

The Emerging Leadership of Endorois Women: An Indirect Impact of the *Endorois* case

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1.

Introduction



1. Introduction¹

In 2010, the African Commission on Human and Peoples' Rights (ACHPR) issued a groundbreaking decision in favor of the Endorois, a minority indigenous community in Kenya, in the case *The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003² (Hereinafter, the *Endorois* case). The ACHPR held the Kenyan government accountable for violating the African Charter on Human and Peoples' Rights, specifically the rights to religious practice, property, culture, free disposition of natural resources, and development.

While this case advances progressive human rights jurisprudence, almost a decade after the judgment was delivered, key recommendations of the case have not yet been enforced. This raises a question that lies at the heart of strategic human rights litigation - what is the role of strategic litigation in concretely realizing human rights? Even in the face of chronic implementation challenges, the *Endorois* case shows that strategic litigation can have powerful indirect impacts, illustrated for example, by the emerging leadership of Endorois women, and a strengthened understanding of substantive equality among the Endorois.



¹ Much gratitude goes to Wilson Kipkazi, Executive Director of the Endorois Welfare Council, for his insightful and detailed comments for this paper. Much appreciation also goes to Christine Kandie and Christine Chebii of the Endorois Welfare Council for their valuable insight.

² For a summary of the case, please see: <https://bit.ly/2OEVzNQ>

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2.

Background



2. Background

In the 1970s, the Kenyan government evicted hundreds of Endorois families from their traditional lands around Lake Bogoria in the Rift Valley to create a game reserve for tourism. In response, and after pursuing legal options at the national level, the Endorois Welfare Council (EWC),³ representative body of the Endorois, took the case to the ACHPR. The legal complaint was filed by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) on behalf of the Endorois. In 2010, the Endorois won their case before the ACHPR. The Commission issued seven recommendations in the case calling upon the Kenyan state to:

- a) Recognize rights of ownership of 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 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.⁴

³ The Endorois Welfare Council (EWC) is a registered civil society organization that was founded in 1995 by elders from the Endorois community in response to the gross violation of their rights, Manual on Gender and Community Development: The Role Of Endorois Women in Safeguarding Community's Rights, Endorois Welfare Council, 2018, p.11, <https://www.escri-net.org/file/ewcmanualdoc>

⁴ The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/2003, Recommendations

At a normative level, this judgment is of immense significance. The decision represents the first legal recognition of African indigenous peoples' rights over traditionally owned lands,⁵ and is also the first case globally which found a violation of the right to development.⁶ As indigenous people in all regions continue to face egregious violations of their rights in the context of land grabbing, this case serves as a clear reminder that indigenous rights are human rights, and States must respect, protect and fulfill these rights.



⁵ Lucy Claridge, Landmark ruling provides major victory to Kenya's Indigenous Endorois, Minority Rights Group International, July 2010, p.2, <https://www.refworld.org/pdfid/4ca571e42.pdf>

⁶ Ibid

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3.

The Implementation Process



3. The Implementation Process

Effective implementation is essential to transform positive human rights judgments into concrete benefits. Since the judgment was delivered, EWC has advocated for the implementation of the African Commission’s ruling. The Endorois have created infrastructure for example: various committees to support the implementation process, including the Lake Bogoria management committee, the compensation committee and the lands and boundary committee; and multiple forums that would give Endorois people more opportunities to engage in negotiating enforcement of the decision, including the Endorois women forum, youth forum and religious leaders’ forum. EWC has also developed tools to support establishing a common framework for negotiation processes, including the Lake Bogoria management plan and a draft Endorois boundary map. In addition, EWC has engaged in advocacy at the national, regional and international level for implementation of the recommendations in the case, engaging with county and national government representatives, as well as with the ACHPR and the United Nations (UN).⁷

Towards enforcement, in 2013, the ACHPR issued a resolution calling on the Kenyan government to implement the case,⁸ and in 2016, the UN Committee on Economic, Social and Cultural Rights recommended that the Kenyan government “implement, without further delay, the decision of the African Commission on Human and Peoples’ Rights (276/2003) and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process.”⁹

