Defending Human Rights in Africa: The Case for Minority and Indigenous Rights

CYNTHIA MOREL*

Abstract
The main purpose of this article is to provide insight into the defence of human rights in Africa from a non-governmental organization (NGO) perspective. This perspective is based on the experience of Minority Rights Group International (MRG), which has been actively working with communities on the African Continent for over three decades, and which has more recently become involved in advocacy and litigation before the African Commission on Human and Peoples’ Rights. The article will first discuss the importance of securing the recognition and protection of minorities in Africa. Attention will then be given to the litigation work that MRG has initiated in collaboration with the Centre for Minority Rights Development, based in Kenya. Finally, the article will attempt to place NGO work within the broader context of recent developments within the African system. Thoughts on the opportunities and remaining obstacles from a practitioner’s perspective will also be shared.

1. Minority Rights in Africa
In order to secure the rights of minorities, the challenge today is to accommodate ethnic, religious and linguistic diversity, to promote the richness of different community values and to combat political, economic and social exclusion, and to respect the rights of all ethnic groups in development matters in line with their fundamental rights as articulated in international law.¹ This leads to the protection and promotion of human rights, constructive co-existence and conflict prevention, and serves as a means of countering the manipulation of identities for political purposes. The starting point in order to achieve these objectives is by recognizing the existence of minorities in Africa.² One must then consider the rights that follow from recognition and the support required in order to ensure minorities’ sustained participation in defending and furthering the realization of their rights.

The task at hand is arduous, particularly with regards to the multinational construct that is Africa, where there are many more ‘peoples’ described as minority groups or ethnic groups than there are states.³ The task is further complicated by the fact

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¹ Cynthia Morel has held the position of Legal Cases Officer at Minority Rights Group International (MRG) since November 2002. She previously worked as an analyst for the Canadian International Development Agency’s Central African Department. Ms Morel has also worked as a research officer at the Inter-American Institute of Human Rights, Costa Rica. The author thanks Dr Margot Salomon from MRG for her valuable input, particularly with regards to the section on the right to development. The author also thanks Clive Baldwin (MRG), Ibrahima Kane from Interights, and Korir Singoei from the Centre for Minority Rights Development in Kenya.


³ Ibid.

4 Though no official consensus exists on who constitutes minorities in Africa, criteria drafted in line with international norms would generally include: any ethnic, linguistic or religious group within a state; in a
that the African Charter on Human and Peoples’ Rights\(^4\) makes no specific reference to minorities, and that African states have traditionally viewed the recognition of the distinct identities of minorities as an element that poses a threat to national unity and undermines the objective of nation building.\(^5\)

Fortunately, despite the absence of an explicit reference to minorities within its provisions, due recognition has nonetheless been read into the Charter by the African Commission on Human and People’s Rights.\(^6\) The minority rights approach is also reflected in the reporting Guidelines for Article 19 which require that states give information on ‘the constitutional and statutory framework which seeks to protect the different sections of the national community’, and refer to ‘precautions taken to proscribe any tendencies of some people dominating another as feared by the Article’.\(^7\) Furthermore, an emerging shift in the mindset of states – from the perceived threat minorities pose to nation building, to the increasing understanding of how protection of these groups facilitate conflict prevention and resolution – has been made evident through the adoption of normative instruments such as the 1994 Declaration on a Code of Conduct for Inter-African Relations.\(^8\)

2. Litigation before the African Commission

Minority Rights Group International (MRG)’s legal cases programme, initiated in November 2002, sets out to improve the capacity of minorities and indigenous peoples to effectively access the legal protection afforded by international conventions on human rights, and the regional courts and monitoring bodies that enforce them. The purpose is also to further develop jurisprudence in the field of minority rights law.\(^9\)

The key to the successful litigation work of international non-governmental organizations (NGOs) is the reliance on domestic partners for the identification of non-dominant position in the state in which they live; consisting of individuals who possess a sense of belonging to that group; determined to preserve and develop their distinct ethnic identity; discriminated against or marginalized on the grounds of their ethnicity, language, or religion. A further key criterion, which is increasingly accepted internationally in the determination of minority status, is that of self-identification. Many ethnic groups in Africa describe themselves as indigenous minorities. The names of their organizations reflect this peculiarity, for example: the Working Group on Indigenous Minorities in Southern Africa (WIMSA), the African Indigenous and Minority Peoples Organization (AIMPO) in Rwanda, and the Minorités Autochtones Pygmées du Gabon (MINAPYGA).


