



# Forest Peoples Programme

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## A SURVEY OF INDIGENOUS LAND TENURE

A REPORT FOR THE LAND TENURE SERVICE OF THE  
FOOD AND AGRICULTURE ORGANISATION

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## About the authors:

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**Fergus MacKay** is a human rights lawyer trained at the California Western School of Law. He is an expert in indigenous rights and has written a number of books and articles on the subject. He has worked as an attorney for indigenous organisations in Alaska and other areas of the United States. As legal adviser to the World Council of Indigenous Peoples he worked with indigenous organizations throughout the Americas and the Pacific on a variety of activities including: rights education, litigation, land demarcation, promotion of treaty ratification and technical support with drafting legislation. He has also been active in the development of the draft United Nations Declaration on the Rights of Indigenous Peoples, the draft Organization of American States Declaration on the Rights of Indigenous Peoples and other international standard-setting exercises pertaining to indigenous peoples. He acts as regional coordinator for the Three Guyanas Programme and coordinator of the Human Rights and Legal Programme of the Forest Peoples Programme.

**Thomas Griffiths** is an Oxford-trained social anthropologist who carried out field research for his doctorate on Amerindian livelihood strategies with the Uitoto people in lowland Colombia. He currently works as policy advisor to the Forest Peoples Programme on issues relating to International Financial Institutions, International Forest Policy and Community-based Natural Resource Management. As well as participating in international forest-related fora, he undertakes participatory field evaluations of development policies and projects. This grassroots work is used to inform policy analysis and provide information to indigenous and NGO networks engaged in policy debates at the national and international levels. With prior qualifications in ecology and protected area management, he also works with local communities in participatory mapping and natural resource management planning. He is fluent in Spanish and speaks Uitoto.

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## Chapter 1. Executive Summary

This study provides a concise overview of the information available on the land rights of indigenous peoples, with a focus on those in developing countries and countries with economies in transition. Successive chapters summarise the rights of indigenous peoples in international law and then examine how these rights are being recognised, or not, in Latin America, Africa and the Asia-Pacific. A final chapter reviews the findings of the survey and identifies key issues to be considered in making policy decisions about indigenous land rights.

Indigenous peoples remain an undefined category but one that has gained widespread currency in international discourse and international law. Indigenous rights to land, understood as rights to collective ownership, are embedded in the right of indigenous peoples to self-determination. A treatment of land rights should not be divorced from wider human rights considerations or from the political economy in which land is but one issue.

Indigenous rights are firmly entrenched in international human rights jurisprudence. New human rights instruments focused on indigenous rights need ratification but, for the large part, consolidate existing rights. Aboriginal rights based on English Common law have long antecedents and have been found to apply widely in Commonwealth countries. Rights based on immemorial possession are also widely recognised in Latin countries. International law on indigenous land rights fits least certainly with legislation based on the French Civil Code.

Latin America has witnessed a remarkable transformation in the way indigenous rights are recognised. Policies of assimilation and integration, with a concomitant denial of rights to land, have given way to new Constitutions and laws recognising the multi-ethnic and pluri-cultural nature of Latin American states. Particularly in lowland areas, very large swathes of land have begun to be recognised as inalienable territories under collective ownership and, even in some countries, indigenous self-governance. The social and environmental advantages of recognising indigenous rights has facilitated this trend. Less progress has been made in areas of competing land use from mining, oil and gas interests and conservation agencies. In the highlands, the fragmented nature of indigenous land holdings has presented greater obstacles to collective titling. Aid agencies have begun to promote titling with mixed results but have learned important lessons from these pilot experiences. Innovative initiatives by communities to map and title their own lands have demonstrated their effectiveness.

Customary land tenure remains the dominant form of *de facto* land ownership in Sub-Saharan Africa, with most systems having a multi-ethnic embrace and allowing for a complex mix of individual, family and communal tenures. These tenure systems enjoy very uneven degrees of legal recognition in Africa and for the most part customary tenures are considered to confer weaker rights than officially registered titles. Notwithstanding the prejudices of law and administration, customary tenure systems have proved remarkably resilient, adaptive to change and effectively cushion farmers against landlessness and poverty. Hunter and gatherer groups have however suffered marginalization and denial of access both by formal laws and the customary regimes of farming communities. In general, the formalization of land titles has exacerbated existing inequalities, meaning loss of livelihood and entitlements by hunters and gatherers and women. Individual titling programmes have been particularly damaging. More participatory processes for developing legislation, land policy and for regularising customary land ownership are required, with particular attention being made to marginalised social groups and women.

Asian governments have been the most outspoken in denying that the concept of indigenous peoples applies in the continent. However, as the term has gained currency and the legal implications better understood, this reaction has weakened. Collective land rights are recognised in only a few Asian states. Where collective rights are so recognised it is usually on the basis on immemorial possession. In the Pacific Islands and the Philippines, customary land rights are considered to confer strong rights equivalent to ownership, but in Indonesia and Malaysia customary tenures are considered to confer

weaker rights similar to usufructs. Because land and natural resources are considered alienable, communal tenures in Asia have been especially prone to mismanagement owing to lack of clarity about who makes decisions in the name of the larger group. Paradoxically Asian countries have gone much further than most African and Latin America ones in promoting collaborative natural resource management regimes, but these regimes have rarely involved the conferring of strong tenure rights on user groups.

Indigenous peoples commonly prioritise self-sufficiency and food security over production for the market, guided by an emphasis on the importance of social values, equity and reciprocity. But indigenous peoples are not opposed to development. Development specialists often ignore indigenous visions of land and development in favour of narrow, 'productivist' goals. Recognition of communal tenures implies considerable economies of administration, but land administration units dealing with indigenous peoples are nevertheless often under funded and of weak capacity. Competing pressures on indigenous lands have discouraged states from effecting land regularisation and international agencies often pursue contradictory development policies, promoting indigenous peoples' rights with small-scale projects while supporting broad national reforms that result in indigenous peoples being dispossessed.

