



PROTECTED AREAS AND INDIGENOUS PEOPLES' RIGHTS

AMNESTY INTERNATIONAL SUBMISSION TO THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES

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[The] declaration as a protected wooded area could constitute a new and sophisticated mechanism adopted by the private owners of land claimed by indigenous communities “to obstruct the land claims of the original peoples [...] using legal mechanisms and even invoking purposes as virtuous as the conservation of the environment.”

Rodolfo Stavenhagen, former UN Special Rapporteur on the Rights of Indigenous Peoples, cited in *Xákmok Kásek Indigenous Community v. Paraguay*¹

INTRODUCTION

Amnesty International welcomes the opportunity to contribute to the report of the Special Rapporteur on the Rights of Indigenous Peoples on *Protected Areas and Indigenous Peoples' Rights: the Obligations of States and International Organizations*.² We would like to bring to the Special Rapporteur's attention a number of cases that we have been working on or which have been brought to our attention, that illustrate particular aspects of how protected areas and other conservation initiatives impact on Indigenous peoples' rights.

The submission will be structured around some of the questions laid out by the Special Rapporteur in the call for submissions.

PARTICIPATION OF INDIGENOUS PEOPLES IN PROTECTED AREAS

As stated by Indigenous peoples and many conservation experts around the world, where Indigenous Peoples are present, and their land tenure rights are secure, they are best placed to promote the conservation of their ecosystems as owners/co-managers. If Indigenous peoples have a share in management and conservation, there is an incentive to ensure sustainability, given that the ecosystem is inextricably bound up with their identity, spirituality, livelihood and long-term survival.³ However, state policies, laws and practices governing protected areas have disenfranchised Indigenous peoples around the world.

EVICION WITHOUT CONSULTATION

In Paraguay, approximately 600 Indigenous families of the Ava Paranaense (Guaraní) people were evicted

¹ Inter-American Court of Human Rights - Case of the Xákmok Kásek Indigenous Community v. Paraguay Judgment of August 24, 2010 (Merits, Reparations, and Costs), Series C No. 214, para 169.

² <https://www.ohchr.org/en/calls-for-input/calls-input/call-submissions-protected-areas-and-indigenous-peoples-rights>

³ Amnesty International, *Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya*, AFR 32/8340/2018, p. 59.

over 40 years ago for the construction of the “binational” Itaipú dam (covering territory in Brazil and Paraguay). For a number of years, Amnesty International has been supporting the campaign of one of the affected communities, the Tekoha Sauce, to return to ancestral lands which were not flooded by the dam. Since the eviction took place, nine protected areas have been created on the Paraguay side of the Itaipú project area, consisting of 47,000 hectares, all of which is claimed as ancestral land by the evicted Indigenous communities. By way of contrast, only 2,300 hectares have been designated for two of the 38 evicted communities.⁴ Part of the area of influence of the Itaipú project is designated as a UNESCO Biosphere Reserve. The Tekoha Sauce community attempted to return to their ancestral lands but were violently evicted in 2016.⁵ They have since returned (to their ancestral lands, although not to the same place where they were located before), but they lack legal recognition of their tenure rights and adequate access to livelihoods. A further problem hindering resolution of the community’s claims to their ancestral land, is that a roundtable set up by the state in October 2016 to address the community’s demands has been inactive due to the failure of state representatives to attend sessions. After 11 months of sessions, the Sauce families decided to abandon the initiative.⁶

The Sengwer of Embobut Forest, Kenya, have been evicted from their ancestral lands on successive occasions, since the 1980s, after the forest was designated as a protected conservation area under the colonial government in 1954. A consultation took place in Embobut from 2009-2014; however, Amnesty International’s research demonstrated that the process was entirely inadequate, both in terms of process, and in terms of the stated objectives of the consultation, which expressly ruled out the possibility of the Sengwer remaining in the forest.⁷

