

NATURE CONSERVATION IN TRADITIONAL LANDS: RECONCILING ENVIRONMENTAL CONCERNS WITH THE RIGHTS OF INDIGENOUS PEOPLES

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ABSTRACT

This article analyses the apparent conflict between environmental protection and the interests of indigenous peoples generated by the pillars of the fortress approach to nature conservation areas. This approach has historically forced the displacement of indigenous peoples from their lands, therefore violating their rights, especially the rights to property and development. This article demonstrates that the African Court of Human Rights and the Inter-American human rights mechanisms have already asserted the compatibility between the concerns with environmental protection materialized in the creation of conservation areas and the rights of indigenous peoples since they carry out a respectful and sustainable relationship with the land and with natural resources. This rationale has permeated international policy regarding environmental protection, provoking a shift to a conservation approach concerned with the rights of indigenous peoples.

Keywords

Indigenous peoples; conservation areas; environmental protection; right to property; right to development; regional human rights mechanisms; sustainable development.

1. CONSERVATION AREAS: THE NEGATIVE IMPACTS OF A TRADITIONAL APPROACH

The World Commission on Environment and Development underscored in 1987 the trend of unsound exploitation of natural

resources causing undesirable impacts on the environment. This pattern of development, which ignores the limits of the environment to absorb human activities and recover itself, could not be infinitely maintained.

In this scenario, the international community has engaged in formulating a new concept that could overcome the tensions arising from a pattern of economic growth which has been undermining social advances and ecological preservation. Under the framework of sustainable development, environmental concerns and development have been interconnected as they depend on each other to significantly contribute to human welfare. In that sense, the preservation of the environment is indispensable for the achievement of a reasonable social and economic development.

Regarding that "environmental protection is thus inherent in the concept of sustainable development", conservation measures are essential for safeguarding the sustainability of natural resources and underpinning vital life processes that are essential for the maintenance of ecosystems. A priority dimension of conservation efforts has been the protection of biodiversity.

On the occasion of the Conference on Environment and Development in 1992, the international community agreed to establish an international legal framework to address the imperative concern with biodiversity protection, consolidated in the Convention on Biological Diversity. Among many strategic measures to preserve the environment, protected areas stand out as one the Convention encourages the state parties to undertake to advance the protection of natural diversity. Within the

scope of this international treaty, a protected area comprises “a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives”. This international treaty determines that state parties shall implement conservation areas in order to protect biological diversity within their territories.

The Conference of the Parties to the Convention on Biological Diversity adopted in 2010 the revised Strategic Plan for Biodiversity. It provides twenty targets that should be met by States until 2020. As Target 11, States must coordinate conservation measures involving the establishment of protected areas to preserve “17 percent of territorial and inland water areas”. Protected areas were also incorporated into targets of the Sustainable Development Goal 15 which addresses the issue of sustainable use of natural resources and protection of ecosystems.

In this sense, States have commonly resorted to the establishment of conservation areas as a strategic measure to meet their commitment to the protection of the environment. Albeit these initiatives are advanced to preserve features of the Earth’s ecosystems, their implementation has not been immune to provoking negative consequences, especially due to the manner States have managed to institute these protected areas.

The establishment of conservation areas is a recent practice, though it became a central measure within conservation policy. Since the establishment of the first protected area – the Yosemite Park in 1864 -, a traditional paradigm, known as ‘fortress conservation’, has prevailed, which considers that a protected area needs to be isolated from any kind of human activity due to its harmful character. This approach does not take into consideration the beneficial role of indigenous people in environmental preservation. Historically, lands targeted to become conservation areas have been expropriated, involving the forced displacement of indigenous people, and placed under State management. Such perception over conservation efforts has caused serious infringements to the rights of indigenous peoples.

The institution of protected areas without due concern to indigenous peoples who live in these territories has prejudicially interfered with their relationship with traditional lands. These reserves have constantly forced indigenous

communities to leave their ancestral lands. Without access to the territories, their rights to practice cultural and spiritual traditions are also impaired. Where indigenous populations were authorized to remain on their lands, infringement to their rights has also been observed due to severe restrictions to livelihood: prohibitions on hunting and extraction of relevant plants to indigenous cultural traditions or impediments to pastoralist and agricultural practices.