The situation of indigenous women is very varied. Some customary regimes provide them with strong rights and security equivalent to those enjoyed by men. Others provide less equality. Market forces and ill-considered government efforts to formalise tenure have often worsened the situation of women, especially where there has been a strong emphasis on individualising land tenure and promoting cash cropping, processes which have tended to favour men.

One of the most significant advances of recent years have been efforts to use new geomatic technologies to map indigenous land use systems and land claims. There has been a general acceptance that participatory mapping is a powerful tool that can assist communities in securing access to land, develop communal management systems embedded in customary law and traditional ecological knowledge, and deal with decision-makers and land-use planners on a more equal basis.

Communal tenures are also gaining favour as a means to secure environmental services and values. Community-based forest and wildlife management has begun to be accepted as a viable means of managing natural resources and even conservationist agencies have accepted that indigenous rights must be respected in protected areas. Communal tenures have historically been seen as obstacles to development but new data question these conclusions. The World Bank, IDB and ADB, though not the AfDB, have all adopted programmes to promote indigenous rights.

A detailed list of recommendations of ways of promoting indigenous land rights is included, giving emphasis to the importance of giving indigenous peoples themselves a decisive voice in their own development. The report concludes by noting that there remain huge knowledge gaps about the relationships between tenure systems and food security and between indigenous rights and national laws.

## **Chapter 2. Introduction**

This study provides a concise overview of the information available on the land rights of indigenous peoples, with a focus on those in developing countries and countries with economies in transition. Successive chapters summarise the rights of indigenous peoples in international law and then examine how these rights are being recognised, or not, in Latin America, Africa and the Asia-Pacific. A final chapter reviews the findings of the survey and identifies key issues to be considered in making policy decisions about indigenous land rights, with comments on the advantages and disadvantages of different policy options.

In the past twenty years, Indigenous Peoples have emerged as a distinct category of human societies under international law and in the national legislation of many countries. The rights of indigenous peoples that are notably distinctive are those *collective* rights which are now recognised for indigenous peoples but which have not, so far, been widely recognised for other human groups. Accordingly, this study focuses on collective rights related to land tenure<sup>1</sup> and summarizes the extent to which these rights are recognized in law and in practice, what are the main obstacles to the effective recognition and administration of indigenous lands, and what are the implications of collective tenure for the promotion of natural resource management, community development, poverty alleviation and the rights and needs of indigenous women.

### 2.1 Definitions:

There is no internationally accepted definition of the term ‘Indigenous Peoples’. The term has gained international currency in the context of international debates about the rights of ‘ethnic minorities’, ‘tribal peoples’, ‘natives’, ‘aborigines’ and ‘indigenous populations’, who have quite evidently suffered, and continue to suffer, discrimination and marginalisation as a result of colonialism, and post-colonial projects of nation-building, development and modernisation. The term ‘Indigenous Peoples’ has been adopted by a large number of governments, international agencies and, most significantly, by a broad movement of self-identified peoples as the best catch-all term available to insert consideration for their rights into international law. Despite, or rather because of, growing acceptance of the phrase and a growing recognition of Indigenous Peoples’ inherent rights, its use has been objected to by a number of governments, especially in Asia.

The International Labour Organization’s Convention No.169, adopted in 1989, applies to both Indigenous and Tribal Peoples and thus includes many such peoples from Asia and Africa. It ascribes both the same rights without discrimination. Article 1(2) of ILO Convention No. 169 notes:

*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.*

The principle of self-identification has been strongly endorsed by Indigenous Peoples themselves and has been adopted in Article 8 of the United Nation’s Draft Declaration on the Rights of Indigenous Peoples. The Chairperson of the UN Working Group on Indigenous Populations notes that indigenous peoples tend to be those who have close ties to their lands or to a specific territory, seek to maintain their identity and cultural distinctiveness and have an experience of subjugation, exclusion or discrimination, whether or not it persists.<sup>2</sup>

### 2.2 Indigenous rights and rights to land :

As reasserted in the UN Human Rights Conference on Human Rights in Vienna, in 1993, human rights are indivisible. Political, social, cultural, economic and civil rights all interrelate and provide the basis for justice, equity, and dignity. Indigenous peoples’ rights are no less indivisible. Rights to land are only one element crucial to their existence and their futures. Indigenous peoples view securing ownership, control and access to their lands, territories and natural resources as only one part of their quest for self-determination.

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<sup>1</sup> Not all indigenous peoples aspire to or have secured collective rights to their lands and territories. In many countries national legislation does not provide options for collective land rights and community members have perforce been obliged to seek individual titles to land. It is however beyond the scope of a short study to address the wider implications of individual titling regimes for Indigenous Peoples beyond noting that the imposition of individual titling on common property regimes has led to mass destitution, impoverishment and natural resource destruction (eg Debo 1940).

<sup>2</sup> E/CN.4/Sub.2/1986/7; Daes 1996b.

This study's focus on indigenous land tenure must therefore be seen as incomplete, not just because it cannot claim to be exhaustive in its own terms, but because tenure systems cannot be understood when divorced from their wider context. The functioning of collective land tenure systems is directly affected by the extent to which collectives are given legal recognition, the extent to which indigenous knowledge is respected, and the extent to which customary law is allowed to operate. The viability of these institutions in turn depends on the degree of self-governance achieved by the collectives, whose coherence also depend on maintenance of social identity, respect for customary forms of decision-making, elements often underpinned by traditional belief systems and 'cosmovisions'. The introduction of new religions and values can transform the way customs operate and thus the way land is managed, owned and transferred and these changes can have differentiated impacts on different sectors of these societies.

