

The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the *Endorois* and the *Mamboleo* decisions

Derek Inman*, Stefaan Smis**, Ezéchiél Amani Cirimwami*** and Christian Bahati Bahalaokwibuye****

ABSTRACT: While many commentators have critiqued the lack of enforcement and monitoring mechanisms with the African human rights system, there have only been a few contributions that focus their analysis on the implementation of the recommendations provided by the African Commission on Human and Peoples' Rights. This lacuna means that little is actually known of the status of state compliance. The purpose of this article is to address the issues of implementation and compliance by examining in detail the 'aftermath' of two decisions of the African Commission: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois)* and *Mr Mamboleo M Itundamilamba v Democratic Republic of Congo (Mamboleo)*. By analysing the way state parties have reacted to these findings, the article aims to shed some light on the effectiveness of the mechanisms set up to monitor compliance, highlights the arguments used by state parties when refusing to implement the recommendations of the African Commission and examines the ways in which implementation is avoided.

TITRE ET RÉSUMÉ EN FRANCAIS:

Volonté ou absence de volonté dans la mise en œuvre des recommandations de la Commission africaine des droits de l'homme et des peuples:

Évaluation des affaires *Endorois* et *Mamboleo*

RÉSUMÉ: Bien que des nombreux commentateurs ont critiqué l'absence de mécanismes d'application et de suivi de recommandations dans le système africain des droits de l'homme, seulement quelques contributions se sont appesanties sur la mise en œuvre des recommandations de la Commission africaine des droits de

* BA Hons (Carleton) LLM (Nottingham) PhD Candidate (Vrije Universiteit Brussel); Researcher and Doctoral Candidate at the Faculty of Law and Criminology of the Vrije Universiteit Brussel; derek.inman@gmail.com/Derek.Inman@vub.be.

** LLM PhD (Vrije Universiteit Brussel); Professor of international law and human rights law at the Faculty of Law and Criminology of the Vrije Universiteit Brussel and Reader in international law at the School of Law of the University of Westminster; Stefaan.Smis@vub.be.

*** LLB (Université officielle de Bukavu) LLM (Université catholique de Bukavu) PhD Candidate (Vrije Universiteit Brussel and Université catholique de Louvain); Doctoral Candidate at the Faculty of Law and Criminology at the Vrije Universiteit Brussels and the Faculty of Law and Criminology at the Université catholique de Louvain; amani.cirimwami@gmail.com.

**** LLB (Université catholique de Bukavu) DES (Univeristé du Burundi) LLM (Université Paris 2 Panthéon-Assas) PhD (Vrije Universiteit Brussel); Associate Professor at the Faculty of Law of the Université catholique de Bukavu; bahalao@gmail.com.

l'homme et des peuples. Cette lacune signifie que l'on en sait peu sur le statut de conformité des États vis-à-vis desdites recommandations. Cet article vise à combler ce vide en examinant en détail les 'conséquences' de deux décisions de la Commission africaine: *Centre for Minority Rights Development (Kenya) et Minority Rights Group (au nom du Endorois Welfare Council) c. Kenya (Endorois)* et *Mamboleo M Itundamilamba c. la République démocratique du Congo (Mamboleo)*. En analysant la manière dont les États parties ont réagi aux recommandations de la Commission, cet article fait une lumière sur l'efficacité des mécanismes mis en place pour veiller au respect des recommandations, présente les arguments invoqués par les États parties lorsqu'ils ont refusé de mettre en œuvre les recommandations de la Commission africaine et examine la manière dont les États évitent de mettre en œuvre les recommandations.

KEY WORDS: Implementation, compliance, African Commission on Human and Peoples' Rights, recommendations, Kenya, DRC

CONTENT:

1	Introduction	401
2	The <i>Endorois</i> decision	407
2.1	Background.....	407
2.2	Summary of the facts.....	407
2.3	Claims made before the African Commission.....	408
2.4	Decision of the African Commission.....	409
2.5	The 'aftermath' of the <i>Endorois</i> decision.....	414
2.6	Indirect implementation?	417
3	The <i>Mamboleo</i> decision.....	418
3.1	Background.....	418
3.2	Summary of fact	419
3.3	Claims made before the African Commission.....	420
3.4	Decision of the African Commission.....	420
3.5	The 'aftermath' of the <i>Mamboleo</i> decision	421
4	Conclusion	424

1 INTRODUCTION

When the African Charter on Human and Peoples' Rights¹ (African Charter or Charter) entered into force in 1986 it was rightfully lauded for its innovative approach: designed to reflect the history, values, traditions, and development of Africa, the African Charter effectively combined African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties. To ensure compliance, the African Commission on Human and Peoples' Rights (African Commission or Commission) was established with a broad mandate to promote, ensure, and interpret the rights that are guaranteed within the African Charter.² However, nowhere in the African Charter is it explicitly mentioned that the African Commission would have the power to fulfil its protective mandate by issuing legally binding findings, orders, or remedies. This was an issue of contention during the drafting and the drafters agreed that it was premature to establish an organ with that power.³ What resulted instead was a system that allowed the African Commission as a quasi-judicial organ to receive and consider communications alleging violations of a state

1 21 ILM 58, 21 October 1986.

2 See art 54 African Charter.

3 See F Viljoen *International human rights law in Africa* (2007) 420-421.

party's Charter obligations and to pronounce decisions possibly accompanied by recommendations on how to remedy the violations.⁴

To understand the limits of the Commission's supervisory mandate requires first to enquire about the legal value of its findings.⁵ Simply stated, are these findings legally binding? Leaving aside the human rights courts whose judgments are binding *inter partes*, it has always been a controversial question what legal value to attribute to the findings of the supervisory bodies of human rights treaties, which, strictly speaking, offer recommendations.⁶ There is nevertheless a tendency to attribute a growing legal value to these findings, which is illustrated by the fact that national courts and tribunals have been increasingly invoking the findings of treaty bodies.⁷ The Spanish Supreme Court, for example, has recently even gone further, explicitly stating that the findings of UN human rights treaty bodies are legally binding.⁸ In addition, the Spanish Supreme Court determined that to comply with treaty body decisions is a matter falling within the confines of the rule of law and therefore acting contrary to it would also violate the principles of legality and legal hierarchy recognized in article 9(3) of the Spanish Constitution.⁹

4 Art 58 of the African Charter only refers to the power of the African Commission to 'undertake an in-depth study of the cases [that reveal the existence of a series of serious or massive violations of human and peoples' rights] and make a factual report, accompanied by its findings and recommendations'. However, a progressive interpretation of the African Charter by the African Commission confirmed by its practice and its rules of procedure has resulted in the African Commission accepting communications from individuals, groups of individuals, or non-governmental organizations, speaking on behalf of persons alleging violations of the African Charter that do not necessarily fulfill the criteria of serious or massive violation of human rights by a state party.

5 In this contribution we use the word 'decisions' to refer to all pronouncements of the African Commission whereas 'findings' refer to the conclusion of the African Commission's view in an individual communication.

6 See M O'Flaherty 'The concluding observations of the United Nations human rights treaty bodies' (2006) 6 *Human Rights Law Review* 27.

7 See International Law Association Committee on International Human Rights Law and Practice 'Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunal (Berlin 2004)' <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1155&StorageFileGuid=69d4f406-fc35-42cd-8eec-308c1b10b807> (accessed 15 August 2018).