⁷ See generally, Manual on Gender and Community Development: The Role of Endorois Women in Safeguarding Community’s Rights, Endorois Welfare Council, 2018. Interviews with members of the Endorois people, 2018-2019

⁸ African Commission on Human and Peoples’ Rights Resolution calling on the Republic of Kenya to implement the Endorois decision, 2013, www.achpr.org/sessions/54th/resolutions/257/

⁹ CESCR’s [Concluding Observations](#) on the combined second to fifth periodic reports of Kenya (2016), paras. 15-16

National and international allies supported the efforts of EWC to implement the case. In this context, since 2012, ESCR-Net (International Network on Economic, Social and Cultural Rights) joined these efforts to advance implementation of the specific decision and land-related rights generally, with the leadership of members from the Strategic Litigation Working Group and the Women and ESCR Working Group, including MRG (UK), CEMIRIDE (Kenya), Dejusticia (Colombia), Hakijamii (Kenya), Kenya Human Rights Commission (Kenya), Kenya Land Alliance (Kenya), Ogiek Peoples' Development Program (Kenya), Socio-Economic Rights Institute (South Africa), Association for Women's Rights in Development, and Global Initiative-ESCR (US), among others. In relation to implementation efforts, emphasis has been placed on the role of women in advancing implementation and in engaging and taking leadership roles in land rights more broadly.

Collective efforts supported by ESCR-Net include:

- community workshops conducted in 2013, 2014, 2015, 2016 and 2018, regarding issues of compensation, restitution, registration, community bylaws, and women's leadership;
- various strategic exchanges with community members and allies, as well as engagement with the ACHPR, the UN (including the Commission on the Status of Women and Permanent Forum for Indigenous Rights), the government task force (created in 2014 with a one-year mandate to study the implementation of the Endorois decision) and various government agencies (to create opportunities for more meaningful dialogue between the Endorois and the Kenyan government);
- a survey on immaterial losses to support negotiation with the government regarding a monetary amount to compensate the community for such losses; and
- the formulation of draft Endorois community bylaws/membership code (to provide criteria for identifying who may be recognized as a member of the Endorois community).

The Endorois, to date, continue to lead from the front towards implementation of their case, but currently face legal, technical and financial obstacles in taking forward their advocacy plan for successful implementation.

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4.

Direct and
Indirect Impacts



4. Direct and Indirect Impacts

The exhaustive efforts of the Endorois as well as partners supporting their work has resulted in modest gains in implementing or at least partially enforcing certain recommendations of the case.

⇒ The Endorois now have access to Lake Bogoria and its surrounding sites for religious and cultural rites and to graze livestock (in line with case recommendation b).

However, this was not permitted by the government in explicit compliance with the judgment, but more accurately can be attributed to community pressure.¹⁰ Wilson Kipkazi, the executive director of EWC, has suggested that there is a link between government permission to access Lake Bogoria and the case in the context of the “immense international pressure the Endorois have been able to galvanize through their sustained advocacy in relation to enforcement of the Endorois decision.”

⇒ The Endorois receive royalties from some economic activities within the Lake Bogoria National Reserve and have benefitted to some extent from employment possibilities within the Reserve (in line with recommendation d).

Through increased political leverage on the basis of the ACHPR decision, the Endorois were able to negotiate with the County government of Baringo and raise the Endorois revenue share from 4% to 10%.¹¹

