

**INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES AND NATURAL RESOURCES IN AFRICA:  
THE ENDOROIS CASE**

Key words: African indigenous groups; The African Commission on Human and Peoples' Rights; Rights to land, territories and natural resources; The Endorois case.

Supervisor: Dr. Mattias Åhrén, Faculty of Law, University of Tromsø, Norway

Topic, research question and relevance of topic:

*Topic:* The overall topic of the thesis is the development of African indigenous peoples' legal rights to land, territories and natural resources.

By taking the work of the African Commission on Human and Peoples' Rights (hereinafter the African Commission or the Commission) and their work on African indigenous populations as a starting point, the thesis will focus on how the legal recognition of indigenous populations' right to their lands, territories and natural resources is evolving on the African continent<sup>1</sup>. Examining the African Commission's ruling in the Endorois case – representing the first time an African indigenous peoples' rights to traditionally owned land has been legally recognized – and the Kenyan government's response to the case, will serve to exemplify how indigenous peoples' land rights advance in Africa.

*(Hypothesis)* As has been pointed out during the eleventh session of the United Nations Permanent Forum on Indigenous Issues in May 2012, Kenya plays a significant role in advancing indigenous peoples' rights in Africa. Taking Kenya as a starting point, I wish to investigate the issue of indigenous peoples in an African context and to see if and how the recognition and situation of indigenous peoples in Kenya may affect and improve the situation of indigenous peoples on the African continent.

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<sup>1</sup> How well the African Commission can represent African indigenous groups an issue which was addressed in the feedback from fellow students. I am of course not suggesting that the African Commission can represent or is representing all (or even the majority of) indigenous groups on the continent, rather I am suggesting that the African Commission, being the main body for the promotion and protection of human rights in Africa, is a good starting point for researching how the legal recognition of indigenous peoples' land rights is advancing in Africa. One might also point out that since the 29th Ordinary Session of the African Commission in Libya in 2001, representatives of indigenous communities have attended every session of the Commission. (Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa, 2006, 8)

*Relevant background information – The African Commission:*

The African Commission, the most recent of three regional human rights systems<sup>2</sup>, was established in 1986 when the African Charter of Human and Peoples Rights (the Charter) entered into force. The Charter, which all African states have ratified, called for the establishment of a commission to monitor state parties' compliance with the Charter's norms. In accordance with its mandate, the African Commission is an independent body which promotes and protects human rights on the continent. It does so by, amongst other, receiving and considering complaints alleging violations by state parties of the African Charter.

The African Commission has been credited for its creative interpretations of the Charter, and for its willingness to consider some of what are perceived as the more unusual human rights, such as indigenous peoples' rights<sup>3</sup>. In line with this, the Commission has a specific working group which provides advisory opinions to the Commission in matters relating to indigenous issues<sup>4</sup>. In providing an opinion in support of the UN Declaration on the Rights of Indigenous Peoples<sup>5</sup>, which a number of African states were refusing to support, it played an instrumental role in the final adoption of the Declaration by African states<sup>6</sup>.

On the other hand, the Commission and its work have come under considerable criticism<sup>7</sup>. One particular critique concerns the lack of any follow-up mechanism to ensure that states implement the given recommendations<sup>8</sup>. Once a finding has been made, the Commission has no power or means to make sure that the concerned states respect the decision, as the recommendations of the Commission are not legally binding as such. Due to the lack of a monitoring mechanism, state parties often disregard the Commission's recommendations<sup>9</sup>.

Nonetheless, with the maturing of the human rights system in Africa, the Commission has the potential to become a powerful force in the advancement of human rights in Africa<sup>10</sup>.

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<sup>2</sup> The other two regional human rights systems being the Inter-American Commission (and Court) of Human Rights and the European Commission (and Court) of Human Rights

<sup>3</sup> Murray, R. 2005

<sup>4</sup> The African Commission Working Group on indigenous populations/communities, hereinafter the Working Group. Through its Working Group the Commission is, in the words of the Chairperson of the Working Group on Indigenous Populations/Communities, Musa Ngary Bitaye, the main platform for the promotion and protection of the rights of indigenous peoples in Africa (Statement made during the tenth session of the UNPFII in May 2011).

