requested by the Commission. (on file with authors).


\textsuperscript{33} \textit{See Endorois Communication, supra note 1, at ¶ 292. The Inter-American Court has ruled for restitution of ancestral territory to indigenous groups, including demarcation. See Case of the Mayagna (SUMO) Awas Tingni Cmty. v. Nicaragua, Case No. 11.577, Inter-Am. Ct. H.R..(Ser. C.) (2001). CERD recognizes the right to just, fair, and prompt compensation for violation of indigenous land rights. See, e.g., General Recommendations, XXIII, Rights of Indigenous Peoples, U.N. Doc. A/52/18, (1997), reprinted in Compilation of General Comments and General Rec-
ernment of Kenya halted the mining of red rubies on Endorois land in accordance with the Commission's order. Upon petition of the applicant, the Commission is empowered to mandate the maintenance of the status quo with respect to disputed land.34

3. Remedies Sought at the Commission

While the Endorois sought a formal Declaration that their rights were violated, their main prayer was for restitution of their ancestral land, without which their culture and religion stand in jeopardy.35 The Endorois stressed that the land should be secured through demarcation and the issuance of collective title to the community.36 In addition, the Community

34 Makau W. Mutua, _The Construction of the African Human Rights System: Prospects and Pitfalls, in_ REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 143, 151 (Samantha Power & Allison T. Graham eds., 2000) (discussing recent developments at the Commission, including the adoption by the Commission at its 40th session (November 2006) of Resolution on the Importance of Implementation of the Recommendations of the African Commission on Human and Peoples’ Rights obliging states to report on measures taken and constraints encountered within 90 days of notification of decision, point to increasing possibilities for enhanced implementation).

35 See Letter from the Chair of the African Commission on Human and Peoples Rights to His Excellency Mwai Kibaki, President of the Republic of Kenya (Dec. 9, 2004) (on file with author). While the African Charter does not provide for Provisional measures, Rule 111 of its procedure has been utilized as an interpretive mechanism in other situations. The binding character of provisional measures in international law, however, remains contentious. The Commission, in another unprecedented move, allowed the introduction of video testimony from the Endorois community. This monumental evidentiary ruling brought the voices of an oppressed community into the hall of justice, and strengthened the reality of the indigenous struggle in Africa. The Commission’s Rules of Procedure are silent in regard to the kind of evidence that is admissible. Parties to disputes before the Commission have been innovative in submitting various forms of evidence to which the Commission has acquiesced. See Rules of Procedure, _supra_ note 32, at Rule 111; _see also_ General Recommendations, _supra_ note 33.

36 See Endorois Communication, _supra_ note 1, at ¶ 292. The Inter-American Court has ruled for restitution of ancestral territory to an indigenous group, including demarcation. See Awas Tingni Cmty. v. Nicaragua, Case No. 11.577, Inter-Am. Ct. H.R.,(Ser. C.) (2001). CERD recognizes the right to just, fair and prompt compensation for violations of indigenous land rights.
sought a non-liquidated amount of monetary compensation as recompense for their unlawful and forced eviction.\(^{37}\)

The African Charter’s unfortunate silence on remedies, however, often renders the Commission’s decision subject to disarticulation. Consequently, in practice, it is incumbent on the Applicants to carefully fashion and plead specific remedies. In the context of the Endorois claim, the Applicants emphasized policy recommendations. Despite the lack of direction provided by the African Charter, the Commission, in past practice, issued declaratory orders regarding rights violations and outlined recommendations for legal change.\(^{38}\) The call for amendments in domestic law is consonant with state obligations under Article 1 of the African Charter to “adopt legislative and other measures to bring its domestic laws into conformity with the Charter.” The Commission has more recently issued recommendations for compensation.\(^{39}\)

The African Commission’s Decision on the Merits upheld all of the Endorois’ requests for relief. As mentioned above, the Commission formally declared that Kenya violated six African Charter Rights.\(^{40}\) The Com-

\[^{37}\] Id.; see also Endorois Decision, supra note 3, at \(\S\) 22.
\[^{38}\] See Endorois Communication, supra note 1, at \(\S\) 293. The Community actually framed this compensation as a remedy “to the community for all the loss they have suffered through the loss of their property, development, and natural resources, but also freedom to practice their religion and culture. Endorois Decision, supra note 3, at \(\S\) 22.

\[^{40}\] In the Endorois case, the Kenyan government sought the Commission’s application of the doctrine of margin of appreciation in vehemently refuting the pursuit of compensation by the community. Kenya’s Response, supra note 9, \(\S\) 3.4.5. Kenya’s suggestion implicitly relies on the precedent of the European Court for Human Rights which has allowed states wide discretion to address issues that national institutions are better suited to appreciate. See Handyside v U.K., 24 Eur. Ct. H.R., \(\S\) 48-49 (1976); see Brannigan and McBride v United Kingdom, 258-B Eur. Ct. H. R. (1993). See generally, F.G. JACOBS AND R.C.A WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1996). In this respect, Kenya urged the Commission to be:

[G]uided by the principles under the Charter of Economic Rights and Duties of States on compensation where, if disputes/questions arise after expropriation on compensation, it shall be settled
mission recommended that Kenya “[r]ecognize rights of ownership to the Endorois and restitute Endorois ancestral land.” The Commission further stated that Kenya should, “[e]nsure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.” In addition to the remedy of restitution, the Commission urged Kenya to “[p]ay adequate compensation to the community for the loss suffered,” and “[p]ay royalties to the Endorois for existing economic activities and ensure that they benefit from employment possibilities within the Reserve.”

The Commission’s choice of compensation is a positive one, being both in conformity with past practice and supported by various cases in several jurisdictions which confirm the necessity of compensation for spoliation of indigenous natural resources and land. The restitution of property is unusual under both the Charter and the practice of the Commission, but the remedy is not unique internationally. While the Commission should be lauded for its recommendation that Kenya restitute the Endorois’ ancestral land, the Commission failed in several respects.

First, the Commission did not recommend that the state identify and demarcate Endorois territory. Second, the African Commission failed to articulate a temporal limit to the right of indigenous communities to regain their ancestral land. This requirement would fashion a more coherent land restitution remedy, ensuring that a floodgate of similar claims is checked. Relevant comparative jurisprudence such as Sawjoyamaxa Indigenous under the domestic law of the expropriating state and by its tribunals, unless the state concern expressly agrees to submit the issues to an international tribunal in accordance with the principle of free choice of means.

See Kenya’s Response, supra note 9, ¶ 3.4.5.

41 See Endorois Decision, supra note 3.

42 Id. at 80.

43 Id.

44 Id. In addition, to the main recommendations regarding restitution and compensation, the Commission made several points to address cooperation with the Community on these issues and future ones. The Commission recommended that Kenya “(e) Grant registration to the Endorois Welfare Committee;” “(f) Engage in dialogue with the Complainants for the effective implementation of these recommendations;” and “(g) Report on the implementation of these recommendations within three months from the date of notification.”

Community v. Paraguay, suggests that rights remain in force so long as the people retain a spiritual or material relationship with the lands.\textsuperscript{46} Specifically, this relationship includes a traditional, spiritual, or ceremonial presence, settlement or sporadic cultivation, seasonal or nomadic hunting, use of natural resources connected with custom and any other factor characteristic of their culture.\textsuperscript{47}

II. The Evolving Contribution of the Endorois Communication

A. Being Indigenous in Africa

The Endorois asserted that their “culture, religion, and traditional way of life are intimately intertwined with their ancestral lands, Lake Bogoria and the surrounding area.”\textsuperscript{48} By advancing this view, the Endorois

\textsuperscript{46} See Yakye Axa, supra note 9, at ¶ 23. In contrast to the Commission’s silence on the contours of the territory, the Inter-American Court for Human Rights utilized the Doctrine of Margin of Appreciation to favour state discretion to delineate the boundaries of indigenous territories and resolve multiple competing claims over the same land. The court deemed itself incompetent to identify traditional lands for the settlement of indigenous peoples but determined that its responsibility was to assess whether the state respected and guaranteed the rights of indigenous peoples to their communal property. The Court stated that, “it is up to the state to delimit, demarcate, title and return the land... because it is the state that possesses the technical and scientific expertise to do so.” See also Pasqualeucci, infra note 79, at 298. The African Commission has more recently applied the doctrine. See Prince v South Africa, Comm. No. 255/2002, Afr. Comm’n on Human and Peoples’ Rights (2004). The Commission cautiously adopted the doctrine but warned that “reliance on the margin of appreciation doctrine does not preclude the Commission from assessing the reasonableness of a state’s limitation of an African Charter right.” See Zimbabwe Human Rights NGO Forum v Zimbabwe, Comm. No. 245/2002 Afr. Comm’n on Human and People’s Rights (2006). The Zimbabwean government urged the Commission “to be alive to the international human rights principles of margin of appreciation and make decisions that are both capable of practicable application and beneficial for the parties concerned.” See also Zimbabwe Response to Decision of the Commission in 21st Annual Activity Report of the African Commission on Human and Peoples’ Rights, ¶ 4.3, Doc. EX.CL/322 (X). If the Commission were to employ the doctrine in this area, it may provide a worrying advantage for states to shrink land rights.

\textsuperscript{47} Sawjoyamaxa Indigenous Cnty. v. Paraguay, Inter-Am. Ct. H.R., (ser. C) No. 146 (2006) (noting that rights subsist even when an indigenous group has been kept out of the land for a period of time through threat of violence).