To understand the scope of the impact conservation areas has upon the rights of indigenous peoples, it is paramount to refer to the role of land within their universe. In this context, International Law has evolved to safeguard the special bond indigenous peoples have with traditional territories through the content of specific rights concerning the property and natural resources.

2. INDIGENOUS PEOPLES AND THE VALUE OF TRADITIONAL LANDS

The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter, Declaration) is the outcome of a wide international process to recognize the rights of these peoples who have for so long remained invisible to domestic legal frameworks as well as to International Law. Previous efforts to set standards of protection were led by the International Labour Organization (ILO), which adopted the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169). Although only 23 States have ratified this ILO Convention, it ignited the debate within the United Nations over the rights of indigenous peoples, culminating in the adoption of the Declaration.

The Declaration has consolidated the international arena as a strategic forum to tackle indigenous peoples’ historical plights. Its preamble recognizes the recurrent harms inflicted on indigenous peoples, specifically due to the removal of traditional lands, which has “prevent[ed] them from exercising, in particular, their right to development in accordance with their own needs and interests”.

The Declaration pronounces that indigenous peoples, collectively and individually, are entitled to all human rights enshrined in international human rights treaties. Through its

provisions, these rights are, then, read under the social, economic, and cultural circumstances in which indigenous peoples live. Albeit its non-binding nature, the Declaration comprises authoritative guidance for interpreting rights in regard to indigenous peoples' particularities.

Traditional lands are a communal tenure for indigenous peoples. Hence, the whole community is entitled to enjoy the environment surrounding them as much as all are responsible for taking care of it on behalf of the group and future generations. Thus, of particular relevance was the recognition, within the Declaration, of the special attachment indigenous peoples have to the land by affirming their collective rights to the lands. In that sense, the Declaration affirms that "indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired". This encompasses more than the traditional right to property but indeed the protection to the indigenous peoples' way of life, which is strongly attached to traditional territories. The Declaration even provides for in article 26 their right "to maintain and strengthen their distinctive spiritual relationship" with their traditional lands and natural resources.

Besides the economic livelihood dependency, indigenous peoples' spirituality, cultural identity, and social organization are rooted in this profound relationship with the land. This is better expressed in the words written down in the Kimberley Declaration:

Our lands and territories are at the core of our existence; we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories and they are inextricably linked to our survival and the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management.

Therefore, their rights to lands, territories, and resources comprise a fundamental pillar for their development. In that sense, these rights, jointly with the right to self-determination, have been remarked as central for safeguarding all other rights of indigenous peoples. In this regard, the deprivation of access and use of traditional lands leads to the impoverishment of indigenous communities and, consequently, the undermining of a range of human rights.

The Declaration protects indigenous peoples from being forcibly evicted from their lands. Their displacement is permitted under the Declaration only when they, after consulted, give free, prior, and informed consent to their relocation and it is conditioned to fair compensation for the loss indigenous communities will suffer. The Inter-American Court of Human Rights (IACtHR) underscored in the case *Chitay Nech et al* the negative effects forced displacement could entail to indigenous peoples: it results in "plac[ing] them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups".

Significantly, land-connected rights specified in the Declaration also encompass a right to natural resources. The Declaration has advanced the previous stance adopted in the ILO Convention No. 169 – which refers only to the right to use natural resources – and stood for the interests of indigenous groups by affirming the right to use, own and control natural resources. The IACtHR has adopted the same rationale by encapsulating the right to natural resources into the right to property (art. 21) enshrined in the American Convention. It expressed this discernment in the case *Saramaka People v. Suriname*:

the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right was not connected to the natural resources that lie on and within the land. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property.

The indigenous peoples' rights over land, however, do not originate in similar terms to the common notion of land tenure, based on State recognition through a formal title; rather, indigenous groups' ownership over territories is determined through the traditional use and occupation of these lands. In circumstances of forced eviction or transference of lands to third parties without the indigenous peoples'

consent, they still uphold rights over the lands and, thus, have the right to redress. This right requires the restitution of lands to indigenous peoples as the first measure. Where “this is not possible, just, fair and equitable compensation” ought to be provided for indigenous groups. This compensation should be carried out through the grant of other territories “of equal extension and quality...chosen by agreement with the members of the indigenous peoples”.

