Expert Testimony of the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, before the Inter-American Court of Human Rights (IACHR)on the Case of Kaliña and Lokono Peoples vs. the Government of Surinam; Presented on 3 Feb. 2015, Costa Rica

On international standards and policy on protected areas, conservation and sustainable use of biodiversity and on the rights of indigenous peoples

Introduction

I would like to begin by expressing how honoured I am to testify before the Inter-American Court of Human Rights.The Court's judgments on the rights of indigenous peoples are held in the highest esteem and are often cited in the work of the various United Nations mechanisms that I have been part of for more than a decade. For instance, I recall in 2008 when I was the Chairperson of the UN Permanent Forum on Indigenous Issues thatwe publicly welcomed the Court's judgment in the case of the Saramaka People.[1]

Convention on Biological Diversity

I will begin with the Convention on Biological Diversity, which has been ratified by 194 states. Protected areas are one of the main issues addressed under the CBD andI would like to highlight Decision VII/28, adopted by the Conference of Parties in 2004.It provides in pertinent part that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous [peoples] consistent with national law and applicable international obligations."[2]This language has been repeatedly affirmed by the Conference of Parties,[3] for example, in its decisions defining the 'Ecosystem Approach' and adopting the Addis Abba Principles on Sustainable Use (both 2004).

These decisions require respect for indigenous peoples' rights and additionally subject the establishment and management of protected areas to compliance with a state's obligations under international human rights law. This is recognition by the state parties to the CBD that protected areas have often resulted in grave violations of indigenous peoples' rights, and that they should not be treated any differently than any other activity that may affect indigenous peoples' territories. In this respect, the CBD decisions have also highlighted that the recognition of indigenous-owned and managed protected areas is an alternative and effective way of protecting biodiversity.[4]

These decisions are also reinforced in the text of the Convention, in particular in Article 10(c), which requires that state parties shall "protect and encourage [indigenous peoples'] customary use of biological resources in accordance with traditional cultural practices...." This articles should also be read to include protection for rights to lands and resources, and to require recognition and protection of indigenous institutions and customary laws.

In 2014, the COP adopted a decision that addresses Article 10c in relation to protected areas.[5]It highlights the requirement that protected areas and management regimes must be consensual if indigenous peoples' rights are to be respected, and emphasizes the need for a collaborative approach, or recognition of indigenous peoples' own conservation initiatives within their territories.[6]

International Policy

I will now turn to the primary international policy standards and best practice on protected areas and indigenous peoples. These standards reflect international consensus that sees respect for indigenous peoples' rights not only as a pressing human rights concern, but also as fundamentally related to the effectiveness of conservation efforts.

I recently attended the 2014 World Parks Congress, the primary global forum on protected areas, which is held once each decade. This Congress reaffirmed the decisions taken at the 2003 Congress, which formally instituted what is known as the "new protected area paradigm". This new paradigm has been firmly incorporated into the CBD decisions and programmes of work on protected areas that I discussed previously. It also greatly influenced the world's largest non-governmental conservation organizations, all of whom have adopted policies in the past 10 years requiring compliance with indigenous peoples' rights in their activities.

This new paradigm is explicitly based on full respect for the rights of indigenous peoples in relation to all existing and future protected areas, including their effective participation in all decision making based on their consent; and the establishment of "participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent...."[7]

These 2003 decisions were based on the premise that "there is an urgent need to re-evaluate the wisdom and effectiveness of policies affecting indigenous peoples...."[8]Thus, the old paradigm, by which large parts of indigenous territories were essentially expropriated and nationalized, and then made subject to coercive measures that often resulted in conflict, impoverishment, and cultural deterioration, not to mention other serious human rights violations, was formally rejected as both incompatible with contemporary understandings of human rights and as ineffective in practice. These points were reinforced in the decisions of the 2014 Congress, which state that working in partnership with and recognizing the collective rights of indigenous peoples [9] underlies the commitment to redress and remedy past and continuing injustices in accord with international agreements,[10] including the restitution of lands where they have been included in protected areas without indigenous peoples' consent.[11]

The 'New Paradigm' is Research Based

The new paradigm is in part based on in-depth research from numerous sources, some of which is summarized in a 2008 World Bank study. This study explains that "Traditional indigenous territories encompass up to 22 percent of the world's land surface and they coincide with areas that hold 80 percent of the planet's biodiversity."[12]It explains that this is not mere coincidence as research consistently "reveals a strong correlation between indigenous presence and the protection of natural ecosystems,"[13] not the least because "traditional ways of using and managing biodiversity are grounded in progressive principles of sustainability."[14]

The World Bank study also reviewed many World Bank-funded protected areas projects and identified key lessons from those projects. These include: first, that recognition of indigenous land rights is strongly related to successful outcomes and conflict avoidance; second, that "empowering Indigenous Peoples to manage biodiversity in their own territories has resulted in a more sustained and cost effective way to protect biodiversity;"[15] and third, that countries that "directly incorporated

Indigenous Peoples objectives into biodiversity projects"achieved the best results, from both a social and environmental perspective.