\textsuperscript{48} For the Endorois, these factors were exhaustively argued out before the Commission, although the Kenyan government position was that the communities’ right to the land had been foreclosed by the State’s action to set it aside under the rele-
sought to anchor their property rights and right to natural resources claims at the African Commission on their identity as a people whose association with a specific territory is relevant to their survival. The significance of this posturing will become clear because indigenous rights, despite numerous academic discussion in recent years, still meet difficult conceptual and normative challenges.49

On a conceptual level, the idea of “indigenous” and “peoples” appear to suffer from definitional uncertainty.50 No consensus on the terminology has crystallized because “the terms attempt to fix for international law purposes aspects of group identity that are inherently contextual and forever subject to change.”51 While the absence of a universally accepted definition
is often criticized, scholars and advocates emphasize the primacy of self-definition as central to identifying right-holders. Self-identification should neither detract from the validity of the term nor be seen as an empty mantra. One could argue that self-identification is in fact rooted in the notion of autonomy of the self, the liberal personhood upon which human rights are vested. In fact, we hold the view that self-identification, as opposed to a narrower inaccurate definition, provides flexibility in its application to the highly varied contexts within which indigenous groups exist globally.

53 SKUBARTY, supra note 50, at 45. Zelim Skubarty argues that the lack of clear definition gives states a means for diminishing their liability in international human rights law. He contends:

[T]he reasons why attempts to reach agreement on definition . . . are resisted by so many states is that by denying their existence they can prevent any authoritative disclosure of the human rights violations, any attempts at measuring and scrutinizing the minority situation and thus downplay the increasing support for the concept of the . . . right of the international community to intervene in the internal affairs of a state in exceptional humanitarian circumstances.

While normative challenges also exist in relation to specific rights held by indigenous peoples, they should not distract from the recognition of these rights. Moreover, various international instruments elaborate on the content and scope of the rights of indigenous people. They include ILO Convention No. 169, Article 27 of the Covenant on Civil and Political Rights and its interpretations by the Human Rights Committee, and most importantly, the U.N. Declaration on the Rights of Indigenous Peoples.

In seeking to explain away some of the ontological difficulties associated with the concept of indigenous peoples' rights, some authors have


57 Treaty law, especially Article 27 of the International Covenant on Civil and Political Rights (ICCPR), is certainly an important source of indigenous rights. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.

constructed them as a *sui generis* category of rights. This view holds that indigenous peoples' rights are inherent and their mere non-textualization do not deprive them of normative value. We believe such attempts are counterproductive. Instead, we view indigenous rights as representing a bold and creative attempt at interpreting traditional human rights norms through the lense of historically excluded and marginalized groups. Specifically, this approach requires a contextual awareness in the application of rights to indigenous communities, such as the Endorois in Kenya. Indeed, human rights supervisory bodies have held that property rights, for instance, acquire an "autonomous meaning" when applied to indigenous people.

---

58 See Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, in *Peoples' Rights* 69 (Philip Alston ed., 2001). Kingsbury has pointed out that indigenous peoples' claims under international law come from five main different directions including *sui generis* claims. See also Howard R. Berman, *Are Indigenous Populations Entitled to International Juridical Personality?*, 79 Am. Soc'y Int'l L. Proc. 189, 193 (1989). Berman argues that indigenous peoples' rights constitute a *sui generis* category of rights that arise outside of the positive law system. They are "pre-existing rights in the sense that they are not developed from the legal system of surrounding states but [they] arise *sui generis* from the historical condition of indigenous peoples as distinctive societies with the aspiration to survive as such." See also Jérémie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 Int'l J. Minority & Groups Rts. 207 (2007).

59 See Part III(A) *infra* regarding Africa's opposition to the UN Declaration on Rights of Indigenous Peoples.

60 International Workshop on the Draft Declaration the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/2005/WG.15/CRP.1 (Nov. 29, 2005) (prepared by Govt. of Mex.). "The experts underlined that the draft Declaration does not aim to propose new principles of international law, but builds upon and affirms existing ones, which have been recognized in international jurisprudence, international instruments, as well as in customary law."

61 See Awas Tingni, *supra* note 33 at ¶ 146:

The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.
Further, while cultural rights are universal to all human beings,\textsuperscript{62} they acquire a unique meaning when applied to indigenous people.\textsuperscript{63}

Aware of these contestations, the Endorois Communication sought to hew out an understanding of indigenous identity in Africa that is consistent with emerging international human rights standards. Moreover, the use of the indigenous rights discourse was strategically designed to permit the Endorois to draw from the emerging international standards and jurisprudence on indigenous peoples rights, as will become evident in Part III of this paper. Appropriately, the African Commission’s Decision on the Merits provides considerable discussion on the various definitions of indigenous peoples present in international discourse.

The Commission reiterated that the term does not create a special class of citizens, but addresses “present-day injustices and inequalities.”\textsuperscript{64} The Commission noted “that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that in-

\textsuperscript{62} The right to culture is recognized in various international and regional instruments. See Universal Declaration of Human Rights, art. 27, G.A. res. 217A (III), U.N. Doc. A/810 (1948). Cultural rights are incorporated in Article 27 of the Universal Declaration on Human Rights (1948), which states, “Everyone has the right freely to participate in the cultural life of the community . . .” See also African Charter, supra note 4, at art. 22 (guaranteeing the right of all peoples to economic, social and cultural development); Convention on the Rights of the Child, art. 29, G.A. res. 44/25, U.N. Doc. A/44/49 (Sept. 2, 1990) (recommending that the education of a child is geared towards developing a respect for his or her cultural identity, language and values, for the cultural values of the country in which the child is living); International Covenant on Economic, Social and Cultural Rights, art. 15, G.A. res. 2200A (XXI), 49, U.N. Doc. A/6316 (Jan. 3, 1976) (upholding the right of everyone to take part in cultural life).

\textsuperscript{63} See Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Human Rights Committee, General Comment 23, Art. 27, ¶ 7 (Fiftieth Session, 1994), U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994). The General Comment states:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.


\textsuperscript{64} Endorois Decision, supra note 3, at ¶ 149.
digenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognize the linkages between people, their land, and culture. In applying these standards to the Endorois, the Commission determined that, "Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands – Lake Bogoria and the surrounding area. Furthermore, the Commission upheld the idea that self-identification is key to the recognition of indigenous rights and accepted, "that self-identification for the Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity." Consequently, the Communication and the resulting Decision on the Merits relied on and thereby legitimated the developing consensus, within the African Commission itself and the African Union, on the relationship between the identity of indigenous peoples in the continent and their unique association with a specific territory that is relevant to their survival.

---

65 Endorois Decision, supra note 3, at ¶ 154. The Commission also took note of the criteria outlined by African Commission's Working Group of Experts on Indigenous Populations/Communities: “occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalization, dispossession, exclusion or discrimination.” Id. at ¶ 150.

66 Endorois Decision, supra note 3, at ¶ 156.

67 Endorois Decision, supra note 3, at ¶ 157. The Commission affirmed that the “heart of indigenous rights” is “the right to preserve one’s identity through identification of ancestral lands, cultural patterns, social institutions and religious systems.”


69 See AFRICAN COMMISSION ON HUMAN & PEOPLE’S RIGHTS, REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 86-88 (2005):
B. The Right to Natural Resources

The Endorois asserted that their right to property and natural resources under the Charter were violated and requested that the Commission "recognise their rights to communal property rights to their ancestral lands," because "[t]his falls within the scope of Article 14." While the African Charter creates two distinct rights, to both property (Article 14) and the free disposal of wealth and natural resources (Article 21), the two rights interact quite closely in the context of traditional lands. In particular, because indigenous people look at land and its resources in a wholistic fashion, the violations of their right to property and natural resources appurtenant to it occur contemporaneously. The artificiality of creating different incidences with regard to the two rights becomes intensely clear in the case of the Endorois who, upon eviction from their land, also lost access to" traditional medicines made from herbs found around the Lake and resources, such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralist way of life.

In Africa, indigenous land and natural resources rights—the most contested property domain—are a tinderbox apt to ignite. Predicated upon conquest and scattered warped treaties, British colonial annexation of Af-

[Use of the term indigenous] is by no means an attempt to question the identity of other groups or to deny any Africans the right to identify as indigenous to Africa or to their country. In a strict sense all Africans are indeed indigenous to Africa. . . . it is a term fighting for rights and justice for those particular groups who are perceived negatively by dominating mainstream development paradigms. . . . One of the misunderstandings is that to protect the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. . . . the issue is that certain marginalised groups are discriminated against in particular ways because of their particular culture [and] mode of production. . . . The call of these marginalised groups to protection of their rights is a legitimate call to alleviate this particular form of discrimination.

70 Endorois Communication, supra note 1, at ¶ 57.
71 Endorois Decision, supra note 3, at ¶ 122. The African Commission noted in its Decision on the Merits that, "Article 21 of the African Charter is, however, wider in its scope than Article 14, and requires respect for a people's right to use natural resources, even where people do not have title to the land."
72 Id. at ¶ 131
73 Some treaties between native communities and colonial authorities were concluded in Africa. See P.G. McHugh, Aboriginal Societies and the Common
rica was bitter and tumultuous. Invoking the Latin maxim *cuius est solum, eius est usque ad caelum et ad inferos* (whoever owns the soil, it is theirs up to the sky and down to the depths), the colonial authorities in Africa bundled together all the incidents of property and assigned them to the ultimate control of the state. The right to natural resources under the African Charter should be appreciated from both this challenging historical perspective and the broader context of multinational corporate interests which often undermine communities’ natural resource rights.

---


The treaty of peace and friendship between the Britain and the chiefs of Ife in 1888 recognized the independence of the Kingdom of Ife, which paid 'tribute to no other power.' The ‘treaty of friendship and commerce’ between Britain and Egba in 1893 fully recognized the Egba independence and provided a basis for the formation and autonomous operation of the Egba.

74 See Judith V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources, 29 TULSA L.J. 541 (1993) The position in the United States differs regarding certain natural resources within reservation, including sub-surface resources being held to belong to the tribal group for whom the reservation is held.