Large-scale projects of exploitation of natural resources have been the constant source of violations to the indigenous peoples’ rights to traditional lands and natural resources. Unexpectedly, these rights have also been infringed by conservation initiatives established within traditional territories. The fortress conservation approach to protected areas has generated tensions with the interests of indigenous peoples since it ignores the sustainable and special bond these peoples carry with the land.

The Declaration recognizes in its article 29 the role of indigenous communities in preserving the environment to such an extent that this provision safeguards a right of these peoples to “the conservation and protection of the environment and the productive capacity of their lands or territories and resources”. In this sense, the case-law of regional human rights courts has demonstrated that conservation efforts do not require a compromise of indigenous peoples’ needs.

3. REGIONAL HUMAN RIGHTS SYSTEM’S RESPONSE: A COMPATIBILITY APPROACH

The negative impacts of conservation efforts in the rights of indigenous peoples have already been under scrutiny of regional human rights mechanisms. The African human rights system found, in two distinct cases, that the Kenyan State had violated several rights of indigenous peoples after the creation of conservation areas within their traditional lands.

The first case, brought before the African Commission on Human Rights, involves the forced displacement of the Endorois community in 1973 from its ancestral lands for the establishment of a game reserve in the area. The African Commission determined that the eviction resulted in the violation of several rights

of the Endorois people, among them, the right to property. According to article 14 of the African Charter, the right to property may be limited only for the reason of “public need or in the general interest of the community and accordance with the provisions of appropriate laws”.

The Commission refused the State’s argument that the removal of the Endorois people from their ancestral lands was justified by the common interest of environmental protection, asserting that “the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystem”. Hence, through this rationale, the impediments to the right to property of the Endorois community were not proportionate to the deemed public need in the case, environmental conservation.

The restitution of the ancestral lands to the Endorois people comprised one of the final recommendations of the African Commission to the Kenyan State, together with the recognition of the Endorois’ rights to own these lands. The Commission observed that International Law does not accept the mere access of indigenous peoples to their traditional lands as this would maintain them under a vulnerable situation. As the IACtHR has established in the *Saramaka* case, *de jure* ownership is the only measure consistent with international law. Thus, the destination of the reserve to environmental conservation does not impede the restitution of the lands to the Endorois community with the legal recognition of ownership to this indigenous group.

The African Court, in the *Ogiek* case against the Kenyan State, similarly did not find conservation interests as a reasonable ground to infringe the rights of the Ogiek people. The Kenya Forestry Service issued in 2009 an eviction order to the Ogiek community to establish a reserved water catchment zone in the ancestral lands of the Mau Forest. The Court concluded that the removal of indigenous Ogiek people was not “necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest”. The Kenyan State could not prove before the Court that the Ogiek hampered the preservation of the environment in the Mau Forest. In its final terms, the African Court ordered the State to “take all appropriate measures within a reasonable time frame to remedy all the violations”. There is still pending a decision on reparations in this case.

Therefore, both decisions have concluded that the Kenyan State, whilst instituting the protected areas, acted in violation of the Endorois and the Ogiek peoples' rights to property (art. 14) and to freely dispose of natural resources (art. 21), besides other rights. Their eviction from ancestral lands constituted a measure that disregarded their entitlement to the lands and their reliance on the environment where they live. The deprivation of access to the lands also infringed these peoples' right to development. In the African Commission's view, the right to development involves substantive and procedural dimensions, which must be equally guaranteed to satisfy this right. The land deprivation caused a precarious situation for the Endorois people which had their means of livelihood damaged due to the lower quality of the lands to where they were displaced. Regarding the procedural element, the regional body deemed that the right to development entails the participation of indigenous peoples in the decision-making processes that may have an impact on their lives. The Kenyan State did not properly consult the Endorois people and did not obtain prior and informed consent before attributing the lands around the Lake Bogoria as a game reserve.