¹⁰ Interview with Wilson Kipkazi, executive director of EWC, 18 May 2019

¹¹ Interview with Christine Kandie, EWC, 28 May 2019

In 2015, the Kenyan Wildlife Service (KWS), in context of the integrated management plan for the Lake Bogoria National Reserve, invited the Endorois to collaborate including on the access and benefit-sharing aspects of the management plan.¹² This invitation resulted from a direct call by UNESCO after the Endorois challenged the government for creating the Lake Bogoria World Heritage Site without consulting the Endorois people and in disregard of the African Commission decision declaring Lake Bogoria to be Endorois land. The UNESCO call may have been influenced by the African Commission decision, but government action appears to have been more motivated by other considerations, including responding to UNESCO and state reporting in relation to the Nagoya Protocol which Kenya has signed and ratified.¹³ Nonetheless, it could be argued that by including the Endorois in the context of benefit sharing, particularly in relation to the Nagoya Protocol, the government has implicitly recognized the Endorois claim to the land. In fact, the government recognized the land as belonging to the Endorois in a report presented at a UNESCO meeting in Baku, however as land the government holds in trust on behalf of the community.¹⁴ The Endorois also received royalties from Novozymes for genetic research conducted at Lake Bogoria, which resulted in commercial production, but this was primarily due to corporate social responsibility guidelines at the company.

As regards special employment opportunities, the Endorois picketed and demonstrated against the County government and disrupted tourism to achieve this. The Governor himself was involved personally in the negotiations, and the Endorois now have seven youths employed at the Lake Bogoria reserve. The ACHPR case has supported growing political mobilization of the Endorois to demand what was recommended by the Commission.

¹² Experiences and Lessons Learned from the Development and Implementation of Community Protocols and Procedures, Natural Justice & the ABS Capacity Development Initiative, p.8, <https://www.cbd.int/abs/submissions/assessment/naturaljustice-abs-initiative-en.pdf>

¹³ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010, <https://www.cbd.int/abs/>

¹⁴ Email exchange with Wilson Kipkazi, executive director of EWC, 14 August 2019

The EWC was registered (in line with recommendation e) but this took place in 2007 even before the judgment was delivered. However, it is connected to the case. The Commissioners pressed the government representatives during a case hearing to explain why they had not yet legalized the community organization through registration, and the registration came through after that exchange.¹⁵

⇒ The state has also engaged in dialogue on implementation (in line with recommendation f) for example, through the aforementioned task force, but the effort here from the government was minimal. The task force only came to the community once without proper notice, and when the Endorois asked for two weeks to prepare adequately, the task force never returned.¹⁶ The term of the taskforce has also not been renewed to date.

Nothing has been done so far in terms of explicit recognition of the rights of ownership of the Endorois and restitution of their ancestral lands (recommendation a), and adequate compensation for loss suffered (recommendation c).

The Endorois have struggled for their land rights since the 1970s, and despite a judgment in their favor, still have neither their land nor compensation. The Kenyan government has failed to meet substantive recommendations of the case, and this has had negative consequences for many thousands of Endorois in terms of their human rights. To what extent then has this case been instrumental in realizing the human rights of the Endorois? To engage with this inquiry, we need to look beyond the direct impacts of the case. There can also be indirect impacts that have concrete value and meaning for plaintiffs.

Often studies of strategic litigation and implementation are constrained by a “win or lose” understanding of case outcomes. More recent studies take a multidimensional look at impact, including attention to non-material changes, such as indirect shifts in attitudes, behaviors, discourse, and community empowerment.¹⁷ In fact, litigation’s indirect or “radiating effects” can often be more significant than formal judicial outcomes.¹⁸

¹⁵ Interview with Wilson Kipkazi, executive director of EWC, 18 May 2019

¹⁶ Ibid

¹⁷ James A Goldston & Erika Dailey, Strategic Litigation Impacts: Insights from Global Experience, Open Society Justice Initiative, 2018, ps.18-19, <https://bit.ly/2LMDslR>

¹⁸ Celeste L. Arrington, The Mechanisms behind Litigation’s “Radiating Effects”: Historical Grievances against Japan, Law and Society Review, Volume 53, Issue1, 29 January 2019, p.7, <https://doi.org/10.1111/lasr.12392>

While the Endorois have made limited material gains from the case, the community has “gained a degree of self-organization, increased internal communication, and improved morale that would scarcely have been possible but for the litigation’s function as a focal point of advocacy.”¹⁹ Apart from the indirect impacts already explored in the course of this paper, the Endorois case has resulted in other substantial indirect impacts.