These all seem to be powerful reasons to ensure that indigenous peoples' rights are fully recognized and respected in relation to conservation initiatives, including protected areas, and to put the onus on states to justify why non-consensual protected areas may be strictly necessary within indigenous territories. They also put the burden on states to substantiate that they have rigorously applied the criteria that would allow them to intervene in indigenous territories, including through undertaking participatory assessments of alternatives, as well as to substantiate that they have adopted adequate measures to respect indigenous peoples' rights.

Overlap with human rights norms

As can be seen from the CBD decisions, international environmental and human rights laws should not be seen as distinct bodies of law, but as interrelated and complementary. Indeed, the state parties to the CBD have built respect for rights and related international obligations into their decisions on protected areas as they concern indigenous peoples.

This is a much welcomed development as I have to say that the UN Rapporteurship on the Rights of Indigenous Peoples has received many complaints about human rights violations in connection with protected areas, as have the treaty bodies. In many cases, allegations of grave harm have been substantiated. The Rapporteurship has adhered to the same basic principles enunciated by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, the latter explicitly in relation to protected areas. These basic principles are: first, that states must "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources;"[16] second, that decision making in relation to all aspects of protected areas must take place with indigenous peoples' effective participation, and their consent where any restrictions on their rights may be proposed, and that this obligation is ongoing ;[17] and third, that indigenous peoples have a right to restitution and other forms of redress where their lands have been incorporated into protected areas without their consent.[18]

I will not presume to discuss this Court's jurisprudence other than to say that it did find a violation of the right to property in connection with a nature reserve in the Xamok Kasek case in 2010, and ruled that the victims' right "to recover their lost lands remains in effect."[19]In the same year, the African Commission on Human and Peoples' Rights found violations of indigenous peoples' rights caused by a protected area in Kenya,and extensively quoted the Court's jurisprudence in Saramaka People to support its decision.[20]

I will note some of the main points. The African Commission began by stating that the "'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land" and, in particular, that consent must be obtained where a project would have a major impact within their territory.[21] It also explained that "a limitation may not erode a right such that the right itself becomes illusory."[22] It held that, because the respondent state denied the affected people all legal rights in their ancestral land, [it had] rendered their property rights essentially illusory, and that this cannot be justified with reference to the public interest.[23]

Concluding Remarks

To conclude, the Convention on Biological Diversity and its authoritative interpretation by the Conference of Parties fully upholds indigenous peoples' rights in relation to protected areas, and mandates that they be established and managed in full compliance with a state's international obligations. This allows for the application of the full spectrum of a state's human rights obligations, such as those defined by the American Convention on Human Rights and as set forth in the UN Declaration. This is also the consensus reflected in the primary international policy standards and best practice.

From what I have seen of the facts in the Kalina and Lokono peoples' situation, I would say that the protected areas in their territory illustrate a considerable deviation from these requirements. These reserves are consistent with the old and discredited paradigm insofar as they are non-consensual and fail to recognize and respect indigenous peoples' rights, and the State has taken a considerable area of their territory. They are coercive and exclusionary and the means employedare unnecessary and disproportionate to the asserted public interest, which could be achieved in a different and less drastic way. Also, because they are by law owned by the State, I would classify these reserves as an ongoing and outwardly illegitimate dispossession of indigenous lands that requires redress, not just in relation to property rights but also with regard to the full spectrum of rights that are interdependent with indigenous peoples' relations to traditional territory. The international authorities strongly support restitution as the appropriate and primary remedy in such situations in addition to other forms of redress.

Thank you.

Notes

[1] See Permanent Forum Hails General Assembly Adoption of Indigenous Rights Declaration. Pledges to Make it 'a Living Document', as Seventh Session Concludes. UN Department of Public Information, 02 May 2008. Available at: http://www.un.org/News/Press/docs/2008/hr4953.doc.htm.