8 In an appeal based on a decision of the UN Committee on the Elimination of Discrimination against Women that had found a violation of the Convention on the Elimination of Discrimination against Women (CEDAW) in an individual complaint brought forth by Angela González the Spanish Supreme Court developed an interesting and progressive argument. The Spanish Supreme Court read art 24 of CEDAW, which requests state parties to "adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized" in CEDAW, and art 7(4) of the Optional Protocol to CEDAW, which obliges state parties to "give due consideration to the views of the Committee", in conjunction with Spanish Constitutional provisions, which adopts a monistic view on the relationship between international and national law (arts 96 and 10(2)), to conclude that the findings of the CEDAW Committee are binding in Spain. See Communication No. 47/2012, *González Carreño v Spain*, CEDAW (16 July 2014), UN Doc CEDAW/C/58/D/47/2012.

A similar move towards attributing more legal weight to the findings of human rights supervisory bodies can also be seen in the African human rights system where the African Commission itself has developed the view that its findings have a binding character. The reasoning of the African Commission is based on a combination of the law of treaties, as codified in the 1969 Vienna Convention on the Law of Treaties, and article 1 of the African Charter. For the African Commission the principle of *pacta sunt servanda* expressed in article 26 of the Vienna Convention on the Law of Treaties holds that agreements are binding upon parties and must be interpreted in good faith. Accordingly, African states that have ratified the African Charter without reservations are bound by its provisions and particularly article 1, which refers to the basic obligation to 'recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'. However, while adopting legislation is essential it is not always sufficient. Therefore, when the African Commission, which is mandated to supervise the African Charter and to ensure its protection, is called upon to pronounce an alleged violation of the African Charter it effectively reveals the content of the African Charter and gives an authoritative interpretation. Consequently, its findings must be considered as possessing a legal value that is equal to that of the African Charter. In addition, abiding to its findings is equally an obligation of states, which falls under the 'other measures' referred to in article 1 of the Charter. As the African Commission concluded in *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* the state in question, in ignoring a previous decision that had found the state party in violation of article 7(1)(d) of the Charter, had violated article 1 of the Charter.¹⁰ The fact that reference was made to a previous decision clearly indicates that the Commission considers its decisions are binding. Ever since this case the Commission has followed this precedent with little resistance of states. There can be no doubt that the legal value of the African Commission's recommendations plays an important role in the effective implementation of its findings. If a decision is seen as legally binding, then compliance efforts would be positively affected.

As is the case with most of the UN human rights treaty bodies that inspired the drafters of the African Charter, the latter is vague or even silent on the implementation of decisions. However, the Rules of Procedure of the African Commission, which was adopted in 1988, revised in 1995, and replaced by new Rules of Procedure in 2010 to respond to the creation of the African Court on Human and Peoples' Rights (African Court or Court), clarify, to a certain extent, the issue. Rule 98(4) requests that states report to the African Commission on the

9 Supreme Court of Spain, R. Casacion 1002/2017, Judgment 1263/2018 (17 July 2018). See <https://www.womenslinkworldwide.org/files/3045/sentencia-angela-tri-bunal-supremo.pdf> (accessed 1 August 2018).

10 See *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* (2000) AHRLR 243 (ACPHR 1999).

measures taken to implement provisional measures. Rule 112 details the steps, timing and organs involved in the follow-up of the recommendations of the Commission.¹¹ If the state party has refrained to implement the African Commission's findings, or has not complied with the provisional measures requested within the timeframe defined in Rule 112, the Commission can seize the African Court.¹² The Court will then address the case even if the state party has not recognized the competence of the Court to handle individual complaints. Finally, Rule 125 allows the African Commission to request the African Union Assembly of Heads of State and Government, when it submits its activity report, 'to take necessary measures to implement its decisions' and/or to 'bring all its recommendations to the attention of the Sub-Committee on the Implementation of the Decisions of the African Union of the Permanent Representatives Committee'.

11 Rule 112 states as follows:

1. After the consideration of the Commission's Activity Report by the Assembly, the Secretary shall notify the parties within thirty (30) days that they may disseminate the decision.
2. In the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.
3. Within ninety (90) days of receipt of the State's written response, the Commission may invite the State concerned to submit further information on the measures it has taken in response to its decision.
4. If no response is received from the State, the Commission may send a reminder to the State Party concerned to submit its information within ninety (90) days from the date of the reminder.
5. The Rapporteur for the Communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the State Party to give effect to the Commission's recommendations on each Communication.
6. The Rapporteur may make such contacts and take such action as may be appropriate to fulfill his/her assignment including recommendations for further action by the Commission as may be necessary.
7. At each Ordinary Session, the Rapporteur shall present the report during the Public Session on the implementation of the Commission's recommendations.
8. The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.
9. The Commission shall include information on any follow-up activities in its Activity Report.

12 Rule 118 provides as follows:

If the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2), it may submit the communication to the Court pursuant to Article 5(1)(a) of the Protocol and inform the parties accordingly.

If the Commission has made a request for Provisional Measures against a State Party in accordance with Rule 98, and considers that the State has not complied with the Provisional Measures requested, the Commission may pursuant to article 5(1)(a) of the Protocol, refer the communication to the Court and inform the Complainant and the State concerned.

Unfortunately, research focusing on compliance with decisions of African human rights supervisory bodies is still in its infancy. Ten years ago, Viljoen and Louw pioneered this research by launching a discussion on the possible reasons for (non-)compliance with the decisions of the African Commission. They first identified a handful of factors – legal as well as non-legal – that possibly influence compliance and statistically tested them on the basis of data gathered between 1999 and 2004. The hypothesis was that the way in which the Commission executes its mandate, by producing decisions that are convincing, that fulfil quality standards, and that abides by its role in the follow-up, would influence compliance. Other factors thought to affect compliance relate to: the nature of the case and the type of rights involved; the quality of the complainant and how strong they were involved in the follow-up; the system of government and political stability of the respondent state; the involvement of civil society actors; and, the international pressure exercised upon the state party to the dispute. The results of the study showed that non-legal factors, such as the state context and the involvement of NGOs, are crucial factors in positively influencing compliance.¹³ Viljoen and Louw therefore concluded that a stable, open, free and democratic system of government is conducive to compliance. This conclusion is understandable as an undemocratic regime will by nature violate more human rights than a democratic one and will probably be more inclined to disregard human rights remedies at the national and international levels.

The other finding offered by Viljoen relates to the involvement of non-state actors, such as NGOs, in the submission and follow up of cases.¹⁴ This is more remarkable but at the same time also understandable knowing the role these national and international NGOs play in the African human rights system. In addition, Ayinla and Mukundi Wachira, in explaining the reasons for the poor implementation rate, also invoke a number of non-legal issues besides the ones referred to above, stating: ‘the lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty, a lack of an institutionalized follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement and the non-binding character of the Commission’s recommendations.’¹⁵ To that, in their study on the implementation of regional human rights decisions, the Open Society Foundation adds that cases ‘that require states to respect the traditional civil and political rights of small numbers of individuals have a better chance of being implemented than cases involving larger groups.

13 F Viljoen and L Louw ‘State compliance with the recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004’ (2007) 101 *American Journal of International Law* 32.

14 F Viljoen ‘The African human rights system and domestic enforcement’ in Langford, M, Rodriguez-Garavito, C & Rossi, J (eds) *Social rights judgments and the politics of compliance* (2017) 360.

15 A Ayinla and G Mukundi Wachira ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: a possible remedy’ (2006) 6 *African Human Rights Law Journal* 456.