These include, a stronger sense of Endorois identity that has been strengthened via collective work on the case;²⁰ a greater awareness amongst community members of their human rights and the importance of political participation;²¹ the Endorois community being recognized by other communities as champions of human rights and role models (to provide a compelling example from Kenya, members of the indigenous Ogiek community, who in 2017 won a major case before the African Court of Human and Peoples’ Rights, have reported that they would never have thought to litigate had they not become aware of the experience of the Endorois);²² the creation of key alliances at the local, national, regional and international levels that support the community in various ways; progressive land reform in Kenya (a potential indirect impact since drawing direct causality in this context can be difficult);²³ as well as continued community mobilization around the case which is building the skills and infrastructure needed in the larger struggle for the realization of a range of rights.

One particularly important indirect impact of the case, explored in more detail below, is how the judgment and the implementation thereof has affected gender norms within the Endorois. While the case itself was not directly focused on gender equality, it provided the impetus to advance substantive equality within the Endorois community.

¹⁹ James A Goldston & Erika Dailey, *Strategic Litigation Impacts: Insights from Global Experience*, Open Society Justice Initiative, 2018, p.52, <https://bit.ly/2LMDsIR>; Interview with Wilson Kipkazi, executive director of EWC, 18 May 2019, p.62

²⁰ Interview with Wilson Kipkazi, executive director of EWC, 18 May 2019

²¹ Interview with Christine Kandie and Christine Chebii, 28 May 2019

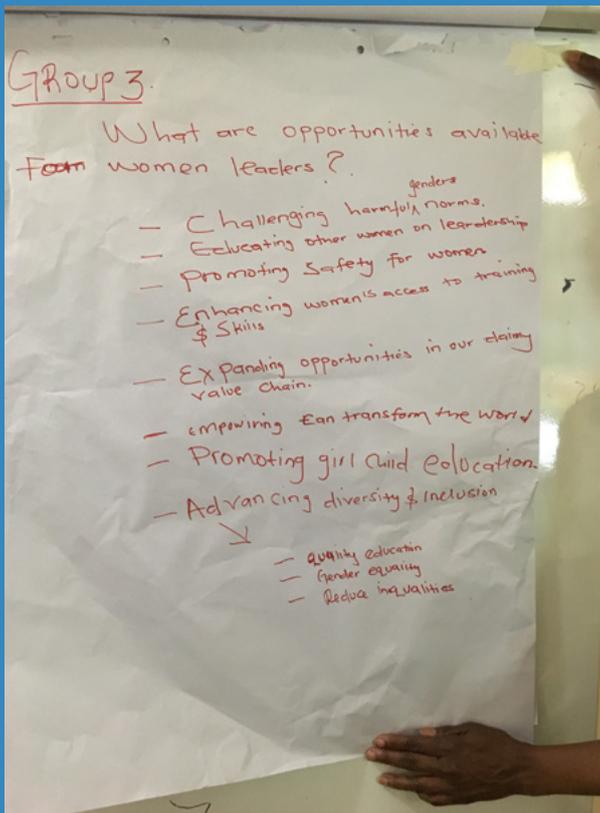
²² James A Goldston & Erika Dailey, *Strategic Litigation Impacts: Insights from Global Experience*, Open Society Justice Initiative, 2018, p.47, <https://bit.ly/2LMDsIR>

²³ James A Goldston & Erika Dailey, *Strategic Litigation Impacts: Insights from Global Experience*, Open Society Justice Initiative, 2018, p.52, <https://bit.ly/2LMDsIR>; Interview with Wilson Kipkazi, executive director of EWC, 18 May 2019

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5.

Exploring gender equality and women's leadership as an indirect impact



5. Exploring gender equality and women’s leadership as an indirect impact

Today, Endorois women are actively engaged in efforts to advocate for the implementation of the ACHPR decision in ways that have started to shift gender dynamics within the Endorois, with leaders recognizing the importance of substantive gender equality, and women taking leadership roles, particularly in relation to securing land rights more broadly.