While the government has repeatedly claimed that there can be no human occupation of the forest due to concerns over degradation of the ecosystem, the Sengwer have offered to work with government on conservation. As one community member told Amnesty International, “I want the government and the affected people to embark on consultations that will lead to the community going back [to the forest]. If this is accepted we will ensure that we police the conservation efforts. Among other things we would ensure that no one cultivates [crops]. I believe this way we will co-exist with the forest and water catchment”.⁸ If the government wishes to restrict the rights of the Sengwer to their land, livelihoods and cultural heritage, they must demonstrate that this restriction is necessary and proportionate. As the African Court on Human and Peoples’ Rights ruled in the case of the Ogiek, “[The government] has not provided any evidence to the effect that the Ogieks’ continued presence in the area is the main cause for the depletion of natural environment in the area [...] the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest”.⁹ In the Sengwer case, evidence to show that the Sengwer are responsible for forest degradation is also absent; indeed, in 2018 a government report found that the Kenya Forest Service was responsible for “rampant corruption and abuse of office [...] they have overseen wanton destruction of our forests, have systematically executed plunder and pillaging of our water towers”.¹⁰

The government must also show why the alternative option, which would not restrict the Sengwers’ rights

⁴ Servín, Jorge, “Sauce Historia / Historia Sauce: Informe Antropológico Caso Comunidad Ava Guaraní Tekoha Sauce/Subgrupo Ava Paranaense, 2017, p. 3.

⁵ Latin America Bureau, “Tekoha Sauce: community fights to recover land at Itaipú”, <https://lab.org.uk/tekoha-sauce-community-fights-to-recover-land-at-itaipu/>, 2019.

⁶ Sauce Historia / Historia Sauce, p. 5.

⁷ Families Torn Apart, pp. 31-36.

⁸ Interview, Tangul, September 2016, quoted in Families Torn Apart, p. 62.

⁹ African Commission on Human and Peoples’ Rights v. Republic of Kenya, Application no. 006/2012 (“Ogiek Case”) para 130.

¹⁰ Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya, ‘A report on Forest Resources Management and Logging Activities in Kenya: Findings and Recommendations’, April 2018, p. 45.

(that is, recognising Sengwer occupation rights in the forest and working with them to conserve it), is not feasible.

REMOVAL OF ACCESS TO LIVELIHOODS AND CULTURE

The Tekoha Sauce community of Paraguay, whose case is detailed above, currently live in extreme poverty on the borders of one of the Itaipú project's protected areas, the Limoy Natural Reserve. There is a prohibition on hunting and fishing within the reserve, which impacts on their right to their traditional culture and livelihood.¹¹ Many members of the community, from as young as 14 years old, have no alternative but to work on nearby mechanized agriculture farms, for low pay (80,000 guaraní / day, approx. USD 11.70), work which is only available from September to December each year.¹² The nearest hospital is between 70 and 100km distant, and public mobile health services do not reach the community. A school, set up and run by the community itself, was attended by only 18 pupils out of a total of 56 families (information as of 2017).¹³

FORTRESS CONSERVATION

Fortress conservation was described by the former Special Rapporteur in her 2016 report on conservation, as “based on the following assumptions: protected areas should be created and governed by States; the goal of protected areas should be strict nature preservation with emphasis on biodiversity conservation and protected area management required protected areas to be uninhabited and without human use of natural resources. In its worst forms, coercive force was considered legally and morally justified to remove resident peoples and protect biodiversity.”¹⁴

Amnesty International have documented a number of cases of the use of incarceration, militarized enforcement, and harassment of human rights defenders in or related to protected areas. In the case of Kahuzi Biega National Park, in the Democratic Republic of Congo, Batwa and Mbuti Indigenous communities were forcibly evicted from the park on its establishment in 1975; some of them have since that time returned to the park as they received no compensation and live in extreme poverty in communities neighbouring the park. In July 2021, Amnesty International signed a joint letter of concern to the authorities regarding a joint operation by the DRC army and eco-guards employed by the park. The authorities claimed that the operation targeted non-state armed groups operating in the park. However the letter noted “deep concern and dismay over reports that joint contingents of park guards [...] and soldiers [...] have recently attacked villages inside the PNKB and committed serious human rights abuses, including the killing of two Batwa civilians. [...] It is reported that, beginning on or around the morning of Friday, 23 July 2021, dozens of PNKB guards and FARDC soldiers advanced on villages in the Mabungu grouping and near Kayeye and opened fire on Batwa civilians with an arsenal of rifles and heavy weapons. [...] Park guards and soldiers have burned dozens of homes, rendering hundreds homeless.”¹⁵

