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United Nations Special Rapporteur on the Rights of Indigenous Peoples
Expert Testimony at the request of the African Court on Human and Peoples' Rights on reparations in the case of the
***African Commission on Human and Peoples' Rights v. Kenya*,**
Application number 006/2012

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Introduction

I am honoured to provide expert testimony at the request of the African Court on Human and Peoples' Rights on reparations in the case of the *African Commission on Human and Peoples' Rights v. Kenya*, application number 006/2012.

The jurisprudence of regional human rights systems is of utmost importance for the protection of the rights of indigenous peoples. Regional courts play a key role in advancing the implementation of the United Nations Declaration on the Rights of Indigenous Peoples at the national level. In my experience, having acted as a United Nations expert on indigenous peoples' rights for over a decade, I consider the jurisprudence from the regional human rights systems in Africa and the Americas in the highest esteem and I refer to your judgements continuously in the exercise of my mandate.

Mandate and experience

As the Special Rapporteur on the rights of indigenous peoples, I am specifically mandated by the United Nations Human Rights Council (resolution 42/20) to promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples. My mandate is global and I have been carrying out my role as the Special Rapporteur since 2014. This builds on the over four decades I have dedicated to promoting the advancements of human rights for indigenous peoples, both internationally as well as in the country of my nationality, the Philippines.

This intervention is submitted to the African Court on Human and Peoples' Rights by the Special Rapporteur in accordance with the independence of her mandate, and should not be considered as an express or implied waiver of the privileges and immunities of the United Nations, its officials and experts on mission under the 1946 Convention on the Privileges and Immunities of the United Nations.

UNDRIP and reparation

At the time of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in the General Assembly in 2007, I was the Chair of the Permanent Forum on Indigenous Issues and in this role I was closely involved in its negotiation. I believe my long-standing and in-depth knowledge of the Declaration provides a solid ground for me to emphasise its significance as a norm-setting instrument that reflects a wide consensus at the global level on the rights of indigenous peoples.

The Declaration elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. The rights to lands, territories and resources are of core importance for indigenous peoples around the world and are intrinsically linked to indigenous peoples' rights to self-determination, identity, cultural and spiritual traditions. I wish to recall the Declaration's provisions on self-determination (Art. 3) and on the right of indigenous peoples' to determine their own development priorities including with regards to their lands, territories and resources (Arts. 23, 32). These are important preconditions in order for indigenous peoples to effectively exercise their right to own, use, develop and control their lands, territories and resources (Art. 26(2).

The preamble to the Declaration underlines fundamental aims and principles which should guide its interpretation and implementation. A key objective of the Declaration is to ensure redress for the historical injustices and the dispossession of the lands of indigenous peoples. Despite the advances that has been in human rights law and jurisprudence, and that over a decade had passed since the Declaration was adopted, regrettably indigenous peoples around the world continue to face discrimination, marginalisation and to be disproportionately affected by extreme poverty. Without adequate remedy processes, it is difficult to establish sustainable relationships between indigenous peoples and the States within which they live based on trust, mutual respect and partnership.[1]

The responsibility to provide reparation and redress for indigenous peoples is underscored throughout the Declaration in numerous provisions. Specifically, redress is required for any action aimed at depriving indigenous peoples of their integrity as distinct peoples (Art. 8, para. 2 (a)); any action with the aim or effect of dispossessing them of their lands, territories or resources (Art. 8, para. 2 (b)); any form of forced assimilation or integration (Art. 8, para. 2 (d)); for the taking of their cultural, intellectual, religious or spiritual property (Art. 11); depriving them of their means of subsistence (Art. 20, para. 2); as well as for the development, utilisation or exploitation of their mineral, water or other resources without their free, prior and informed consent (Art. 32).

The clearest manifestation that redress is still needed for indigenous peoples around the world is their continued lack of access to and security over their traditional lands.[2] In this regard, Article 28 of the Declaration, states that 'indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or

[1] Special Rapporteur on the Rights of Indigenous Peoples, Statement at the 12th Session of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 18 July 2019; https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24836&LangID=E

[2] Special Rapporteur on the Rights of Indigenous Peoples, Report to the Human Rights Council, A/HRC/27/52, 2014, para. 31

damaged without their free, prior and informed consent' and that this compensation 'shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'.

In addition, the Declaration affirms that indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (Art. 10).

Ensuring reparation for past wrongs is a *sine qua non* in international law. International standards and jurisprudence set out that reparation should consist of the following elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[3]

As a starting point, it is imperative to reflect on what the concept of reparation entails for indigenous peoples. It is key to consider that remedy and redress are not only legal terms for indigenous peoples, but concepts linked to the core of their history and their existence as societies.

