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Case Study: Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v The Republic of Kenya.

The Endorois people are a semi-nomadic, pastoralist group spanning 60,000 members who claim ancestral heritage to and traditional ownership of the Lake Bogoria region, located in Kenya's Rift Valley (Ashamu). The Endorois belong to the larger Kalenjin speaking ethnic group and are members of the Tugen tribe, "which is made of the four clans: Endorois, Lebus, Somor and Alor" (Claridge 4). Their main source of livelihood, herding/rearing goat and cattle, is intrinsically connected to their way of life. Lake Bogoria is actually "the sole site of religious significance for the Endorois," as the lake acts as the final resting ground (metaphorically and physically) of those ancestors who have passed on and is readily used for significant cultural rituals (Morel 6). Not only does the Lake hold spiritual importance for the Endorois people, but the surrounding region has resources such as salt licks and fertile soil that are necessary for the wellbeing of their livestock and community members.

The Endorois' legal narrative for dispute of their land began with the forced eviction of a massive proportion of their population from the region in 1973, in order for Kenya to create the Lake Bogoria Game Reserve that would serve dual purposes of conservation and tourism. The Endorois were forced to comply with the eviction but also willfully left after a promise of compensation. According to Minority Groups International, "they were assured that 400 families would be compensated with plots of fertile land, that the community would receive 25 percent of

the tourist revenue from the Game Reserve, and 85 percent of the employment generated, and that cattle dips and fresh water dams would be constructed” (Claridge 2). However, only 170 families would eventually receive meager financial compensation in 1986, while the Endorois would also endure “another wave of expulsions” when “houses were set on fire and properties destroyed under the supervision of the provincial administration” (Juma 214). Even worse, they were moved onto semi-arid land that diminished their cattle stock and deprived them from both a food and revenue source.

Most important to understand about the creation of the Lake Bogoria Game reserve is the Trust Land Act, which was established with colonial frameworks by Kenya after gaining independence from Britain. The Trust Land Act, embedded within the Kenyan constitution, emboldened the Kenyan government not only to assert eminent domain acquisition but also to utilize a practice deemed “setting apart,” which could be “triggered if the trust land was needed for any government purpose including prospecting for minerals, or vaguely for a company in which the government held shares” (Juma 219). As is the norm for many governments and encoded within many laws, consultation or participation of the Endorois in this decision making was not legally required. Even further, the Kenyan government justified the Game Reserve by asserting that it would benefit the greater whole of Kenyan society by not only capitalizing off a “shared resource” but also with “cultural, aesthetic, and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation” (Juma 220).

The Endorois pursued domestic legal channels on multiple occasions before exhausting such remedies. Their pleadings with domestic courts were mainly regarding revenue collected from the game reserve, their eviction, and restricted access to their ancestral lands for grazing of

their animals and cultural reasons (Morel 2). The Endorois endeavored on both legal pursuits and civil discussions with Kenyan Wildlife authorities, provincial/local councils, and lastly with the Kenyan High Court. The Endorois were ultimately unsuccessful with the Kenyan High Court, which operates to interpret/utilize the Kenyan Constitution and specifically the Kenyan Bill of Rights. The Kenyan High court rejected the Endorois' bid on the basis that Lake Bogoria is a national, communal resource which means no one, even those born near the resource, could lay claim to exclusive usage or economic benefit from it. Even more limiting was the Kenyan Bill of Rights, as it does not recognize "collective notions of property" and also contains "no constitutional protection for economic, social and cultural rights, and right to development" (Morel 2). The Kenyan High Court, in general, fell short on its adjudications because it failed to quantify the state's duties under the Trust Lands Act and subsequently did not address whether the forced eviction infringed upon human rights (Sing'Oei and Shepherd). Ultimately, the Endorois proceeded with the African Commission on Human and Peoples' Rights, an international body, with a "Letter of Intent in May 2003 and an Admissibility Petition in August 2003" (Sing'Oei and Shepherd 63). Their proof of exhausting the domestic system was that legal action through those channels was not "available, effective, and efficient," which ultimately means they were entitled to pursue higher authorities (Morel 2).

For the Endorois Welfare Council to approach the African Commission, they required the assistance of the Kenyan NGO Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) as legal aid and representation. The Endorois faced an immense first obstacle in order to even be recognized by the African Commission, which was to prove they indeed are a distinct indigenous community with a definition of indigeneity that

falls in line with international legal precedent. Kenya, and many other African countries, have persistently undermined the legal claims of indigenous groups with the assertion that all Africans are in some ways aboriginal to the continent. In fact, the term indigenous does not even appear in the African Charter on Human and People's Rights, the international instrument that the African Commission is responsible for interpreting (Juma). The Endorois cited the definition of indigeneity as established by the Working Group of Experts on Indigenous Populations/Communities (WGIPC), who are a task force of experts on indigeneity created by the African Commission themselves. According to them, Indigenous groups should be made distinct due to self-identification, "must be measured in relation to the dominant or mainstream society and not vis-à-vis other indigenous peoples," and also validated international definitions that identify indigenous peoples as those "whose way of life and cultural survival [is] dependent on their ancestral land" (Morel 3). Under this reasoning, the Endorois gained access to higher standards of human right protection due to their position as a group with "special vulnerabilities" and also to claims supported by communal property rights arguments (Juma).

