

The right to development in the African human rights system: The *Endorois* case*

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OPSOMMING

Die reg op ontwikkeling in die Afrika-menseregtestelsel: Die *Endorois*-saak

Die doel van hierdie artikel is om die impak van die uitspraak in *Centre for Minority Rights Development (namens Endorois) v Kenya (Endorois uitspraak)* oor die verwesenliking van die reg to ontwikkeling in Afrika se menseregte sisteem te ondersoek. Na 'n oorsig van die reg tot ontwikkeling, wat uit eie gekarakteriseer is deur omstredenheid, gaan die artikel voort om te wys hoe die *Endorois* uitspraak wegbeweeg van die uitspraak in die *Social and Economic Rights Center and the Center for Economic and Social Rights v Nigeria (SERAC uitspraak)*, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda (DRC uitspraak)* en *Kevin Mgwanga Gumne et al v Cameroon (Gumne uitspraak)*. Die *Endorois* uitspraak omskryf die konsep van "peoples"; maak duidelik wie die begunstigdes van die reg tot ontwikkeling is en beklemtoon die rol van die staat as die primêre pligdraer. Dit verduidelik ook die inhoud van die reg tot ontwikkeling wat veelsydig is omdat dit bestaan uit elemente van nie-diskriminasie, deelname, verantwoordingspligtigheid, deursigtigheid, regverdigheid en keuses asook vermoëns. Verder, verduidelik dit die drempel van mense se deelname benodig in die ontwikkelingspogings en beklemtoon die onmiddellike totstandkoming van menseregte soos omskryf in die *African Charter on Human and Peoples Rights*. Die *Endorois* uitspraak gee leiding oor hoe om die bereikbaarheid van die reg tot ontwikkeling te verseker. Voor die *Endorois* uitspraak, is al hierdie eienskappe van die reg tot ontwikkeling nooit opgeklar deur die Afrika-Kommissie in die *SERAC*, *DRC* en *Gumne* gevalle nie.

1 Introduction

The communication *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*¹ (*Endorois case*) decided by the African Commission on Human and Peoples' Rights (African Commission or the Commission) in 2009 dealt with the violation of freedom of conscience and religion,² the rights to property,³ to culture,⁴

* I thank Dr Magnus Killander for commenting on earlier draft.

1 Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. See African Commission, 27th Activity Report, 2009.

2 African Charter on Human and Peoples' Rights (ACHPR) adopted by the OAU in Nairobi, Kenya, on 1981-06-27 and entered into force on 1986-12-21, art 8.

3 ACHPR, art 14.

4 ACHPR, art 17.

to natural resources⁵ and the right to development (RTD) of indigenous peoples.⁶ This article focuses specifically on the RTD because not only is the RTD binding in the African Charter on Human and Peoples' Rights (ACHPR); its justiciability was tested for the first time through the case under study.

After the exhaustion of local remedies,⁷ the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions brought the case on behalf of the Endorois community to the African Commission. The complainants claimed the forced eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s, to set up a national game reserve and tourist facilities. According to the complainants, the eviction of the Endorois people from their land amounts to the violation of the rights referred to above.

In examining the violation of the RTD, the African Commission found that the lack of "meaningful participation"⁸ by the Endorois people who "were informed of the impending project [on their land] as a *fait accompli*",⁹ was a violation of the right under discussion. The Commission also found that the RTD was violated as a result of encroachments upon Endorois peoples' choices and capabilities.¹⁰ Put differently, the RTD is underpinned by empowerment and freedom of the beneficiaries.¹¹ In reaching its decision, the Commission clarified the concept of "peoples" and the content of the RTD as never before.

In what will follow, the article briefly clarifies the RTD in international law before focusing on the significance of the *Endorois* decision on the realisation of the RTD.

5 ACHPR, art 21.

6 ACHPR, art 22.

7 According to art 56 (6) ACHPR, communications "shall be considered if they are sent after exhausting local remedies, if any, unless it obvious that this procedure is unduly prolonged".

8 The UN Declaration on the right to development (UNDRTD), A/RES/41/128, art 2(3).

9 Par 281. For more on this see Morel "Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*" 2010 *Housing and ESCR Rights Law Quarterly* 5.