Similarly, the complexity of the case itself and attendant complexity of the remedies ordered by the commission, also affect implementation'.¹⁶

Therefore a lack of clear understanding on why African states do or do not comply with the Commission's decisions does exist and much more research is needed to ascertain what issues influence compliance with the decisions of the African Commission. For example, if state parties do comply, what do the implementation efforts look like? Is it done willingly, expressly referencing the African Commission? Are there instances of partial compliance? On the other hand, if states do not comply, in what ways do they resist implementing the findings of the African Commission? Is it only a question of politics or does law equally play a role? All essential issues for judging the effectiveness of the system for it has little sense for a victim of human rights violations to hear that an international body has supported their claim to then face the reality that the situation remains unchanged.

While many commentators of the African human rights system have critiqued the enforcement mechanisms provided for by African Charter, and the lack of a Charter provision dedicated to monitoring state compliance with the pronouncements of the African Commission, there only a few contributions that focus their analysis on the aftermath of these decisions, as discussed above.¹⁷ This lacuna means that, despite the aforementioned critiques, little is actually known of the status of state compliance. The purpose of this article is to address this issue of implementation and compliance by examining in detail the 'aftermath' of two decisions of the African Commission: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*¹⁸ (Endorois) and *Mr Mamboleo M Itundamilamba v Democratic Republic of the Congo*¹⁹ (Mamboleo). By analysing the way state parties have reacted to these findings, the article aims to shed some light on the effectiveness of the mechanisms set up to monitor compliance and point to the arguments used by state parties when refusing to implement the findings of the African Commission. In the aforementioned cases, Kenya and the Democratic Republic of the Congo (DRC) have taken very different approaches towards the implementation of the findings and recommendations. This has resulted in their resistance manifesting itself differently and, as such, affecting the compliance of the Commission's decision. The uncertainty and confusion of the DRC

16 Open Society Foundation, *From judgment to justice implementing international and regional human rights decisions* (2010) 100.

17 See Viljoen and Louw (n 13) 1; F Viljoen and L Louw 'The status of the findings of the African Commission: from moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1; Ayinla & Mukundi Wachira (n 15) 465; R Murray, D Long, V Ayeni and A Somé 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.

18 *The Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya (Endorois case)* (2009) AHRLR 75 (ACHPR 2009).

19 Communication 302/05 *Mr Mamboleo M Itundamilamba v Democratic Republic of Congo (Mamboleo case)* (23 April 2003).

towards the recommendations of the African Commission has been evidenced through arguments of government officials in judicial and administrative proceedings involving Mamboleo M Itundamilamba's quest for compensation. The government of Kenya, on the other hand, initially welcomed the findings of the African Commission, promising to begin implementation only to fail in taking any significant steps to do so. In this instance resistance has taken the form of non-participation or inaction. However, throughout the struggle for implementation, there have been a number of domestic legal reforms and whether or not these reforms reflect the content of the African Commission's recommendations is examined in this article through an analysis of the developments that followed the *Endorois* decision. The article concludes with an examination of the forces at work preventing effective implementation of African Commission recommendations.

2 THE *ENDOROIS* DECISION

2.1 Background

In November 2009, after a 40 year struggle for recognition and justice by the Endorois community, the African Commission issued a historical ruling, condemning the expulsion of the Endorois peoples from their traditional lands in order to create a wildlife reserve, and determining that the aforementioned eviction violated their human rights. The *Endorois* decision was not only a landmark ruling for indigenous peoples in Africa but worldwide. Sadly, the optimism of that moment has faded, as 9 years on many of recommendations made by the African Commission have failed to be implemented.

2.2 Summary of the facts²⁰

The Endorois are a distinct Kalenjin speaking community, who, for centuries, have been the traditional inhabitants of the Lake Bogoria area within the Rift Valley province in Kenya. The community consists of approximately 400 families, or 60 000 people, who have traditionally practiced pastoralism. The Endorois' traditional way of life has consisted of allowing their animals to graze in the lowlands surrounding Lake Bogoria during the rainy season and retreating to the Mochongoi forest for the dry season. The green pastures around Lake Bogoria have been vital for the health of their livestock and the lake also remains an important site for religious and traditional practices of the Endorois community.

The Endorois community continued to hold, use, and enjoy this land until 1973 when, without prior consultation or consent, the land was declared a protected area by the Kenyan government. In 1986, the

20 *Endorois* paras 3-21. See also C Morel 'Defending human rights in Africa: the case for minority and indigenous rights' (2004) 54-65.

Endorois community was evicted from the fertile lowlands surrounding Lake Bogoria and displaced to semi-arid land, resulting in the death of a number of their animals and causing them to fall into economic hardships previously unknown to them. Moreover, access to Lake Bogoria for religious and cultural purposes was restricted and even met with intimidation.

In an effort to regain access to their lands, the Endorois community pursued various avenues of recourse through the domestic legal system but ultimately failed. The Endorois community first launched their campaign by challenging the land and natural resource regime that was adopted, unchanged, from the British colonial powers.²¹ Under the colonial system, land that was occupied by recognised ethnic groups was considered 'Native Land Areas' and, although controlled by the Native Lands Trust Board in London, was effectively governed under customary tenure.²² After independence, title to the 'Native Land Areas' was transferred to the local authorities where the County Councils were 'obliged to hold the land in trust for the use and benefit of the local communities'.²³ Unfortunately, this form of land tenure system, in many instances, resulted in collusion between the central government and the local authorities to privatize or nationalize 'Native Land Areas' with complete disregard for the local communities.²⁴

As this was the case for the Endorois community, they submitted a complaint to the Kenyan High Court, challenging the legality of the forced evictions and the constitutionality of the denial of access to their grazing lands and to their cultural and religious sites.²⁵ The Kenya High Court dismissed the Endorois claim and stated very clearly that it "could not address the issue of a community's collective right to property" nor did they believe that Kenyan law should afford "any special protection to a peoples' land based on historical occupation and cultural rights."²⁶

2.3 Claims made before the African Commission

After exhausting all domestic remedies, the Endorois community, with the assistance of two NGOs, the Centre for Minority Rights Development and Minority Rights Group International, filed an individual communication with the African Commission in 2003, claiming that Kenya violated their right to freedom of conscience,²⁷ their right to property,²⁸ their right to culture,²⁹ their right to free

21 Morel (as above) 61.

22 As above.

23 As above.

24 As above 62.

25 As above 62-63.

26 *Endorois* para 12.

27 African Charter (n 1) art 8.

28 As above, art 14.

29 As above, art 17.

disposition of wealth and natural resources,³⁰ and their right to economic, social, and cultural development.³¹ The complainants sought restitution of their land, with legal title and clear demarcations, as well as compensation to the community for all the loss they had suffered through the loss of their property, their development, their natural resources, and freedom to practice their religion and culture.³² Kenya, for its part, disputed that the Endorois were a distinct community, argued that the Endorois did not reside in their ancestral lands owing to movements due to a number of factors, claimed that the government instituted education and agricultural recovery programmes, and resettled and compensated the majority of the Endorois during the Mochongoi settlement scheme.³³

2.4 Decision of the African Commission

2.4.1 Article 8: Right to freedom of conscience

The Endorois community alleged that by expelling them from their land and refusing them access to Lake Bogoria and other religious sites, Kenya violated their right to freely practice their religion. First, in order to determine if the Endorois' spiritual beliefs and ceremonial practices constituted a religion under international law, the African Commission looked to its own case law on the matter,³⁴ but also to the Human Rights Committee (HRC). In General Comment 22, where the HRC provides an authoritative interpretation of article 18³⁵ of the International Covenant on Civil and Political Rights (ICCPR), the HRC states: "The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".³⁶ Consequently, the African

30 As above, art 21.

31 As above, art 22.

32 *Endorois* para 22

33 As above, paras 138-143

34 See *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

35 International Covenant on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976, art 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Commission determined that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and that the forced eviction from their ancestral grounds, which was not necessitated by any significant public security interest or as part of a lawful action for the pursuit of economic development or ecological protection, interfered with the Endorois' right to freely practice their religion, resulting in a violation of article 8.