I would like to stress the need for intercultural dialogue with a view to developing shared understanding as a basis for advancing reconciliation and reparation. In order for this dialogue to be fruitful, mutual trust has to be built. There is a need for a change in the approach of States to indigenous claims. These should be considered as justice and human rights issues that, adequately solved, would result in benefits for the country and society as a whole. The fulfilment of indigenous peoples' rights should not be portrayed as a cost. Such a position estranges indigenous peoples from the State and the country, while promoting the notion within the larger society that indigenous peoples are requesting unwarranted privileges. Moreover, it is not conducive to the partnership emphasised by the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration, as a consensus normative framework, provides the best basis to start or continue an intercultural dialogue on how to implement indigenous peoples' rights in an environment of reciprocal cooperation.[4]

For indigenous peoples, satisfaction is fundamental for numerous reasons, as public recognition and acknowledgement by the State of past violations and is a step towards educating the broader society about the history of dispossession of indigenous peoples and the Government's role in that regard.[5] The reparation element of 'satisfaction' is crucial as it encompasses the acknowledgement of facts and the acceptance of responsibility through judicial decisions, public apologies and commemorations with the aim of restoring the dignity of victims.[6]

Throughout the United Nations Declaration on the Rights of Indigenous Peoples there are calls for 'effective mechanisms' for redress. Genuine reconciliation requires affirmative steps to provide remedy and redress for indigenous peoples. An essential approach for redress is the consideration of the collective nature of the impact of such violations on indigenous

[3] Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution, A/RES/60/147, 2005

[4] Special Rapporteur on the Rights of Indigenous Peoples, Statement at the 12th Session of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 18 July 2019

[5] A/HRC/27/52, op. cit. para 29

[6] A/RES/60/147, para. 22

peoples and therefore the incorporation of adequate collective reparation measures.[7] I therefore wish to underscore the measures required to ensure indigenous peoples' collective rights over their lands, territories and natural resources, as these are the basis for the exercise of the fundamental human rights of indigenous peoples.

Delimitation, Demarcation and Titling

In order to ensure restitution and that indigenous peoples are able to effectively exercise their right to their lands, territories and resources, there needs to be delimitation, demarcation and titling of these.

In the context of my various country visits, I have obtained first-hand information about many different mechanisms for indigenous land registration, demarcation, titling and land dispute resolution. While challenges remain in many countries, I have observed positive examples of legislation and measures taken towards communal land titling for indigenous peoples in a range of countries including for example Colombia, Australia, Cambodia, Mexico and the Republic of the Congo. In my own country, the Philippines, the Indigenous Peoples Rights Act recognises indigenous peoples' collective rights of ownership and possession to their ancestral domains, and sets up a procedure for their demarcation and titling through the issuance of certificates of ancestral domain titles.

I wish to recall that the jurisprudence of the Inter-American Court of Human Rights has established the duty of States to adopt measures to ensure that indigenous peoples' right to property. The Inter-American Court has held that indigenous peoples maintain their property rights even when they have been forced to leave or have otherwise lost possession of their traditional lands, including where their lands have been expropriated or transferred to third parties, unless this was done consensually and in good faith.[8] Furthermore, the Court has established, in view of the principle of legal certainty, the obligation to give effect to indigenous peoples' territorial rights through the adoption of the legislative and administrative measures necessary to create an effective mechanism for delimitation, demarcation and titling.[9]

The Inter-American Court has not set one standard procedure for land restitution. However, when studying the different cases where the Court ordered this measure of satisfaction, the Court advised that the State, with the presence of a representative of the indigenous community, must start by identifying and delimiting the traditional territory. The second step is the handing over and titling, free of charge, of the identified and delimited territory to the indigenous community. This second step may encounter barriers if the territory is in the hands of private entities; in this case the State must, in a legal and proportional manner, through fair compensation and in accordance with Article 21 of the American Convention on Human Rights, expropriate the occupied ancestral territory. In order to ensure the expropriation, the Court requests States to set aside the necessary funds in their national budget.

[7] Special Rapporteur on the Rights of Indigenous Peoples, Report to the General Assembly, A/72/186, 2017, para. 11

[8] *Yakye Axa Indigenous Community v. Paraguay*, 2005; *Sawhoyamaxa Indigenous Community v. Paraguay*; 2006

[9] *Mayagna (Sumo) Awas Tingni* vs. Nicaragua, 2001, paras. 153 y 164; *Moiwana vs. Surinam, 2005, paras. 209; Kuna de Madungandí y Emberá de Bayano Indigenous Peoples vs. Panamá*, 2014, paras. 119 y 166.