75 See Ndiva Kofele-Kale, The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment 9 (2006). The author defines indigenous spoliation as "... an illegal act of depredation which is committed for private ends by constitutionally responsible rulers, public officials or private individuals." While the spoliation being addressed by the author goes beyond the text of the African Charter’s Article 21, one can find culpability in relation to the manner in which some of the lands occupied by indigenous minorities have been privatized or seized purportedly for public purposes. See also The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96, ¶ 40, Afr. Comm’n on Human and Peoples’ Rights (2001) [hereinafter Ogoni Communication]. Where the Commission, in assessing the question of natural resource spoliation asserted: "The aftermath of colonial exploitation has left Africa’s precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent’s painful legacy and restore co-operative economic development to its traditional place at the heart of African Society." Id. at ¶ 56.
The Kenyan state justified the exclusion of the Endorois from Lake Bogoria on the grounds that the game reserve would ensure that:

Wildlife is managed and conserved so as to yield to the Nation in general and to individual areas in particular, optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation.\(^7^6\)

This assertion of the Kenyan government begs the question whether the act of totally excluding an indigenous community from its long-standing territory for economic development is consistent with a State’s obligation under the African Charter. Even if such action is permitted under the Charter, the question then becomes whether the solution—expulsion—is proportionate to the purposes intended, namely to conserve the land for tourism.\(^7^7\)

In countering the state’s allegation that their expulsion was the most rationale means to secure the land for tourism, the Endorois contended that:

The cultural activities of the . . . community pose no harm to the ecosystem of the reserve and the restriction of cultural rights would not therefore be justified on such a basis. In addition, the practice of Endorois cultural ceremonies could not be considered to affect the profits of the Game Reserve. Human interest in the cultural richness of the Endorois culture would, if anything, attract greater tourist attention.\(^7^8\)

In deference to the Kenyan government position, we concede that the right to communal ancestral indigenous lands and the natural resources under international human rights law, “is relative and must be balanced against the competing claims to the land in question.”\(^7^9\)

Such restrictions or intrusion on the enjoyment of property rights by indigenous people while permissible, however, “must be sanctioned by specific laws for the express purpose of serving a compelling public interest.”\(^8^0\)

Implicit in both the Endorois claim and the overall indigenous rights discussion is the appropriate balance between the community’s needs on the one hand and the State’s obligation to ensure that natural resources are exploited in a manner that meets national objectives, on the other. In

\(^7^6\) Kenya Response, supra note 9, at ¶ 3.34.
\(^7^7\) See Endorois Communication, supra note 1, at ¶¶ 81–100
\(^7^8\) Id. at ¶ 210.
\(^8^0\) Id. at 299.
Ogoni, the Commission linked the right to land for minority group members to their right to life. 81 Clearly, the Commission must consider the impact of state seizure of land on an indigenous community while at the same time assessing any benefits accrued to the state as a whole. Arguably, in the Endorois case, the price was heavily born by the community82 and the equilibrium should be restored in their favour. In either case, the Commission must pursue internationally accepted standards of reasonableness which, in this context, demand for a fair and just “relationship between a particular objective and the administrative or legislative means used to achieve that objective.”83 The Endorois Communication presented the Commission with an opportunity to further define the contours of its balancing process in pursuit of an effective compromise between state public and the rights of vulnerable communities.

C. The Right to Development

The alleged violation of the right to development84 in this case is grounded on the State’s failure to “adequately involve the Endorois in the development process. . [and] ensure their continued improvement.”85 In this approach, the Communication embraces the understanding of the right to development propounded by the United Nations Declaration on the Right to Development.86

While development as a human right occupies a prominent place in international discourse,87 it nonetheless remains contested due to the difficulty in properly assessing states’ obligations. In particular, the Charter’s elaboration of the right is rendered in the collective, which makes an accu-

81 Ogoni Communication, supra note 75, at ¶ 67.
82 See, e.g., Endorois Communication, supra note 1, at ¶ 15. “Approximately half of the Endorois Community’s livestock died during the first years after eviction.”
84 African Charter, supra note 4, art. 22. “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”
85 Endorois Communication, supra note 1, at ¶ 217.
86 See Endorois Communication, supra note 1, at ¶¶ 220-225 (this position is understandable considering that the Declaration on the Right to Development was initiated and adopted with strong support of third world countries); see also U.N. Declaration on the Right to Development, G. A. Res. 41/128, U.N. Doc. A/41/625 (1986).
rate determination of its beneficiaries difficult and subject to debate. Whether the right to development is “a legally binding right, whether it is simply a manifestation of other (already accepted) rights, and to whom the rights belongs are issues that have not been settled by international law.” Arjun Sengupta, the former United Nations Independent Expert on the Right to Development, however, rejects the aspirational arguments attributed to this right, arguing,

[A] process can be regarded as a right just as much as the outcomes of the process can as objects of the claim or entitlement. This is possible so long as the corresponding obligations for realizing those rights can be clearly specified and the improvement in the realization of the rights can be clearly identified. 89

While the African Commission has not yet elaborated on the right to development under Article 22 of the African Charter, it indicted the Nigerian government for its failure to “involve the Ogoni Communities in the decisions that affected the development of Ogoniland.” This position calls for states to ensure prior, informed consultation with indigenous peoples for development of lands under their occupation or use.91

What the Endorois Communication failed to do, however, was to outline the contours of a development process involving indigenous communities which runs counter to states’ aspirations of modernization and economic development. To be sure, the Community’s insistence on the procedural rights of participation and consultation and an emphasis on equity, is intended to provide space for the emergence of such a development-

90 African Charter, supra note 4, art. 22.

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

91 Ogoni Communication, supra note 75, at ¶ 55
92 See, e.g., ILO Convention, supra note 57, art. 60.
tal paradigm. The Endorois’ contribution to the elaboration of the right to development is, perhaps, to resist pre-determined targets and focus instead on the need for creating spaces for community participation. The political character of development and its link to the interests of the majority, implies that for indigenous people development cannot be extricated from their right to self determination.

III. THE ENDOROIS CLAIM AND THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples stands as a significant pronouncement on the legal treatment of indigenous persons by the international community. The African Commission’s consideration of the merits of the Endorois claim falls at a historic juncture in the evolution of international indigenous rights, standing as one of the first quasi-judicial decisions after the adoption of the Declaration. It was imperative, therefore, that the African Commission take note of the Declaration’s adoption in its consideration of the Endorois Claim. Les Malezer,

---


94 The Kenyan government for instance argues in rebutting Endorois’ allegations of a violation of their right to development that “[t]he community is represented in the County Council by their elected councilors, therefore presenting the community the opportunity to always be represented in the forum where decisions are made pertaining to development.” See Kenya Response, supra note 9, ¶ 7.3.1.


97 Declaration, supra note 8, art. 42. “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up to the effectiveness of this Declara-
Chairman of the Global Indigenous Caucus, stated, "The Declaration is a framework for States to link and integrate with the Indigenous Peoples, to initiate new and positive relations but this time without exclusion, without discrimination and without exploitation." Accordingly, the Commission needs to embrace the Declaration as a necessary framework to fully understanding the content of the African Charter rights as they apply to indigenous communities.

Part III of this paper contends that the African Commission failed to utilize its power under Articles 60 and 61 of the African Charter to expressly interpret the relevant Charter rights through the Declaration. First, we will begin with a brief discussion of the African Commission's acceptance of the Declaration, within the context of regional solicitude about its principles. We will then proceed to examine Articles 60 and 61 of the African Charter, their previous employment, and prospects for its use. This is followed by a discussion of the value of reading the Declaration's provisions into the Charter when applying the Charter's substantive rights to indigenous communities.

A. The United Nations Declaration and the African Commission

The African perspective on the international human rights law of indigenous peoples was crucial to the successful adoption of the Declaration. The African states reluctance to affirm indigenous rights stands in


See also Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (last visited May 3, 2008) [hereinafter FAQs]. "Many of the rights in the Declaration require new approaches to global issues, such as development, decentralization and multicultural democracy. Countries will need to pursue participatory approaches in their interactions with indigenous peoples that will require meaningful consultations and the building of partnerships with indigenous peoples."

See African Charter, supra note 4, art. 60.

See Explanation of Prior Steps Taken by the African Union before the Adoption of the Declaration on the Rights of Indigenous People, http://www2.ohchr.org/english/issues/indigenous/declaration.htm (discussing the consensus among African States on the need to delay the adoption of the Declaration provided the African
sharp contrast to the African Commission’s position on the Declaration. Following the impasse initiated by the African group in November 2006, the African Commission issued a persuasive Advisory Opinion to address African states’ five major concerns with the Declaration. The Advisory Opinion illuminated both the potential impact of contentious principles in relation to the African Charter and provided a practical approach to understanding the Declaration’s provisions. The African Commission emphasized the Advisory Opinion, “could allay some of the concerns raised surrounding the human rights of indigenous populations and wishes to reiterate its availability for any collaborative endeavour with African States in this regard with a view to the speedy adoption of the Declaration.”

The African Commission’s approach, therefore, may be viewed as recognizing the political value of the African region embracing the Declaration. The African Commission’s Communique, issued after the adoption of group power over the process.); see Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc. Assembly/AU/9 (VII) ADD.6, ¶ 8 (Jan. 2007) [hereinafter AU Declaration]. The African Union “[d]ecides to maintain a united position in the negotiations on amending the Declaration and constructively work alongside other Member States of the United Nations in finding solutions to the concerns of African States.”

101 Compare AU Declaration, supra note 100, at ¶ 3 (“Expresses concern at the political, economic, social and constitutional implications of the Declaration on the African continent”) with African Commission, Communique on the UN Declaration on the Rights of Indigenous Peoples, Nov. 28, 2007, http://www.achpr.org/english/resolutions/resolution121_en.htm [hereinafter Commission Communique] (“The African Commission on Human and Peoples’ Rights welcomes the adoption of the UN Declaration . . . . This Declaration is a very important document for the promotion and protection of indigenous peoples’ rights all over the world, including on the African continent.”).