### **2.3 Obstacles to land security:**

As detailed in this report, indigenous peoples face multiple obstacles to maintaining secure rights to their lands. The obstacles inhere in: racism, social prejudices and entrenched forms of discrimination; inappropriate, assimilationist social policies towards indigenous peoples; lack of legal recognition of indigenous rights in national constitutions, laws and land tenure regimes; inflexible or deficient land administration services; and the lack of resources, capacity, political connections or awareness in indigenous communities to take advantage of existing legal opportunities.

Pressure on indigenous lands is intense. Indigenous peoples' rights are denied by forestry, mining, oil and gas, dam-building and agribusiness interests, who seek unimpeded access to natural resources. Conservation schemes have also often led to the forced resettlement of indigenous peoples. Government sponsored colonisation has historically been a major cause of dispossession but has lessened in recent years owing to international campaigns against such programmes and greater awareness of the rights of indigenous peoples and the value of tropical forests. Notwithstanding, pressure on indigenous lands from landless peasants and small-scale miners remains a major threat to indigenous security. Indigenous resistance to dispossession has often been met with violence and human rights abuse.<sup>3</sup> Detailed treatment of these wider issues is outside the scope of this study, but any attempt to secure indigenous peoples' lands must be developed taking into account the wider context in which indigenous peoples find themselves.

## **Chapter 3. Indigenous land rights: legal issues Fergus MacKay**

### **3.1 Indigenous rights in international law**

Indigenous peoples' rights have assumed an important place in international human rights law and a discrete body of law confirming and protecting the individual and collective rights of indigenous peoples has emerged and concretized in the past 20 years. This body of law is still expanding and developing through the decisions of international human rights bodies; through recognition and codification of Indigenous rights in international instruments presently under consideration by the United Nations and Organization of American States; through incorporation of indigenous rights in conservation, environmental and development-related instruments and policies; and through incorporation of these rights into domestic law and practice.

Taken together, this evolution of juridical thought and practice has led many to conclude that some indigenous rights have attained the status of customary international law and are therefore generally

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<sup>3</sup> For summaries see: Bodley 1982; Burger 1987; Colchester and Lohmann 1993; Verolme et al 2000; Colchester 2000.

binding on states.<sup>4</sup> Wiessner, for instance, concludes that state practice permits the “identification of specific rules of a customary international law of indigenous peoples.”<sup>5</sup> These rules relate to the following areas:

*First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own systems of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.*<sup>6</sup>

A full treatment of indigenous rights in international law is beyond the scope of this work. Therefore, this part of the report is divided into four sub-sections, each highlighting a few points related to indigenous rights to lands, territories and resources. The first provides a short overview of the juridical bases of indigenous peoples’ rights in international law and notes some of the main conceptual issues. The second gives an overview of indigenous peoples’ rights as defined by existing international human rights instruments: the so-called established rights. The next section briefly notes some of the main points presently under discussion in the United Nations and the Organisation of American States in the context of their standard setting exercises relating to indigenous peoples: so-called emerging indigenous rights. The fourth and final section looks at indigenous peoples’ rights as codified in international instruments pertaining to environment and development.

### **3.1.1. Juridical Bases and Conceptual Issues**

Indigenous peoples’ rights in international law have four main interrelated juridical bases:<sup>7</sup>

1. The right of “All peoples” to self-determination, as defined in common article 1 of the International human rights covenants adopted by the United Nations in 1966. The United Nations Human Rights Committee (HRC) applies this right to indigenous peoples when examining state-party reports under article 40 of the International Covenant on Civil and Political Rights.<sup>8</sup> Although arguably redundant, this right was also explicitly applied to indigenous peoples by the United Nations Working Group on Indigenous Population and the (then) UN Sub-commission on the Prevention of Discrimination and Protection of Minorities in 1993 and 1995, respectively, when these bodies approved the draft UN Declaration on the Rights of Indigenous Peoples. The Organisation of American States’ Proposed Declaration on the Rights of Indigenous Peoples also recognizes this right, although it explicitly limits its exercise to autonomy and self-government.
2. Indigenous rights are aboriginal rights or rights that predate and survive alien or colonial intervention. As noted by Osvaldo Kreimer of the Inter-American Commission on Human Rights: “Indigenous peoples, because of their preexistence to contemporary States, and because of their cultural and historical continuity, have a special situation, an inherent condition that is juridically a source of rights.”<sup>9</sup>
3. Indigenous rights are also founded on the principle of equal protection of the law and on prohibitions of racial discrimination. Read together with other human rights, such as the right

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<sup>4</sup> See, among others, Anaya 1996, 49-58; Wiessner, 1999, 128; R. Torres 1991; Iorns Magallanes, 1999, 238 & 242 and; Anaya & Williams 2001.

<sup>5</sup> Wiessner 1999, *ibid*.

<sup>6</sup> Wiessner, 1999, *ibid* (emphasis added).

<sup>7</sup> For an extensive treatment of bases of Indigenous rights in international law, see, Kingsbury 2001 and Kingsbury 1992.

<sup>8</sup> See, for instance, UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*. 07/04/99, at para. 8 and, *infra*, note 9 and accompanying text.

<sup>9</sup> Kreimer, 1998, 69-70.



to property, these fundamental principles of human rights law require substantive equality, including, in some cases, affirmative action or special measures, rather than mere formal equality.

4. Finally, indigenous rights are grounded in the right to cultural integrity, which is a fundamental right enshrined in a range of international instruments.

