＜論　文＞

6. The Convention on Biological Diversity in the Human Rights Regime: The Compatibility of Protected Areas with the Rights of Indigenous Peoples

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Introduction

In 2015, a noteworthy judgment which refers to the Convention on Biological Diversity (CBD) has been delivered by the Inter-American Court of Human Rights. The Kaliña and Lokono Peoples case addresses a land dispute between indigenous peoples and Suriname. Within the land in question, some protected areas were established, thereafter indigenous peoples have been prohibited from accessing to their ancestral land. We could figure out how the CBD is understood in the human rights regime by examining this judgment. Is the establishment of protected areas which are needed to conserve biological diversity compatible with the rights of indigenous peoples? This article mainly deals with this issue. This article, therefore, firstly overviews the development of indigenous peoples' rights by the Inter-American Court of Human Rights and then analyzes the Kaliña and Lokono Peoples case.

(1) The development of indigenous peoples' rights by the Inter-American Court of Human Rights

Before getting to the main point, I will briefly introduce the development of indigenous peoples' rights by the Inter-American Court of Human Rights (Osakada, 2008). The Court has been deciding cases based on the American Convention on Human Rights, but this

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convention does not stipulate any specific rights for indigenous peoples. The convention does not contain either the right of persons belonging to minorities or the right of peoples to self-determination, both of which are included in the International Covenant on Civil and Political Rights. It could be said, therefore, that this convention is absolutely individualistic.

In 2001, a landmark judgment with regard to the rights of indigenous peoples to land was handed down by the Court. The Awas Tingni Community case recognized the collective right of indigenous peoples to their traditional lands through an evolutive interpretation of the provision for individual property rights. After emphasizing the fact that, for indigenous peoples, their traditional lands have not only economic but also spiritual significance, the Court mentioned as follows: 'as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of the property, and for consequent registration'. The Court, finally, ordered Nicaragua to delimit, demarcate and title the lands of the Awas Tingni Community.

In the Awas Tingni Community case, indigenous peoples have been allowed to occupy the lands in question and pursue self-government there. In the subsequent cases, indigenous peoples began to claim the rights to their ancestral land which had been taken in the past, thus unable to be occupied or used by them at this time. In the Sawhoyamaxa Community case, the Court affirmed that, taking into consideration that 'spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands', the right to claim land is enforceable as long as this relationship exists. According to the Court, the relationship with the land might be expressed in traditional hunting, fishing and gathering activities, and if indigenous peoples have been prevented from doing these activities for reasons beyond their control, restitution rights shall survive until said hindrances disappear. In this case, the Court ordered Paraguay to restitute the lands to the Sawhoyamaxa Community. If the restitution is not possible on objective and sufficient grounds, the State shall make over alternative lands, selected upon agreement with the Community.

In the background of these developments by the Inter-American Court of Human Rights, since the late 1980s, many Latin American countries came to recognize the collective rights of indigenous peoples to self-government and lands in their domestic laws. As a result of the growing gap between rich and poor, indigenous peoples' organizations, which are opposing neo-liberalism, have been increasing their influence over national and local

policies in many Latin American countries. This movement enabled many Latin American countries to pass their domestic laws which recognize certain rights of indigenous peoples. Against these backgrounds, the Inter-American Court of Human Rights could develop its practices concerning the rights of indigenous peoples to lands.

(2) Case of the Kaliña and Lokono Peoples V. Surname

Worldwide, according to UN figures, there are more than 5,000 different indigenous peoples with a total population of some 370 million people living in 72 countries. They constitute at least 5 percent of the world's total population. Despite the loss of many indigenous peoples' lands, their territories still comprise at least 20 percent of the land area of the planet and are estimated to hold 80 percent of the world's biodiversity (United Nations, 2009, 21 and 84). It is, therefore, no wonder that many protected areas have been established within their ancestral territories. Unfortunately, however, a considerable number of protected areas have allegedly ignored the existence of indigenous peoples, prohibiting them from having access to their ancestral lands. In the Kaliña and Lokono Peoples case, indigenous peoples claimed the right to their ancestral lands which are located in 3 different protected areas and inaccessible to them.

Regarding environmental protection as a justification for the public interest, in the Salvador Chiriboga case, the Court established that, in a democratic society, the protection of the environment by the creation of a metropolitan park was a legitimate reason to restrict the right to property stipulated in Article 21 of the Convention. On the other hand, in the case of Xákmok Kásek Community, the Court determined that the State must adopt the necessary measures to ensure that its domestic laws concerning the protected area do not represent an obstacle to the return of traditional lands to the members of the Community. The Court, therefore, has to address the issue of how to accommodate these two opposing requirements.