102 See Advisory Opinion of the African Commission on Human & Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, ¶ ¶ 7-8 (2007) available at www.chr.up.ac.za/indigenous/acwg/07-08-08AdvisoryOpinion ENG_1.pdf [hereinafter Advisory Opinion] The Commission issued the Advisory Opinion under the authority of Article 45(1) and 45(3) of the African Charter. See also African Charter, supra note 4, at art. 45(1). “The functions of the Commission shall be: . . . to collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights . . . . disseminate information . . . . and should the case arise, gives its views or make recommendations to Governments.”

103 Advisory Opinion, supra note 102, at ¶ 45.

of the Declaration, is indicative of its perspective that, "With the adoption of the UN Declaration a giant step has been taken towards securing the survival of indigenous peoples and their unique cultures based on their own needs and visions."\textsuperscript{105} The Declaration—elaborating upon existing international human rights standards as they apply to indigenous peoples—affirms rights for which states are presently responsible.\textsuperscript{106} The Commission’s positive view of the Declaration may constitute a diplomatic move but also an effort to place the African region at the forefront of creating understanding about the Declaration’s substantive content.

The Commission’s past embrace of the Declaration and its current efforts to assess the situations of indigenous peoples in Africa suggest that the utilization of the Declaration to interpret the African Charter was timely and appropriate. The Commission’s consideration of the Endorois claim was the first time it decided an indigenous rights claim on the merits.\textsuperscript{107} Moreover, the Commission’s recommendation in the Endorois case followed quickly on the heels of the Declaration’s adoption.\textsuperscript{108} Of equal importance, was the opportunity for the Commission to affirm the positive judicial advancements for indigenous rights occurring in African domestic courts, amidst government recalcitrance.\textsuperscript{109}

\textsuperscript{105} Id. at ¶ 3.


\textsuperscript{109} See, e.g., Botswana: San Look Set to Return Home, \textit{Integrated Regional Information Networks}, Jan. 11, 2007 (South Africa) available at www.irinnews.org/Report.aspx?ReportID=64342. "The landmark judgment in favour of the San, which ruled that the government had acted ‘unconstitutionally’ and ‘unlawfully’ was hailed as a model for other legal challenges being mounted by indigenous communities removed from ancestral land in other countries." The government of Botswana originally moved the San tribe to ensure the park’s viability as a nature reserve and to integrate the community into Botswana’s society. The government
The African Commission, however, took note of the Declaration rather sparingly throughout its Decision. Consequently, the African Commission lost an opportunity to put pressure to bear on the African States to emerge at the forefront of indigenous rights recognition. The Commission needed to import the Declaration through Articles 60 and 61 into its understanding of the Charter when addressing Kenya’s actions against the Endorois community. In practice, this means the Commission should have expressly read the Declaration’s provisions into the Charter rights, rendering them virtually inseparable as applied to indigenous rights.


110 See Endorois Decision, supra note 3, at ¶ 81. The African Commission mentioned the Declaration in the context of the right to practice religion under Article 8. The Commission mentions the Declaration again in the context of the right to property under Article 14. While the Commission expressed that it “officially sanctioned” the Declaration, it references it as an international law and does not weave it into the African Charter as we suggest in Part III. See id., at ¶¶ 204, 232.

claims. Since the Declaration recognizes the unique status of indigenous communities within the modern state and provides a framework to support interaction between indigenous rights and national prerogatives, the Commission’s employment of the two instruments in tandem was imperative. The procedural mechanisms of article 60 and 61 must be utilized, in this manner, to render the African Charter’s rights effective in substantive understanding and implementation as regards indigenous communities.

B. Employment of Articles 60 and 61 of the African Charter on Human and Peoples’ Rights

1. Purpose of Article 60

   The African Charter’s provisions in Article 60 and 61 are a unique attribute of the African Human rights system.112 According to Vincent O. Orlu Nmehielle, “They bring the African human rights mechanism within the positive influence of the UN and other regional human rights experiences.”113 The Africa Charter, therefore, allows the utilization of other international human rights instruments to interpret the norms laid down in the Charter.114 Article 60 of the ACHPR states:

---

112 Compare African Charter, supra note 4, arts. 60–61 with American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (July 18, 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82doc.6rev.1 at 25 (1992) and European Convention, supra note 30. But see “Other Treaties” Subject to the Consultative Jurisdiction of the Court Inter-Am. Ct. H.R., Advisory Opinion OC-1/82 (Sept. 24, 1982), Inter-Am. Ct. H.R.; Mary Caroline Parker, ‘Other Treaties’: the Inter-American Court of Human Rights Defines its Advisory Jurisdiction, 33 AM. U. L. REV. 211 (1983); See also Anaya & Williams, supra note 56, at 42 (discussing the use, by the Inter-American Commission, of article 29 of the American Convention to bring in other international instruments.). Other regional systems, therefore, utilize comparative international law to varying degrees despite the lack of express provisions within their respective human rights conventions. Due to the fact that most of the African Charter’s provisions are generalist and not enumerative in nature, one could argue that the Commission’s use of comparative international law is mandated by pragmatism and does not need the express authorization of the Charter. Accordingly, Articles 60 and 61 must represent a more unique approach to the use of international human rights law with reference to the Charter. See African Charter, supra note 41; infra note 113 and accompanying text.


114 Id. at 158–159.
The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of 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 of which the parties to the present Charter are Members.\(^1\)

Article 61 likewise provides:

The Commission shall also take into consideration, as subsidiary measures to determine the 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 Peoples’ Rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.\(^2\)

\(^{115}\) African Charter, supra note 4, art. 60.

\(^{116}\) African Charter, supra note 4, art. 61; see Nmehielle, supra note 113, at 159 (arguing that “the fact that the Article regards whatever inspirations that could be derived here as subsidiary, does defeat the possible normative effect from these other sources.”). The authors of this paper take issue with this contention as article 61 provides that the Commission may utilize other instruments as “subsidiary measures to determine the principles of law.” A plain reading of this phrase indicates that other conventions are to be used as a supplement to understand or explain the intention of the original African Charter right, not necessarily implying they are to be considered of a secondary nature. The application of Article 61, as well as 60, by the Commission, illustrates that this may not be the case. The Commission often references both Article 60 and 61 together, ostensibly, categorizing them as two halves of the same legal principle. See, e.g., Amnesty Int’l v. Zambia, Comm. No. 212/98, ¶ 42 Afr. Comm’n on Human and Peoples’ Rts. (1999), available in Twelfth Annual Activity Report of the Afr. Comm’n on Human and Peoples’ Rights 1998-99, Covering Twenty-Fourth & Twenty-Fifth Ordinary Sessions, reprinted in Documents of The African Commission on Human and Peoples’ Rights 751 (Hart Pub., Rachel Murray & Malcolm Evans eds., 2001) [hereinafter African Commission Documents The Commissions should act bearing in mind the provisions of Articles 60 and 61 of the Charter.”); Tsatsu Tsikata v. Republic of
Article 60 outlines the normative effect of the general international law of human rights with an emphasis on the work of the United Nations and African human rights mechanisms. In contrast, Article 61 refers to a broader realm of international law sources, including regional practices, customary law, and general principles of law, but requires these sources be "rules expressly recognized by Member States of the Organization of African Unity." Vincent O. Orlu Nmehielle contends that when utilizing Article 61 and construing "whether an instrument accords with rules and principles recognized by Member States of the OAU, one need not look at the various state practices of these States, but at the regional or international legal instruments to which these States are parties." While a useful perspective, the Commission has not indicated one way or the other that the application of Article 61, or for that matter, Article 60, hinges on a State being a party to the relevant Convention. Moreover, the Commission has never fully or expressly articulated the import of these two unique Charter principles through a Charter resolution or the interpretive mandate of Article 45. Nevertheless, a brief examination of the use of these Articles throughout the Commission's jurisprudence will provide some measure of clarity regarding their utility.

117 See African Charter, supra note 4, art. 60; Nmehielle, supra note 113, at 159.
118 See African Charter, supra note 4, art. 61; Nmehielle, supra note 113, at 159.
119 Nmehielle, supra note 113, at 159.
120 As part of its brief treatment of the Declaration, the African Commission did note that Kenya withheld its approval of the Declaration. Endorois Decision, supra note 3, at ¶ 155.
121 See African Charter, supra note 4, art. 45(3) ("Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU"); Nmehielle, supra note 129, at 159.
2. Jurisprudential Employment of Article 60

In recent years, the African Commission has utilized articles 60 and 61 to varying degrees. In its landmark decision on the merits in The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, the Commission brought in Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights through Articles 60 and 61 of the African Charter.\(^\text{122}\) Moreover, the Commission did not discuss whether Nigeria signed and ratified the Covenant, or whether Nigeria’s acquiescence to the Covenant’s provisions bore on the Commission’s application via Articles 60 and 61.\(^\text{123}\) Accordingly, Kenya’s abstention from the General Assembly vote on the Declaration would not necessarily preclude the Commission from applying the Declaration to the Charter, given the general acceptance of the Declaration on the African continent.\(^\text{124}\)

In practice, the Commission seems to view Articles 60 and 61 as working in tandem to import relevant international law principles relating to the African Charter and the issue under consideration.\(^\text{125}\) For instance, the Commission alluded to the inseparability of the two articles in the case of

\(^{122}\) Ogoni Communication, supra note 73, at ¶ 48–49.