Three important conceptual issues are:

1. Indigenous rights are qualitatively and quantitatively distinct from minority rights, although there is some overlap in practice;
2. Indigenous rights are both individual and collective rights, although the latter are of most relevance;
3. There is no accepted international definition of the legal concept 'indigenous', nor is there an accepted international definition for the legal concepts 'people' and 'minority'. While various attempts have been made to define indigenous peoples, these have all been unsatisfactory, leading UN subsidiary bodies to declare that indigenous peoples have the right to define themselves and membership in their communities according to their own traditions and customs. Others, the ILO for instance, have stated that self-definition as Indigenous or Tribal is a fundamental criterion in defining who is Indigenous or Tribal.

### **3.1.2 Indigenous peoples' rights under existing international human rights instruments**

It is often stated that indigenous peoples' rights are addressed only under International Labour Organization Convention No. 169. However, this is incorrect; indigenous peoples' rights are recognized and there is well established jurisprudence under both United Nations and Inter-American human rights instruments and procedures. The rights recognized in these global and regional instruments relate to, among others, ownership, possession and use of lands and resources (historically or traditionally) occupied and used, cultural integrity, equal protection/non-discrimination, self-development, self-determination, autonomy and self-government, participation in decision-making and the right to consent to activities, and to health and a healthy environment.

#### **3.1.2.1 Global Instruments:**

Under the International Covenant on Civil and Political Rights, articles 1 and 27 are especially relevant, the latter being the basis for much of the HRC's jurisprudence.<sup>10</sup> Article 1 sets out the right to self-determination, which is defined as the right of all peoples to freely determine their political status, to freely pursue their economic, social and cultural development and to be secure in their means of subsistence. As noted above, this right has been applied to indigenous peoples by the HRC when examining state reports under the article 40 of the ICCPR. For instance, in its Concluding observations on Canada's fourth periodic report, the HRC stated that

*With reference to the conclusion by the [Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.*<sup>11</sup>

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<sup>10</sup> The ICCPR has been ratified by 145 States as of January 2000.

<sup>11</sup> *Concluding observations of the Human Rights Committee: Canada*. 07/04/99, at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999).

The HRC reached similar conclusions – that the State implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands – in its Concluding Observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000.<sup>12</sup> In its complaints-based jurisprudence, the HRC has also related the right to self-determination to the right of indigenous peoples to enjoy their culture under Article 27 of the ICCPR.<sup>13</sup>

Article 27 protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, among others, land and resource, subsistence and participation rights.<sup>14</sup> The HRC published a General Comment in 1994 which elaborates on indigenous rights under article 27<sup>15</sup> and, in July 2000, stated that article 27 requires that “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...” and that “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27...”<sup>16</sup> As with article 30 of the Convention on the Rights of the Child (CRC), article 27 imposes specific and positive obligations on states-parties. Article 30 of the CRC explicitly mentions indigenous children and utilizes language consistent with article 27 of the ICCPR.<sup>17</sup> It protects cultural rights and, in the case of indigenous children (and by implication, the indigenous people in general), land, resource and participation rights.

Articles 1(4) and 5 are most relevant under the Convention on the Elimination of All Forms of Racial Discrimination.<sup>18</sup> Read together these articles provide for, among others, special measures to protect indigenous ownership and control of historically occupied lands and resources and for indigenous consent with regard to matters that may affect them.

This is confirmed by Committee on the Elimination of Racial Discrimination’s 1997 General Recommendation. Therein, it called upon states-parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent” and; to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.”<sup>19</sup> In its recent Concluding Observations on Australia, the Committee reiterated “its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, *as required under*

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<sup>12</sup> *Concluding observations of the Human Rights Committee: Mexico*. UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), paras. 10 and 17; and *Concluding observations of the Human Rights Committee: Australia*. 28/07/2000. CCPR/CO/69/AUS. (*Concluding Observations/Comments*), para. 8.

<sup>13</sup> *Apirana Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000)), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.2.

<sup>14</sup> Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990). See also, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; and *I. Lansman et al. vs. Finland* (Communication No. 511/1992), CCPR/C/52/D/511/1992.

<sup>15</sup> *General Comment No. 23 (50) (art. 27), adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994*. UN Doc. CCPR/C/21/Rev.1/Add.5.

<sup>16</sup> *Concluding observations of the Human Rights Committee: Australia*. 28/07/2000. CCPR/CO/69/AUS. (*Concluding Observations/Comments*), at paras. 10 and 11..

<sup>17</sup> The CRC has been ratified by 191 States as of January 2000.

<sup>18</sup> CERD has been ratified by 160 States as of January 2000.

<sup>19</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997*. UN Doc. CERD/C/51/Misc.13/Rev.4, at paras. 4 and 5.

*article 5(c) of the Convention and General Recommendation XXIII of the Committee*, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples” (emphasis added).<sup>20</sup>

International Labour Organisation Convention No. 169, together with its predecessor ILO No. 107, is the only binding international treaty to exclusively deal with Indigenous and Tribal peoples’ rights.<sup>21</sup> ILO 169 is based largely upon the principle that Indigenous and Tribal peoples should “enjoy as much control as possible over their own economic, social and cultural development.” It recognizes that Indigenous and Tribal peoples “have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development” (Art. 7(1)). It also contains six articles on Indigenous and Tribal land and resource rights, basing these rights on occupation and use of land and resources rather than on grants from the state, and a number of provisions relating to consultation with the objective of achieving consent and participation in decision-making.