2.4.2 Article 14: Right to property

Following this, the African Commission examined the claim that Kenya violated the property rights of the Endorois, as guaranteed in article 14 of the Charter. In determining this claim, the African Commission relied heavily on its own jurisprudence, most notably the *Ogoni* case, but also jurisprudence from the Inter-American Court on Human Rights (Inter-American Court) and the European Court of Human Rights (European Court). However, prior to delving into the more substantive questions of the alleged violation, the African Commission first attempted to determine what was a property right in accordance with African and international law and whether special measures were required to protect such rights.³⁷

The Endorois claimed that property rights had an autonomous meaning under international human rights law, which superseded national legal definitions.³⁸ The complainants explained that indigenous groups had a specific form of land tenure and that domestic legal systems had failed in acknowledging communal property rights, instead relying upon 'formal' title.³⁹ The African Commission appeared to be in agreement as they stated: '... the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute "property" under the Charter'.⁴⁰

To support their conclusion, the African Commission made reference to the landmark case from the Inter-American Court, *The Mayagna (Sumo) Awas Tingni v Nicaragua (Awas Tingni case)*.⁴¹ This judgment adopted an evolutionary interpretation of the right to property as defined in article 21 of the American Convention on Human Rights (American Convention),⁴² in its meaning autonomous of domestic law, recognizing indigenous rights to communal property.⁴³ In its decision, the Inter-American Court acknowledged that indigenous rights to property derived from their traditional use and occupancy patterns and did not depend on state recognition.⁴⁴ The

36 General Comment 22: Article 18, UNHR Committee (30 July 1993), UN Doc HRI/GEN/1/Rev.1 at 35 (1994), para 2.

37 *Endorois* para 185.

38 As above.

39 As above, para 187

40 As above.

41 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACHR (31 August 2001) Ser C/ No 79 (*Awas Tingni case*).

African Commission echoed these sentiments and reinforced them by citing articles 26⁴⁵ and 27⁴⁶ of the United Nations Declaration on the Rights of Indigenous Peoples, and two other Inter-American Court decisions: *Case of the Moiwana Community v Suriname*⁴⁷ and *Yakye Axa Indigenous Community v Paraguay*.⁴⁸

By denying ownership of land to the Endorois, by expropriating their land, and by restricting their access, the African Commission decided that the property rights of the Endorois people had been encroached upon. While encroachment itself is not a violation of article 14 of the African Charter, the African Commission determined that, as the Endorois are an indigenous community, Kenya was required to go beyond conventional factors in considering whether any restriction amounted to a denial of the Endorois' traditions and customs in a way that endangered their very survival. In seeking to establish safeguards that would ensure indigenous peoples' survival if their lands are to be encroached upon for developmental purposes, the African Commission again turned to the Inter-American Court for inspiration,⁴⁹ highlighting three aspects: First, the state must ensure the right of indigenous communities to effective participation, in conformity with

42 American Convention on Human Rights, 144 UNTS 123, 22 November 1969, 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.

43 *Awax Tingni* (n 41) para 148.

44 As above, paras 82-84.

45 United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/61/L.67, 12 September 2007, art 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

46 As above, art 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

47 *Case of the Moiwana Community v Suriname* IACHR (15 June 2005) Ser C/No 124.

48 *Yakye Axa indigenous community v Paraguay* IACHR (17 June 2005) Ser C/No 125.

49 *Saramaka People v Suriname* (28 November 2007) Ser C/No 172.

their customs and tradition regarding development plans. Second, it must guarantee that the indigenous community share in the benefits of the development plan. Third, an environmental assessment must be performed. Only when those factors are respected can the state legitimately curtail indigenous peoples' right to property. The African Commission concluded that no elements of the three safeguards were met and this was tantamount to a violation of article 14 of the Charter.⁵⁰

2.4.3 Article 17: Right to culture

Following the discussion on property, the African Commission looked into alleged violations of article 17, where the Endorois claimed that their group's cultural rights were denied as a result of their limited access to Lake Bogoria and by the damage caused by Kenya to their pastoralist way of life. In this instance, the African Commission determined that

Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.⁵¹

In reaching this conclusion, the African Commission drew inspiration from the HRC as is reflected in their interpretation of article 27⁵² of the ICCPR, which states:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁵³

In reading these together, the African Commission noted that not only did Kenya have a high duty to protect the cultural rights of the Endorois people but that a burden is also placed on African states to preserve the cultural heritage essential to group identity. Due to Kenya's responsibility to protect Endorois culture, in planning the game reserve Kenya had the positive obligation to ensure community access, particularly since access posed no harm to the reserve itself or to Kenya's economic incentive to develop it.

50 *Endorois* para 228.

51 As above, para 241.

52 ICCPR (n 35), art 27:

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

53 General Comment 23: The rights of minorities, UNHR Committee (8 April 1994), UN Doc CCPR/C/21?rev. 1/Add. 5, para 7.

2.4.4 Article 21: Right to free disposal of wealth and natural resources

In determining if a violation of article 21 had taken place the African Commission again sought the views from the Inter-American Court through the *Saramaka* decision. In *Saramaka*, the Inter-American Court interpreted the property rights contained within the American Convention to mean that the state is precluded from interfering with the natural resources located on indigenous land without first consulting with the indigenous peoples and permitting them to benefit from the results of natural resource development.⁵⁴ The African Commission concurred with this interpretation and, as in *Saramaka*, concluded that Kenya could not institute resource development projects within Endorois territory if it affected the natural resources traditionally used by the indigenous community and which were necessary for the survival of the members of that community.⁵⁵

2.4.5 Article 22: Right to economic, social and cultural development

In determining if there was a violation of article 22, the African Commission stressed the connectedness of development with participation. To do this, the African Commission took note of the United Nations Declaration on the Right to Development,⁵⁶ which states that the right to development includes active, free, and meaningful participation in the development process. In *Saramaka*, the Inter-American Court noted that effective participation required the state to consult with said indigenous community ensuring that development plans within their territory were according to their traditions and customs.⁵⁷ For the African Commission, participation also refers to benefit sharing. Again reference was made to the *Saramaka* decision, where the Inter-American Court stated that benefit sharing is not only vital to the right to development but, by extension, serves as an indicator that states are complying with the communal property of indigenous peoples.⁵⁸ Finally, the African Commission noted that the goal of development should be empowerment and this was not the case for the Endorois community.⁵⁹

Declaring that the Government of Kenya was in violation of articles 8, 14, 17, 21 and 22 of the African Charter the African Commission recommended that the respondent state, Kenya:

54 J Murphy 'Extending indigenous rights by way of the Africa Charter' (2012) 24 *Pace International Law Review* 185.

55 *Endorois* paras 260-266.