10 *Idem* par 283.

11 Sen *Development as freedom* (1999) 35; see also Steiner *et al International human rights in context Law, politics, morals – Text and Materials* (2007) 1434.

2 The RTD in International Law: An Overview

25 years have passed since the UN General Assembly officially recognised the right in the United Nations Declaration on the Right to Development,¹² 18 years since a consensus involving all governments was reached on it,¹³ and 13 years since the UN Open Ended Working Group was established and an Independent Expert on the right¹⁴ was appointed, and 7 years since, the UN High-Level Task Force on the Implementation of the RTD was established,¹⁵ yet the right remains controversial in scholarly debates and at the UN level.

The RTD is the subject of scholarly disagreements. Commenting on the book *Development as human right - Legal, political and economic dimensions*,¹⁶ Whyte claims that the book is an intellectual disaster,¹⁷ whereas Louise Arbour, former UN High Commissioner for Human Rights believes that it is an “excellent scholarly writing”.¹⁸ This testifies the controversy on the right in question. In the same vein, while Bedjaoui and others see the RTD as the most important human right or “the necessary condition for the achievement of all other human rights”,¹⁹ or as a “right to rights”,²⁰ as a “basic right”, as Henry Shue²¹ put it, or “enabling right”²² to use Abi-Saab words, it is also claimed that

[t]he right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights [and that] it also permits the Third World to ‘distort’ the issues of human rights by affirming the equal importance of economic, social

12 Adopted by the UN General Assembly in Resolution 41/128 of 1986-12-04.

13 Vienna Declaration and Programme of Action 1993-06-14-25, UN General Assembly A/Conf.157/23 1993-06-12.

14 Commission on Human Rights, Resolution 1998/72 adopted without a vote on 1998-04-22 appointed Arjun Sengupta as the UN Independent Expert of the RTD.

15 The fifth session of the Working Group on the right to development recommended among other things the constitution of a High Level Task Force for the Implementation of the RTD within the framework of the working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights in its Resolution CHR 2004/7.

16 Andreassen & Marks *Development as a human right. Legal, political and economic dimensions* (2006).

17 Whyte “Review of development as a human right” *Electronic Journal of Sustainable Development* 1, issue 1 at http://www.ejsd.org/publicjournal_bookreview/1 (accessed 10 December 2010).

18 Andreassen & Marks iii.

19 Bedjaoui “The difficult advance of human rights towards universality in a pluralistic world” proceedings at the colloquium organised by the Council of Europe in co-operation with the International Institute of Human Rights, Strasbourg 1989-4-17-19; 32-47.

20 Dimitrievic “Is there a right to development?” paper presented at the annual convention of the International Studies Association, Cincinnati, Mar 1982.

21 Shue *Basic rights* (1980) 19-20.

22 Salomon “Legal cosmopolitanism and the normative contribution of the right to development” in *Implementing the right to development: the role of international law* (ed Marks) (2008) 17.

and cultural rights and by linking human rights in general to its 'utopian' aspiration for a new international economic order.²³

This strong stand against the RTD is supported by Donnelly²⁴ who sees no legal or even moral reason for an RTD. Even though he believes that it is correct to link human rights and development,²⁵ he also believes that "the right to development is neither philosophically [nor] legally justified nor a productive means to forge such a linkage",²⁶ and he proceeds to explain "how not to link human rights and development"²⁷ because such a right is a hindrance in the search for how to connect human rights and development.²⁸ Similarly, Shivji,²⁹ claims that the RTD is grounded "on an illusory model of co-operation and solidarity".

However, to Donnelly's claim that the RTD has no philosophical foundation, M'baye³⁰ responds that any development endeavour has a human dimension that can be "moral, spiritual and [even] material", and to Shivji, he speaks as a cosmopolitan and locates the RTD in the realm of international "solidarity which must be at the centre of all conducts, of all human politics, [of] man himself".³¹

In total disagreement with M'baye's contention, Bello³² criticises the RTD on the ground that it is

[t]oo woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; ...The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and "directionless;" it strikes a cord of the advent of the good Samaritan.