\(^5\) The focus of this article will be restricted to the African Charter and its related quasi-judicial and judicial bodies rather than political bodies, such as the African Union and the New Partnership for Africa’s Development (NEPAD).


\(^8\) Declaration on a Code of Conduct for Inter-African Relations, Assembly of Heads of State and Government, 30th Ordinary Session, Tunis, Tunisia, 13–15 June 1994. Para. 4 reads: ‘We reaffirm our deep conviction that friendly relations among our peoples as well as peace, justice, stability and democracy, call for the protection of ethnic, cultural, linguistic and religious identity of all our people including national minorities and the creation of conditions conducive to the promotion of this identity’. [Emphasis added]

\(^9\) Cases are selected through annual calls for cases, though MRG provides general advice on an on-going basis. Now into its second year, the legal cases programme is monitoring approximately 25 cases, 4 of which are based in Africa.
marginalized communities to which they would otherwise have no access. Not only are
the communities in greatest need often unable to speak any international language that
would enable their access to regional bodies, but also, due to the systematic
disadvantages they have suffered, they are most often deprived of any financial means to
seek justice, thereby making support essential for facilitating their access and their ability
to secure their rights. The vital role of domestic partners is to therefore bridge
communication between the victims and supporting NGOs, as well as to ensure that
litigation strategies developed and remedies sought are culturally sensitive. Last, but
certainly not least, the domestic legal expertise of partners is vital for succeeding past the
admissibility stage of petitions before the regional bodies, as the main obstacle in this
regard is to prove exhaustion of domestic remedies, which requires extensive knowledge
of the domestic legal system.

The following section will focus attention to MRG’s first lead case, which was
seized by the African Commission in the course of its 34th Ordinary Session, and granted
provisional measures of protection in May 2004, during the Commission’s 35th Ordinary
Session in The Gambia.

2.1 The Endorois Community, Kenya: Facts of the Case
The Endorois are a distinct Kalenjin speaking community, who were the traditional
inhabitants of the Lake Bogoria area within the Rift Valley province in Kenya. The
community counts approximately 400 families and, in this location, they had practised
pastoralism since time immemorial.

Depending on their livestock for survival, the Endorois’ traditional way of life
had consisted of grazing their animals (cattle, goats, sheep) in the lowlands near Lake
Bogoria during the rainy seasons, and turning to the Monchongoi forest through the dry
seasons. The land surrounding Lake Bogoria is fertile, providing green pastures and also
medicinal salt licks that were vital for the health of their livestock. The lake was, and also
remains, of utmost importance for the religious and traditional practices of the
community.

No challenges to the Endorois’ customary rights over the Lake Bogoria region
were made until the gazetting of the area as a game reserve in 1973. At issue is the fact
that the Endorois Community was not duly consulted prior to declaring the land a
protected area, nor were they duly informed of the gazetting after its coming into effect,
until 1977, when the first game warden to the area informed them of his new role, and of
the fact that construction of a road to facilitate access to the Lake would soon be
underway.

In 1986, the Community was finally evicted from the fertile land surrounding
Lake Bogoria. They were displaced to semi-arid land, which proved insufficient for
sustaining their livestock. As a result, a great proportion of their animals died, reducing
the Community to a level of economic hardship and insecurity previously unknown to
them. Moreover, access to the Lake for religious and cultural purposes was met with
harassment and intimidation.