In the Sengwer case detailed above, Amnesty International documented 15 cases of detention of members of the Sengwer people, solely for their presence on their ancestral lands in the forest.¹⁶ The organization also collected evidence on one round of evictions, beginning on Christmas Day 2017, which resulted in the burning of 341 houses and leading to the killing of one Sengwer man, Robert Kiprotich, and the hospitalisation with gunshot wounds of another.¹⁷ These events led to the suspension by the European

¹¹ Amnesty International, “A Recipe for Criminalization: Defenders of the Environment, Territory and Land in Peru and Paraguay”, AMR 01/8158/2018, p.20.

¹² Sauce Historia / Historia Sauce, p. 21.

¹³ Sauce Historia / Historia Sauce, p. 23.

¹⁴ Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, A/71/229, 29 July 2016, para. 34.

¹⁵ Minority Rights Group, “To Purge the Forest by Force: Organized violence against Batwa in Kahuzi-Biega National Park”, April 2022, p. 34.

¹⁶ Families Torn Apart, p.28.

¹⁷ Families Torn Apart, p. 5.

Union of funding for the WaTER programme (Water Tower Protection and Climate Change Mitigation and Adaptation Programme).¹⁸

The harassment of human rights defenders who advocate for the rights of communities affected by protected areas, is another means of enforcement in fortress conservation. In the Sengwer case, Elias Kimaiyo, a community leader who has engaged consistently in consultation processes with government and other actors, told Amnesty International that he has suffered serious consequences for his activism. On 2 April 2017 he was filming guards of the Kenya Forest Service, who were burning houses in the Embobut forest. As he recounted, “[w]hile I was busy taking pictures and speaking on the phone, I was spotted by KFS guards who started chasing me and shooting at me. I started running down a hill to evade the bullets, whereby I tripped, injuring my knee and I fell down. The shooting stopped but a KFS officer got to where I was lying and declared that I was troubling the government. He hit me very hard with the butt of a rifle, fracturing my upper right arm. The officer grabbed the bag that contained my two cameras, a laptop, iPad and other personal documents and disappeared into the forest.”¹⁹ Kimaiyo has permanent restrictions to his movement due to the injuries, and the case which he took against the KFS has stalled, due to the slowness of the courts in Kenya and also lack of funds to pay lawyers. He has never recovered the equipment that was taken from him.

In July 2021, the Constitutional Court of Ecuador issued a judgment which is of relevance to carceral and militarized approaches to fortress conservation. The judgment concerns Indigenous peoples living in voluntary isolation, and those who are ‘recently contacted’ (according to the Inter-American Commission for Human Rights, recently contacted Indigenous peoples, or Indigenous peoples in initial contact “are indigenous peoples or segments of indigenous peoples who maintain intermittent or sporadic contact with the majority non-indigenous population, generally used in reference to peoples or segments of peoples who have initiated a process of contact recently. However, “initial” should not necessarily be understood as a temporal term, but as a reference to the scant extent of contact and interaction with the majority non-indigenous society”).²⁰

The case concerns detained members of the Waorani Indigenous people living in Yasuní which is a national park and UNESCO Biosphere Reserve; in March 2013, in the province of Orellana, two Waorani elders were attacked and killed by a group from the Indigenous Tagaeri and Taromenane who live in voluntary isolation. In response to this event, relatives of the murdered elders entered the territory of the Tagaeri and Taromenane, killed a number of them, and took away two girls, aged three and six, who were subsequently integrated into Waorani family groups.²¹

In November 2013, an Orellana judge, at the request of the Prosecutor's Office, initiated proceedings in the case for the crime of genocide and ordered the pre-trial detention of seven members of the Dikaro group of the Waorani. This group had until recently lived in voluntary isolation, and is now considered as recently contacted.²²

In December, the lawyer for the detained persons filed for their release, citing among other things, the failure of the Prosecutor's Office to take into account the rights of Indigenous peoples.²³ This request was denied by a lower court.