Sharing this view, Rosas³³ argues that "the precise meaning and status of the right is still in flux". In other words, the significance of the RTD is

23 Alston "Making space for new human rights: The case of the right to development" 1998 *Harvard Human Rights Journal* 20.

24 Donnelly "In search of the unicorn: The jurisprudence and politics of the right to development" 1985 *California Western International LJ* 473.

25 *Idem* 477.

26 *Idem* 478.

27 Donnelly "The right to development - How not to link human rights and development" in *Human rights and development in Africa* (eds Welch & Meltzer) (1984) 261.

28 Donnelly (1985) 478; also Donnelly (1984) 274.

29 Shivji *The concept of human rights in Africa* (1989) 82.

30 M'baye "le droit au développement comme un droit de l'homme" 1972 5 *Revue des droits de l'homme* 513.

31 *Ibid.*

32 Bello "Article 22 of the African Charter on Human and Peoples' Rights" in *Essays in Honour of Judge Tāslim Olawale Elías* (eds Bello & Adjibola) (1992) 462.

33 Rosas "The right to development" in *Economic social and cultural rights* (eds Eide, Krausus & Rosas) (2001) 251.

unclear. In support of this opinion, Alfredsson³⁴ observes that it may be just to sustain that the RTD at least as provided for by the UN Declaration on the right to development (UNDRTD) is not yet binding on states. In this regard, one of the most radical rejections of the RTD is from Ghai³⁵ who argues that the right is dangerous for the human rights discourse as it:

[w]ill divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights and provide increasing resource and support for state manipulation (not to say repression) of civil society and social groups and [lead] the international community for many years in senseless and feigned combat on the urgency and parameters of the right.

Ghai's position is too extreme and seems to be a threat to the concept of human dignity itself, hence the correctness of Baxi's³⁶ view that qualifies Ghai's as "cynical perspective". In fact, the law of development is "not only a new discipline but also ... a juridical technique for carrying on the struggle against underdevelopment",³⁷ and this is in line with Eleanor Roosevelt's view, which in the early days of the Universal Declaration of Human Rights (the Universal Declaration) observed: "We are writing a Bill of Rights for the world, and ... one of the most important rights is the opportunity for development".³⁸ In agreement with this view and basing their arguments on the UN Charter,³⁹ on the Universal Declaration,⁴⁰ and on the 1966 International Covenant on Economic, Social and Cultural Rights,⁴¹ Chowdhury and De Waart⁴² claim that the RTD is a human right in international law.

The disagreement on the RTD goes beyond academic circles and reaches the UN were the Non Aligned Movement and poor countries proponents of the RTD oppose the "outsiders" who are always against

34 Alfredsson "The right to development: Perspective from human rights law" in *Human Rights in domestic law and development assistance policies of the Nordic countries* (eds Rehof & Gulmann)(1989) 84.

35 Ghai "Whose human rights to development" Human Rights Unit Occasional Paper (1989) as quoted by Baxi *Human rights in post human world: Critical essays* (2007) 124.

36 Baxi 124.

37 Espiell "The right to development" *Revue des Droits de l'Homme* 5 (1972) 190.

38 Johnson, "The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights" (1987) 9 *Human Rights Quarterly* 19 - 48.

39 Art 55 & 56.

40 Art 28.

41 Art 2.

42 Chowdhury & De Waart "Significance of the right to development in international law: An introductory view" in *The right to development in international law* (eds Chowdhury, Denters & De Waart)(1992) 10.

the right.⁴³ As a result of this divergence, the RTD is politicised as illustrated by the voting pattern on its resolutions.⁴⁴

3 The Significance of the *Endorois* Decision on the RTD

Apart from the 2004 Arab Charter,⁴⁵ as alluded to earlier, the ACHPR is the only human rights treaty in which the RTD is legally binding. Article 22 of the ACHPR reads as follows:

- (1) 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.