Conservation

There is significant spatial overlap between the traditional lands of indigenous peoples and areas which retain the highest levels of biodiversity. Traditional indigenous territories encompass around 22 per cent of the world's land surface and they coincide with areas that hold 80 per cent of the planet's biodiversity. It has been estimated that 50 per cent of protected areas worldwide has been established on lands traditionally occupied and used by indigenous peoples.[10] Studies have demonstrated that the territories of indigenous peoples who have been given land rights have been significantly better conserved than the adjacent lands.[11]

Land restoration and rehabilitation is essential to meet the targets of SDG 15 and needs to be done with the incorporation of indigenous peoples in decision-making processes. Global scientific studies have pointed to indigenous peoples' contribution through their valuable local knowledge, and that the application of traditional systems of land use and resource management has, in many cases, demonstrated solutions to avoid and reduce land degradation, recovered degraded ecosystems and provided multiple societal benefits.[12]

Indigenous peoples are the guardians of many of the world's last reserves of biological diversity. Yet, they are driven away from these lands because Governments and conservation organisations continue to fail in applying a human rights-based approach to conservation, despite the numerous international commitments to do so. In the exercise of my mandate, I have observed that the loss of the guardianship of indigenous peoples and the placing of their lands under the control of Government authorities, that have often lacked the capacity and political will to protect the land effectively, has left such areas exposed to destructive settlement, extractive industries, illegal logging, agribusiness expansion, tourism and large-scale infrastructure development.[13]

In terms of international standards, the Declaration on the Rights of Indigenous Peoples makes specific reference to conservation in Article 29, which states that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources and that States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

Furthermore, the Convention on Biological Diversity, adopted in 1992, has gained the global support of 196 State Parties. The treaty refers to indigenous peoples' knowledge, innovations and practices for the conservation and customary use of biological diversity. [14] Article 8 (j) of the Convention commits States parties to respect and maintain the knowledge,

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[10] Special Rapporteur on the Rights of Indigenous Peoples, Report to the General Assembly, A/71/229, 2016, para. 14

[11] Sobrevila, C, 'The Role of Indigenous Peoples in Biodiversity Conservation: the Natural but Often Forgotten Partners' , World Bank, 2008; Stevens, S (ed.), *Indigenous Peoples, National Parks and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights*, University of Arizona Press, 2014

[12] UNEP International Resources Panel Report, 'Land Restoration for Achieving the Sustainable Development Goals', 2019, https://www.resourcepanel.org/reports/land-restoration-achieving-sustainable-development-goals

[13] A/71/229, para. 17

[14] The relevant CBD provisions are articles 8(j), 10(c), 17.2 and 18.4.

innovations and practices of indigenous and local communities which are relevant for conservation and sustainable use of biological diversity.

In terms of jurisprudence, I wish to underline the importance of the judgment of the Inter-American Court in the *Kaliña and Lokono Peoples v. Suriname case*.[15] The judgment ordered the State to implement a series of guarantees of non-repetition, including the legal recognition of territorial and other rights of all indigenous and tribal peoples in Suriname. The Court furthermore concluded that respect for the rights of indigenous peoples may have a positive impact on environmental conservation and therefore the rights of indigenous peoples and international environmental laws should be seen as complementary rather than exclusionary rights. In February 2015, I acted as an expert witness in the case. In my testimony, I emphasised the obligations of Suriname to protect indigenous peoples' human rights, specifically the obligation to ensure the effective participation of indigenous peoples in conservation management and their right to restitution for lands incorporated into protected areas without their consent. In 2016, the Inter-American Court of Human Rights issued its judgement in favour of the Kaliña and Lokono indigenous peoples, which cited my testimony and provided explicit recognition of the above rights in its decision.

I will not presume to discuss the jurisprudence of the African regional human rights system other than to recall that, the African Commission on Human and People's Rights held in the case of *Endorois Welfare Council v. Kenya*[16] that the rights of the Endorois had been violated when they were denied access to their traditional lands after the lands were turned into a game reserve and that the Kenyan State was obliged to recognise the communal land rights of the Endorois indigenous peoples and provide compensation and restitution by returning the lands or by providing alternative lands of equal extent and quality in agreement with the indigenous community. Importantly, the Commission found that, although their land had become a game reserve, the Endorois were its ancestral guardians and thus best equipped to maintain its delicate ecosystem and that their alienation from their land threatened their cultural survival and thus the encroachment was not proportionate to the public need.

I wish to emphasise the crucial role indigenous play in conservation and highlight some examples. The effectiveness of indigenous-owned lands in resisting deforestation in Brazil is well known. In Namibia, community-based wildlife management has resulted in significant growth in wildlife populations, especially in areas that had formerly been subject to heavy poaching. In Australia and the United States of America, indigenous peoples effectively manage or co-manage protected areas, through dynamic and sustainable partnerships which seek to redress past exclusion policies. In Timor-Leste, I observed how indigenous peoples have safeguarded marine biodiversity through enforcing their own customary practices. In the Philippines, the national Indigenous Peoples' Rights Act includes a provision that protected areas within or overlapping ancestral domains will remain protected but that indigenous communities have primary responsibility for maintaining and protecting such areas.

[15] *Kaliña and Lokono Peoples v. Suriname*, 2016

[16] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, 2009

Implementation

I will conclude by emphasising the crucial importance of implementation of judgements. In designing reparation measures, I urge respect for the rights of indigenous peoples to participate in these matters, through representatives chosen by themselves in accordance with their own procedures, as set out in Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples. I further recall that Article 40 of the Declaration affirms that indigenous peoples have the right to just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Indigenous representatives should therefore be the ones to advise on the culturally appropriate measures for compensation and other forms of reparation.

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