The Endorois and the NGOs that comprised the complainants in the case, argued that Kenya violated articles 8 (freedom of religion), 14 (the right to property), 17 (the right to culture), 21 (a right to natural resources), and 22 (a right to development). While the Endorois entered this legal battle with aims of a "formal Declaration that their rights had been violated" their "main prayer was for restitution of their ancestral land, without which their culture and religion stand in jeopardy" (Sing'Oei and Shepherd 67). By basing their claims on the Endorois being a people, they were able to benefit from certain provisions of the African Charter to utilize in their legal battle. WITNESS and CEMIRIDE collaborated on landmark use of video as

testimony, which centered Endorois voices while simultaneously capturing physical evidence of how the wellbeing of their community has declined over the course of the past 40 years. The complainants repeatedly linked denied access to their land as the reason for communal deterioration, loss of their pastoralist traditions, and severe health/economic issues within the Endorois peoples. The complainants relied heavily on precedents set by other international judicial bodies, like the Inter-American Court of Human Rights, who have previously ruled on issues such as collective right to property and land as well as right to cultural sites with cases like *Mayagna (Sumo) Awas Tingni v Nicaragua* (Claridge). The complainants drew upon the writings of UN Special Rapporteurs such as Erica-Irene Daes, the UN Declaration on the Rights of Indigenous Peoples, international trends of pushing for demarcation, and even weaponized colonial logics like proportionately tests (Juma).

The Kenyan government, from the start of their oral arguments, worked to delegitimize the Endorois' indigeneity by claiming that they had no legal standing due to them not being a "distinct community" apart from other Tugen Groups (Claridge 4). The government based much of their defense on the fact that much of the Endorois community no longer reside in the Lake Bogoria area, citing the migration of other indigenous tribes from the area due to a "search for pasture for their livestock and for arable land to carry out agriculture," not inherently because of the eviction (Claridge 4). Much of their testimony positioned the wellbeing and progress of greater Kenyan society as antithetical to the Endorois' continued presence on their traditional land. As Laurence Juma articulates,

"Often, local communities are presumed to lack the power or skills to improve their economic situation...Attendant upon this reality, has been the assumption that for every

development project, the benefit which accrues to the local community, outweighs any undesirable consequences that the community might suffer as a result. This is the logic upon which the government of Kenya sought to defeat the claim by the Endorois community that they had not been consulted and had also not participated in the decision regarding their displacement” (222).

Kenya further claimed that they had dispensed sufficient compensation for the eviction, as they had instituted educational, agricultural, and food aid programming to “increase the household income of the rural poor, including Endorois” (Claridge 4). The resettlement of Endorois to other land, followed the law that land had to be of equal quality to that which was previously occupied. Kenya was adamant that they had every right to sell Endorois land to private third parties, conduct mining that polluted Endorois water sources, and most of all, turn such land into a reserve.

On February 2nd, 2010, “the African Union adopted the first ever indigenous land rights case to be decided by the African Commission on Human and Peoples’ Rights” (Morel 1). An even greater precedent is that the Endorois case was the first ruling the African Commission has ever made formally about who can claim indigeneity in Africa, and thus who is entitled to all special protections and communal property rights extended to such groups (Human Rights Watch). The African Commission agreed to all of the complainants’ demands, and indicted Kenya for violating articles 8,14,17,21, and 22 of the African Charter. The Commission further found the forced evictions that spanned from the 1970s to the 80s to be unlawful while the creation of the reserve was similarly unjustified despite domestic law. The Commission ordered that the Kenyan government grant the Endorois people permanent use and enjoyment of their

lands, recognize rights of ownership by granting appropriate legal title, facilitate unrestricted access to Lake Bogoria, and provide monetary compensation by means of revenue that has been generated by the game reserve. The Commission's ruling set forth many legal precedents perhaps because of the detail and extensiveness with which they addressed every African Charter violation made by Kenya.

Article 8 of the African Charter protects freedom of religion and the commission deemed that the eviction of the Endorois from culturally relevant lands led to harmful separation from sacred sites. This specific article of the African Charter comes with an important caveat, that Kenya tried to cite in their defense, which states that governments can interfere with religious practices that jeopardize law and order (Morel). However, the African Commission's dismissal of this logic validated international precedent that recognizes ancestral land as invaluable to indigenous spirituality and thus their exercise of utilizing the resources they have stewarded on their own for centuries is not a threat to law and order. Article 14, or the right to property, was determined to be a valid complaint by the Endorois because the Commission recognized that the Endorois have lived in the Lake Bogoria region since time immemorial. The "impossibility of restituting Endorois land" was

"rejected on the basis that: (a) the contested land was the site of a conservation area, and the Endorois -- as the ancestral guardians of that land -- were best equipped to maintain its delicate ecosystems; (b) the Endorois were prepared to continue to conservation work begun by the government; (c) no other community had settled on the land in question; (d) the land had not been spoliated and was thus uninhabitable; and (e) continued

dispossession and alienation from their ancestral land continued to threaten the cultural survival of the Endorois' way of life" (Morel 10).