Through this provision, the ACHPR sets obligatory standards that states cannot bargain away, or negotiate. In fact, state parties to the ACHPR intended to create legal rights and duties. Therefore, in this context, the RTD is a legal right which should be fulfilled by state parties. This development is viewed as an aspect of African contribution to the human rights discourse. Evans and Murray⁴⁶ observed: "The African Charter is unique in codifying a legally binding right to development upon states".

43 Marks "The human right to development: between rhetoric and reality" 2004 *Harvard Human Rights Journal* 142.

44 In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the Commission for Human Rights (CHR) without a vote whereas at the General Assembly, 125 votes in favour, 1 vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at General Assembly. At the CHR in 2001 the European Union (except the United Kingdom) was for the RTD, 3 abstentions (United Kingdom, Canada and the Republic of Korea) were recorded and Japan and the USA voted against (see Commission on Human Rights Res. 9, U.N. ESCOR, 57th Sess., at 68, UN Doc. E/CN.4/2001/167 (2001); The same year (2001), at the 56th session of the General Assembly (Sep–Dec) 123 votes in favour and 4 against (Denmark, Israel, Japan, and the USA), with 44 abstentions were recorded (see GA Res 150, U.N. GAOR, 56th Sess, Supp No 49, at 341, UN Doc. A/2890 (2001); At its 57th session in December 2002, where the General Assembly adopted the conclusions of the Open-Ended Working Group on the RTD, it recorded 133 votes in favour, 4 votes against (USA, Australia, the Marshall Islands and Palau), and 47 abstentions (see GA Res 556, UN GAOR, 57th Sess, Supp No 49, UN Doc A/57/49 (2002)).

45 (2004) Arab Charter on Human Rights (revised version) art 2.

46 Baldwin and Morel "Group rights" in *The African Charter on Human and Peoples' Rights – The system in practice, 1986-2006* (eds Evans & Murray)(2008) 270. The RTD is binding in the ACHPR (art 22) as well as in its protocol on the rights of women in Africa (art 19 which provides for the right to sustainable development for women). More discussion on the issue will be provided in the course of the study.

On this premises, the African Commission rendered the *Endorois* decision in which the RTD was adjudicated.

Prior to *Endorois*, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,⁴⁷ (the *SERAC* case) was the most authoritative decision of the African Commission recognising collective or peoples' rights. The *SERAC* decision emphasised the responsibility of a state party to the ACHPR for failing to regulate the actions of a non-state actor (Shell Corporation), which violate human rights in a community, the Ogoni peoples' rights.

Nevertheless, *SERAC* did not clarify the concept of "peoples" in article 21 and 22 of the ACHPR.⁴⁸ In fact, on this issue, the African Commission seems to follow the trend set in its earlier decisions where it avoided to pronouncing on the right of people to self-determination.⁴⁹ Indeed the concept of "people" is vague, unclear and keeps changing, hence Ougergouz⁵⁰ argues that the concept of "people in the African Charter is a Chameleon-like concept". In the same vein, Olowu⁵¹ argues that the African Commission plays "the ostrich game" on the issues of "peoples". In avoiding this concept, the African Commission confused the Niger Delta with "Ogoniland" and failed to investigate whether the Ogoni communities could qualify as a specific group to be identified as a specific people⁵² who could be right holders of the RTD. Even in the first interstate communication filed before the African Commission, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*,⁵³ (the *DRC* case) and the case *Kevin Mgwanga Gumne et al v Cameroon*⁵⁴ (the *Gumne* case) where the RTD was discussed, "peoples" were not defined without ambiguity. In *Gumne*, the Commission found that

the people of Southern Cameroon" qualify to be referred to as a "people" because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.⁵⁵

47 *SERAC & Another v Nigeria*, ACHPR, 2001, 15th Annual Activity of the African Commission 2001, 2002. Banjul, the Gambia.

48 Olowu *An integrative rights-based approach to human development in Africa* (2009) 155.

49 See the *Katangese Peoples' Congress v Zaire* (the *Katangese* case) (2000) AHRLR 72 (ACHPR 1995).

50 Ougergouz *African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 204 & 211.

51 Olowu 155.

52 *Ibid.*

53 Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

54 Communications, 266/2003; 26th Annual Activity Report of the African Commission, Annex IV.

55 *Idem* par 179.