Efforts to regain access to their land culminated in domestic legal action from
1997 to 2002, which ultimately failed. Juma Kiplenge, an Endorois who also formed part

10 For example, during the colonial period, the Government did not interfere with the community’s
pastoralist activities in the Lake Bogoria area, despite its sectioning into three separate districts.
Furthermore, upon independence the land inhabited by the Endorois was named ‘Endorois Location’. As a
Native Reserve, it was then placed under the local authority of the respective County Councils, to be held
in trust on behalf of the Endorois Community.

of the domestic legal team, suffered many threats through the course of the litigation. The acts of violence that ensued led to an Amnesty International alert on his behalf in 1998.\textsuperscript{12}

### 2.2 Key Legal Arguments and Aims of the Case\textsuperscript{13}

The case raises issues of eviction without proper consultation or compensation. In tandem with this, it raises issues of effective participation in the community’s development. As pastoralism not only consists of an economic activity, but also a distinct way of life, the case also raises issues as to a community’s right to freely take part in the cultural life that has been passed on to them by their ancestors. In addition, since the Endorois people are pastoralists requiring fertile land for the survival of their cattle, the case raises important issues relating to use of natural resources that are found on ancestral lands. The communication therefore alleges violations of articles 8, 14, 16, 17(2), 20(1), 21 and 22 of the African Charter.

That said, numerous interviews with the Endorois Community have confirmed three priority concerns – and thus aims – for the legal work currently being undertaken before the African Commission: the restitution of the Endorois’ traditional land, adequate compensation, and access rights.

### 2.3 Case Law

Recent legal developments, both within and beyond the African context, confirm that success in obtaining the aforementioned remedies are plausible and within reach.

With regards to its jurisprudence, the African Commission took its most decisive step in confirming its commitment to collective rights in the case of \textit{Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria}, where the Ogoni were referred to as ‘people’, ‘communities’, and ‘society’.\textsuperscript{16} The decision also gained recognition as a landmark case by virtue of declaring that all rights contained within the African Charter were in effect justifiable.\textsuperscript{17}

The range of ‘solidarity rights’ contained within the African Charter, and the reaffirmed commitment to uphold these rights, is of critical importance for the protection of indigenous and pastoralist communities such as the Endorois. The African Charter, in this respect, champions the indivisibility of human rights reaffirmed in the


\textsuperscript{13} Information relating to the litigation strategy of this case is necessarily limited in view of its status as a pending communication before the African Commission.

\textsuperscript{14} Kenya ratified the African Charter on 23 Jan. 1992. Though the initial violations took place prior to the State’s ratification, the violations at hand have had a continuing effect.

\textsuperscript{15} These interviews were conducted jointly by the Centre for Minority Rights Development and MRG in October 2003 and May 2004.

\textsuperscript{16} In Communication 155/96 \textit{Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria} (27 Oct. 2001) (hereinafter: ‘the Ogoni case’), the African Commission noted in relation to article 21 (which provides for peoples’ right to freely dispose of their natural wealth and natural resources) that ‘in all their dealing with the Oil Consortiums, the Government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland’ (para. 55). The Commission further noted that ‘the survival of the Ogonis depended on their land and farms […]. These and similar brutalities not only persecuted individuals in Ogoniland, but also the Ogoni community as a whole. They affected the life of the Ogoni Society as a whole’ (para. 67).

\textsuperscript{17} \textit{Ogoni case}, n. 16 above, para. 68: ‘[The Commission] welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective’.
1993 Vienna Declaration and Programme of Action,\(^\text{18}\) which has been strongly advocated for by leading figures, including the former United Nations High Commissioner for Human Rights, Mary Robinson.\(^\text{19}\)

Furthermore, cases within the domestic jurisdictions of member states of the African Charter also indicate an encouraging measure of progress in relation to rights that impact heavily on indigenous peoples and minorities, such as those relating to the use of, and access to, natural resources.