<sup>5</sup> The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter the UNDRIP or the Declaration), adopted by the UN General Assembly on September 13<sup>th</sup> 2007

<sup>6</sup> Wachira, George Mukundi., 2008, 8

<sup>7</sup> The Commission has been criticized for, amongst other, for its apparent lack of independence of its members. The secretariat in Banjul has been plagued by administrative problems and is chronically underfunded and understaffed.

<sup>8</sup> Unlike other regional and global human rights bodies, the African Commission has not developed any follow up mechanism to ensure implementation of its recommendations.

<sup>9</sup> As reported by Viljoen and Louw in their study on State Compliance with the Recommendations of the African Commission on Human and Peoples Rights, 1994-2004, first published in 2007

<sup>10</sup> Christof Heyns, 2005; Viljoen & Louw, 2007

*Research question / case study:*

For the purpose of the thesis an indigenous-specific land rights case (considered by the Commission) will be examined in greater detail. An analysis of one case concerning indigenous peoples' right to land will, I hope, serve to suggest how the legal recognition of indigenous peoples' rights to lands, territories and natural resources is evolving in Africa.

In planning my thesis, a number of experts in the field of (African) indigenous issues were contacted and asked to identify cases which, in their opinion, were of importance<sup>11</sup>. The overall majority identified the Endorois ruling<sup>12</sup> as a case which could have far-reaching consequences for indigenous peoples' land rights in Africa. Valérié Couillard at Forest Peoples Programme<sup>13</sup> takes note of the importance of the Endorois case, but states that it has neither been made known publicly nor understood enough. More specifically, she writes: "The Endorois decision also needs to be further disseminated and understood. It could be interesting to analyze for which other countries/peoples in Africa this decision is directly relevant and predict or promote legal reforms in line with the standards of *The issue of the right to development and the right of peoples to access their natural resources is very particular to the African Charter and is likely to be much further developed in the coming years*"<sup>14</sup>.

To put the Endorois case briefly: in 2003 two non-governmental organizations lodged a complaint with the Commission on behalf of the Endorois indigenous community<sup>15</sup> in Kenya. According to the complaint, the Kenyan government had failed to recognize and protect the Endorois peoples' rights to traditionally occupied land and, in doing so, had violated the African Charter. In its decision, adopted in 2010, the Commission found that the expulsion of the Endorois people from their lands was illegal and that the Kenyan government had violated a number of fundamental rights of the Endorois. The Commission asserted the Endorois' collective right to their lands and awarded them a full remedy. This decision represents the first time that an African indigenous peoples' right to land has been legally recognized and thus creates a major precedent

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<sup>11</sup> IWGIA, members of the UNPFII, Rodolfo Stavenhagen (the former UN Special Rapporteur on the rights and fundamental freedoms of indigenous peoples), Forest Peoples Programme. Replies received throughout January and February 2012.

<sup>12</sup> Center for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v The Republic of Kenya

<sup>13</sup> Forest Peoples Programme (FFP) is an international NGO based in London. The organization supports indigenous forest peoples' struggles to defend their lands and livelihoods.

<sup>14</sup> Valérié Couillard in an email dated 28.1 2012, (emphasis added).

<sup>15</sup> The Endorois is a semi-nomadic indigenous community numbering about 60, 000 people who reside in the Lake Bogoria area of Kenya's Rift Valley.

that is likely to have significant spill-over effects, including potentially similar cases concerning minorities and indigenous communities in Africa<sup>16</sup>.

In exploring indigenous land rights in Africa other relevant African cases, considered by the Commission, include the Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria ó often referred to as the Ogoni case ó and the case of Katangese Peoplesø Congress v. Zaire. Both of these cases ó the former dealing with the impacts of oil development activities on the the Ogoni peopleø lands in the Niger delta and the latter with the claims to independence of the Katanga people ó echo the themes of indigenous land rights and may be seen as forerunners to the case of my choice.