\(^{123}\) See generally id. The practice of the Commission seems to indicate that individual ratification of an incorporated instrument by the state in question is not a requirement for its use in the Commission’s analysis. For example, in another instance of judicial employment of Articles 60 and 61, the African Commission cited cases from the Inter-American Commission and Article 27 of the Vienna Convention on the Law of Treaties to illustrate the obligations imposed upon Zambia by the African Charter, despite the fact that international agreements were not self-executing in that country. See also Legal Resources Found. v. Zambia, Comm. No. 211/98, ¶¶ 58–59, Afr. Comm’n on Human and Peoples’ Rights (2001), available in Afr. Comm’n on Human & Peoples’ Rights, Fourteenth Annual Activity Report AHG/229(XXXVII), Conference of the Heads of State and Government, Thirty-Seventh Ordinary Session, 93 (2001).

\(^{124}\) See Commission Communiqué, supra note 101, and accompanying text. Further support is provided in the text of Article 61 which states that the Commission should consider rules “expressly recognized by member states of the Organization of African Unity” without requiring those norms be recognized by all states or the state in question. See African Charter, supra note 4, art. 61.

\(^{125}\) However, the Commission has, at times, separated the purposes of Article 60 from Article 61, outside of its judicial decision-making. See, e.g., Memorandum of Understanding Between the African Commission on Human and Peoples’ Rights and the United Nations High Commissioner for Refugees, Art. II, ¶ 6, available in Afr. Comm’n on Human & Peoples’ Rights, Sixteenth Activity Report, Annex IV, 27 (2002). The Commission stated:
Democratic Republic of Congo v. Burundi, Rwanda, and Uganda. The Communication addressed the presence of the armed forces of the states of Burundi, Rwanda, and Uganda in the Congo and their involvement in and support for the rebel activities against the Congolese government. In considering the merits, the Commission stated:

The combined effect of Articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples’ rights, . . . By virtue of Articles 60 and 61 the Commission holds that the Four Geneva Conventions and the two additional protocols covering armed conflicts constitute part of the general principles of law recognized by African States, and take same into consideration in the determination of this case.

Additionally, on the few occasions the Commission did not employ both articles together, the Commission did not always seem to follow the textual distinction between them. For example, in The Law Office of Ghazi Suleiman v. Sudan, the Commission examined alleged violations of freedom of expression by the government of Sudan against Ghazi Suleiman, a lawyer. The Commission provided:

Pursuant to Article 60 of the African Charter, draw inspiration from Resolutions, Recommendations and Decisions of the United Nations Human Rights Treaty Monitoring and Charter-Based Bodies, the Executive Committee of UNHCR and the relevant Organs of the African Union, in undertaking joint actions with the aim of more effectively promoting and protecting the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates; . . .


127 Id. at ¶ 70. Notably, the Communication’s use of the Geneva Conventions and the additional protocols is not preceded by an analysis of their general acceptance—through express ratification or state practice—by the African States. The argument for the Commission to use the Declaration, signed by the majority of African states, is thus strengthened by comparison. See supra note 104, and accompanying text.

47. Article 60 of the Charter provides that the African Commission shall draw inspiration from international law on human and peoples' rights.

48. The European Court of Human Rights recognises that "freedom of political debate is at the very core of the concept of a democratic society . . .".

49. The African Commission's view affirms those of Inter-American Court of Human Rights which held that: "freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. . . ."

50. The Inter-American Court states that: "when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas." It is particularly grave when information that others are being denied concerns the human rights protected in the African Charter as did each instance in which Mr. Ghazi Suleiman was arrested.129

The Commission's utilization of the Declaration for the purposes of interpreting the African Charter would, for all intents and purposes, in light of a textual analysis, stem from the language in Article 60 regarding United Nations mechanisms. Though to the extent that the principles embodied in the Declaration are nothing more than a codification of norms recognized in domestic courts throughout the region, Article 61 is likewise an appropriate procedural mechanism.130 The African Commission's recent history of referencing international instruments through both Article 60 and 61 indi-

---


129 Id. at ¶¶ 47–50. While the Sudanese Communication is a perfect example of the Commission making little distinction between Articles 60 and 61, the Commission is only utilizing those articles to compare the African Charter right with other regional instruments. The Commission, therefore, is employing those provisions in a less effective manner than in Dem. Rep. of Congo v. Burundi, Rwanda, & Uganda. See Congo Communication, supra note 126, at ¶ 70.

130 See supra note 109, and accompanying text (regarding the recognition of indigenous rights in domestic courts). See also Anaya & Williams, supra note 55, at 54 ("The multilateral processes that build a common understanding of the content of indigenous peoples' rights, therefore, also build expectations of behaviour in conformity with those rights.").
cates a willingness to interpret the African Charter in this fashion. The Commission has firmly stated:

The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms, and standards taking into account the well recognized principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that “all human rights are universal, indivisible, interdependent, and interrelated.”

The Commission, embracing its position on the Declaration, and pursuing its prerogatives under Articles 60 and 61 should, therefore, have seized the opportunity to understand the application of the African Charter to indigenous peoples by expressly referencing the Declaration.

3. The Import of Article 60 for Indigenous Rights

The juridical employment of Article 60 to import the norms of indigenous rights into the Commission’s conceptions of state obligations under the African Charter serves a dual purpose. First, this allows the Commission to recognize and advance the rights of Africa’s indigenous peoples under the auspices of the African Charter. The Commission formally stated that “[i]n interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments.” Furthermore, these two unique provisions reflect a broad understanding of their own application, providing the Commission “great flexibility in the interpretation of the norms enshrined in the Charter.”

The Declaration’s enumerated rights “constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world.” The Declaration—the baseline for the articulation of legal norms on the rights of indigenous peoples—provides a framework for understanding the Charter rights as applied to indigenous communities on the

132 Id. at ¶ 47.
133 NMEHIELLE, supra note 113, at 161.
134 Declaration, supra note 8, art. 43.
African continent.\textsuperscript{135} Due to the unique relationship between states and their indigenous communities, the Declaration is necessary to illuminate how the Charter’s human rights standards must be applied to indigenous populations.\textsuperscript{136} The African Commission, itself, recognizes the importance of the Declaration for upholding indigenous peoples’ rights. In its \textit{Communique on the UN Declaration on the Rights of Indigenous Peoples}, the Commission stated:

\begin{quote}
The UN Declaration on the Rights of Indigenous Peoples is in line with the position and work of the African Commission on indigenous peoples’ rights as expressed in the various reports, resolutions and legal opinions on the subject matter. The African Commission is confident that the Declaration will become a very valuable tool and a point of reference for the African Commission’s efforts to ensure the promotion and protection of indigenous peoples’ rights on the African continent.\textsuperscript{137}
\end{quote}

As stated previously, the Declaration’s norms are not out of step with judicial recognition of indigenous rights presently occurring on the African continent.\textsuperscript{138} The Commission’s efforts would serve to strengthen the work of domestic courts supporting the human rights of indigenous persons and provide some guidance to states on their obligations toward their indigenous communities.

Second, African Commission jurisprudence interpreting the Declaration in conjunction with the African Charter will have a positive influence on the development of the norms embodied in the Declaration. Hiram E. Chodosh argues that “the persistent exclusion of declarative law from the realm of law retards the evolution of these norms and impedes the growth of a more effective international legal system.”\textsuperscript{139} The African understanding and conception of international indigenous rights will, therefore, impact...

\textsuperscript{135} See id. at pmbl. ¶ 21 ("Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples . . . .").

\textsuperscript{136} See Declaration, supra note 8, at pmbl. ¶ 19 ("Encouraging States to comply with and effectively implement all their obligation as they apply to indigenous peoples under international instruments, in particularly those related to human rights, in consultation and cooperation with the peoples concerned . . . .").

\textsuperscript{137} Commission Communique supra note 101, at ¶ 5.

\textsuperscript{138} See supra note 109, and accompanying text.

the normative interpretation of the Declaration.\textsuperscript{140} Although the Declaration is not a binding statement of international law, this instrument should nonetheless be viewed as a statement of norms and commitments of states, applicable to the Charter through Article 60.\textsuperscript{141} Vincent O. Orlu Nmehielle appropriately contends "that the usefulness of Article 60 and 61 of the Charter depends on the creative imagination of the Commission, as well increased experience and practice of the African mechanism."\textsuperscript{142} The Commission, accordingly, should further develop its jurisprudence under Articles 60 and 61, while, at the same time, contributing to the articulation of the Declaration's developing norms. The Commission's consideration of the Endorois claim less than a year after the Declaration's adoption would have allowed it to be one of the first human rights bodies to articulate the legal meaning of the Declaration's provisions. Unfortunately, the Commission missed an opportunity for the African perspective on indigenous rights provisions to have a profound impact upon the substantive rights of indigenous populations across the globe.

C. Kenya's Violations of the UN Declaration

The Center for Minority Rights Development's (CEMIRIDE) Communication on behalf of the Endorois community alleges a host of human rights violations perpetrated against the Endorois community by the Kenyan government.\textsuperscript{143} The Communication especially notes, "The Endorois are a people, a status that entitles them to benefit from provisions of the African charter that protect collective rights."\textsuperscript{144} The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communi-

\textsuperscript{140} See Julia Swanson, The Emergence of New Rights in the African Charter, 12 N.Y.L. SCH. J. INT'L & COMP. L. 307, 316 (1991). "The first step towards determining the recognition afforded a norm . . . is to identify an already established . . . law on the subject . . . . Inclusion of a norm in legal documents and its establishment as the subject of study, analysis, and observation . . . enhance the standing of the norm."

\textsuperscript{141} See FAQs, supra note 97, at 2.

\textsuperscript{142} Nmehielle, supra note 113, at 161.

\textsuperscript{143} See Endorois Communication, supra note 1, at 2; Endorois Decision, supra note 3.