A leading example of this is the Richtersveld Community and Others case,\(^\text{20}\) in which an indigenous community affirmed its right to restitution of its customary law interests to land. In the judgment, the South African Supreme Court recognized that a nomadic lifestyle can support the exclusive use and occupation of land, especially where the community had a strong sense of entitlement to the land that others respected. It declined an overly technical approach to establishing occupation, holding that the community was not required to have occupied every bit of the subject land to support their beneficial occupation to the overall area.\(^\text{21}\)

Other significant developments relating to indigenous peoples in general, and land rights in particular, include the Australian decisions of Mabo v Queensland\(^\text{22}\) and the Inter-American case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,\(^\text{23}\) both of which are likely to guide any future decisions of the African Commission by virtue of Article 60 of the African Charter.\(^\text{24}\)

The added value of the Mabo decision stems from its achievement in inserting the legal doctrine of native title into Australian law.\(^\text{25}\) The Awas Tingni case, on the other hand, accorded due attention to the communitarian tradition of indigenous peoples, which is reflected in their understanding of collective rather than individual ownership of land.\(^\text{26}\) Though communal property rights of indigenous peoples were recognized in

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\(\text{18}\) Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 5: ‘All human rights are universal, indivisible and interdependent and interrelated […]’.

\(\text{19}\) See, for example, Statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the opening of the 58th Session of the Commission on Human Rights, Geneva, 18 March 2002.


\(\text{22}\) Mabo v Queensland, (No. 2) (1992), 175 CLR 1 F.C. 92/014, 3 June 1992, High Court of Australia.


\(\text{24}\) ‘The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the [1945] Charter of the United Nations, the [1963] Charter of the Organization of African Unity, the [1948] Universal Declaration on 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.’

\(\text{25}\) In recognizing the traditional rights of the Meriam people to their islands in the Eastern Torres Strait, the Court also held that native title existed for all Indigenous people in Australia prior to Cook’s Instructions and the establishment of the British Colony of New South Wales in 1788. This decision altered the foundation of land law in Australia. The new doctrine of native title replaced a 17th century doctrine of terra nullius (no-one’s land) on which British claims to possession of Australia were based. For more information see http://www.foundingdocs.gov.au/text_only/places/cth/cth18.htm.

\(\text{26}\) The Awas Tingni case, n. 23 above, para. 149.
Nicaragua’s domestic law, the state was nonetheless found in violation of Article 21 of the American Convention on Human Rights on the right to property in view of its failure to carry out proper delimitation, demarcation, and titling of the territory belonging to the Community. The Inter-American Court accepted that this had created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they did not know for certain how far their communal property extended geographically, and therefore the scope of their freedom to use and enjoy their respective property.

The UN Human Rights Committee, which is author of numerous developments in case law affecting indigenous peoples, will be discussed in detail in a further section which explores the protection of cultural rights.

2.4 The Unique Provisions of the African Charter

2.4.1 Right to Development

In suit of the legal developments noted above, the Endorois Community will be the first to invoke the right to development (Article 22) as a further means to secure land and indigenous rights.

The normative content of the internationally recognized right to development was substantiated in the 1986 United Nations (UN) Declaration on the Right to Development and in the work of the former Independent Expert on the Right to Development. In the years since the adoption of the UN Declaration, international consensus has been built up around several elements deemed central to the realization of the right to development. At the domestic level this includes an entitlement of every human person and all peoples to participate in, contribute to, and enjoy economic, social, cultural, and political development in which all human rights and freedoms can be realized. The central subject of the right to development is the human person, and as such, national development requires their active, free, and meaningful participation in the development process and in the fair distribution of the benefits resulting from it.

While the right to development has not been formally adjudicated upon as such by any human rights judicial or quasi-judicial body, as previously stated, the African Commission made clear in the Ogoni communication that there was no right under the African Charter that was not able to be made effective. The conclusion can therefore be drawn that the right to development can be given practical and effective meaning in Africa.