[2] Decision VII/28 Protected Areas, at para. 22. In, Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting. UNEP/BDP/COP/7/21, pps. 343-64.

[3] See e.g., Decision X/31, para. 32(c)

[4] See e.g., Decision XI/24, para. 1(e).

[5] Decision XII/12, Plan of Action on Customary Sustainable Use of Biological Diversity, atpara. 9 ("Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge. Customary sustainable use of biological diversity and traditional knowledge can

contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognize and support customary sustainable use of biological diversity and traditional cultural practices in protected areas").

[6] See also Id. at p. 8, Tasks, 3(i) (containing one of the action points listed in the programme of work annexed to this decision, further illustrates the consent requirement as well as the explicit linkage to human rights norms more broadly, and mandating compiling examples of best practice that "Promote, in accordance with national legislation and applicable international obligations, the full and effective participation of indigenous [peoples], and also their prior and informed consent to or approval of, and involvement in, the establishment, expansion, governance and management of protected areas, including marine protected areas...").

[7] Id. at p. 26.

[8] Durban Accord: Action Plan, adopted at the Vth IUCN World Parks Congress, Durban South Africa (2003), at p. 25.

http://cmsdata.iucn.org/downloads/durbanactionen.pdf

[9] See also: A strategy of innovative approaches and recommendations to enhance the diversity, quality and vitality of governance in the next decade, VIth IUCN World Parks Congress 2014, at para. 5 (recommending that "In situations where the land, water, natural resources and coastal and marine areas of indigenous peoples and local communities overlap with established protected areas under any other governance type, all countries and relevant organisations ensure that collective rights and responsibilities to own, govern, manage, and use such land, water, natural resources and coastal and marine areas are respected. Further, they ensure that the indigenous peoples' and local communities' right to free, prior and informed consent is affirmed and their livelihoods and food and water sovereignty are appropriately recognized and supported, along with their knowledge, institutions, practices, management strategies and plans related to conservation. They foster, moreover, the full engagement of the concerned indigenous peoples and local communities in the governance of the overlapping established protected areas"), http://cmsdata.iucn.org/downloads/conclusions_of_governance_stream_wpc_2014__12_dec.pdf.

[10] 'The Promise of Sydney Vision', http://www.worldparkscongress.org/about/promise_of_sydney_vision.html.

[11] A strategy of innovative approaches and recommendations to enhance the diversity, quality and vitality of governance in the next decade, para. 17 stating that "Governments and UN human rights bodies, in full collaboration with relevant rightsholders, establish effective monitoring, restitution and accountability mechanisms to ensure that rights-based approaches and international standards of justice are applied in all conservation programmes. This should redress past and ongoing injustices suffered by indigenous peoples and local communities, including

restitution of lands expropriated without free, prior and informed consent, and application of appropriate processes, such as the IUCN Whakatane Mechanism").

[12] C. Sobrevila, The Role of Indigenous Peoples in Biodiversity Conservation: the natural but often forgotten partners, (World Bank, Washington D.C., 2008), at p. 5.

[13] Id

[14] Id. at p. 9.

[15] The Role of Indigenous Peoples in Biodiversity Conservation, at p. 45.

[16] Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/2002. UN Doc. A/57/18,paras.292-314, at 304.

[17] Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka. 14/09/2001. UN Doc. A/56/18,paras.321-342, at 335. The Human Rights Committee held in 2009 when deciding a case under Optional Protocol I, that "participation in the decision-making process must be effective." This "requires not mere consultation but the free, prior and informed consent of the members of the community" where the activity in question may "substantially compromise or interfere with ... culturally significant economic activities...." Poma Poma v. Peru, at para. 7.6.

[18] Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, 15/05/06. UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 17. the Human Rights Committee, which has explained that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...;" that "securing continuation and sustainability of traditional forms of economy ... and protection of sites of religious or cultural significance ... must be protected under article 27...." Concluding observations of the Human Rights Committee: Australia 28/07/2000. UN Doc. CCPR/CO/69/AUS, at paras. 10 and 11.

[19] Xamok Kasek 2010, at para. 116, and, at para. 311-13, 337(26), at para. 313 (ordering that "the State must take the measures necessary to ensure that Decree No. 11,804 [concerning the protected area] is not an obstacle to returning the traditional land to the members of the Community").

[20] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (February 2010).

[21] Id. at para. 291.

[22] Id. at para. 215.

[23] Id.