Reviewing the judgment, the Constitutional Court accepted the arguments of the lawyers acting on behalf of the Waorani detainees, that detention was an entirely inappropriate response in the case of members of a

¹⁸ Families Torn Apart, p. 17.

¹⁹ Families Torn Apart, p. 47.

²⁰ “Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas”, December 2013, p. 5.

²¹ Constitutional Court of Ecuador, Sentencia No. 112-14-JH/2, Revisión de garantías, 21st July 2021, para. 14.

²² Sentencia No. 112-14-JH/2, para. 15.

²³ Sentencia No. 112-14-JH/2, para. 16.

people who until recently had lived in voluntary isolation from Ecuadorian society. The court [translation by Amnesty International] *further develops the principle of intercultural interpretation [...] It should be noted that the Court understands the intercultural and dialogic perspective, not as an option, but as a constitutional obligation, due to the plurinational and intercultural character that the Fundamental Charter establishes for the Ecuadorian State and its institutions.*²⁴

The court required that [translation by Amnesty International]: *[a]ccount shall be taken of the fact that the person being prosecuted belongs to an indigenous community, people or nationality. The greater the preservation of the customs of an indigenous community, people or nationality, the greater the autonomy in the application of its own law. Consequently, the greater the obligation of the court hearing the habeas corpus or of the judge hearing the criminal case to adopt alternative measures to pre-trial detention that respect the worldview of an indigenous person and his or her culture. These measures should be analysed depending on the circumstances of each specific case and on the particularities of the indigenous community, people or nationality.*²⁵ The court further required *[t]he elaboration and implementation of a protocol for the substantiation of habeas corpus of members of indigenous peoples, including those of recent contact, with an intercultural approach.*²⁶

The international human rights law framework also provides arguments for opposing detention in such cases. The UN Declaration on the Rights of Indigenous Peoples provides that “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”²⁷

PUNITIVE AND DISINCENTIVIZING LAWS

In Paraguay, Law 352 on the creation of protected forest areas provides that when such areas are privately owned, they are [translation by Amnesty International] *exempt from the payment of real estate tax and from any substitute or additional tax that may be created on the ownership of the rural property; and are inalienable* [not subject to being taken away from or given away by the possessor] *during the period of validity of the declaration.*²⁸ There are of course good reasons for such provisions, in order to incentivise private land owners to register their lands as protected conservation areas. However they can also have a negative impact on the rights of Indigenous peoples and other local communities. In the case of the Xákmok Kásek Indigenous Community, which was litigated at the Inter-American Court of Human Rights, this provision provided a financial incentive for the private land-owner, who had succeeded in obtaining a protected area designation for land claimed by the Xákmok Kásek, and also made it impossible in the law for the title to be transferred back to the community, as long as the designation as protected area was in force.²⁹ While the situation for the Xákmok Kásek has since been resolved, the law continues to be in force.

GOOD PRACTICES IN THE MANAGEMENT OF PROTECTED AREAS

While examples of Indigenous co-management of protected areas do exist, Amnesty International has focused on situations of exclusion of Indigenous peoples from conservation management. However we would like to note two recent cases from the Constitutional Court of Ecuador that, if fully implemented by the state, would constitute good practice.

²⁴ Sentencia No. 112-14-JH/2, paras. 25-6.

²⁵ Sentencia No. 112-14-JH/2, para. 254(12).

²⁶ Sentencia No. 112-14-JH/2, Decisión, para. 5(ii).