\textsuperscript{144} Endorois Communication, supra note 1, at ¶ 30. Richard Kiwanuka, The Meaning of "People" in the African Charter on Human and Peoples' Rights, 82 AM. J. INT'L L. 80, 85 (1988) (suggesting that collective rights are sui generis in international law, and belong to "groups, communities, or peoples." Kiwanuka elaborates, "When the group secures the right in question, then the benefits redound to its individual constituents, and are distributed as individual human rights.").
ties recognized that "the African Charter and its jurisprudence relating to 'peoples' concludes that both the individual and collective rights provided for in the African Charter should be applicable to the promotion and protection of the human rights of indigenous peoples."145

These African Charter rights, therefore, have corresponding rights within the Declaration on the Rights of Indigenous Peoples. Appropriately, a thorough study of the relationship between all these rights would be extremely useful and enhance our understanding of both human rights instruments. We have chosen to take a more narrow approach and examine two of the substantive rights within the African Charter and the Declaration — the Right to Natural Resources and the Right to Development.146 The reason for their selection is two-fold: a discussion of these two rights will effectively illustrate the importance of interpreting the Charter through the normative framework of the Declaration; and these rights bear heavily on African states ability to promote national economic development through capitalization on Africa’s environmental richness, while respecting indigenous communities.

1. The Right to Natural Resources

The right to natural resources is a crucial element of the Endorois Communication. The violation of this right in the Endorois case is indicative of a larger issue within African states as governments pursue national development strategies.147 Recent history illustrates that indigenous and minority populations suffer when governments attempt to capitalize on national resources while failing to consult with those communities which possess equal claims to these resources.148 The Endorois community has,

146 See African Charter, supra note 4, arts. 21–22.
147 See Afr. Commission’s Working Group, supra note 51, at 41. “In East Africa, the massive land dispossession has had negative consequences for the cultures of . . . pastoralists, . . . . Different religious rituals are no longer observed because of loss of livestock and game resources, which are necessary for the performance of such rituals. This has deprived indigenous peoples of their valuable spiritual practices.”
148 See Endorois Communication, supra note 1, at ¶ 7. “Apart from a confrontation with the Maasai over the Lake Bogoria region approximately three centuries ago, the Endorois have been accepted by all neighboring tribes as bona fide owners of the land.” See also Afr. Commission’s Working Group, supra note 51, at 21. “Indigenous pastoralist and hunter-gatherer communities in Africa have been losing their land incrementally over the years.” Examples of pastoralists who are suffering from particular human rights violations are the Pokot of Kenya and Uganda, the
likewise, suffered from Kenya's desire to promote national development through the creation of game reserves.\footnote{See Endorois Communication, \textit{supra} note 1, at \textsection\ 9–10.}

The Kenyan governments' creation of the Lake Bogoria Game Reserve in 1974 precipitated the violations of the Endorois community's rights to natural resources under both the African Charter and the Declaration.\footnote{See Endorois Communication, \textit{supra} note 1, \textsection\ 9. The government contends that the creation of game reserves is an important public policy initiative, used nationwide, to preserve natural resources, including the wildlife and flora and fauna of the area demarcated. \textit{See CEMIRIDE (on behalf of the Endorois Community) v. Kenya}, Comm. No. 276/2003, 6, Respondents' Submissions and Further Clarifications Arising out of the Questions by the Commissioner during the Merit Hearing of the Communication, \textit{Afr. Comm'n on Human and Peoples' Rights.} (2006) [hereinafter Respondents' Submissions].}

As a result of the creation of the Lake Bogoria Game Reserve, the Endorois were systematically evicted from the Reserve from the mid-1970's until 1986.\footnote{See Endorois Communication, \textit{supra} note 1, \textsection\ 14.} The community is now forced to seek permission to access their land from local authorities exercising effective control over the area.\footnote{See \textit{CEMIRIDE (on behalf of the Endorois Community) v. Kenya}, Applicant's Written Submissions in relation to the Oral Hearing on Merits, Comm. No. 276/2003, \textsection\ 5, \textit{Afr. Comm'n on Human and Peoples' Rights.}, (2006) [hereinafter Applicant's Written Submissions].} Due to the Endorois' displacement, the community was restricted in their right to graze cattle and lost access to medicinal salt licks, medicinal herbs and traditional fresh water sources.\footnote{See Endorois Communication, \textit{supra} note 1, at \textsection\ 14–15; Applicant's Written Submissions, \textit{supra} note 152, at \textsection\ 5, 15.}

Due to these eviction actions, the Kenyan government denied the Endorois their right to the resources of the Lake Bogoria region, resources crucial to the Endorois' survival as a people.\footnote{See \textit{S. James Anaya, Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend}, 16 \textit{Colo. J. Int'l Envt'l. L.} \& \textit{Pol'y} 237, 238 (2005).}

Land and natural resource rights are critical to the physical and cultural survival of indigenous peoples as distinct communities.\footnote{See \textit{S. James Anaya, Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend}, 16 \textit{Colo. J. Int'l Envt'l. L.} \& \textit{Pol'y} 237, 238 (2005).} These rights are specifically crucial to upholding their communities' long-term ec-
onomic viability. The African Charter provides protection for the right to natural resources in Article 21. Article 21(1) asserts that “[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.”

The right articulated in Article 21 of the African Charter should be understood as belonging to the people of each state. In other words, the people, not the government, own the natural resources. The African Charter conceptualizes state governments as “temporary custodians or trustees of natural resources charged with managing them for the benefit of all the people in country.” Article 21, therefore, “provides a basis to argue that the right belongs to states as well as people without equating the people with states. A credible case can even be made that the African Commission

---

156 Id.
157 See African Charter, supra note 4, art. 21. The protection of the right to natural resources is related to the peoples’ right of self-determination and the right to development. Art. 1(2) of the Declaration on the Right to Development reads, “The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over their natural wealth and resources.” Declaration on the Right to Development, G.A. Res. 41/128, art. 1(2), U.N. Doc. A/RES/41/128 (Dec. 4, 1986).
158 African Charter, supra note 4, art. 21(1). The right to natural resources relates to Article 14’s right to property which states, “The right to property shall be guaranteed. It 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.” Id. at art. 14. See also Nmehielle, supra note 113, at 119 (arguing that the American Convention on Human Rights’ Article 21 provides broader protection for the right to property than the African Charter). He contends that the African Commission should require “States to adhere to the international law principle of payment of just and adequate compensation,” a requirement codified in the American Convention’s Article 21(2). Id. at 120. The Endorois Communication alleges a violation of Article 14’s right to property regarding their beneficial interest in their traditional land, the possession attached to it, and their cattle. Endorois Communication, supra note 1, at ¶ 45–47. The Endorois Communication stipulates that a Commission finding of a violation of Article 14’s property right provision is not necessary to find violations of all the corresponding rights alleged, including Article 21’s right to natural resources. See Endorois Communication, supra note 1, at ¶ 130.
on Human and Peoples' Rights recently has implicitly adopted this more liberal interpretation."

Further support is provided by the African Commission's Advisory Opinion formulated in response to the African Group's draft aide-memoire of November 2006. The Advisory Opinion expressed the conclusion, that contrary to the African Group's contention, the African Charter vests the control of land and natural resources in the people, not the state. This understanding of the right in Article 21—by not equating states with "peoples"—avoids the assumption "that the interest of the people are adequately represented by their state," which is rarely the case.

The vesting of Article 21's right with the people allows the incorporation of the Declaration's land and natural resource provisions into our understanding of the African Charter. Indigenous peoples should exercise control over the land and natural resources in conjunction with state responsibilities under the Charter for the management of these resources. The Declaration's Article 26 is the primary provision on the land and natural resource rights of indigenous peoples. The article states:

---

160 Id. at 47-48.
161 See Advisory Opinion, supra note 102, at ¶ 33-35.
162 See id. at ¶ 33-34.
163 See Kiwanuka, supra note 144, at 97.
164 See Declaration, supra note 8, art. 26. During the drafting stages prior to the adoption of the Draft Declaration by the Human Rights Council in 2006, Norway had introduced a proposal for article 26(3) that would have broadened the scope of indigenous rights to natural resources. The proposal stated:

In addition, effective measures shall be taken in appropriate cases to safeguard and legally recognize the rights of the people concerned to use lands, territories and resources not exclusively owned, occupied or otherwise acquired by them, but to which they have traditionally had access for their subsistence and traditional activities.

Commission on Human Rights, Report of the Working Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session, Annex I, Chairman's Summary of Proposals (11th Sess.), 27-29, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006) (prepared by Luis-Enrique Chávez) [hereinafter Chairman's Summary]. This proposal would have created broader rights of access and placed an affirmative obligation on States to legally protect this right. The proposal would have been extremely useful to communities like the Endorois who have been denied access to land they depend upon for subsistence activities.
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop, and control the territories or resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned.165

The African Charter’s right is to “be exercised in the exclusive interest of the people.”166 Indigenous peoples, as distinct communities, constitute peoples within the meaning of Article 21.167 The Declaration’s Article 26 affirms that “people” under Article 21 of the African Charter, includes certain minority groups belonging to insular communities that have not been part of the majority’s development processes. Furthermore, Article 26 must be employed to understand how these communities can secure the recognition of the right to resources under the African Charter. The Declaration can be utilized to flesh out the extent and quality of “their wealth and natural resources when applying Article 21 of the African Charter to indigenous peo-

165 Declaration, supra note 8, art. 26. After Namibia led the African Group to block the vote on the Draft Declaration in the U.N., some co-sponsors of the Declaration—Guatemala, Mexico, and Peru—met with the African Group to decide on acceptable edits to the text. Urgent Information for Indigenous Peoples of all Regions, U.N. Declaration on the Rights of Indigenous Peoples, Report of the Global Indigenous Peoples’ Caucus Steering Committee 1 (Aug. 31, 2007) [hereinafter Urgent Information]. The co-sponsor group compromised with the African Group on language submitted by the Global Indigenous Peoples’ Caucus Steering Committee regarding territorial integrity. The co-sponsor group dropped the language so that the African Group would not reopen the land and natural resource provisions for revision. Furthermore, Article 26 was viewed as recognizing Indigenous Peoples’ “territorial integrity over the land they have traditionally owned or occupied.” Id. at 5. As a result, the revisions to the Draft, which emerged out of the meeting, did very little to alter the articles concerning ownership and use of traditional land and natural resources.