However, “peoples” remained flawed because the finding of the Commission was followed by the reasoning which informed the Katangese case where “peoples” were not defined. Accordingly, because Cameroon is party to the AU Constitutive Act and was party to the OAU Charter:

[t]he Commission is obliged to uphold the territorial integrity of the Respondent State. As a consequence, the Commission cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons. That will jeopardise the territorial integrity of the Republic of Cameroon.⁵⁶

This reasoning is informed by the belief that the recognition of the distinct identities of minorities constitutes a “threat to national unity and undermines the objective of nation building”.⁵⁷ In the Katangese case, the Commission held that it had an obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those state parties to the African Charter.⁵⁸ In these cases, the Commission did not find the violation of peoples’ rights and this outcome is linked to the “ostrich game” played on “peoples”. This approach hinders the protection of peoples rights that will be superseded by national unity. This happened in violation of the 1989 reporting Guidelines⁵⁹ and the 1994 Declaration on a Code of Conduct for Inter-African Relations⁶⁰ which urge African states to provide information on measures taken to protect all national minorities.⁶¹

However, the African Commission through the *Endorois* decision “has exorcised the ghosts of its previous wobbly conception of peoples”.⁶² Indeed, “peoples” and specifically indigenous people are now clarified.

56 *Idem* par 180.

57 Morel 55; Morel “Defending Human Rights in Africa: The Case for Minority and Indigenous Rights” 2004 *Essex Human Rights Review* 55; see also Nmehielle *The African human rights system, Its law, practice, and institutions*. (2001)143.

58 The *Katangese* case, para 5.

59 Guidelines for National Periodic Reports, Second Activity Report of the African Commission on Human and Peoples’ Rights (adopted June 1989), Annex XII, Guidelines para. III.2, art 19.

60 Declaration on a Code of Conduct for Inter-African Relations, Assembly of Heads of State and Government, 30th Ordinary Session, Tunis, Tunisia, 1994-06-13–15. Par 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”.

61 Morel 55.

62 Sing’Oei “The Endorois Of Kenya: From Non-Beneficiaries To Active Stakeholders” - Indigenous Peoples Issues and Resources (2010) 2 available at http://indigenousofkenya.com/index.php/components/components/plugins/content/attachments/index.php?option=com_content&view=article&id=4828:the-endorois-of-kenya-from-non-beneficiaries-to-active-stakeholders&catid=55:africa-indigenous-peoples&Itemid=77 (accessed 2011-06-07).

Relying on the Report of the Working Group on Indigenous Peoples,⁶³ the Commission highlighted the identification criteria of indigenous people to be:

- (a) the occupation and use of a specific territory;
 - (b) the voluntary perpetuation of cultural distinctiveness;
 - (c) self-identification as a distinct collectivity, as well as recognition by other groups;
- and
- (d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.⁶⁴

The Commission went on to identify the Endorois peoples and to protect their rights in these terms:

The alleged violation of the African Charter by the respondent state are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institution and religious systems. The African Commission therefore accepts 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.⁶⁵

This case is important as it clearly identifies the beneficiaries or rights holders of the RTD and stresses the role of the state as the primary duty bearer.

As far as the content of RTD is concerned, similar to the *DRC and Gumne* cases, the *SERAC* case did not shed light on the content of the right. In *SERAC*, though the Commission was of the view that the RTD was violated, it did not pronounce such violation in its final decision. In fact, it referred to the violation of the RTD while emphasising the violation of ‘the right to food implicit’ in several violated provisions.⁶⁶ The Commission affirmed that:

The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.⁶⁷

This is surprising because the African Commission missed the opportunity to provide a dynamic reading of the law to clarify the scope and protect the RTD. All provisions of the ACHPR in which the right to

63 *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* submitted in accordance with the “Resolution on the Rights of Indigenous Populations/Communities in Africa” adopted by the African Commission on Human and Peoples Rights at its 28th ordinary session (Published by IWGIA, 2005), see Chapter 4.

64 *Endorois* case par 150.

65 *Idem* par 156-157.

66 *Idem* par 64.