On the international level, the recommendations of the Inter-American Commission on Human Rights and the rulings of the Inter-American Court on Human Rights are also of interest, as these have contributed to the evolution of international law and inspired decisions by other regional human rights monitoring bodies, such as the African Commission. The alignment with international jurisprudence is evident in the Endorois case, where the African Commission drew almost entirely on indigenous land right verdicts from the Inter-American human rights system<sup>17</sup>.

*Where I could offer my support – relevance of the project:*

As previously noted, the fact that the Commission has not developed any follow-up mechanism and therefore struggle to monitor statesø implementations of recommendations is widely criticized. A relevant research question, which could offer the Commission some support, would be not only to look at the Endorois case as an example of how indigenous land rights are legally recognized in Africa, but how the decision has been met by the Kenyan government. Therefore, writing under the overall rubric of indigenous land rights in Africa, a question which will frame my thesis is also, -How are the African Commissionø recommendations in the Endorois case being implemented in Kenya?ø

Personal motivations for choosing this topic:

On a more personal note, I would like to provide an answer for why I have chosen to focus on Africa. During my Bachelor studies in history at the University of Helsinki, I attended a series of lectures and courses at the Institute for African Studies. These courses sparked an interest in the continent and in issues which are often connected with Africa: poverty, violence, bad governance

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<sup>16</sup> Victor Mosoti (Counsel, Environment and International Law Unit, Legal Vice Presidency) for the World Bank, December 2010

<sup>17</sup> Pentassuglia, G., 2011,187

and development. Understanding that these are very complex issues and that they do not single handedly concern Africa, I am interested in exploring how these issues affect distinct minorities and how popular development models take into account the needs of minority groups and indigenous peoples. Of interest is also the larger issue of the concept of human rights in Africa and how supposedly universal human rights fit or do not fit into the African plethora of cultures and societal values (the question being: is there a universal justification for universal human rights?).

#### Normative framework:

The African Charter on Human and Peoples' Rights (the Charter) and protocols to the Charter The United Nations Declaration on the Rights of Indigenous Peoples (the UNDRIP or the Declaration)<sup>18</sup>

Other relevant framework includes the declarations and conventions (and general comments on such conventions) on which the UN Special rapporteur on the rights and fundamental freedoms of indigenous peoples bases his activities<sup>19</sup>. Of relevance for the matter of land rights (in particular the restitution of land or compensation for forced evictions) are also the Pinheiro Principles<sup>20</sup> which concern property and land restitution for displaced persons<sup>21</sup>. The Pinheiro Principles reflect emerging principles in international human rights law and have been referred to by the African Commission in its urgent appeals addressing eviction of indigenous peoples from their lands<sup>22</sup>.

#### Previous research/available material on the topic(s):

There is a large body of information, ranging from sociological and historical studies to jurisprudential articles, on the work of the African Commission. Likewise, much has been written on indigenous peoples' rights to lands, territories and natural resources on a global scale. Considerably less information has been produced on African indigenous groups, the Commission's work on indigenous peoples and the legal recognition of African indigenous communities' rights to

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<sup>18</sup> The UNDRIP is now endorsed by all African states. Although it is not a legally binding document, it is increasingly being used by regional and national human rights bodies when considering cases brought to them. What is of interest for the purpose of examining the Endorois case is how the Kenyan government and concerned national human rights bodies and actors relate to and use the Declaration.

<sup>19</sup> This framework includes (aside from the UNDRIP) ICCPR, ICESR, CERD, CEDAW, CRC, ILO 169, ILO 107

<sup>20</sup> The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights on the 11<sup>th</sup> of August 2005.

<sup>21</sup> In accordance with the Pinheiro Principles, Principle 1.1, displaced persons are persons who have been 'arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence'

<sup>22</sup> To be more specific, the Pinheiro Principles were addressed in the Commission's urgent appeal to Rwanda concerning the destruction of Batwa huts (January 2011). Referrals to new international standards, such as the Pinheiro Principles, clearly indicate how the work of other human rights bodies influence the Commission and its work.

land, territories and natural resources (the Commission and its indigenous-focused affiliates being the primary producers of such information and material).