56 United Nations Declaration on the Right to Development, UN Doc A/RES/41/128, 4 December 1986.

57 *Endorois* para 289.

58 As above, para 294.

59 As above, para 283.

- (a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve.
- (e) Grant registration to the Endorois Welfare Committee.
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- (g) Report on the implementation of these recommendations within three months from the date of notification.

2.5 The ‘aftermath’ of the *Endorois* decision

Following the decision of the African Commission the government of Kenya welcomed the decision and promised to begin the implementation of the recommendations.⁶⁰ James Orengo, Minister of Lands at the time of the ruling, went even further when he stated that the government had no option but to implement the recommendations proposed by the African Commission and claimed that he would be drafting a memorandum for the Cabinet in the coming weeks to ensure that implementation would take place.⁶¹ In addition, at the African Commission’s November 2010 session, the Kenyan delegation continued its commitment to implement the recommendations.⁶²

As stated in the recommendations above, three months after the issuance of the African Commission’s ruling the government was requested to submit a report of the implementation of the recommendations. Unfortunately, the report failed to arrive. In January 2011, during a sitting of the Kenyan National Assembly, Member of Parliament Ekwe Ethuro directly challenged the efforts the Minister of Lands James Orengo was making to implement the decision using a Private Notice to question what steps the Minister had taken to comply with the ruling.⁶³ The Minister refused to provide any information, insisting that the Commission’s findings had no official status and that he had yet to receive a sealed copy of the decision without which he would not be able to take any action towards implementation.⁶⁴ Despite a sealed copy being delivered to the Minister the government of Kenya continued its pattern of inaction towards implementation, going so far as to begin the process of having Lake Bogoria proclaimed as a UNESCO heritage site without consulting

60 Alex Kiprotich ‘Will State respect community’s land rights?’ <https://www.standardmedia.co.ke/article/2000006073/will-state-respect-community-s-land-rights?searchtext=Endorois&searchbutton=SEARCH> (accessed 10 August 2018).

61 As above.

62 Viljoen (n 14) 380.

63 Kenyan National Assembly Official Record, Hansard, 18 January 2011, 17-22.

64 Ibid.

the Endorois community.⁶⁵ Unfortunately, at the time of this writing, there is no publicly available information indicating that the process of domestic implementation has been set in motion as the government continues to insist upon the complexity of the restoration process.⁶⁶

Perhaps on a more positive note, the African Commission has made many attempts to follow-up on this particular individual communication. At the 50th Ordinary Session of the African Commission, which took place from 24 October to 5 November 2011, the Working Group on Indigenous Populations/Communities (Working Group) submitted a report on their research and information visit to Kenya where the Minister of Justice indicated that the government was keen to implement the recommendations of the African Commission and 'hoped that Kenya will indeed honour its international obligations and set the standard for the rest of the continent to follow in this regard'.⁶⁷

After failing to follow through on such commitments, the African Commission took the rare step of holding an implementation hearing in light of Kenya's continued non-compliance with the decision.⁶⁸ The aim of the hearing, which took place in April 2013, was to discuss the implementation of the African Commission's recommendations with the state concerned and interested parties. At this oral hearing the government of Kenya pledged to submit an interim report within 90 days, and a comprehensive report, which should include a roadmap with a timeline and commitments for implementation, at the 54th Ordinary Session of the African Commission, which was to be held on 22 October to 5 November 2013.⁶⁹ Unfortunately, the Kenyan Government did not comply with its pledge, resulting in the African Commission issuing a country-specific resolution that called on the government of Kenya to 'inform the Commission of the measures proposed to implement the *Endorois* decision, and more particularly, the concrete steps taken to engage all the players and stakeholders, including the victims, with a view to giving full effect to the decision'; and, to 'immediately transmit to the Commission, a comprehensive

65 Viljoen (n 14) 380.

66 As above. Viljoen has also noted that political context of Kenya during the pre- and post-*Endorois* period cannot be discounted. In 2002, the National Rainbow Coalition defeated the Kenya National Union, which had been in power since independence in 1963. The new government did not immediately cooperate with African Commission during the consideration of the merits and admissibility of the *Endorois* matter. Despite participation efforts beginning in May 2006, the election of 2007, and the post-election violence of 2008, resulted in a new coalition government of political rivals, with different and opposing partners holding portfolios that are integral to the implementation of the *Endorois* decision, perhaps undermining the efforts of the Minister for Lands. See Viljoen (n 14 above) 384-385.

67 Working Group on Indigenous Populations/Communities 'Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya (1-19 March 2010)' http://www.achpr.org/files/sessions/50th/mission-reports/indigenous-2010-kenya/misrep_spec_mec_indig_kenya_2010_eng.pdf (accessed on 10 August 2018) 45

68 Murray, Long, Ayeni and Somé (n 17 above) 123.

69 As above.

report, including a roadmap for implementation as pledged during the oral hearing at the 53rd Ordinary Session of the Commission'.⁷⁰

In conjunction with these efforts of the African Commission, its Working Group organised a workshop on the status on the implementation of the *Endorois* decision. The objective of the workshop was to bring the government together with civil society representatives in an effort to commence a dialogue and to collectively work on the aforementioned roadmap. Despite the workshop being attended by 19 members of the *Endorois* community, 19 members of Kenyan organisations, and 7 international representatives, not a single delegate from the Kenyan government was present.⁷¹

In addition to the efforts of the African Commission and the Working Group, the involvement of civil society organisations has also been crucial in the implementation efforts. The *Endorois* Welfare Council, the Centre for Minority Rights Development (Kenya), Minority Rights Group International, and ESCR-Net have used international mobilisation and advocacy campaigns to raise awareness about the *Endorois* case and the need for implementation.⁷² Such efforts eventually led to the exploitation of opportunities that are available at the international level for indigenous peoples to have their issues heard, namely at the United Nations Permanent Forum on Indigenous Peoples and through the Universal Periodic Review process, where Kenya was called upon to 'implement the recommendations and decisions of its own judicial decisions of its own judicial institutions and of the African Commission, particularly those relating to the rights of indigenous peoples'.⁷³

The Kenyan government finally took a positive step towards implementation in September 2014, when a Task Force on the Implementation of the *Endorois* Decision (Task Force) was created.⁷⁴ However, the Task Force, as it has been construed, gives rise to some concern. First, the *Endorois* community has no representation on the Task Force, nor is there a requirement for consultation with the *Endorois* community. Second, the Task Force was created to study the decision and to provide guidance on the political, security, economic, and environmental impact of the implementation of the decision. In fact, such criticisms levelled against the Task Force has also been reiterated at the international level, with the UN Committee on the

70 Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision, adopted during the 54th ordinary session held 22 October – 5 November 2013 <http://www.achpr.org/sessions/54th/resolutions/257/> (accessed 1 August 2018).

71 Final Communiqué of the Workshop on the Status of the Implementation of the *Endorois* Decision of the African Commission on Human and Peoples' Rights <http://www.achpr.org/news/2013/10/d96> (accessed 29 July 2018).

72 Viljoen (n 14) 382-383.

73 Report of the Working Group of the UPR: Kenya, UN Doc A/HRC/15/8, 15 June 2010, para 101.114.

74 See 'Endorois task force formed' *The Daily Nation* <https://www.nation.co.ke/news/Endorois-Task-Force-President-Uhuru-Kenyatta/-/1056/2466646/-/hm3ara/-/index.html> (accessed on 17 July 2018). For the Government Notice see here [https://www.escri-net.org/sites/default/files/Government%20Task%20Force%20\(Gazette%20Notice\).pdf](https://www.escri-net.org/sites/default/files/Government%20Task%20Force%20(Gazette%20Notice).pdf) (accessed 7 July 2018).