ILO 169’s provisions on territorial rights are framed by Art. 13(1) which requires that governments recognize and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially “the collective aspects of this relationship.” Art. 14 requires that indigenous peoples’ collective “rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized” and that states “shall take steps as necessary to identify” these lands and to “guarantee effective protection of [indigenous peoples’] rights of ownership and possession.” Art. 13(2) defines the term ‘lands’ to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”

ILO 169’s predecessor, ILO 107 adopted in 1957, provides in Article 11 that “The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized.” Interpreting this article in a complaint involving Tribal people in India, the ILO Committee of Experts held that the rights that attach under Article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. The Committee stated that the fact that the people in question had some form of relationship with land presently occupied, even if only for a short time, was sufficient to form an interest and, therefore, rights to that land and attendant resources.<sup>22</sup>

### 3.1.2.2 Regional Instruments:

The jurisprudence of the Inter-American Commission of Human Rights (IACHR) pertaining to indigenous peoples is considerable. This jurisprudence is based on the American Convention of Human Rights and the American Declaration of the Rights and Duties of Man.<sup>23</sup> First, it is well recognized in the inter-American system that indigenous peoples have been historically discriminated against and disadvantaged and therefore, that special measures and protections are required if they are

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<sup>20</sup> *Concluding Observations by the Committee on the Elimination of Racial Discrimination : Australia*. 24/03/2000. CERD/C/56/Misc.42/rev.3. (*Concluding Observations/Comments*), at para. 9.

<sup>21</sup> As of October 2001, the following 15 states have ratified ILO 169: Mexico, Norway, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Peru, Bolivia, Honduras, Venezuela, Argentina and Paraguay. Austria has ratified, but has yet to transmit its instrument of ratification to the ILO. The following states have submitted it to their national legislatures for ratification or are discussing ratification: Brazil, Chile, The Philippines, Finland, El Salvador, Russian Federation, Panama, and Sri Lanka.

<sup>22</sup> ILO 1988, 287. ILO 107 has been ratified by 27 states, many of them in Asia and Africa, including Brazil and India. A number of state-parties automatically denounced ILO 107 upon ratification of ILO 169.

<sup>23</sup> All but four of the OAS member states have ratified the American Convention on Human Rights. The American Declaration has been held to be binding on all American states by the Inter-American Court of Human Rights by virtue of its status *in toto* as customary international law (*Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Series A, No.10 (1990)).

to enjoy equal protection of the law and the full enjoyment of other human rights.<sup>24</sup> These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, “ancestral and communal lands,” and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>25</sup>

Directly on the issue of rights to lands, territories and resources, the IACHR has found that indigenous peoples’ property rights derive from their own forms of land tenure and traditional occupation and use.<sup>26</sup> This is consistent with aboriginal title jurisprudence in most common law states (see below) and with international instruments in general. It related these rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop and transmit culture free from unwanted interference. For instance, in 1997, the IACHR stated that “For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the group.’”<sup>27</sup> It reiterated this conclusion in 2000, stating that “Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity.”<sup>28</sup>

Most recently, in the *Mayagna (Sumo) Awas Tingni Community Case*, finding that Nicaragua had violated the right to property, judicial protection and due process of law by granting logging concessions on indigenous lands without taking steps to title and demarcate those lands, the IACHR held that “The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.”<sup>29</sup>

Due to Nicaragua’s failure to comply with the IACHR’s decision, the *Awas Tingni Case* was transmitted to the Inter-American Court on Human Rights for a binding decision. In its judgment, issued in September 2001, the Court observed that

*Given the characteristics of the instant case, it is necessary to understand the concept of property in indigenous communities. Among indigenous communities, there is a communal tradition as demonstrated by their communal form of collective ownership of their lands, in the sense that ownership is not centered in the individual but rather in the group and in the community. By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual*

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<sup>24</sup> See, among others, IACHR 1972, 90-1; and, IACHR 1997, 115.

<sup>25</sup> See, among others, IACHR 1984, at 76-78, 81; IACHR 1997, at 103-4; *Case 7615 (Brazil), OEA/Ser.L/V/II.66, doc 10 rev 1 (1985)*, 24, 31; and, IACHR 1986, at 114.

<sup>26</sup> Inter-American Commission of Human Rights, Report No. 27/98 (Nicaragua), at para. 142, *cited in*, *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment on the Preliminary Objections of February 1, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 66 (2000).

<sup>27</sup> IACHR 1997, at 115.

<sup>28</sup> IACHR 2000, at Ch. X, para. 16.

<sup>29</sup> *Supra*, note 24.

*element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.*<sup>30</sup>

Finding that “The customary law of indigenous peoples should especially be taken into account because of the effects that flow from it. As a product of custom, possession of land should suffice to entitle indigenous communities without title to their land to obtain official recognition and registration of their rights of ownership;”<sup>31</sup> the Court held, among others, that “the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities.”<sup>32</sup>

The *Awas Tingni Case* is highly important because of its affirmation of the validity of indigenous peoples' own forms of communal property and other rights in a binding decision. It is the first time that an international judicial body has ruled on this issue and confirmed that indigenous peoples' territorial rights arise by virtue of traditional occupation and use and indigenous forms of tenure, rather than from grants, recognition or registration by the state. This and the other principles set forth by the Court are applicable to all similar cases throughout the Americas. In effect, the Court held that aboriginal title – rights to lands and resources based upon traditional or immemorial occupation and use and defined by indigenous laws and customs pertaining to land tenure – is part of binding inter-American human rights law.