28 Art. 21: [1]. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. [2]. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. [3]. Usury and any other form of exploitation of man by man shall be prohibited by law.

29 The Awas Tingni case, n. 23 above, para. 153.


33 UN Declaration on the Right to Development, art. 1(1).

34 UN Declaration on the Right to Development, art. 2(1) and art. 2(2).

35 The African Charter is unique among human rights conventions in codifying a right to development.

36 See n. 16 above.
At the international level, the right to development is politically contentious and gives rise to debates between Northern and Southern states. Southern states prioritize the scope of international cooperation and the debilitating effects of the inequitable international economic environment in the realization of the right to development. From the perspective of Northern states, the key elements relate to addressing corruption and generally have regard to the importance of good governance. An added benefit of having the African Commission consider for the first time article 22 of the African Charter would be to provide jurisprudential guidance as to the content of the right within a Southern context. There is widespread recognition that the right to development requires an international and a national enabling environment; under the Charter, the African Commission may have the opportunity to elaborate on the latter critical component.

The creation of game reserves and other initiatives designed to attract tourism in order to stimulate economic activity are of little worth if – as in the case of the Endorois – eviction is conducted without appropriate safeguards. As cases of this nature continue to proliferate in Africa and elsewhere, the African Commission finds itself in a privileged position to ensure that implementation of such initiatives is undertaken with the full consideration of the rights of minorities and indigenous peoples, and with their full and effective participation.

2.4.2 Cultural Rights

In addition to its unique provisions on the right to development, the African Charter is singular in encompassing provisions for both the individual and the collective dimensions of culture. By placing individual human rights in the contextual setting of peoples, the African Charter thus acknowledges that to restrict the exercise of a right to an individual (for the benefit of that individual alone), is ultimately to limit the protection afforded to the individual; protection that recognition of the group right would further provide.

Additional protection of cultural rights is provided through the express recognition of peoples’ right to existence. The basic premise of this article, as some academics rightly suggest, is that the ‘the right to enjoy one’s culture cannot be enjoyed if the group no longer exists.’ As such, the protection of minorities’ existence not only includes their physical existence, but also their continued existence on the territories on which they live and their access to the material resources required to maintain their existence on those territories. Protection of their existence, extending far beyond the duty not to destroy or deliberately weaken minority groups, also requires ‘respect for and protection of their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples, synagogues and the like.’

37 Art. 17(2), which protects the individual’s participation in the cultural life of his or her community, is complemented by art. 17(3) which obliges the state to promote and protect traditional values recognised by a community.

38 Art. 20(1) is politically contentious in view of its provision for the right to self-determination, though this concept has been found more acceptable by states when framed in terms of self-determination within state borders, rather than any particular right that threatens territorial integrity of states. More useful elements of art. 20(1) for the purposes of the Endorois case relate to the provisions that allow for all peoples ‘to freely determine their political status and … pursue their economic and social development according to the policy they have freely chosen.’


40 Ibid. 222.

41 A. Eide, as cited in Murray and Wheatley, n. 39 above, 222.
The extent of the protection these provisions will afford remains to be seen, though the African Commission has already come forth with several decisions on related religious and language rights cases. Moreover, in light of the African Commission’s recent adoption of the Working Group on Indigenous Populations/Communities’ report, it would appear that the scope of protection of cultural rights would indeed extend to the particular needs of the Endorois and other pastoralist communities. The Working Group’s findings include specific attention to the risks that current lack of protection poses to the cultural survival and to the way of life of indigenous communities, especially in cases of land dispossession. UN Special Rapporteur Ms Erica-Irene A. Daes has also strongly advocated the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality.

A further African normative instrument to be used as a reference in cases relating to pastoralist communities such as the Endorois is the 1976 Cultural Charter for Africa, which has been interpreted by academics as denoting the need to combat and eliminate all forms of cultural alienation, suppression and oppression from Africa.