Economic, Social and Cultural Rights, in their concluding observations for Kenya stating as follows:

The Committee is concerned that the implementation of the decision of the African Commission on Human and Peoples' Rights (276/2003) relating to the Endorois has been long delayed, despite acceptance of the decision of the Commission. While noting the establishment of the Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in communication No.276/2003, the Committee regrets that the Endorois are not represented on the Task Force and they have not been sufficiently consulted in the work of the Task Force (art. 1(2)).⁷⁵

As of the time of this writing, the Task Force has met a number times, including with the civil society organisations that assisted in bringing the case forward to the African Commission, but little noticeable progress towards implementation has been made.⁷⁶

2.6 Indirect implementation?

Despite Kenya's failure to implement the *Endorois* decision it is important to note that a number of the issues enumerated as violations against the Endorois could be addressed under the 2010 Constitution.⁷⁷ Although it is beyond the scope of this article to fully examine possible positive effects the 2010 Constitution could have on indigenous peoples' rights in Kenya some key provisions deserve special mention.

In terms of the right to freely practice one's religion, the 2010 Constitution provides for the right to manifest any religion or belief through worship, practice, teaching, or observance and prohibits any form of restriction or denied access to any institution or facility because of one's belief or religion.⁷⁸ The right to take part in cultural life has received renewed prominence in the 2010 Constitution with article 11 identifying culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. The 2010 Constitution also mentions the need to advance the rights of minorities and vulnerable groups while organs of the state and public officers are obliged to address the needs of minority or marginalised communities.⁷⁹ In terms of land rights, the 2010 Constitution provides for compensation to persons when land is compulsorily acquired by the government⁸⁰ and provides the right for equality and freedom from discrimination.⁸¹ Moreover, the newly adopted Land Act⁸² regulates compulsory land acquisition but when acquisition fails or ceases there

75 Concluding Observations (Kenya), UN ESCR Committee (4 March 2016), UN Doc E/C.12/KEN/CO/2-5, para 15.

76 Viljoen (n 14) 386.

77 Constitution of Kenya 2010 <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (accessed on 8 July 2018).

78 As above, art 8.

79 As above, arts 21(3) and 56.

80 As above, art 40.

81 As above, art 27.

82 Land Act 2012 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%206%20of%202012> (accessed 8 July 2018), s107-110.

is the possibility for the original owners or their successors pre-emptive rights to reacquire the land.⁸³ Furthermore, in Kenya's Combined Periodic Report,⁸⁴ covering 2008-2014, submitted to the African Commission, a number of recently introduced legislative measures represent evolving protective policies as it concerns land rights: First, there is the national Land Commission Act, which manages public land, initiates investigations into present or historical land injustices.⁸⁵ Second, there is the Environmental Management and Coordination Act, which requires an environmental impact assessment to be completed before commencing development projects.⁸⁶ Third, there is the Truth, Justice and Reconciliation Act, which establishes a commission to deal with historical land injustices.⁸⁷ Finally, there is the Community Land Bill, which is designed to protect group rights and vulnerable communities.⁸⁸ Even more aspirational, included within the 2010 Constitution is a Bill of Rights that not only provides standalone economic, social and cultural rights but also specific economic, social and cultural rights for minorities and marginalised communities, and group rights, applicable to communities rather than individuals.⁸⁹

3 THE MAMBOLEO DECISION

3.1 Background

On 23 April 2013 the African Commission issued its ruling in *Mamboleo*. More than half a decade since the decision, the *Mamboleo* case remains notable for the complex set of administrative and judicial procedures Mamboleo had to follow in the hope of seeing the African Commission's ruling being implemented at the domestic level. Two opposing views have interacted in this saga. On the one hand, the Minister of Justice acknowledged the legally binding nature of the African Commission's ruling and concluded that it is legally enforceable. On the other hand, the Commercial Tribunal, seized by Mamboleo to enforce the implementation of the Commission's ruling, reached a different conclusion. It considered that, by its nature, decisions of the African Commission are not subject to compulsory enforcement proceedings because they are simply recommendations and are therefore not binding.

83 As above, s110(2).

84 Republic of Kenya 'Combined 8th – 11th Periodic Report on the African Charter on Human and Peoples' Rights, November 2014' http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf (accessed 15 July 2018).

85 As above, para 105.

86 As above, para 106.

87 As above, para 107.

88 As above.

89 Constitution 2010 (n 77) paras 19-60.

3.2 Summary of facts

The primary element of this case is the non-payment of lawyers' fees. As a lawyer Mamboleo rendered legal services to his client, Pharmakina SA (Pharmakina), a pharmaceutical engineering company based in Bukavu, a city located in the eastern part of the Democratic Republic of the Congo (DRC). Legal services offered by Mamboleo were related to the 1973 nationalization of cinchona plantations by the then Zaïrian state. Taking into account the precarious political situation at that time, Pharmakina promised to pay extra legal fees or, alternatively, substantially increase the monthly fees previously agreed upon under a contract dated 16 December 1978. Failing to pay the extra fees as agreed, Pharmakina doubled the monthly fees when amending the contract in November 1982. However, with the change of the company management a few years later, Pharmakina stopped paying the agreed upon legal fees. That breach of contract was the cause for referring the matter for arbitration before the National Bar Council, which, on 1 April 1998, rendered an arbitral award⁹⁰ that required Pharmakina to pay the sum of 500 000 US dollars to Mamboleo. Unhappy with this decision, Pharmakina initiated proceedings before the Administrative Chamber of the Supreme Court of the DRC, which annulled the award in April 2000.⁹¹ This annulment was pronounced despite the lack of jurisdiction of the aforementioned Administrative Chamber of the Supreme Court.⁹² Moreover, the Chamber refused to defer the matter in order to permit Mamboleo to retrieve his case files, which were, at the time, in Bukavu and were difficult to procure because of the ongoing war that resulted in the Eastern DRC being controlled by rebel forces supported by neighbouring Rwanda.

Not satisfied by this decision, the President of the National Bar Association instituted third-party proceedings on behalf of Mamboleo before the same Administrative Chamber of the Supreme Court in order to obtain the withdrawal of its judgment of 17 April 2000. On the date of the referral of the case to the Commission on 20 April 2005, almost four years after the appeal was filed, the Congolese Supreme Court had still not made any ruling on the matter. Having no additional remedies under the Congolese judicial system, Mamboleo brought the matter before the African Commission by virtue of article 55 of the African Charter.

90 National Bar Council, Arbitral Award No 98/CNO/LH/006 (1 April 1998) (on file with authors).

91 Administrative Chamber of the Supreme Court, Judgment No. 444/445/452 (17 April 2000) (on file with authors).

92 See Rule 16(5) of the Framework Rules of Procedure of Congolese Bar Associations, in conjunction with article 81 of the Organic Law on Bar Associations, referring to the National Bar Council as an arbitration tribunal. Therefore, according to Congolese law, its awards can only be set aside by civil rather than administrative courts.