The State also violated the right of the Ogiek community to economic, social, and cultural development since the denial of access to their ancestral lands resulted in the undermining of Ogiek's way of life. Under the authoritative guidance of the Declaration on the Rights of Indigenous Peoples, especially considering article 23, the Court affirmed that the forced displacement of Ogiek people restricted their ability to determine the means through which they could enjoy the right to development.

The Inter-American human rights system has been a reference in terms of safeguarding the rights of indigenous peoples. Amid many cases the IACtHR has received concerning indigenous peoples, it had to deal with the impact of conservation initiatives in the *Kaliña and Lokono Peoples v. Suriname* case. It refers to the situation of Kaliña and Lokono peoples who lost access to their ancestral lands after Suriname authorities established three nature reserves within their lands. The case also involved the environmental effects of States' authorization to a mining operation in certain parts of Kaliña and Lokono's territory and the issuance of property titles over fractions of these lands to individuals.

This case is one among other cases in which the IACtHR held Suriname responsible for violations of indigenous peoples' rights. Hence, the *Kaliña and Lokono* case was not the first one in which the Court pointed out that the domestic legislation of Suriname does not recognize the juridical personality of the indigenous and tribal peoples living in Suriname's territory. This hampers the exercise of collective rights by these peoples, especially their collective right to property. Due to the absence of recognition of juridical personality to Kaliña and Lokono peoples, they have encountered many barriers to guarantee their right to property over their ancestral lands under Suriname's laws.

Regarding the centrality of the land and its resources to indigenous peoples, the IACtHR, within its indigenous peoples-related case law, has been relying on an interpretation of the right to property (art. 21) under the American Convention on Human Rights guided by the rights enshrined in common article 1 of the International Covenants and article 27 of the International Covenant on Civil and Political Rights. In terms of the Covenants' common article, which establishes the right to self-determination, peoples are entitled to "freely pursue their economic, social and cultural development". The latter provision refers to the right of minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language". About this provision, the Human Rights Committee observed that, for indigenous peoples, the enjoyment of their culture comprises "a way of life which is closely associated with territory and use of its resources".

Read in light of these rights specified in international human rights treaties, article 21 of the American Convention entails not only the possession of the property but also the enjoyment of the resources extracted from it and of the spiritual and cultural value of the lands, which are essential elements for indigenous peoples to live with dignity.

In *Kaliña and Lokono*, the Court noted, regarding its previous decision in *Salvador Chiriboga* case, that environmental protection may be legitimately invoked as a reason for a public interest which justifies limitations to the right to property. Whilst assessing whether the infringements imposed by the creation of the nature reserves to the rights of Kaliña

and Lokono peoples were proportionate, the IACtHR appraised that the establishment and management of protected areas should not entail the exclusion of indigenous peoples from these conservations efforts and from the lands since the interests of environmental conservation and of indigenous peoples are compatible. In the Court's reasoning:

a protected area consists not only of its biological dimension but also of its socio-cultural dimension and that, therefore, it requires an interdisciplinary, participatory approach. Thus, in general, the indigenous peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies. Consequently, respect for the rights of the indigenous peoples may have a positive impact on environmental conservation. Hence, the rights of the indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights.

Thus, there does not impede the access of indigenous peoples to conservation areas since the objective of these areas is not undermined by the activities of indigenous peoples as they are assumed to pursue the sustainable use of natural resources. To achieve compatibility between environmental conservation and indigenous peoples interests, the IACtHR remarked that States should consider and guarantee when establishing sanctuaries of nature preservation, the effective participation of indigenous peoples in the decisions regarding conservation areas; the access and use by the indigenous population of ancestral territories, and the destination of benefits from conservation to indigenous communities.

Taking into consideration these standards to achieve compatibility between nature protection and the rights of indigenous communities, the IACtHR ordered the Suriname State to ensure the Kaliña and Lokono peoples' "effective access, use and participation" in the nature reserves. Besides, the reparations from the *Kaliña and Lokono Peoples* case included the creation of a community development fund whose objective is to support projects which the indigenous communities deem relevant for their development.

The referred cases have shown that the regional human rights mechanisms consider that the noble purpose of environmental protection contained in the creation of nature reserves is not enough reason to impose severe restrictions on the rights of indigenous peoples over lands and natural resources. Contrary to the view advocated by the fortress conservation approach to protected areas, these interests are not in conflict and, as the IACtHR affirmed, States must reach a compatibility perspective about them. This rationale, ruled within the legal arena of these regional courts, have had resonance in the international policy concerning conservation areas.