²⁷ Art. 34

²⁸ Ley No. 352 De Áreas Silvestres Protegidos, 1994, Art. 56 (“...estarán exentas del pago del impuesto inmobiliario y de todo impuesto sustitutivo o adicional que se crease sobre la propiedad del inmueble rural”; y además, son “inexpropiables durante el lapso de validez de la declaratoria”)

²⁹ Inter-American Court of Human Rights - Case of the Xákmok Kásek Indigenous Community v. Paraguay Judgment of August 24, 2010 (Merits, Reparations, and Costs), Series C No. 214, para 82.

CONSULTATION, FREE, PRIOR AND INFORMED CONSENT AND CO-MANAGEMENT

In the Waorani case cited above, given that in the time for it to reach the Constitutional Court, the affected people had been released from detention, the court turned to measures aimed at addressing the conditions that had led to conflicts within the park, and preventing future conflicts; these measures were also to be considered a form of reparation to the affected people. The court concluded that these conflicts had arisen primarily because of tensions caused by the invasion of the park by external actors, including illegal poachers and loggers, and the failure of the state to consult with the affected Indigenous peoples in order to develop a conservation plan for the park. There are also at least nine oil exploration blocks within the park.³⁰

The court therefore ordered [translation by Amnesty International]:

That the Secretariat for Human Rights, in coordination with the Follow-up and Monitoring Committee, develop a plan for concrete measures to ensure respect for the self-determination of recently contacted Indigenous peoples, and the principle of non-contact of the Tagaeri and Taromenane peoples in isolation.

This plan must include:

- i) Timeline and roadmap to be followed for the formulation and implementation of the participatory plan, which shall be submitted to this Court within 120 days from the date of notification of this judgment.*
- ii) Free, prior and informed consultation with the recently contacted peoples. This consultation should not be carried out with Indigenous peoples in isolation.*
- iii) Specific measures with regard to the economic and mainly extractive activities that take place in the province of Orellana. These measures must include immediate and effective state intervention for the dismantling of illegal hunting and logging camps in the Intangible Zone of the Yasuní National Park.*
- iv) The plan must provide for the participation of the Indigenous authorities of the Waorani nationality, the authorities of the autonomous decentralised parish and municipal governments of the Province of Orellana, organisations from Orellana Province, civil society organisations, the church, academia and experts on the subject.³¹*

RECOGNITION OF INDIGENOUS WORLD-VIEWS AND JURIDICAL FRAMEWORKS

In the case “*Consulta previa en la comunidad A’i Cofán de Sinangoe*” in January 2022, the Constitutional Court of Ecuador confirmed previous decisions by courts of the first and second instance after the A’i Cofán people of Sinangoe initiated judicial proceedings in 2018 against the Ecuadorian state for granting 20 mining concessions and considering another 32 on their ancestral lands. The lower courts had found violations of the right to free, prior and informed consent and other human and environmental rights.³²

The Court affirmed [translation by Amnesty International] *that the adoption of internal rules - which respond to the specific needs of the community - are part of a legitimate exercise of the right to practice their own law prescribed in Article 57.10 of the Constitution, and therefore must be understood by State entities from an intercultural and dialogical perspective that does not seek to apply mestizo [a reference to the dominant culture of Ecuador, reflecting the identity of the elite] legal mechanisms to their exercise of self-determination. Likewise, with respect to the creation of an Indigenous guard, it is found that this also forms part of their uses and customs and responds to the capacity of Indigenous communities and peoples to generate and exercise authority within their ancestral territory, in accordance with the provisions of*

³⁰ Sentencia No. 112-14-JH/2, Decisión, para. 55.

³¹ Sentencia No. 112-14-JH/2, Decisión, para. 4(i-iv).