166 African Charter, supra note 4, art. 21(1).

167 See Duruigbo, supra note 159, at 62–63.
The first step in understanding the quantity and quality of the natural resources of indigenous populations is recognition of the traditional ownership systems. As relates to ownership of natural resources, these rights “often are not conceptualized in exclusive terms, but rather as recognized regimes of shared use and property rights between groups.”

The application of the Declaration’s understanding of land and natural resource rights hinges on an interpretation of the language, “traditionally, owned, occupied or otherwise used or acquired” within Article 26(1)-(2). According to the report produced by the International Workshop on the Draft Declaration on the Rights of Indigenous Peoples, the phrase is included within the Declaration “as an appropriate alternative to refer to the base that provides legitimacy to the claims of indigenous peoples.” The employment of this somewhat vague and ambiguous language supports the principle that legal texts develop meaning from evolving values and understanding.

The African Commission can extend its influence by developing jurisprudence on the meaning of this language in the context of Africa’s indigenous populations. The Commission should have provided a better understanding of the meaning “traditionally, owned, or otherwise occupied” by applying this language to the Endorois claim. The pastoralist community of the Endorois have always understood the Lake Bogoria land “to be ‘Endorois’ land, belonging to the Community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices.” The recognition of the Endorois as bona fide owners of the land by other tribes supports their claim for traditional ownership.

Determining whether an indigenous group has “traditionally, owned, occupied or otherwise used or acquired” land will require a case-by-

---

168 African Charter, supra note 4, art. 21(1). See also Declaration, supra note 8, art. 26.

169 See Anaya & Williams, supra note 55, at 45.

170 See Declaration, supra note 8, art. 26(1)-(2).


172 Endorois Communication, supra note 1, at ¶ 6.

173 See Endorois Communication, supra note 1, at ¶ 7.
Anaya and Williams espouse that "evidence of indigenous peoples' traditional and customary land tenure can be established by qualified expert and academic opinion, as well as by objective facts that can be discerned from the oral accounts and documentation produced by the indigenous communities concerned."\(^{175}\)

In recognizing a violation of the right to natural resources in its Decision on the Merits, the African Commission referenced, not the Declaration, but the Saramaka case before the Inter-American Commission on Human Rights.\(^{176}\) While the discussion in the Saramaka case may have been useful to understanding Declaration rights themselves, the Commission's Decision leaves considerable questions as to which points of law were formally adopted by the Commission. The problem with referencing this case but not incorporating the Declaration is that the Commission utilized terms without fully adopting their meaning. Consequently, while the terms "traditionally, owned, or otherwise occupied" were mentioned at various points, the Commission failed to flesh out their contours. The Commission specifically failed to define what these terms specifically means for indigenous communities in Africa.

The Commission should have been cognizant of different rubrics for the recognition of rights for pastoralist versus hunter-gatherer communities. The Commission's definition of standards—such as community understanding, traditional recognition, and practical use—would help shape the understanding of the Declaration's language, and, in turn, influence the global understanding of the Declaration's provision on land and natural resource rights.

The Commission's use of the Saramaka case instead of importing the Declaration results in much weaker legal protection for indigenous communities. For instance, the Commission cited Article 21 of the Inter-American Convention which allows that "law may subordinate [the] use and enjoyment [of property] to the interest of society."\(^{177}\) This understanding is not expressly present in Article 21 of the African Charter. The Commission's analogization of the Inter-American Convention's property right to the natural resource claim resulted in the Commission adopting the two prong test of Article 14 of the African Charter. This test indicates that rights may be "encroached upon in the interest of public need or in the

---

\(^{174}\) See Declaration, supra note 8, art. 26.

\(^{175}\) Anaya & Williams, supra note 55, at 47 (discussing the Canadian case, Delgamuukw v. British Columbia, and Mabo v. Queensland, an Australian indigenous rights case).

\(^{176}\) See Endorois Decision, supra note 3, at ¶ 257-266.

\(^{177}\) Endorois Decision, supra note 3, at ¶ 265.
general interest of the community and in accordance with the provisions of appropriate laws."178 The Commission gave no indication how this might play in the context of national development priorities.

The Commission’s approach fails to address that states “shall give legal recognition and protection” to indigenous “land, territories, and resources.” The Declaration requires legal protection of these regimes in order to ensure that the natural resources are “exercised in the exclusive interest of the people.”179 The respect of traditional ownership systems through legal regimes will secure that states exercise natural resource rights in both the interest of the majority and minority of the population.

Ultimately, it appears that the African Commission’s Decision on the Endorois’ natural resource claim hinged on a failure of both parties to address Article 14’s two-prong test in a consultative manner.180 A thorough discussion of the principles of Article 26 of the Declaration would provide greater understanding as to what constitutes a deprivation of Article 21 under the African Charter. The African Charter’s right to natural resources may, therefore, be ineffective for indigenous peoples without the Declaration’s principles requiring legal recognition of traditional ownership systems.

2. The Right to Development

The pursuit of national development, as discussed above, is the impetus for violations of the right to natural resources, among other violations of indigenous peoples’ rights.181 The recognition of the right to development is imperative to understanding the relationship between economic development by states and the corresponding development of insular groups within the state’s borders. The Endorois Communication alleged a violation of the right to development under Article 22 of the African Charter.182 The violation of Article 22, discussed in the Endorois case, is representative of a large problem among African states, which promote development on historical indigenous land at the expense of the sustainability of indigenous communities directly tied to that land.183

---

178 African Charter, supra note 4, art. 14; see also Endorois Decision, supra note 3, at ¶ 267.
179 See African Charter, supra note 4, art. 2(1); Declaration, supra note 8, art. 26.
180 Endorois Decision, supra note 3, at ¶ 268.
181 See supra note 147 and accompanying text.
182 See Endorois Communication, supra note 1, at ¶¶ 218–25.
The Endorois alleged a violation of the right to economic, social, and cultural development. The Community contends, “The clear violation of the right to development directly interlinks with violations of the rights to natural resources, land, religion and culture as their inability to effectively participate in the decisions that affected them stripped them of the effective control over their land and their life as a community.”

A key component of the Endorois claim was based on their non-participation in the plans for national development which resulted in the creation of the Lake Bogoria Game Reserve. The Endorois argued that “the lack of recognition of the Endorois as a people has drastically undermined their ability to participate effectively in the development process of their community.”

In addition to the Kenyan government’s failure to engage in a dialogue with the community concerning the creation of the Game Reserve, the government failed to address the Endorois community’s continual well-being. These two-fold failures on behalf of the Kenyan government stem, in part, from a lack of recognition of the Endorois Welfare Committee (EWC), established to represent the interest of the Endorois. The EWC was refused registration and, therefore, did not participate or consult with the government on the use of the land.

Article 22 of the African Charter stipulates, “All peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” Article 20(1) of the African Charter is related to article 22. It espouses that “[a]ll peoples shall have the right to existence. . . . They . . . shall pursue their economic and social development according to the policy they have freely chosen.” Accordingly, the exis-

---

184 Endorois Communication, supra note 1, at ¶ 230 (noting that a finding of the violation of the right to culture under Article 17, property under article 14, and natural resources under article 21, would be a strong indication that the right to development has also been violated). The violations of those Charter rights are, ostensibly, violations of economic and cultural development.

185 Applicant’s Written Submissions, supra note 152, at ¶ 37.

186 See Endorois Communication, supra note 1, at ¶ 217.

187 Applicant’s Written Submissions, supra note 152, at ¶ 36.

188 See Endorois Communication, supra note 1, at ¶ 217.

189 See Endorois Communication, supra note 1, at ¶ 5.

190 Id.

191 African Charter, supra note 4, art. 22.

192 Id. at art. 20.
tence of a group of peoples must be recognized for states to allow them to participate in their economic, social, and cultural development.

The African Commission's Working Group of Experts on Indigenous Populations/Communities claims the root of the varied human rights violations against indigenous peoples is that "many marginalized indigenous peoples in Africa are denied the right to exist as peoples and to determine their own development." A chief purpose of the Declaration is to "respect and promote the rights of indigenous peoples," and recognition of their existence is integral to the effective realization of the Declaration's rights. The effective application of the African Charter's right to development to indigenous communities, like the Endorois, begins with governments acknowledging the existence of indigenous communities and respecting their identity as distinct groups within the state. The Declaration provides further explanation of how this can be accomplished and is discussed further below.

A more developed understanding of the African Charter's base construction of the development right is gained by reference to other human rights instruments. The United Nations adopted a formal Declaration on the Right to Development in 1986 (Development Declaration). Article 2(1) of that Declaration posits, "The human person is the central subject of development and should be the active participant and beneficiary of the right to development." Furthermore, Article 3(1) states, "States have the primary responsibility for the creation of national and international conditions...

194 Declaration, supra note 8, at pmbl. ¶ 8.
195 In this context, the authors stress that they are not advocating for the express incorporation of the U.N. Declaration on the Right to Development into Article 22 of the African Charter. We are merely referencing it as a tool to understanding the right to development as traditionally understood. In this sense, we are utilizing it in the manner in which the Commission utilized discussion from regional human rights mechanisms regarding freedom of expression in The Law Office of Ghazi Suleiman v. Sudan. Sudanese Communication, supra note 128, at ¶¶ 39–53. Nevertheless, the Commission could interpret the African Charter with express reference to substantive provisions of the Declaration on the Right to Development.
196 Declaration on the Right to Development, supra note 86, art. 2. See also The Right to Development, C.H.R. Res. 1998/72, ¶ 3(a), ESCOR Supp. (No. 3), U.N. Doc. E/CN.4/1998/72 (1998) ("The essence of the right to development is the principle that the human person is the central subject of development and that the right to life includes within its existence in human dignity with the minimum necessities of life"). Article 2(2)–(3) of the Declaration on the Right to Development further provides:
favourable to the realization of the right to development."\(^{197}\) The right to development, therefore, is best understood as comprising of both a procedural and substantive element: the right to participate in the development process; and the right to a substantive improvement in well-being.\(^{198}\)

While the Development Declaration furthers an understanding of the general right to development, the Commission should incorporate the Declaration on the Rights of Indigenous Peoples into Article 22 of the African Charter.\(^{199}\) The Preamble to the Declaration on the Rights of Indigenous Peoples countenances the procedural and substantive elements, stating that "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions and to promote their development in accordance with their aspirations and needs."\(^{200}\) The control by indigenous peoples over the development process is effectuated through the Declaration’s two main provisions on the right to development.