Regarding the Endorois case, which was concluded no less than two years ago (in 2010),: some material has been published and disseminated mainly by the relevant actors in the case (the NGOs who submitted the complaint on behalf of the Endorois community, Endorois-run organizations and the African Commission).

Literature (sources) to be analyzed for the thesis:

*Material produced by the Commission:* Material produced in conjunction with the Endorois case; recommendations, reports, resolutions, comments, concluding observations and urgent appeals; statements made by the Commission's Working Group on African Indigenous Populations/Communities.

*Material produced by UN agencies:* Reports by the UN Special Rapporteur on the Rights of Indigenous Peoples: annual reports and Country mission reports to African countries<sup>23</sup>; General comments, observations and conclusions made by human rights monitoring bodies.

*Other reports and studies:* Reports, micro- and macro- studies that concern the situation of African Indigenous Populations and communities and land rights. Such reports have been published by, for instance, Minority Rights Group, IWGIA, Forest Peoples' Program and Unrepresented Nations and Peoples' Organization.

*Academic material:* With reference to the complex issues of indigeneity in Africa (who is indigenous and who is not) the work of researchers such as Sidsel Saugestad and Felix Mukwiza Ndahinda is of importance.

Rachel Murray has produced a number of articles and books on the African Human Rights System and has, to some extent, dealt with group and collective rights under the African system. Frans Viljoen at the University of Pretoria, South Africa, has linked minority and indigenous

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<sup>23</sup> To this date 4 reports that concern Africa have been carried out: The Republic of Congo 2011, Botswana 2010 (2009), Kenya 2006 and South Africa 2005

concerns to the African Charter and Commission in his texts. Viljoen has also examined the implementation of the Commission's recommendations.

Among writers who have concerned themselves with human rights issues in Africa on a more general level Issa Shivji deserves mentioning.

Location(s) and time for fieldwork:

*May (7-18) 2012: New York, US, The eleventh session of the United Nations Permanent Forum on Indigenous Issues (UNPFII)*

Some fieldwork will be conducted during the eleventh session of the UNPFII. This would entail networking, meeting and interviewing relevant people such as commissioners from the African Commission, members of African indigenous groups and African governmental representatives, in particular from Kenya.

My fieldwork during the UNPFII session will be limited due to the fact that I am attending the session in my capacity as the assistant to Permanent Forum member Eva Biaudet and will spend most of the two weeks in New York working long hours. Fieldwork for my thesis will be conducted whenever time allows for it.

Conducting fieldwork during the UNPFII session remains an important objective, as the UNPFII is a significant actor in the advancement of indigenous peoples' rights. Just like the regional human rights systems interact, align and contribute to the development of the international human rights jurisprudence, so too does the UNPFII and its approaches to indigenous issues play an important role in influencing the work of other agencies working for the promotion of indigenous peoples' rights (such as the African Commission, which, in the words of commissioner Musa Ngary Biatye, is the main platform for the promotion and protection of the rights of indigenous peoples in Africa<sup>24</sup>).

*June – July 2012: Kenya (Nakuru and Nairobi)*

The primary fieldwork will be carried out in and with the Endorois community (mainly through the Endorois Welfare Council, representing the Endorois community in the case brought in front of the Commission) in June and July 2012 in Kenya. Relevant people to be interviewed about the Endorois case (and the government's response to it) include: members of the Endorois Welfare

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<sup>24</sup> Statement by the African Commission's Working Group during the tenth session of the UNPFII, May 2011

Council in Nakuru; Korir Sing'oei (acting lawyer for the Endorois case<sup>25</sup>), commissioners at the Kenyan Commission for Human Rights<sup>26</sup> and Kenyan governmental representatives in Nairobi. Fieldwork will be conducted both in Nakuru (where the Endorois community resides) and in Nairobi.