Under the African Charter on Human and Peoples' Rights (1986) property rights are guaranteed under Article 14.<sup>33</sup> The right to equal protection of the law, both for individuals and peoples (Articles 3 and 19) and the prohibition of discrimination (article 2) are also recognized. If UN and IACHR jurisprudence are relied upon, these provisions read together will amount to a recognition of indigenous property rights based upon traditional occupation and use. Articles 19-24 of the African Charter set out the rights of peoples, including the right to self-determination, the right to freely dispose of natural wealth and the right to a satisfactory environment. However, there is no jurisprudence in the African human rights system that squarely addresses the rights of indigenous peoples. The African Commission recently established a Working Group on Indigenous Peoples with a mandate to assess indigenous rights in relation to the right to self-determination and other rights which may provide further guidance on this issue.<sup>34</sup>

### 3.1.3 Emerging Standards: The UN and OAS Declarations

This section very briefly notes the development of indigenous peoples' rights as typified by the UN draft Declaration on the Rights of Indigenous Peoples and the Proposed American Declaration on the Rights of Indigenous Peoples currently being developed by the UN and the Organisation of American States.<sup>35</sup> While these instruments are placed here under the ‘emerging rights’ section, it is important to note that the distinction between rights of general application (“established”) and “emerging” indigenous rights is somewhat artificial as the majority of the so-called emerging standards either build upon existing human rights or are contextualised restatements or elaborations thereof.

Both the UN Draft and OAS Proposed Declarations build upon existing standards and attempt to redefine prevailing political, economic and cultural relations between indigenous peoples and states.

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<sup>30</sup> *Judgment of the Inter-American Court of Human Rights in the case of The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua Issued 31 August 2001* (footnotes omitted), Unofficial translation by Indian Law Resource Center, at para. 149

<sup>31</sup> *Ibid.*, at para. 151.

<sup>32</sup> *Ibid.*, at para. 164.

<sup>33</sup> The African Charter has been ratified by 53 African states as of June 2001.

<sup>34</sup> African Commission on Human and Peoples' Rights, *Resolution on the Rights of Indigenous People/Communities in Africa*, Cotonou, Benin, 6 November 2000.

<sup>35</sup> The IACHR has stated that “The Proposed Declaration should be understood to provide guiding principles for inter-American progress in the area of indigenous rights.” IACHR 1999, at Ch. X, para. 9.

They do so by recognizing rights in three main interrelated areas: 1) self-determination, autonomy and self-government; 2) lands, territories and resources; and; 3) political participation rights. These rights are all in some way related to fundamental guarantees of non-discrimination and cultural integrity, which are also elaborated upon by the instruments in question. Guarantees for indigenous lands, territories and resources are expansive, requiring legal recognition, titling and demarcation of lands traditionally occupied and used, protection of the total environment thereof, restitution and compensation for lost lands, and various measures of participation in extra-territorial activities that may affect territorial and subsistence rights, the environment and cultural integrity. Article 26 of the UN Draft Declaration, for instance, provides that

*Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal sea, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation or encroachment upon these rights.*

The OAS Proposed Declaration also provides a substantial measure of protection (Art. XVIII):

1. *Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property.*
2. *Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.*
3. *Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptable and indefeasible. This shall not limit the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them. Such titles may only be changed by mutual consent between the State and respective indigenous people when they have full knowledge and appreciation of the nature or attributes of such property.*
4. *The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.*

### 3.1.4 Instruments Focused on Environment and Development

A number of instruments concerned with environment and development have incorporated indigenous peoples' rights and issues, particularly those adopted at the UN Conference on Environment and Development in 1992. These include the Convention on Biological Diversity (CBD), the Rio Declaration and Agenda 21, Chapter 26 especially. The CBD, a binding treaty ratified by 171 states, deals with indigenous peoples' rights and interests in a number of different ways, most notably in articles 10(c) and (d) and 8(j). Article 8(j) focuses on indigenous traditional knowledge and intellectual property rights. Article 10(c) protects the "customary use of biological resources in accordance with traditional cultural practices." This article has been interpreted to require recognition of and respect for indigenous tenure over terrestrial and marine estates, control over and use of natural resources and respect for indigenous self-determination and self-government.<sup>36</sup>

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<sup>36</sup> CBD 1997, 18.

### 3.2 Aboriginal title and Indigenous Peoples of the Commonwealth

Aboriginal title, also known as Native or Indian title, consists of the rights of indigenous peoples to their lands, resources and waters recognized by the common law. The common law is a body of judge-made law exported to and applied in the majority of former British colonies, most of which today comprise the Commonwealth. Today these countries' legal systems remain grounded in the common law as developed locally and as modified by local statutory and Constitutional provisions. Recognition of aboriginal title in some of these countries is based upon a combination of common law principles and British colonial constitutional law as developed in practice and as elaborated by the Judicial Committee of the Privy Council, the court of last resort for the colonies.

#### 3.2.1 Five Hundred Years of Aboriginal Title Jurisprudence

The doctrine of aboriginal title originated in the writings of Spanish jurists of the 15<sup>th</sup> and 16<sup>th</sup> centuries,<sup>37</sup> in particular Francisco de Victoria, who concluded that "the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view"<sup>38</sup> and that the consent of indigenous peoples had to be obtained before Europeans could acquire lands from them.<sup>39</sup> Victoria's theories on aboriginal title were incorporated into Spanish as well as Dutch and English laws applying to colonial holdings and were widely accepted by international law scholars of the 16<sup>th</sup> and 17<sup>th</sup> centuries.<sup>40</sup> These writings were also relied upon by United States Supreme Court in its recognition and affirmation of aboriginal title in the early 19<sup>th</sup> century.<sup>41</sup>

Outside of the United States, the New Zealand Supreme Court was the first to recognize aboriginal title when it decided *R. v. Symonds* in 1847 and found that "Whatever may be the opinion of jurists as to the strength or weakness of the Native title ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers."<sup>42</sup> This finding was affirmed in three separate cases decided by Privy Council between 1901 and 1913, which held that the title of Maori tribes to the possession and occupancy of their lands required respect.<sup>43</sup> The Privy Council reached the same conclusion in three cases involving African colonies in the first half of the 20<sup>th</sup> century.<sup>44</sup>