³² Amnesty International, “Ecuador: Constitutional Court ruling to protect indigenous peoples from mining projects affecting their human rights”, 10th February 2022

article 57.9 of the Constitution, without this being considered per se as the existence of a parallel police or militia.³³

The court's judgment does not interest itself to any significant extent with the designation of Cayambe-Coca National Park or its legal implications, other than to take note in a footnote of the A'I Cofán Community's objection to it [translation by Amnesty International]: *We live within our ancestral territory, which was declared as the Cayambe Coca National Park, without consultation, by the State through the Ministry of Environment.*³⁴ By recognising the right of the A'I Cofán Community to organise itself, including by setting up an Indigenous Guard, to protect its lands and the ecosystem, the judgment points to an Indigenous-led and Indigenous-determined conservation paradigm (it is also worth noting that the A'I Cofán Community did not act unilaterally, but invited the authorities to recognise the Indigenous Guard and work with it; this request was not acted on by the authorities).³⁵

GRANTING OF LEGAL PERSONHOOD TO NON-HUMAN ENTITIES

In the A'I Cofán case detailed above, the court ruled that [translation by Amnesty International]: *[i]n this case, as we are in the vicinity of the Cayambe-Coca National Park, rivers, forests and other natural elements are at stake, which are of transcendental importance, not only for the community of Sinangoe, but also for the survival of the biodiversity of flora and fauna of our country and the world. These elements are closely interconnected and their sustainability and wellbeing have implications for the constitutional rights of all people and of nature itself* (Amnesty International's emphasis).³⁶ The court also ratified the judgment of two lower courts, which [translation by Amnesty International]: *declared the violation of the rights to prior consultation, to nature, to water, to a healthy environment, to culture and to territory.*³⁷

The court's citing of the constitutional rights of nature refers to Chapter 7 of the 2008 Constitution of Ecuador. In Article 71, the Constitution provides, "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes", and further, "The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem", and (Art. 72), "Nature has the right to be restored."

UNESCO PROGRAMMES

In 2017, part of the Itaipú area was designated by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a Biosphere Reserve in the Man and the Biosphere (MaB) programme.³⁸ The Ava Paranaense Indigenous communities were never consulted by the Paraguayan state or by UNESCO on this designation.³⁹ On 29 May 2019, the Federación por la Autodeterminación de los Pueblos Indígenas (FAPI; Federation for the Self-Determination of Indigenous Peoples, an umbrella organisation of Indigenous peoples in Paraguay) wrote to the Director General of UNESCO outlining a number of allegations of human rights violations relating to the Itaipú dam, including the expropriation without consultation or compensation of their ancestral lands, the continuing poverty in which the Tekoha Sauce exists, and the legal cases that the Itaipú corporation has initiated in order to evict members of Tekoha Sauce from the lands they are currently occupying.⁴⁰ No response was received to that letter. It raises concerns about the

³³ Constitutional Court of Ecuador, Case No. 273-19-JP, *Consulta previa en la comunidad A'I Cofán de Sinangoe*, Judgment, 27 January 2022, para. 138.

³⁴ *Consulta previa en la comunidad A'I Cofán de Sinangoe*, footnote 7.

³⁵ *Consulta previa en la comunidad A'I Cofán de Sinangoe*, para. 10.

³⁶ *Consulta previa en la comunidad A'I Cofán de Sinangoe*, para. 135.

³⁷ *Consulta previa en la comunidad A'I Cofán de Sinangoe*, Decisión, para. 1 (p. 38).

³⁸ Itaipú Binacional, "La UNESCO Aprobó el Ingreso de la Itaipú en la Red Mundial de Reservas de Biosfera", 14th June 2017,

³⁹ Interview with an adviser of the Federación por la Autodeterminación de los Pueblos Indígenas (FAPI), 11 April 2022.

