

# Trouble in Paradise How Can the Law Help? Minority Rights and Tourism

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**What protection does international human rights law afford to communities adversely affected by tourism development? MRG's legal cases officer, Cynthia Morel, outlines how international human rights law can be used to secure more sustainable practices.**

While little case law as yet exists on the specific issue of indigenous and minority rights in the context of tourism, most of the relevant principles can be drawn from well established standards and jurisprudence relating to land, effective participation and the right to development. Striking an ethical balance between tourism development and the needs of local communities can only be possible when the tourism industry and local authorities actively engage in upholding these rights.

## Land rights

Both minorities and indigenous peoples have a right to property, though the latter are understood to have a prior claim on both property and wider communal land rights due to their ancestral ties to these lands, and also due to the importance of these lands for the survival of their traditional way of life. The recognition of indigenous peoples' communal land rights as property rights has become increasingly established under international law. One of the leading cases on this principle stems from the *Mayagna (Sumo) Awas Tingni v. Nicaragua* case, where a community's ancestral lands were threatened by commercial logging. In this case, the Inter-American Court of Human Rights recognized that the American Convention on Human Rights protected property rights 'in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property'.<sup>1</sup> Moreover, the Inter-American Court stated that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.<sup>2</sup> The Awas Tingni case has set an important precedent that is now influencing legal systems globally. For example, many of the principles set out in that landmark case are currently under consideration by the African Commission on Human and Peoples' Rights, in a case dealing with the eviction of the Endorois pastoralist community from a nature reserve in Kenya.

It is important to note that these standards do not render all forms of encroachments on indigenous lands illegal. If encroachment of land is found to pursue a legitimate aim (i.e. that measures taken are in the interest of public need or in the general interest of the community), and that the measures taken are in accordance with the provisions of appropriate laws, no violation will arise unless the measures taken are deemed disproportionate to the aims sought. It is clear that the creation of nature and game reserves often is – or can be – in the general public interest. United Nations (UN) Expert Erica-Irene Daes nonetheless sets out some of the key parameters that help establish what factors must be taken into account when determining proportionality. Daes draws particular attention to the fact that 'limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the *most urgent* and compelling interest of the state'.<sup>3</sup> She then stresses that:

*'few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.'*<sup>4</sup>

Recent jurisprudence has further confirmed the link between dispossession of indigenous peoples and right to life violations in instances where prompt relocation to land of equal value is not afforded.<sup>5</sup> As such, if displacement is deemed absolutely necessary – or restitution impossible – only prompt relocation to land which allows for the continuation of the indigenous community's traditional way of life will be deemed compatible with international legal standards.

Given the critical importance of traditional knowledge systems for sustainable ecotourism practices, and also for the support of conservation efforts of natural reserves, a worthwhile alternative to forcible displacement of indigenous peoples for the creation of these initiatives is to allow them to remain on their ancestral lands as living testaments of how to live in harmony with the environment. More will often be gained from indigenous peoples actively engaging in conservation efforts from within, rather than being disenfranchised and impoverished by the process. Failure to engage indigenous peoples

has in many instances forced displaced families to resort to poaching of wildlife. The stalemate often resulting from forced displacement without adequate compensation therefore poses a serious risk to sustainable conservation efforts. The flourishing of a fruitful and dynamic ecotourism industry will depend on the industry's success in negotiating a delicate balance between its interests and those of affected communities.

### Right to participation and right to development

While interest in the traditions and cultures of minorities and indigenous peoples is consistent with the wider ethical framework of ecotourism, the reality is that, under current prevailing models, local peoples are being overwhelmingly marginalized in the process of development. Some of the most widely ratified international instruments, such as the International Covenant on Civil and Political Rights, secure the right to participation. The right to participation has also been incorporated in more recent instruments, such as the 1986 UN Declaration on the Right to Development, where the right to development is defined as requiring 'active, free and meaningful participation in development'. The right to participation is also outlined in the 1993 Vienna Declaration and Programme of Action, a Declaration which marked the culmination of a long process of review and debate over the status of implementation of the body of human rights instruments developed since the 1948 Universal Declaration on Human Rights. Most recently, this is also an underlying tenet of the newly adopted UN Declaration on the Rights of Indigenous Peoples.

In this regard, the right to participation is often scrutinized by UN Treaty Bodies in the examination of state reports. For example, in light of its General Recommendation No. 23 on the rights of indigenous peoples, the UN Committee on the Elimination of Racial Discrimination (CERD) has explicitly requested in the review of state reports that:

*'information [be provided] on the effective participation of indigenous communities in the decisions directly relating to their rights and interests, including their informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out'.<sup>6</sup>*

CERD has also recommended that states 'adopt all measures to guarantee that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities'.<sup>7</sup>

Together, these standards firmly establish the right for minorities and indigenous peoples to be involved in collectively in decision-making, planning and implementation processes affecting their economic, social and cultural rights. Moreover, they are entitled to information that enables the decision-making process to be meaningful. It follows that states and non-state actors, particularly development agencies, have a duty to enable people affected by a development activity to participate in ways that can positively transform their social, political and economic conditions. Indeed, international development organizations have begun adopting participation and consultation standards with respect to indigenous peoples. A UN Development Programme policy paper notes that participation is 'essential in securing all other rights in development processes'.<sup>8</sup>

In this light, ecotourism practices that adversely affect a community's socio-economic or cultural well-being will be in violation of the right to development. The overriding goal of the substantive improvement in well-being of these communities would therefore require, at a minimum, that they receive a fair share of the income and employment opportunities generated by the industry, and that necessary training be afforded to local community members in order to facilitate access to administrative and management positions.

### Free prior informed consent

One of the most important concepts regarding participation is that any consent given by communities directly affected by the creation of nature reserves and ecotourism centres should be free prior informed consent. The International Labour Organization (ILO) delineated consultation standards with respect to indigenous peoples in Convention No. 169. The relevant text of the Convention states: 'The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the

proposed measures.' The most developed explanation of what free prior informed consent means has been made by the UN committee of experts monitoring the implementation of the key treaty prohibiting racial discrimination (ICERD).<sup>9</sup>

The requirement of prior informed consent has also been delineated in the case law of the Inter-American Commission on Human Rights (IACHR). In *Mary and Carrie Dann v. USA*, where the state had interfered with the indigenous community's use and occupation of their ancestral lands by purporting to have appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission, the IACHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.<sup>10</sup> To have a process of consent that is fully informed 'requires at a minimum that all of the members of the Community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives'.<sup>11</sup> It is again a principle enshrined in the newly adopted UN Declaration on the Rights of Indigenous Peoples and that formed an important part of the landmark San case won by the indigenous community at the Botswana High Court in 2006.<sup>12</sup>

### Conclusion

The above standards are obligations imposed upon states under international law – both in terms of restricting state action against minorities and indigenous peoples, and requiring authorities to protect these communities from third parties, including private business interests linked to the tourism industry. Tourism also raises more complex issues, like whether or not the country of origin of international tourists has responsibilities under international human rights law vis-à-vis its tourists and the country of destination, or whether such rights are only enforceable against the home state of those adversely affected. While addressing such complex issues falls beyond the scope of this article, what remains clear is that the tourism industry must show leadership in using the standards set out as key guidelines for all of their dealings with minorities and indigenous peoples, particularly when their dealings directly impact on the relationship of indigenous communities with their ancestral lands. ■

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