67 *Ibid.*

food is implicit could have been read together to do so. The Commission espoused the language of the plaintiff instead of interpreting the law to find the violation of the RTD in its final decision. In fact, in the same case, the Commission found the violation of the right to shelter (which is not provided for in the Charter) through the combination of the protection of the right to health, property and family.⁶⁸ A similar approach could have linked other human rights together to pronounce on the violation of the RTD, even if the latter was not expressly provided for by the ACHPR.

Furthermore, the notion of "peoples" discussed earlier, the right to wealth and natural resources and to adequate compensation in case of spoliation under article 21 of the ACHPR provide a legal basis to clarify and adjudicate the RTD as provided under article 22. Nonetheless, the Commission failed to do so. A better reading of the ACHPR could have been useful in clarifying the content of the RTD, especially if one is to consider Okafor's⁶⁹ view that in addressing the RTD, "one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter".

However, through *Endorois*, the Commission departed from "the doctrine of implied rights"⁷⁰ which assisted in finding the violation to the right to housing and food in *SERAC*. It went for the broad interpretation of the law which enabled it to consider the interdependency of the rights in protecting the RTD. As a result, the Commission highlighted the holistic character of the RTD which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.⁷¹ It clarified the RTD as being both "constitutive and instrumental",⁷² hence the violation of either procedural or substantive element constitutes an encroachment on the right.

Furthermore, unlike *SERAC*, *Endorois* clearly set the benchmark for participation needed for the realisation of the RTD. In this respect, "prior informed consent" is the minimum standard to be achieved by states before undertaking any development endeavors in indigenous peoples' communities. The African Commission declared:

The State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.⁷³

68 *SERAC* case par 60. For more analysis on this see Olowu 153 & 154.

69 Okafor "'Righting' the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples' Rights" in *Implementing the right to development – The role of international law* (ed Marks)(2008) 55.

70 Sing'Oei *op cit*.

71 *Endorois* case par 128.

72 *Idem* par 277.

73 Communication 276/2003, para 289.

As far as the legal regime of collective rights is concerned, *Endorois* also departed from *Gumne* and *SERAC*. Though under the ACHPR, human rights are submitted to the principle of immediate realisation, the African Commission through the *Gumne* and *SERAC* cases submitted socio economic rights⁷⁴ and the RTD⁷⁵ to progressive realisation based on the availability of resources.

It could be argued that the African Commission is empowered⁷⁶ to use international law including the General Comments of the Committee on Economic Social and Cultural Rights in reaching its decision. Nevertheless, this approach worked because Cameroon in the *Gumne* case and Nigeria in the *SERAC* case are parties to the International covenant on Economic Social and Cultural Rights (ICESCR). Olowu correctly questions: “[W]ould there have been credible and justifiable basis for the Commission to apply the same approach were it to involve a state that is not party to ICESCR?”⁷⁷ In fact, such an approach would not have worked for countries like Botswana, Mozambique, or Comoros that are not party to the ICESCR.⁷⁸

In the *Endorois* decision however, there was no emphasis on the progressive realisation. It could be argued that the Commission brought back the principle of immediate realisation of human rights enshrined in the ACHPR by simply calling upon Kenya to remedy the violation of the rights of the Endorois community.

4 Concluding Remarks

The aim of this article was to examine the impact of the Endorois case on the realisation of the RTD in the African human rights system. After an overview of the RTD characterised by the controversy on its nature, the article proceeds to show that *Endorois* departs from *SERAC*, *DRC* and *Gumne*. In this respect, *Endorois* defines the concept of “peoples”, clarifies the beneficiaries of the RTD and stresses the role of the state as the primary duty bearer. It also explains the content of RTD which is multifaceted as it comprises elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities. In addition, it explains the threshold of people’s participation needed in development endeavors and emphasises the immediate realisation of human rights as subscribed to the ACHPR. The *Endorois* decision provides guidance on how to ensure the justiciability of the RTD.

74 *SERAC* case par 48 & 52.

75 *Gumne* case par 206.

76 Art 61 ACHPR.

77 Olowu 154.

78 *Ibid.*