⁴⁰ Federación por la Autodeterminación de los Pueblos Indígenas, "FAPI remite nota a la UNESCO en relación a Comunidad Sauce", <https://fapi.org.py/la-fapi-remite-nota-a-la-unesco-en-relacion-a-la-comunidad-indigena-tekoha>

extent to which intergovernmental organizations consult effectively with affected Indigenous peoples to ensure that such programmes do not provide a veneer of legitimacy and “good intentions” to the expropriation of their lands. According to UNESCO, the MaB programme “is an intergovernmental scientific programme that aims to establish a scientific basis for enhancing the relationship between people and their environments. It combines the natural and social sciences with a view to improving human livelihoods and safeguarding natural and managed ecosystems, thus promoting innovative approaches to economic development that are socially and culturally appropriate and environmentally sustainable.”⁴¹

IMPACT OF REDD+ ON INDIGENOUS PEOPLES' RIGHTS

In the case of the Sengwer, detailed above, a consistent approach by the government has been to question the legitimacy of the community's leadership as representing the true wishes of the community. This had a particular impact on the REDD+ process, which was led in Kenya by the United Nations Development Program.⁴²

Because of the succession of violent evictions over 40 years, and the resulting dispersal of the Sengwer community to many locations inside and outside the forest, it is inevitable that the traditional leadership structures, based around the heads of 21 clans within the Sengwer, have been significantly disrupted.⁴³ Inter-governmental organizations and donors who are involved in conservation and climate change mitigation processes also engage directly with Indigenous peoples in many cases, and there is a risk that they replicate government behaviours with regard to the undermining of leadership structures. Peter Kitelo, an Ogiek leader and activist who has taken part over a number of years in consultations with the United Nations Development Programme around the REDD+ programme (Reducing Emissions from Deforestation and Forest Degradation in Developing Countries), expressed his concerns in a 2018 letter to the UNDP Resident Coordinator, over the failure of the organisation to engage with the Sengwer in good faith on REDD+. He denounced “the “propping up” of people who are coming forward as more “Sengwer community representatives” [...] so that a narrative of “imposters” can be created in an attempt to deflect attention from the complaints raised [...] UNDP as a honest broker should listen more to those who don't agree with them and not put itself in a situation that compromise the organization's trust.”⁴⁴

INVOLVEMENT OF OTHER INTER-GOVERNMENTAL ACTORS AND DONORS

The Sengwer case detailed above illustrates the risks involved with donors' involvement in state-led conservation initiatives. Beginning in 2015, Embobut forest was included in WaTER, a forest conservation and climate change mitigation project funded by the European Union (EU). During planning and research activities, Sengwer representatives complained on a number of occasions about human rights violations committed in the past by the main project implementers, the Kenya Forest Service (KFS), and the failure to consult them within the project framework. It was not until the killing of Robert Kirokich, a Sengwer man, in Embobut in January 2017, during an operation by armed KFS guards, that the EU delegation took action and suspended funding for the project (a strongly worded call to the EU by UN Special Rapporteurs played a decisive role at this point⁴⁵). A letter from the EU Delegation in Nairobi to Amnesty International confirmed that a study in 2010 “looked into the social, environmental, economic and human rights impact of the programme” but that it “did not match the human rights assessment standards that we apply today”. The KFS was due to receive a grant of €4m under the project with no acknowledgement by the EU of its role in evictions going back to 2014, or of the lessons learnt under a previous World Bank project which

[sauce/](#). Copy of the letter sent to UNESCO on file with Amnesty International.

⁴¹ UNESCO, “Man and the Biosphere (MAB) Programme”, <https://en.unesco.org/mab>

⁴² Families Torn Apart, pp.70-71.

⁴³ Families Torn Apart, p. 16.

⁴⁴ “My Key Observations and Concern over the UN (UNDP) REDD+ Due-diligence and Project Document Development Process”, letter to Mr. Siddharth Chatterjee, UN Resident coordinator and UNDP Resident representative, 25 May 2018.