Article 23 grants indigenous communities control over the development process, “to determine and develop priorities and strategies for exercising their right to development.”\(^{201}\) This provision is similar in substance to the African Charter’s right to “pursue their economic and social develop-

---

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social, and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim 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 the benefits resulting therefrom.

Declaration on the Right to Development, *supra* note 86, art. 2(2)-(3).

\(^{197}\) *Declaration on the Right to Development, supra* note 86, art. 3.

\(^{198}\) *See Endorois Communication, supra* note 1, at ¶ 220–22.

\(^{199}\) *See Declaration, supra* note 8, arts. 23, 32.

\(^{200}\) *Id.* at pmbl. ¶ 10.

\(^{201}\) *Id.* at art. 23. Article 23 also states, “In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.” *Id.*
ment according to the policy they have freely chosen."\textsuperscript{202} Reading both provisions together, they affirm the right of indigenous communities to make decisions regarding the overall development of their community. The ability of indigenous communities to freely choose and pursue development processes respective of their tradition is continually affected by national development processes.

Article 32, therefore, provides guidance on the indigenous input into national development of resources on indigenous land.\textsuperscript{203} The Declaration’s Article 32 should be incorporated into the African Charter’s general development right in Article 22.\textsuperscript{204} Article 32(1)-(2) outlines:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse, environ-

\textsuperscript{202} African Charter, \textit{supra} note 4, art. 20(1).

\textsuperscript{203} See Declaration, \textit{supra} note 8, art. 27. Article 32 is buttressed by Article 27, which provides guidance for the participatory process by which indigenous communities may seek recognition of violations of their rights and potential redress. Article 27 provides:

States 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. Indigenous peoples shall have the right to participate in the process.

\textsuperscript{204} See African Charter, \textit{supra} note 4, art. 22.
mental, economic, social, cultural, or spiritual impact.\textsuperscript{205}

Article 32 provides for both the procedural and substantive rights to development.\textsuperscript{206} Article 32’s general development right relates specifically to the “use of their lands or territories or other resources,” and is, therefore, textually distinguishable from the right outlined in Article 23.\textsuperscript{207} The incorporation of this provision into the African Charter allows Article 22’s development right to tackle the specific and complex problem of the effect of national development on indigenous communities. When it comes to indigenous land and resources, Article 32(1) provides that indigenous communities must “determine and develop priorities” for their use in order to uphold Article 22 of the African Charter.\textsuperscript{208}

Indigenous peoples have the right to participate in decision-making to determine development initiatives through representation and negotiation with their government.\textsuperscript{209} In order for governments to uphold this right, they must formally recognize not only the existence of the indigenous populations, but also the decision-making bodies of those groups. Furthermore, Article 32(2)’s requirement of “free and informed consent” of the indigenous community gives life to Article 22 of the African Charter’s conception that development must be pursued “with due regard to their freedom.”\textsuperscript{210}

In the context of the right to development, the African Commission’s Decision was largely positive. Importantly, the Commission emphasized benefit sharing and development that would increase the capability of the Endorois Community.\textsuperscript{211} The African Commission’s decision recognized the procedural and substantive elements to the development right.\textsuperscript{212}

\textsuperscript{205} Declaration, \textit{supra} note 8, art. 32. Article 32 was one of the only articles mentioning natural resources that was revised during the negotiation process between the Co-Sponsoring states and the African Group. The adjective “their” was deleted before resources in paragraph 2. Errico, \textit{supra} note 97.

\textsuperscript{206} See Endorois Communication, \textit{supra} note 1, at ¶ 220–22.

\textsuperscript{207} Compare Declaration, \textit{supra} note 8, art. 32(1) with Declaration, supra note 8, art. 23.

\textsuperscript{208} See African Charter, \textit{supra} note 4, art. 22; Declaration, \textit{supra} note 8, art. 32.

\textsuperscript{209} See Declaration, \textit{supra} note 8, art. 32(1)–(2).

\textsuperscript{210} African Charter, \textit{supra} note 4, art. 22.

\textsuperscript{211} Endorois Decision, \textit{supra} note 3, ¶ 279, 283, 296.

\textsuperscript{212} \textit{Id.} at ¶ 277. The African Commission described the right to development as two-pronged, “that it is both constitutive and instrumental, or useful as both a means and an end.” Procedurally, the Commission found that consultations with the State were inadequate because the “community members were informed of the impending project as a \textit{fait accompli}, and not given an opportunity to shape the
Furthermore, the Decision did note that the state had a duty to consult with the Endorois regarding any projects and “obtain their free, prior, and informed consent, according to their customs and traditions.” The Commission found that any consultation with the Endorois Community was insufficient.

The Decision, however, suffers from some disarticulation. As discussed above, in the context of the right to natural resources, the Commission’s employment of case law and outside sources provides little clarity of the contours of the African Charter right. For example, the Commission states, “Had the Respondent State allowed conditions to facilitate the right to development as in the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois . . . .” Article 22, however, is silent on what those conditions would be. Additionally, beyond clarifying the two elements of the development right, the subsequent discussion creates confusion as to what exactly is required of states to satisfy those two elements.

In contrast, the Commission could have required Articles 23 and 32 of the Declaration as requirements for meeting Article 22 of the African Charter. Specifically, Article 32(3) prioritizes implementation of its substantive right through procedural mechanisms. The state is required to monitor the development process, provide methods of redress for violations of the development right, and to ensure the long-term success of the overall development process. This framework for understanding the development right of the African Charter, provided by the Declaration, would provide greater clarity to the discussion. The Commission could have then plugged in the Endorois claim into its own reading of the Declaration’s Article 32. As a result, indigenous communities and states would have a better understanding of violations of Article 22.

CONCLUSION

Due to the failure of many African governments to recognize the existence of indigenous peoples within their borders, national development has been pursued without acknowledging its devastating impact upon these policies or their role in the Game Reserve.” Id. at ¶ 281. Substantively, the Commission found that the “Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area’s medicinal salt licks or traditional water sources.” Id. at ¶ 286.

213 Id. at ¶ 291.
214 Id. at ¶ 290.
215 Id. at ¶ 271.
216 See Declaration, supra note 8, art. 32(3).
marginalized communities. Recent demand for tourism expansion comes at a high cost for traditional communities. Indigenous communities, like the Endorois, Maasai, Basarwa, and Batwa, are being removed from their traditional areas so that tourists may enjoy game viewing without disturbance by "backward natives." African state governments, however, claim that removal policies are an altruistic attempt to integrate these communities for their own "development."

The human rights principles of the African Charter cannot be effectively applied to or realized by indigenous people unless they are given a voice. The Declaration, cognizant of the unique status of indigenous communities, provides an avenue for indigenous participation. The Declaration is necessary to the application of the African Charter to indigenous populations on the continent. All human rights are universal, indivisible, interdependent, and interrelated.

We contend that the Commission cannot fully understand how the African Charter rights should be applied to indigenous communities without incorporating the Declaration through Articles 60 and 61. The Declaration provides the most effective framework for the realization of the African Charter's rights for indigenous communities. Its use by the African Commission would also provide greater clarity to both states and indigenous communities regarding the requirements of the African Charters, as applied to indigenous populations. Furthermore, referencing the Declaration through Articles 60 and 61 will allow an African understanding of the normative content of the Declaration to influence the international recognition of indigenous rights.

The African Commission missed a golden opportunity to fully embrace the concept of indigenous rights for Africa. The Commission's use of

---

217 Others v Attorney General (52/2002) [2006] BWHC 1 (13 December 2006) at ¶ 31, available at http://www.saflii.org/bw/cases/BWHC/2006/1.html. The Botswana Constitutional Court recently invalidated state directives to evict the Basarwa (Bushmen) from the Central Kalahari National Reserve. See Sesana Case, supra note 57, at ¶¶ 231–232. Botswana High Court Miscellaneous Application No. 52 of 2002 (2006) (on file with authors). The High Court ruled: "that creation of the CKGR did not extinguish the "native title" of the Bushmen to the CKGR . . . [and therefore] neither the declaration of the Ghanzi Crown land nor of CKGR extinguished the native rights of the Bushmen to CKGR." Id. The Batwa were, likewise, evicted from the Bwindi-Mgahinga forest in an effort to protect the forest gorilla, an important tourist attraction. Consequently, the Batwa community is in danger of extinction. See also Wairama Baker G., Uganda: Marginalizing Minorities 17 (2001).

218 See Gambia Communication, supra note 131, ¶ 48.
the Declaration would not have constituted judicial activism because, despite state reluctance to embrace indigenous rights, the judiciary in many states is working toward the advancement and realization of the principles contained within the Declaration. While the recommendations of the Commission are not binding upon States, there will soon be an African Court system functioning on the continent. The Commission could have provided some valuable precedent to this Court in crafting an opinion that took full cognizance of indigenous rights and further provided recommendations that are reasonable and effective. Nevertheless, the Endorois decision stands as a landmark case for indigenous rights on the African continent and despite our criticism, will no doubt play an important role in its continuing evolution.