In other terms, the African Commission rejected the colonial logics cited by the Kenyan government with their proportionality test as well as formal title to land being synonymous with proof of traditional ownership. The Kenyan government was only further implicated for failing to provide proper monetary compensation after the initial evictions.

Article 17, the right to culture, was infringed upon by the Kenyan government because the Commission found clear degradation of the Endorois' pastoralist way of life. According to the Commission, "the rights embodied in Article 17 go 'beyond the duty not to destroy or deliberately weaken minority groups but require respect for, and protection of, their cultural heritage essential to their group'" (Juma 230). This is a specifically important precedent because it demands sustained governmental protection and preservation of cultural rights, which implies an active duty not a passive obligation. The Commission's ruling on this specific article furthered the internationally established notion that belief systems, traditions, and entire sources of ancestral knowledge are linked to *unique* resources, meaning there is truly no land of "equal or better" quality. Article 22, the right to dispose freely of their natural resources, was violated due to the Kenyan government's history with selling Indigenous land to private third parties for economic projects such as mining. The Kenyan government not only allowed for ruby mining, but also "failed to consult or share benefits with Endorois" (Claridge 6).

In the arguably most significant ruling, the African Commission found the Kenyan government to be in violation of the Endorois right to development, protected under Article 22, making this the first international body to do so. The Commission ruled that development



required the fulfillment of five criteria “that is equitable, non-discriminatory, participatory, accountable, and transparent” (Morel 225). Development, as established by the Commission, is not simply accomplished with physical, material items such as the education/housing program the Kenyan government provided, but rather is facilitated by and for the Indigenous community through *choices* (Juma). Even further, it was not a sufficient claim that economic development or conservation development for greater Kenyan society superseded the development of the Endorois, who are also supposed to be protected by the Kenyan constitution just as equally. Most notably, the Commission ultimately came to this conclusion about Article 22 because Kenyan government failed to involve Endorois leaders in development. They also neglected to persistently educate Endorois community members on risks of Kenyan development plans so that their consent was indeed informed (Sing’Oei Shepherd).

The Endorois case was one of the “first quasi-judicial decisions after the adoption of the [UN] Declaration [on the Rights of Indigenous Peoples]” (Sing’Oei and Shepherd 82). Needless to say, the case felt very much like a triumph and a confirmation that the UN’s principles were not only valid, but necessary. Regardless of the international attention it received and the precedents it burned into international discourse on Indigenous issues, the African Commission was no more successful than many international bodies in facilitating the enforcement of their ruling. According to the Kenyan National Commission on Human Rights, in 2018 Kenya had still failed to produce any concrete implementations of the Commission’s rulings except for the creation of two failed task forces, dedicated to providing frequent reports of Endorois conditions, under President Kenyatta’s leadership (Kabiru). As is frequent in many countries in the Global South, who are home to significant Indigenous populations, political turmoil and corruption in

state governments has deprioritized/stalled processes to rectify relations with communities like the Endorois.

While the case extends far beyond the Endorois specifically, and is actively being cited in other African Indigenous groups' ongoing cases with the African Commission, the importance of realized promises can not be emphasized enough. Kenya, who has a history of forced evictions, cannot rework entire colonial legacies and legal frameworks simply with the restitution of land to only one Indigenous community, and definitely not with failed attempts at full restitution. One of the major failings of the Commission was that it declined to recommend the Kenyan government "identify and demarcate the land belonging to the community" (Juma 224). I believe this lack of recognition, despite it not aligning with Indigenous philosophies on property, will hinder future claims made by the Endorois. Essentially, the Endorois case highlights that arbitrary rulings do not provide Indigenous communities with any further enfranchisement within their state governmental systems. Instead, the African Commission essentially provided a temporary fix, albeit still being impactful as a precedent. The Commission showed the failure of international bodies to achieve long-term, sustainable change because of their continued reliance on harmful frameworks such as "domestic-dependent nations" or "trust guardianship relationships."

Ultimately, the Endorois have seen very little alleviation of the pain that they have been put through in the great crusade of "development" and are less equipped now to regain volition over their own development due to inaction by the Kenyan government. Philosophical change through manipulation of legal jargon is one thing, but change that actually fills the stomachs of Endorois peoples, secures their lands formally for future enjoyment, and nourishes their spiritual traditions by eliminating fear of persecution is what we must achieve internationally.

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