3.3 Claims made before the African Commission

Before the African Commission Mamboleo contended that the DRC had violated articles 3 and 7(1)(a) and (c) of the African Charter and therefore asked the Commission to declare null and void Judgment No. RA444/445/452 of 17 April 2000 by which the Supreme Court annulled the arbitral award. He also requested the Commission to grant him a fair amount in compensation for having been deprived of the enjoyment of his rights to US dollars 500.000, which was awarded to him by the National Bar Council. Finally, Mamboleo asked the African Commission to recognize the legal obligation of Pharmakina to comply with the Arbitral Award issued by the National Bar Council.

The DRC argued that the Commission should consider the complaint unfounded and that the case be dismissed accordingly.⁹³ The respondent derided Mamboleo for challenging a decision issued by the Administrative Chamber of the Supreme Court without producing a copy of that decision, thereby not allowing the state to make an informed assessment of the objective or subjective motivation of the court being called into question. The DRC therefore argued that as Mamboleo was unable to produce a copy of that decision, the African Commission must dismiss his claim as unfounded since this situation raises serious doubts as to the alleged violation of the rights of the applicant.

3.4 Decision of the African Commission

In its decision, the African Commission found that the DRC had violated the rights protected under articles 3, 7(1)(a) and 7(1)(c) of the African Charter.⁹⁴ The Commission noted that under DRC law in force at the time when the Commission was seized of the matter, the Administrative Chamber of the Supreme Court did not have jurisdiction to entertain an action for annulment of the decision previously rendered in favour of the applicant by a body recognized by law as having civil jurisdiction to hear that dispute in the last resort.⁹⁵ The legal reasoning of the Commission on this matter is that while state parties have a discretion as to the choice of using means peculiar to their judicial system to meet the requirements of article 7 of the African Charter, compliance with this provision is determined in the light of the objectives of the Charter, namely taking all appropriate measures to

93 See *Mamboleo* paras 89-94.

94 As above, paras 95-131.

95 As above, para 109 states:

the Commission notes that Congolese law, jurisprudence and doctrine enshrine the civil nature of the dispute between the Complainant and his former client, Pharmakina Company. Such a civil nature is confirmed by the private status of Pharmakina, a public limited company (PLC), involved in a dispute with an individual, in this case the Complainant.

ensure that justice is delivered by a *competent*, independent and impartial court or tribunal.⁹⁶

Having found that the rights protected under the aforementioned articles have been violated, the Commission responded to the applicant's allegations. It remained committed to the fundamental principle of compensation on the basis that the series of rights guaranteed by the African Charter would be an empty proclamation if it was not backed by the guarantee of a right to restitution or compensation in the event of violation.⁹⁷ Declaring that the DRC has violated the provisions of articles 3, 7(1)(a) and 7(1)(c) of the African Charter, the Commission:

- a) Urges the Democratic Republic of Congo to recognize or cause to be recognized the Complainant's right to claim against Pharmakina in respect of the latter's legal obligation to comply with Arbitral Award No. 98/CNO/LH/006 of 1 April 1998, issued by the National Bar Council of the DRC, which grants the Complainant the sum of 500,000 (five hundred thousand) U.S. Dollars as fees owed to him for services rendered to Pharmakina Company.
- b) Requests the Democratic Republic of Congo to take or cause to be taken the necessary measures aimed at granting the Complainant a fair compensation as damages for harm arising from the prolonged non-enforcement of the decision. The amount of the compensation will be determined in accordance with Congolese law.
- c) Also requests the Democratic Republic of Congo to grant the Complainant compensation for the costs of the procedure which will also be determined in accordance with Congolese law.
- d) Lastly, requests the Democratic Republic of Congo to report in writing within one hundred and eighty (180) days of being informed of this decision, all measures that it has taken to implement these recommendations.

3.5 The 'aftermath' of the *Mamboleo* decision

After the ruling of the Commission had been issued, Mamboleo embarked on a tumultuous journey through administrative and judicial procedures hoping to see the African Commission's decision being implemented domestically. Two procedures were activated for this purpose: a referral to the government through the Minister of Justice; and a referral to the Commercial Tribunal of Bukavu.

3.5.1 Referral to the Governmental authority

Two years after the Commission issued its ruling, Mamboleo requested the DRC government to give effect to the decision of the African Commission through a letter addressed to the Minister of Justice, Guardian of Seals and Human Rights (Minister of Justice) on 20 July

96 As above, para 115.

97 As above, para 133.

2015.⁹⁸ Shortly thereafter, on 31 July 2015, the Minister of Justice responded to Mamboleo's request through an official letter addressed to Pharmakina.⁹⁹ In this letter the Minister of Justice stated that, in accordance with the Constitution and the laws of the DRC, the African Commission's decision in the *Mamboleo* case takes pre-eminence over any judgment or decision pronounced by an internal national tribunal or court.¹⁰⁰ Accordingly, the Minister ordered Pharmakina to reach an agreement with Mamboleo within a reasonable time in order to pay all fees which have been recognized by the African Commission, otherwise Pharmakina would be subject to enforcement measures.¹⁰¹ In other words, the view of the DRC government is that the decision of the African Commission is legally binding with the consequence that the DRC is not permitted to disregard a ruling of the African Commission. However, to complicate issues, in a letter dated 25 September 2015, the Minister of National Economy (Minister of Economy) contradicted the Minister of Justice by stating that

the Arbitral Award was annulled by the judgment RA 444/445/452 issued by the Supreme Court of Justice and that its execution may jeopardize the proper functioning of PHARMAKINA, which was not called upon to present its defense before the African Commission on Human and Peoples' Rights, whose recommendation nevertheless touches on its interests.¹⁰²

While not having the competence to make pronouncements on the implementation of the African Commission's decision, and instead basing his reasoning on more economic grounds meant to preserve the company from the financial risks, the ministerial correspondence nonetheless created confusion and obstructed the implementation of the African Commission's recommendations.

98 Under the Congolese law in force at that time, article 1(B) of Ordinance n° 15/015 of 21 March 2015 gives the Ministry of Justice the power to collaborate with the Office of the High Commissioner for Human Rights, the African Commission, and with other national, regional and international institutions. It also confers to the aforementioned ministry the power to defend the interests of the DRC before international and regional human rights bodies, particularly the United Nations Human Rights Committee and the African Commission.

99 Letter of the Minister of Justice n°2108/BNS/115/KN/Cab/MIN/JGS/2015 on 31 July 2015 (on file with authors).

100 It is important to note that the Congolese constitutional law provides a legal basis for the application of international law domestically. According to article 215 of the Congolese Constitution, international (human rights) treaties are directly applicable in the DRC directly following their ratification. Article 153 provides that it becomes part of the national Congolese law without any act of implementation. However, the language of the treaty plays a decisive role with respect to the domestic enforcement of decisions of judicial or quasi-judicial bodies that the treaty establishes. Although the African Charter is directly applicable in the DRC and its citizens can directly seize the African Commission, the African Charter lacks a clear articulation of the domestic legal effect of the African Commission's decisions. This is the reason why the decisions of the African Commission face obstacles upon enforcement by private parties before domestic courts.

101 Translated from French: '*En vue de vous épargner une mesure d'exécution forcée de la décision de la commission, je vous invite à approcher dans le meilleur délai Maître Mamboleo pour convenir des dispositions à prendre en vue d'une exécution amiable*'.

102 Letter of the Minister of Economy n° 1745/CAB/MIN/ECONAT/JCM/MMG/BLA/2015 on 25 September 2015 (on file with authors).