Following traditional rules and customs, the Endorois struggle for land had in the past been mainly led by men. After the 2010 judgment, initially there was minimal participation from women with respect to implementation of the case. However, Endorois women working at EWC, as well as partner organizations, including MRG and ESCR-Net, advocated for including women in relation to implementation processes. MRG, for example, organized passports for 18 Endorois women to facilitate travel in relation to international advocacy towards case implementation.²⁴ For the aforementioned survey on immaterial losses, Christine Chebii from EWC, with the support of MRG and other ESCR-Net members, insisted that half the community members surveyed for this process had to be women.²⁵ Moreover, ESCR-Net encouraged and EWC supported the strong participation of women in the community workshops on case implementation, with women composing over half of the community representatives at a 2015 meeting co-organized by EWC and ESCR-Net.

At this meeting, it was decided through the drafting of community bylaws (although this is yet to be formally ratified) to register all Endorois women, including those who marry non-Endorois, as community members.

²⁴ Interview with Christine Kandie, 28 May 2019

²⁵ Interview with Christine Chebii, 28 May 2019; Rebecca Marlin, “The Endorois decision” – Four years on, the Endorois still await action by the Government of Kenya, MRG, 23 September 2014, <https://bit.ly/30popmk>

If ratified, these bylaws recognizing gender equality, have bearing on implementation, as the ACHPR judgment impacts only those who are recognized as Endorois. Even if it is not formally ratified, these bylaws and the accompanying discussions show openness from the Endorois leadership to positively engage with issues of gender equality. It is noteworthy that these draft bylaws push beyond the common practice of other indigenous communities in Kenya, which would again make the Endorois a model for others to consider.

In 2016, ESCR-Net members joined with EWC to organize the first workshop for Endorois women leaders in the context of implementing the ACHPR decision. Another workshop in 2018, again co-organized by ESCR-Net and EWC, brought together many of the same participants from the women's workshop in 2016 to build on the previous strategic conversations and skills development. Envisioned as a training of trainers, the 2018 workshop aimed to support women to conduct secondary trainings or dialogues, as well as to play a key role as organizers within their own communities, helping to shape ongoing advocacy and decision-making towards implementation of the ACHPR decision and beyond.²⁶

The women participants were powerful in articulating their vision for their community and in envisioning a path forward in the ongoing struggle for land and natural resources. In terms of political participation and leadership, Endorois women shared that taking leadership roles and participating in political debates can be challenging due to cultural barriers, gender stereotypes and lack of resources, among other things. Yet, despite all the challenges, the women participants expressed a real desire to participate in decisions that affected them and their families, which includes implementation of the case. One participant expressed that when she is a leader in the community, her daughter and other girls will know this is a possibility, and that this is the key to strengthening the position of women.²⁷

²⁶ Endorois Women lead on land rights struggle, ESCR-Net, 26 September 2018, <https://www.escr-net.org/news/2018/endorois-women-lead-land-rights-struggle>

²⁷ Endorois Women lead on land rights struggle, ESCR-Net, 26 September 2018, <https://www.escr-net.org/news/2018/endorois-women-lead-land-rights-struggle>; Endorois women and men join forces in their struggle for the right to land in Kenya, ESCR-Net, 17 August 2016, <https://www.escr-net.org/news/2016/endorois-women-and-men-join-forces-their-struggle-right-land-kenya>; Report on the Training of Trainers for Endorois Women, ESCR-Net, May 2018, <https://bit.ly/2XAh1aT>

The Endorois women at both workshops also collectively developed positions and resolutions to present to key Endorois leaders including EWC board members and community elders. The positions and resolutions centered primarily on gender equality with a focus on participation and leadership in key committees and decision-making processes in relation to the ACHPR decision; priorities regarding compensation; land ownership; economic development; capacity building; benefit-sharing and access to information. The board members and other key leaders accepted the resolutions and pledged their support for effecting the resolutions in practice, making concrete commitments towards gender equality via shared leadership in the Endorois struggle to implement the ACHPR ruling.²⁸

Supported by Endorois leadership and partner organizations, some of the key milestones achieved by the Endorois women over the past few years include: successful elections for the leadership of the aforementioned Endorois women forum; inclusion of Endorois women in the Lake Bogoria revenue sharing committee; participation of Endorois women in ACHPR sessions in Banjul, Gambia, and before the United Nations Permanent Forum on Indigenous Affairs as well as the United Nations Commission on the Status of Women, among other spaces. In 2019, for the first time, three women were elected to the board of EWC.