In this regard, the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, provided the following expert testimony before the Court. At first, she highlighted the Decision VII/28 adopted by the CBD COP 7 in 2004. Paragraph 22 stipulates as follows: 'Recalls the obligation of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes 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 and local communities consistent with national law and applicable international obligations'. According to the Special Rapporteur, this decision requires to respect for indigenous rights and subject the establishment and management of protected areas to a State's obligation under international human rights law.

In addition, she underscores the Decision XII/12 adopted by the CBD COP 12 in 2014, as, in her understanding, it requires that 'protected areas and management regimes must be consensual if indigenous peoples' rights are to be respected'. Paragraph 9 of its Annex provides as follows: '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 officially 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'.

After seeing these CBD decisions, she concludes that 'international environmental and human rights laws should not be seen as distinct bodies of law, but as interrelated and complementary. …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 obligation, such as those defined by the American Convention on Human Rights and as set forth in the UN Declaration.'

Let's put the issue of whether her analysis is right or not aside for now. We will see how the Court addressed this argument in its judgement. To tell the conclusion first, the Court

accepted her idea of a complimentary relationship between international environmental law and human rights law as follows. '...the Court finds that 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 indigenous peoples may have a positive impact on environmental conservation. Hence, the rights of indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights.'

Then, the Court reinforced the compatibility of the rights of indigenous peoples and the protection of natural areas by referring to Article 8(j) and 10(c) of the CBD, CBD Decision VII/28, Principle 22 of the Rio Declaration on Environment and Development and Article 18, 25 and 29 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). In conclusion, the Court indicated the following criteria to achieve the above-mentioned compatibility in establishing the protected area within traditional territories of indigenous peoples; 'a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation. All of the foregoing provided that they are compatible with protection and sustainable use.'

(3) Some Considerations

The Inter-American Court of Human Rights referred to the CBD and the CBD decisions to prove that traditional activities of indigenous peoples, which entail sustainable practices, generally contribute to the environmental protection, leading to a conclusion that the rights of indigenous peoples could be compatible with the establishment of a protected area. In the international human rights regime, the CBD and the CBD decisions are considered to require States to comply with the rights of indigenous peoples including the UNDRIP. I wonder if this understanding might produce a gap with the one in the international environmental law regime.

The CBD Decision VII/28 certainly requires States to respect the rights of indigenous peoples consistent with applicable international obligations in establishing, managing and monitoring protected areas. It follows that, even in the international environmental law regime, there is a general understanding that the establishment, management and

monitoring of protected areas should not violate the rights of indigenous peoples. The problem is the specific contents of the rights of indigenous peoples as well as applicable international obligations. More specifically, do they include the rights of indigenous peoples based on the American Convention on Human Rights or the UNDRIP?

The Special Rapporteur seems to support that both of them are included. In this respect, it is clear that the American Convention on Human Rights is applicable international obligations for its States Parties, not for the non-Party States. On the other hand, in my opinion, the UNDRIP is not considered as applicable international obligations by States Parties to the CBD. This is not only because of its non-binding nature, but also because of the way the CBD Decision XII/12 refers to the UNDRIP. The CBD Decision XII/12 mentions the UNDRIP three times: firstly, just taking note with appreciation of the outcome document of the World Conference on Indigenous Peoples, which renewed the commitment for the implementation of the UNDRIP; secondly, just taking into consideration the UNDRIP; thirdly, just taking into account the UNDRIP. The Decision, therefore, does not mandate States Parties to observe the UNDRIP in the work of the CBD, but just recommends to take it into consideration. This means there is a gap of understanding concerning the specific contents of the rights of indigenous peoples between the international human rights regime and the international environmental law regime.

Conclusion

As mentioned previously, the Inter-American Court of Human Rights confirmed the compatibility of the rights of indigenous peoples and the establishment of protected areas by referring to the CBD and the CBD decisions, thereafter indicated the following criteria to achieve the compatibility: 'a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation'. As there is no established condition to protect the rights of indigenous peoples within protected areas in the international environmental law regime, indigenous peoples might claim that States should observe these criteria in the work of the CBD by invoking this judgment. This article has also revealed there is a gap of understanding with regard to the specific contents of the rights of indigenous peoples between the international human rights regime and the international environmental law regime. In this regard, indigenous peoples have demanded and will demand the observance of the UNDRIP in the work of the CBD, which has given and will give rise to controversy at the CBD COPs (Osakada, 2015, 208-

212). I would like to keep paying my attention to how far the criteria and specific rights concerning ancestral lands of indigenous peoples which have been established in the international human rights regime will be accepted in the work of the CBD.

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