3.5.2 Referral to the Commercial Tribunal of Bukavu

Despite the clear wording of the aforementioned letter by the Minister of Justice, Mamboleo did not recover his dues. Consequently, Mamboleo decided to refer the case to the Commercial Tribunal of Bukavu, where Pharmakina is headquartered, for enforcement of execution measures. The *Mamboleo* case went through two major procedures before the Commercial Tribunal: an injunction for payment,¹⁰³ and opposition to this injunction.¹⁰⁴

On the basis of the Arbitral Award and the African Commission's decision, Mamboleo introduced a request, seeking to obtain from the President of the Commercial Tribunal an injunction for payment, ordering Pharmakina to pay the amount referred to in the two decisions. The total amount requested was estimated at US \$1 519 600. On 3 June 2016, the President of the Commercial Tribunal of Bukavu issued an injunction for payment¹⁰⁵ and ordered Pharmakina to pay the requested sum.¹⁰⁶ Rather than executing the injunction, Pharmakina filed an opposition on 17 June 2016,¹⁰⁷ supported by two arguments. First, it contended that the Commercial Tribunal does not have jurisdiction over the case arguing that the claim for the payment of legal fees to a lawyer is neither a commercial act nor a mitigating act that may be included in the matters devolved to the commercial tribunals pursuant to article 17 of Law 2/2001 of 3 July 2001 relating to the organization and functioning of commercial tribunals.¹⁰⁸ Second, Pharmakina contended that an injunction for payment cannot arise from the decision of the African Commission, which, according to article 45 of the African Charter, is not a court of appeal and who could not be called upon to annul, revise or revoke decisions emanating from domestic courts. For Pharmakina, the African Commission is confined to render advisory opinions or recommendations to governments. Consequently, Pharmakina took the position that the African

103 Under the Congolese law, this matter is governed by Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, art 1: 'The recovery of an unquestionable debt due for immediate payment may be secured through the injunction to pay procedure'.

104 See Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, art 9: 'The ordinary remedy against the injunction to pay shall be an opposition which shall be brought before the competent court whose president pronounced the injunction to pay'.

105 Commercial Tribunal of Bukavu, Injunction for payment N° 249/2016 (3 June 2016) (on file with authors).

106 The effect of an injunction for payment is that, in the absence of an opposition within fifteen days from notification of the injunction, in the case of withdrawal by the debtor who filed the opposition, the creditor may request the insertion of an executory clause in the ruling. Such insertion has the effect of a decision after trial and is not be open for appeal. See Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, art 16.

107 Under the Congolese law, 'opposition' is the ordinary remedy against the injunction for payment.

108 The issue whether or not the Commercial Tribunal has jurisdiction in this matter is less relevant for issue we want to address in this contribution and will therefore not be discussed here.

Commission's decision cannot be enforced against the company as it was not party in the proceedings before the African Commission. Moreover, Pharmakina maintained that the nature of African Commission's recommendations does not have the required character to lead to an injunction for payment.¹⁰⁹ Referring to the latter argument, the Commercial Tribunal revoked its earlier pronouncements for an injunction, with its reasoning based on the interpretation that articles 30 and 45 of the African Charter, does not give the Commission the powers of a court of cassation. The Commercial Tribunal determined that the African Commission only has the power to make recommendations to states. Therefore, according to the Commercial Tribunal, Mamboleo wrongly relied on the ruling issued by Commission to recover his dues.¹¹⁰ Unfortunately, at the time of this writing, no subsequent developments have emerged since the decision of the Commercial Tribunal.

4 CONCLUSION

The analysis of how Kenya and the DRC addressed the respective cases after the African Commission had found that the state violated the African Charter shows that the implementation of the findings of the African Commission can be controversial. The problem is a legal one but politics can also affect the question of implementation.

First, there remains the issue of the legal value attributed to the findings and recommendations of the African Commission. Are they simply recommendations or are they legally binding? In the midst of doctrinal positions defending opposing views the African Commission has developed an argument in favour of attributing binding force to its decisions. However, the African Commission has not been clear or convincing on this point with the consequence that, in practice, the argument often returns that African Commission's findings are only recommendations. There is, in other words, still a tension between the two views. The *Mamboleo* case illustrates this quite well. The DRC government and the courts advanced different positions on this point. In the *Endorois* case, on the other hand, the Kenyan government never alluded to legal value of the recommendations but seems to shirk its obligations by simply ignoring the African Commission's insistence that the recommendations be implemented. Perhaps by disregarding the recommendations of the African Commission for nearly nine years, one can easily assume that the Kenyan government questions the binding nature of the recommendations.

Second, whether states comply with findings of the African Commission also relates to the power the African Commission has to push states to implement and comply with its findings and recommendations. The African Charter is vague on this question and

109 For more details concerning the allegations of all parties, see the Commercial Tribunal of Bukavu, Judgment R.P.O 045, 32-34 (on file with authors).

110 As above, 35.

the African Commission has, in Rule 112 of its Rules of Procedure, developed a process to monitor implementation and compliance but that process, to a great extent, depends on the good faith and willingness of states. The African Commission can request information and use the tactics of 'naming and shaming' that has to a certain extent led to positive effects elsewhere. However, in a context where the African Commission's work is not very well known to the larger public and states have not been very keen to put human rights issues high on their agenda, it might not be very effective. Practice has also shown that the Commission itself does not strictly follow the steps or apply the deadlines provided in Rule 112, which does not give an incentive to states to comply.

Moreover, once the findings have been published little information is publicly available to demonstrate how the African Commission and respective states interact and how the African Commission is pursuing compliance and implementation. This also negatively affects the effectiveness of naming and shaming approach mentioned above. By the end of 2018, the African Commission has had no publicly available communication with the DRC concerning implementation and, as far as the authors of this paper are aware, the DRC has not submitted the requested documentation to the African Commission detailing how the DRC has implemented the decision. In the *Endorois* case, the African Commission has gone to extraordinary lengths to request information from the Kenyan government but these requests are simply ignored or, even when the government of Kenya makes a pledge, reneged without visible consequence. One is left wondering if implementation efforts must be monitored by civil society as opposed to the African Commission. If states do not adhere to its requests, the African Commission can inform the African Union Assembly of Heads of State and Government (and Executive Council) but sadly these political organs have given scant attention to such requests. What remains is the potential application of Rule 118 of the Rules of Procedure, which gives the discretion to the African Commission to seize the African Court of Human and Peoples' Right (African Court) when a state party has not complied with its findings after the deadlines outlined in Rule 112. The African Court could then confirm the Commission's findings and attach to it the legal character of a judgment as long as the state in question has ratified or formally accepted the jurisdiction of the Court. The advantage of utilising the African Court is that the Protocol to the African Charter is unequivocal on that point and requests states to 'comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.¹¹¹

Third, the legal tradition of each state party also plays a role in the sense that states whose relevant national institutions are familiar with the application of international law will probably be more inclined, compared to other states, to follow the findings of the African Commission. While there is a growing tendency in Africa to adhere to

111 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004), art 30.

the monistic view on the relationship between international and national law, or perhaps officially state that a ratified treaty or convention forms part of domestic law, many states are still to fully understand the consequences of such a choice. This is illustrated by the DRC: while its Constitution clearly opts for a monistic approach to the relationship between international and international law, courts and tribunals very seldom invoke international law with the exception of international criminal law, international humanitarian law, and international business law.

Finally, it must be said that politics also play a role. Many countries on the African continent have a questionable record when it comes to upholding human rights standards. Not considering human rights as a priority they will equally lead to a disregard the African Commission's decisions, which is the most fundamental issue in the unwillingness to implement the recommendations of the African Commission.