Other regional systems such as the Inter-American Commission and Court have also accepted that, for indigenous communities, the relationship with their traditional lands is not merely a question of possession and production. Rather, it has been found that there is a material and spiritual element that must be fully enjoyed in order to preserve their cultural legacy and pass it on to future generations.

Finally, it must be recalled that the United Nations Human Rights Committee has pioneered many of the developments for the protection of minority and indigenous peoples’ rights. An example can be drawn from Lovelace vs Canada, which involved a


44 Final Report, n. 43 above, 26-31, 58.


46 Murray and Wheatley, n. 39 above, 226. The Cultural Charter for Africa was adopted by the Organization of African Unity (OAU) in 1976 at the 13th Summit of the Assembly of Heads of State and Government, and quoted in the Report of the Secretary-General on the Status of Signature/Ratification of OAU Treaties as recently as 1999. The Charter’s preamble states that the OAU is “[a]ware of the fact that any people has the inalienable right to organize its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas”, as well as “[c]onvinced that all cultures of the world are equally entitled to respect just as all individuals are equal as regards free access to culture”. Note that the OAU was replaced by the African Union (AU) in 2001 by virtue of The Constitutive Act of the African Union (adopted in 2000 at the Lomé Summit (Togo)). There are 53 state parties to the AU.

47 Mary and Carrie Dann vs. USA, Inter American Commission on Human Rights, Case No. 11.140, 27 Dec. 2002.

48 The UN Human Rights Committee oversees the implementation of the International Covenant on Civil and Political Rights (6 ILM 368 (1967)). The provision of particular importance to minorities and indigenous peoples is art. 27, which establishes that: ‘In those States in which ethnic, religious or linguistic
woman born and raised on a Native Reserve. It was found that her loss of status as a member of the Native community (and thus her right of abode on the Reserve) upon her marriage to a non-Native, constituted a violation of article 27 of the International Covenant on Civil and Political Rights. The Human Rights Committee held that her desire to return to the Reserve upon her divorce did not constitute a right as such. However, since this was the only location where she could have access to her culture and language, the restrictions placed on Ms Lovelace’s right to live on the reserve were not in accordance with reasonable and objective justifications.49

The Human Rights Committee has also recognized that the right to enjoy a particular culture may consist in a way of life that is closely associated with the territory and use of its resources.50 Moreover, the Human Rights Committee has recommended that state parties should take measures under Article 27 to ensure that indigenous peoples’ rights to enjoy their cultural activities, including their religion and language, as well as their rights to carry out their traditional activities, are respected.51

The underlying limitation of this normative instrument, however, remains its restriction to individual petitions.52 While the Human Rights Committee has demonstrated considerable flexibility in recognizing the broader community dynamics in which individual rights of minorities are enjoyed,53 the unique provisions of the African Charter, in addition to their forthright comprehensiveness of the collective rights, have lead many experts to argue that ‘a regime developed under the Charter might be more compatible with the collective expression of the rights of minority groups.’54

The land around the lake is central to the culture and way of life of the Endorois people. The declaration of the gazetting of the Game Reserve, the eviction of the Endorois people from their traditional land, and the denial of access and use of their traditional land surrounding Lake Bogoria by Kenyan authorities violated and continues to violate the cultural rights of the Endorois. Though the African Charter’s express

50 UN Human Rights Committee General Comment 23, para. 3.2; Lansman et al. v. Finland, Communication No. 511/1992, 26 Oct. 1994.
52 Article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights states that the Human Rights Committee has the competence ‘to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.’ [Emphasis added]
53 See Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, n. 51 above. Though the Chief acted as sole applicant, the Human Rights Committee acknowledged that it was prepared to recognise ‘a group of individuals who claim to be similarly affected’. In this instance, the protection extended to the entire community (para. 32.1). See also Human Rights Committee General Comment 23 para. 6.2, which states the following: ‘Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.’
54 Murray and Wheatley, n. 39 above, 216.
provisions for the protection of these rights foster considerable hope for the Endorois Community, the extent of the protection it will afford in real terms remains to be seen.