*October/November 2012: Banjul, the Gambia, the African Commission's semiannual session*

I have been advised by Samuel Tilahun, contact person for the African Commission's Working Group, to plan my stay in the Gambia so that it coincides with the Session of the Commission, which will enable me to meet Commissioners, Working Group members, NGOs and other experts in the field. Mr. Tilahun has communicated that the next ordinary session will be held in October/November 2012. Fieldwork (two or three weeks, dates yet to be confirmed) will therefore also be conducted in the Gambia during the Commission's session in October/November.

Method(s), research strategy and data:

*Multiple methods: text analysis, interviews and participant observation*

The main working method will be text analysis as I will be concerned with reading and analyzing recommendations made by the African Commission and the material it has produced in conjunction with relevant decisions.

Conducting interviews during my fieldwork in the US (New York) and Africa (Kenya and the Gambia) will serve to complement the text analysis.

Participant observation will be the key method during the deliberative meeting<sup>27</sup> of the African Commission during its semiannual session in October/November. During the week leading up to the ordinary session, various NGOs and members of civil society meet and deliberate on what matters they will raise with the Commission. This "pre-session" for civil society actors and agencies will be an important forum to meet and interview experts in the field.

Ethical dimensions and reflexivity: I have been working as assistant to Ms Eva Biaudet, one of the members of the UNPFII, since January 2011. This is a role which I am constantly in and may be

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<sup>25</sup> Sing'oei is also representing the Ogiek people in their case against Kenya, which is being deliberated by the Commission at the time of writing.

<sup>26</sup> The National Human Rights Commission of Kenya has, unlike other national human rights commissions in Africa, adjusted itself to include the representations and concerns of indigenous peoples.

<sup>27</sup> Permission to partake in the Commission's deliberative meetings (mainly carried out during the second week of the session) is yet to be obtained.

difficult or even impossible to rid myself of during my fieldwork. Likewise, due to the support that IWGIA is providing me with for the purpose of this project (facilitating my stay in Kenya) I may be regarded as being affiliated with the organization. Such associations may affect the answers I get from my interviewees, as they may be under the impression that their answers will factor into reports and studies other than a university thesis. I am of the opinion that neither affiliation will be a problem as long as I make it clear to my informants that I am conducting research in my capacity as a student from the University of Tromsø, and that the research that I am doing will result in a written thesis to be presented at my home institution (rather than being of primary relevance for either IWGIA or the work of Ms Biaudet<sup>28</sup>).

Issues raised during the feedback occasion included my role as an outsider and how this would affect the fieldwork (and the answers my interviewees provide me). Obviously, as a European researcher conducting fieldwork in Africa I will be an "outsider". But given the nature of the Endorois case in which the Minority Rights Group (MRG) and their lawyers<sup>29</sup> actively cooperated with and supported the Endorois and the activities and sessions of the Commission (which attract experts, civil society members and researchers from across the world) I will neither be the first nor the last non-African female researcher looking into these matters. The topic for my research on land rights and the evolving indigenous-specific human rights jurisprudence is sensitive neither to gender nor outsider- status.

#### Progress/Time plan:

**May 2012** Fieldwork in New York, US: The eleventh session of the UNPFII

**June – July 2012** Main fieldwork in Kenya (Nakuru and Nairobi): Examining the Endorois case and the Kenyan government's implementations of the African Commission recommendations.

**October/November 2012** Fieldwork in Banjul, The Gambia: All in all approximately two weeks will be spent at the African Commission's Secretariat in Banjul during the African Commission's semiannual session.

**September 2012 – May 2013 (alternatively September 2013)**, Tromsø: Writing of thesis

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<sup>28</sup> A short report on the fieldwork in Africa will, on the other hand, be prepared for Ms Biaudet and falls, in that sense, within the scope of my work. Similarly, during my stay in Africa I will try to combine my work as assistant to Ms Biaudet, in her capacity as a member of the UN Permanent Forum, with fieldwork for my thesis. As long as the fieldwork and work related business (meeting relevant actors and visiting civil society organizations) are kept separate, I do not see this as constituting a problem.

<sup>29</sup> My fellow students made the obvious point that I am an outsider. It is worth mentioning that two of the MRG's lawyers involved in the Endorois case were European women and therefore clearly "outsiders" too.

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