⁴⁵ Office of the High Commissioner for Human Rights, “Indigenous rights must be respected during Kenya climate change project, say UN experts”, 15 January 2018, <https://www.ohchr.org/en/press-releases/2018/01/indigenous-rights-must-be-respected-during-kenya-climate-change-project-say>

had been investigated and condemned by the Bank's Inspection Panel.⁴⁶

CONCLUSION

An Indigenous-led and Indigenous-determined conservation paradigm is supported by research evidence and international human rights standards, and is increasingly recognised by international and national judicial decisions, as the A'I Cofán Community judgment shows. Currently, it is estimated that Indigenous lands hold 80% of the world's biodiversity (whilst Indigenous peoples only hold formal legal title to an estimated 10% of the world's land).⁴⁷ Research increasingly points to a direct causal relationship between Indigenous ownership and stewardship of their lands, and the increased biodiversity to be found there, among other positive conservation outcomes including reduced CO2 emissions.⁴⁸

In any case, if states wish to initiate protected areas on Indigenous lands, these must not violate the rights of Indigenous peoples to the conservation of their lands, to self-determination, to self-governance, to consultation in order to obtain their free, prior and informed consent, and to maintain and strengthen their spiritual relationship with their lands.⁴⁹ Whilst the approach of establishing protected areas cannot per se be considered harmful, any initiative to establish a formally recognised protected area on the lands of Indigenous peoples must take as its starting point the assumption that the idea of conservation on those lands will not be a new one, that it will already be part of the worldview of the affected people, and that Indigenous visions and their spiritual relationships with their lands and territories must be central, including the concept of responsibility to past and future generations.

The issue of consultation and free, prior and informed consent is not of unique relevance to the theme of conservation and protected areas; however there is a particular danger that governmental and inter-governmental actors focus exclusively on the "virtuous purposes" (as Stavenhagen expresses it in the quote above) and begin to see Indigenous actors who raise objections to conservation projects as obstacles to those same virtuous purposes. The UN Declaration on the Rights of Indigenous Peoples does allow for the possibility of limitations being placed on the rights it enumerates; these must be "determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."⁵⁰ It may be tempting for governmental, intergovernmental actors and donors to conclude that their conservation projects – especially if they are the ones who have designed them – constitute such "just and most compelling requirements of society". The balancing of such requirements against human rights obligations must however still be done, and – certainly in cases of the forced expropriation of lands from Indigenous peoples without their free, prior and informed consent – the case law indicates that such a restriction would not be justified, and that the balancing would fall on the side of respecting Indigenous rights.⁵¹ Evicting Indigenous peoples from protected areas also ignores the evidence that conservation objectives can be better achieved through Indigenous-led initiatives which respect their right to their ancestral land.

RECOMMENDATIONS

- Indigenous peoples must be enabled to exercise their right to self-determination in relation to all conservation initiatives, including the recognition of their traditional knowledge; state, intergovernmental organizations and donors working on conservation must see themselves as

⁴⁶ Families Torn Apart, p. 9.

⁴⁷ World Resources Institute, "By the Numbers: Indigenous and Community Land Rights", <https://www.wri.org/insights/numbers-indigenous-and-community-land-rights>, 20th March 2017

⁴⁸ Initiative for Equality, "Evidence for Success of Indigenous Peoples in Conservation", January 2021, <https://initiativeforequality.org/wp-content/uploads/Evidence-on-Indigenous-Protection-of-Lands-Jan-2021.pdf>

⁴⁹ UN Declaration on the Rights of Indigenous Peoples, Arts. 3, 10, 19, 25, 26, 29.1.

⁵⁰ Art. 46.2.

⁵¹ See for example Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, para 154, and Ogiek Case at the African Court (see footnote 9).

supporting Indigenous conservation efforts as appropriate and as determined with the free, prior and informed consent of the affected peoples.

- Protected areas which affect Indigenous lands or territories must only be implemented after full and effective consultations with affected Indigenous peoples in order to obtain their free, prior and informed consent.
- No conservation initiatives must be implemented which would violate the principle of non-contact with Indigenous peoples in voluntary isolation.
- States must ensure that laws and policies governing protected areas fully protect Indigenous peoples' rights to their lands, the right to consultation with the objective of obtaining their free, prior and informed consent, and the right to reclaim land that has been taken from them without their free, prior and informed consent.
- Donors and other inter-governmental actors involved in conservation and climate change mitigation must ensure that the programmes they finance do not contribute to the violation of human rights.