3. Opportunities and Challenges: The Road Ahead

The timeliness of the Endorois case is significant in light of the recent adoption of the aforementioned Report of the African Commission’s Working Group on Indigenous Populations/Communities (‘the Report’). In the words of Marianne Jensen, who took part in the Working Group as an independent expert:

By adopting this report and its findings and recommendations, the African Commission has sent a very clear signal that they recognize the existence of indigenous peoples in Africa, that indigenous peoples suffer from serious human rights violations often including the violation of fundamental collective rights, that the African Charter should be used to protect and promote the human rights of indigenous peoples, and that the African Commission will actively work on the issue.55

The upcoming consideration of the admissibility of the Endorois case in November 2004 is also particularly timely in light of the closing year of the International Decade of the World’s Indigenous People (1994-2004). Though many of the objectives set out at the beginning of the Decade have yet to materialize, the African Commission has made significant headway in contributing to the realization of the goals set forth within the African context. Examples of this, beyond the adoption of the Report, include the range of interventions the African Commission takes into consideration under the agenda item on the ‘Human Rights Situation in Africa’.56

Further evidence, as previously cited, lies in the African Commission’s openness to deal with collective rights issues through its jurisprudence.57 Together, these advances serve as an indication that the Endorois Community, and others suffering similar violations, can hope to benefit from greater protection in the years to come.

Of course, the road ahead remains difficult in view of the many normative and structural deficiencies that beset the Commission. According to Nsongurua J. Udombana, these include:

The lack of effective access to the Commission by individuals; the facts that the Commission has no enforcement powers and that its recommendations are not taken seriously by states parties; the invisibility of the Commission’s work because of the confidentiality requirements of the African Charter under article 59.58 Other shortcomings are lack of independence, as the proceedings are heavily dependent on the Heads of State and Government, and lack of resources, as the Commission is grossly underfunded by member states and suffers from poor working methods.59

56 Interventions delivered under this agenda item have related to issues such as the plight of the Nubians in Kenya, and the Batwa in the Democratic Republic of Congo. Collective rights to land have also been raised by several NGOs such as the Bakweri Land Claims Committee (BLCC). The BLCC also currently has a case pending before the African Commission on this subject matter: Communication 260/2002 Bakweri Land Claims Committee (BLCC) v Cameroon.
57 Ogoni Case, n. 16 above. Bakweri Land Claims Committee (BLCC) v Cameroon, n. 56 above, seized by the Commission during its 33rd Session.
58 Art. 59: [1] All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. [2] The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.
Despite these shortcomings, evidence suggests that the African system for the protection of human and peoples’ rights is nonetheless strengthening. In terms of developing jurisprudence, the African Commission has received 854 communications since 1987. Of this number, nearly 100 cases have been brought to the attention of the Commission within the last 2 years. Though significantly modest in comparison to the volume of cases that are dealt with by its regional counterparts at the European and Inter-American levels, the increasing referral to the African Commission is nonetheless considerable in view of general lack of awareness of its activities.

The rise in the number of cases being brought before the African Commission has been coupled with a dramatic increase in the participation of states at its Sessions. For instance, in 1993, only four member states participated in the deliberations of the African Commission Session held in Tunis. In contrast, less than ten years later, thirty-eight states took part in the 2001 equivalent held in South Africa. Though accessibility to the location of the African Commission sessions has influenced attendance to some degree, a comparable increase has also taken place within civil society organizations, both for the public sessions of the African Commission and for the NGO Forum that precedes them.

An increase in high-level delegations attending the African Commission sessions also suggests that governments are beginning to accord greater legitimacy to the regional body. This shift, however, is perhaps most evident within the states’ own domestic jurisdictions. The Endorois case itself serves as an excellent case in point, as all forms of harassment that the Community had been subjected to for decades, at the hands of the local authorities, ceased upon filing the case to the African Commission.