Currently EWC is prioritizing the capacity building of Endorois women in preparation for the 2022 elections in Kenya.

A number of male Endorois leaders have encouraged women's leadership and taken concrete steps to advance gender equality, for example, by mandating the inclusion of women on the various committees formed to advance implementation of the case. This has substantially strengthened the Endorois struggle, from ensuring accurate documentation of losses to recognizing women as full participants, organizers and leaders in the ongoing struggle for land and other rights.

This indirect impact on gender norms is powerful, as women becoming politically engaged and taking on key decision-making roles are key conditions for women's equality. It is a fundamental human right of women to participate in decisions that affect their lives. Moreover, women's participation is a critical condition for true democracy: women have a unique set of issues and experiences that must be adequately represented in decision-making processes at the community, county and national levels.

²⁸ Ibid

Their engagement has a substantial impact on political agendas. Community debates and government policies are more likely to be aligned with women's needs and interests if women are able to participate effectively.²⁹

“Women have come together and mobilized around the case. Our work with partners has supported this, as has our work within our communities. We have now gone from male leadership to shared leadership. We feel privileged to take on leadership. It means everything to us.

We have studied this case for a long time. If women are included on implementation, we are stronger in our ability to make change happen. When women are involved, we bring the issues women confront to the table, to negotiations. And when we take on leadership, it can be difficult, but we are also being respected.”³⁰

--Christine Kandie, EWC

²⁹ Primer on Human Rights and Women's Leadership, ESCR-Net, 2018, p.16 <https://bit.ly/2xEWXVo>

³⁰ Interview with Christine Kandie, 28 May 2019

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6.

Conclusion



6. Conclusion

Fully successful implementation of human rights judgments remains too infrequent.³¹ This is reflected in the modest progress in implementing key recommendations of the Endorois case. It is imperative that the Kenyan government immediately act to implement the Endorois case in its entirety, and thus meet their obligation to respect, protect and fulfill human rights.

However, in considering the role of strategic litigation in advancing human rights, it is important to consider both direct impacts and indirect impacts. As regards indirect impacts, the Endorois have clearly achieved concrete human rights and other gains. On the issue of women's political participation and leadership, in particular, the impact of the case in advancing gender equality within the Endorois community is remarkable, despite the ongoing work to fully realize substantive equality. It influences structural change by confronting entrenched power dynamics within society and taps into the transformative potential of strategic litigation.

A few key lessons that emerge from the implementation of the Endorois case, underpin any progress made so far, and have the potential of transferability in other jurisdictions, include:

- where applicable, affected communities must be central to shaping demands, and implementation is more strongly facilitated when these communities are organized (communicating, aligned on goals and messaging, and ideally ready to act towards demanding implementation);
- a network of allies and partner organizations in litigation and implementation efforts can provide support, amplify advocacy and intensify pressure against governments if they work in close partnership with resisting communities;

³¹ See generally, Malcom Langford et al. (eds.), *Social Rights Judgments and the Politics of Compliance- Making it Stick*, 2017, p. 3. Also see, César Rodríguez-Garavito and Ashley Kauffman, *Making Social Rights Real: Implementation Strategies for Courts, Decision Makers and Civil Society*, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia Working Paper No. 2, 2014, pgs 7-11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837110

- if demonstrations, lobbying or other national-level advocacy on implementation leads to excessive state retaliation and violence, regional and international advocacy—involving community leaders—might be more strategic, depending on context; and
- human rights activists and litigators should develop strategies to leverage implementation of specific cases to support wider goals of realizing human rights.

Strategic litigation, as part of a wider community-led advocacy and organizing strategy, can play a significant, if limited role, in directly and indirectly realizing human rights relating to land and beyond.



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