4. NEW POLICY APPROACH TO CONSERVATION AREAS: INDIGENOUS PEOPLES AS RIGHTS-HOLDERS

The recognition that a new approach was necessary for the establishment of protected areas was reached in the 2003 World Parks Congress. This international forum is sponsored by the International Union for Conservation Nature (IUCN) which has been the leading organization in the articulation of international policy concerning conservation areas. On the occasion of the 2003 World Parks Congress, the participants agreed upon the Durban Accord – as a result of the presence and advocacy of around 150 representatives of indigenous peoples in the forum-, the final document of the Congress which reshaped the understanding of protected areas: instead of isolated havens for wildlife, they are pillars for achieving sustainable development through their capacity to sustain livelihoods. As such, the establishment and management of these areas must assimilate the needs and respect the rights of indigenous peoples. The new approach was integrated to the scope of the Convention on Biological Diversity as the Conference of the Parties stressed in 2004 that there should be an observance of the rights of indigenous peoples in the establishment and management of protected areas.

Meanwhile, the positive connection between indigenous peoples and environmental conservation has already been stated in several international documents. Principle 22 of the Rio Declaration on Environment and Development reinforces the importance of including indigenous people in decisions concerning

sustainable development strategies since they hold a “vital role in environmental management and development”. Even the Convention on Biological Diversity is straightforward in terms of the positive contribution indigenous peoples aggregate to conservation initiatives, calling on States to “respect, preserve and maintain knowledge, innovations, and practice of indigenous and local communities embodying traditional lifestyle relevant for the conservation and sustainable use of biological diversity”.

The new paradigm for protected areas, more than recognizing the value of indigenous people’s traditional knowledge and practice for improving conservation measures, has been centered in respect for the rights of indigenous peoples. This converges with the understanding that conservation is not only a principle that guides the indigenous peoples’ interaction with the environment, it indeed comprises a right of indigenous groups, as codified in article 29 of the UN Declaration on the Rights of Indigenous Peoples. Thus, when a State institutes conservation initiatives within traditional lands in the name of public interest, it has to do so in accordance with its duty to undertake measures that respect indigenous peoples’ right to protection of the environment within their lands, ensuring that these communities also benefit from these preservation efforts.

5. CONCLUSION

The creation of protected areas under the terms of the fortress conservation approach has violated the indigenous peoples’ right to the land and natural resources, which triggers a restriction to other rights to which they are entitled. Hence, the negative effects are comprehensive, undermining in an ultimate instance even the right to development, as it was bespoken in the cases of the African system of human rights. In its turn, the IACtHR emphasized the undeniable consequences the human rights violations had to the development of Kaliña and Lokono peoples within the case’s reparations stage.

Whilst the African system detains specific self-standing rights whose justiciability is relevant for indigenous peoples, the Inter-American system has declared an innovative response to adequate the right to property to the indigenous reality, framing in its scope the rights to freely dispose of natural resources and development. Despite this distinction, the regional human rights mechanisms have underscored within their decisions the importance of the land to indigenous communities. Depriving them of access to traditional territories represents one of the gravest harms one could inflict to indigenous peoples. It entails the violation of the right to property, a central prerogative within the legal framework of protection to indigenous peoples, which is indispensable for the realization of other rights.

The three regional human rights mechanisms have concluded that the restrictions to the rights of indigenous peoples over their lands and natural resources were not proportionate to the public interest regarding environmental protection. Moreover, they observed that to foster environmental conservation through protected areas is not irreconcilable with the interests of indigenous peoples. On the contrary, due to their way of life and their strong relationship with the land and nature, conservation measures should be established in consonance and respect for the rights of indigenous peoples. This human rights paradigm for protected areas has been recently sought within conservation policies worldwide.

The pursuit of environmental protection without respect for human rights does not pave the way for sustainable development. Concerns over nature protection cannot overestimate the common interest of humankind to the detriment of the survival of indigenous peoples, especially when indigenous communities are the ones who could most contribute to maintaining our ecosystems protected.

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