Further proof of strengthening legal protection in Africa is the recent entry into force of the Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights, after the Union of Comoros became the 15th state to ratify the Protocol on 26 December 2003. Once established, the Court’s role will be to consider cases on violations that have occurred in states that have accepted the jurisdiction of the Court. Cases under its consideration will have been referred by the African Commission, though a case may also be brought before the Court by an NGO with observer status before the Commission, or an individual, provided that the State concerned has made a declaration accepting the jurisdiction of the Court to receive such cases. A significant departure from the current structure of the African system for the


60 This information was supplied to the author in April 2004 by Jan Jalloh, Information and Documentation Officer at the African Commission’s Secretariat based in Banjul, The Gambia.

61 Udombana, n. 59 above. This lack of awareness is deemed by Udombana and numerous other practitioners and academics as attributable to the many of the previously cited normative and structural deficiencies of the African Commission.

62 African Commission Annual Activity Reports.

63 The African Commission is based in Banjul, The Gambia, and meets twice a year for a period of two weeks. African Commission sessions generally alternate between The Gambia and other African member states willing to host sessions.

64 Other states to have ratified the Protocol are: Algeria, Burkina-Faso, Burundi, Côte d’Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo, Uganda, and Gabon.

65 Article 5 of the Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights lists who is entitled to submit cases to the Court. For more detail on the conditions that apply, see F. Ouugergouz, The African Charter on Human and Peoples’ Rights: A
protection of human and peoples' rights is that the Court's decisions will be binding and enforceable on states.\footnote{Though the African Commission's decisions are not binding \textit{per se}, it must be kept in mind that states have nonetheless been bound by the binding character of the African Charter. As such, though the African Commission decisions have never been officially binding, the Commission has established itself as an authority in interpreting the provisions of the African Charter that the states are otherwise obliged to observe.} The overall strength of the system will nonetheless rely heavily on the ability to ensure a strong and effective role for the Commission in relation to the newly established African Court.\footnote{Ouguergouz highlights that the Court is, in fact, designed to ‘complement’ the African Commission (art. 2 of the Protocol, and para. 7 of its Preamble), n. 65 above, 705-706.}

In conjunction with the ratification of the Protocol to establish the African Court for Human and Peoples’ Rights, member states have also taken steps to ratify the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa.\footnote{Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. The first country to ratify this instrument is the Union of Comoros.} The African Charter on the Rights and Welfare of the Child, which entered into force on 29 Nov. 1999, counts as another recent addition to the African system.\footnote{Art. 3 and art. 26 deal specifically with non-discrimination issues.} And though the focus of this article has been on the African System’s judicial and quasi-judicial bodies, one must recall the further scope for NGO participation within the African Union’s Peace and Security Council, which often deals with human rights issues affecting minorities.

4. Conclusion

Though modest in some respects, these developments reveal the potential of the African Charter, the African Commission, and the forthcoming African Court on Human and Peoples’ Rights. The challenge is to ensure that these institutions continue to strengthen and become true guarantors of human and peoples’ rights in Africa. This will, however, require a genuine effort on the part of states not only to take heed of decisions rendered by the Commission and Court, but also to ensure that sufficient funds are allocated to these bodies in order to ensure their effectiveness and sustainability. Ensuring that states honour these duties and obligations will require a concerted effort from NGOs to place pressure on their respective governments. Most certainly, the increased legitimacy of the African system will also largely depend on the extent to which practitioners make use of the system itself. In particular, the degree to which they will participate in the struggle to further secure the protection of rights provided for under the African Charter, including minority and indigenous peoples’ rights, will be crucial. Beyond the official regional system, much also stands to be gained from according increased attention to the traditional African methods that successfully mediate between ethnic groups and resolve conflicts, in view of building truly multicultural societies in Africa.