It was not until the last quarter of the 20<sup>th</sup> century however that other commonwealth countries followed suit. The first was Canada, whose Supreme Court first recognized the existence and enforceability of aboriginal title in *Calder v. A.G. (British Columbia)* in 1973. In that case, Justice Judson stated that "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...."<sup>45</sup> Almost 20 years later, the Australian High Court issued its landmark decision in *Mabo v. Queensland (No. 2)*, declaring that "native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."<sup>46</sup> Both *Mabo* and *Calder* have been followed by a series of cases further affirming the

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<sup>37</sup> Lindley 1926, 12-17. See also, among others, Cohen 1942; Berman 1978 and; Bartlett 2000, 73.

<sup>38</sup> Victoria 1917, 128.

<sup>39</sup> Ibid. 120-28 & 140-46.

<sup>40</sup> Cohen 1982, 50-55.

<sup>41</sup> *Johnson v. McIntosh* (1823) 8 Wheat 543, *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831) and, *Worcester v. Georgia*, 6 Pet. 515 (1832).

<sup>42</sup> *R. v. Symonds* (1847) NZPCC 387 (SC(NZ)), at 390.

<sup>43</sup> *Nireaha Tamaki v. Baker*, (1901), NZPCC 371; *Te Teira Te Paea v. Te Roera Tareha*, 1902, A.C. 56; *Manu Kapua v. Para Haimona*, 1913, A.C. 56.

<sup>44</sup> *Re Southern Rhodesia* [1919] AC 211, 233, per Lord Sumner; *Amodu Tijani v. Secretary, Southern Nigeria*, 1921, 2A.C. 399, 407, per Viscount Haldane; and, *Adeyinka Oyekan v. Mussendiku Adele*, 1957, 1 WLR 876, 880, per Lord Denning.

<sup>45</sup> *Calder v. Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, at 146.

<sup>46</sup> *Mabo v. Queensland* (1992) 66 A.L.J.R. 408, at 429.

existence and enforceability of aboriginal title and elaborating its content.<sup>47</sup> In Australia today, native title is regulated by statute, the *Native Title Amendment Act 1998*; in Canada, it is recognized and protected under Section 35 of Canada's 1982 Constitution.

Judicial recognition of aboriginal title is not peculiar to the Anglo-commonwealth. In *Adong bin Kuwau v Johor*, the Malaysian Court of Appeal affirmed the trial judges' ruling that the Jakun tribe had a proprietary "right to continue to live on their lands, as their forefathers had lived...."<sup>48</sup> Most recently, the Sabah and Sarawak High Court (Malaysia) in *Nor Anak Nyawai et al* followed the decision in *Adong bin Kuwau*. Observing that "the common law respects the pre-existing rights under native law or custom....,"<sup>49</sup> the Court held and ordered that "the Plaintiffs are entitled to exercise native customary rights over the disputed area" to the exclusion of all others.<sup>50</sup> In recent years, indigenous peoples have filed actions seeking recognition of their aboriginal title in Guyana, Belize and South Africa. While these cases are still pending, it is possible that the respective courts will be persuaded by the weight of authority from other jurisdictions to also recognize and affirm aboriginal title rights as part of their common law.

### 3.2.2 Sources of Aboriginal Title

Aboriginal title is a collective right to land and resources derived from occupation and use of the same land prior to the acquisition of sovereignty by the British crown. It is considered to be a unique form of property insofar as it does not conform to traditional feudal estates in land known under the common law, which flow from the crown, but rather is based upon pre-sovereignty occupation and indigenous peoples' own laws and customs. It is capable of recognition and enforcement under the common law because that law considers, absent competing and better title, occupation to be proof of possession and possession to be proof of ownership.<sup>51</sup> As stated by the Canadian Supreme Court "possession is of itself proof of ownership."<sup>52</sup>

As noted earlier, aboriginal title is also based upon British colonial constitutional law, a set of unwritten principles that applied to all British colonies and, unless modified by local law, remains part of the law of former colonies. Slattery observes that "Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony."<sup>53</sup> One of these principles, confirmed by the Privy Council and national courts on numerous occasions is that "a mere change in sovereignty is not to be presumed to disturb rights of private owners...."<sup>54</sup> Following this, the doctrine of aboriginal title should be valid universally within the commonwealth.

The preceding in part explains why aboriginal title has been held to exist and continue without recognition by the executive or legislature and the courts have not hesitated to state so explicitly. The Canadian Supreme Court has stated many times that aboriginal rights arise "by operation of law, and do not depend on a grant from the Crown."<sup>55</sup> The Australian High Court in *Wik Peoples v.*

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<sup>47</sup> Among others, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 and *Ward on behalf of the Miriuwung and Gajerrong People v. Western Australia* (1998) 159 ALR 483.

<sup>48</sup> *Adong bin Kuwau & Ors v Kerajaan Negri Johor & Anor*, (1997) 1 MLJ 418-436. Upheld: (1998) 2 MLJ 158

<sup>49</sup> *Nor Anak Nyawai et al* (12 May 2001), Suit No. 22-28-99-I, High Court for Sabah and Sarawak at Kuching, at para. 4.

<sup>50</sup> *Ibid.*, at para. 115.

<sup>51</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 1082 per Lamer, C.J. See, generally, McNeil 1989.

<sup>52</sup> *Calder v. Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, at 190.

<sup>53</sup> Slattery 1987, 737. In accord, McHugh 1991, 97.

<sup>54</sup> *Amodu Tijani v. Secretary, Southern Nigeria*, 1921, 2A.C. 399, per Viscount Haldane, at 407. Also, *Calder v. A.G. (British Columbia)* (1973) 34 DLR (3d) 145, at 208-09 (Supreme Court of Canada); *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 682, at 687, per Williamson J.(New Zealand Court of Appeal); *Western Australia v. Commonwealth* (1995) 183 CLR 373, at 422 (High Court of Australia).

<sup>55</sup> *Roberts v. Canada* [1989] 1 S.C.R. 322, at 340.



*Queensland & Ors*, stated unequivocally that “native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration.”<sup>56</sup> Citing *Wik*, the Sabah and Sarawak High Court (Malaysia) concurred, finding that

*It [native/aboriginal title] is therefore not dependent for its existence on any legislation, executive or judicial declaration ... though they can be extinguished by those acts. Therefore, I am unable to agree with Ms Gau that native customary rights owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights had been extinguished.*<sup>57</sup>

### 3.2.3 Nature and Content of Aboriginal Title

Aboriginal title is a right to the land itself as well as the resources pertaining to the land. The content of the title or the extent of land to which it applies is determined by the practices, customs and laws of the indigenous people(s) that maintain a connection with the land. It cannot be determined arbitrarily, but only by reference to factual occupation and use of land and resources - what the common law recognizes as proof of possession – and indigenous customs, practices, usages and laws. These practices and usages include hunting, fishing, agriculture, gathering, ceremonial and religious functions, seasonal migrations and trade with neighbours. Aboriginal title also extends to coastal and offshore fisheries.

According to the Canadian Supreme Court “aboriginal title confers more than a right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site specific rights can be made out even if title cannot. What aboriginal title confers is the *right to the land* itself.”<sup>58</sup> Further, aboriginal title includes “the right to exclusive use and occupation”<sup>59</sup> and “the ability to exclude others from lands held pursuant to that title.”<sup>60</sup> In *Mabo*, Brennan J maintained that “The ownership of the land within a territory in the exclusive occupation of a people must be vested in that people.”<sup>61</sup> Consequently, the High Court ordered in that case that the aboriginal people in question had the right “as against the whole world to possession, occupation, use and enjoyment of the lands” at issue.<sup>62</sup> This conclusion was also reached in the Privy Council’s 1921 *Amodu Tijani* decision, where Viscount Haldane observed that “A communal usufructuary occupation ... may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.”<sup>63</sup> The Council ordered that compensation be rendered on the basis of a deprivation of “full ownership.”<sup>64</sup>

US and Canadian cases have also held that aboriginal title includes mineral rights, rights to commercially exploit timber, fish and game and water rights.<sup>65</sup> In *Delgamuukw*, for example, Lamer CJ stated on the basis of a previous case that “aboriginal title also encompass [*sic*] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands.”<sup>66</sup>

### 3.2.4 Problems with Aboriginal Title – Extinguishment

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<sup>56</sup> *Wik Peoples v. Queensland & Ors*, [1997] 187 CLR 1, at 84 (per Brennan CJ).

<sup>57</sup> *Nor Anak Nyawai et al*, at para. 57.

<sup>58</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, at 1095 & 1096, per Lamer, C.J., (emphasis in original).

<sup>59</sup> *Ibid.*, at 1083.

<sup>60</sup> *Ibid.*, at 1104.

<sup>61</sup> *Mabo*, 175 CLR 1, at 51.

<sup>62</sup> *Ibid.*, at 217.

<sup>63</sup> *Amodu Tijani*, at 409-10.

<sup>64</sup> *Ibid.*, at 411.

<sup>65</sup> See, among others, *United States v. Shoshone Tribe of Indians* 304 US 111 (1938) and *Delgamuukw*.

<sup>66</sup> *Delgamuukw*, at 1086.

In all countries that have developed jurisprudence on aboriginal title that jurisprudence recognizes the power of the crown or state to unilaterally extinguish aboriginal title, normally without indigenous consent and just compensation. This practice of extinguishment deviates substantially from national laws permitting taking of land from non-indigenous persons and is, therefore, discriminatory.<sup>67</sup> Complaints made by indigenous peoples to international human rights bodies have confirmed that the practice of extinguishment is discriminatory and contravenes a number of other human rights guarantees, including the right to self-determination.<sup>68</sup>

### 3.3 Indigenous rights in Spanish law and the regalian doctrine

The regalian doctrine, also known as *jura regalia*, is a fiction of Spanish colonial law that has been said to apply to all Spanish colonial holdings. It refers to the feudal principle that private title to land must emanate, directly or indirectly, from the Spanish crown with the latter retaining the underlying title. Lands and resources not granted by the crown remain part of the public domain over which none but the sovereign holds rights. In this sense it is similar to feudal doctrines embedded in English real property law that were exported to British colonies. In much the same way that aboriginal title jurisprudence in commonwealth countries has rejected the early notion that indigenous peoples' land rights were voided by the crown's acquisition of sovereignty, the proponents of the regalian doctrine have also overstated the rights of the Spanish crown. From the earliest days of Spanish colonial expansion both Spanish and Papal laws required respect for indigenous peoples' pre-existing property rights, thereby exempting them from the application of the regalian doctrine.<sup>69</sup>

The regalian doctrine has been entrenched in the Constitution of the Philippines since 1935.<sup>70</sup> In that country, a former Supreme Court judge challenged the constitutionality of the indigenous Peoples' Rights Act of 1997 (IPRA), arguing that recognition of indigenous land rights in that Act violated the regalian doctrine in that validation of those rights amounted to an unlawful deprivation of the state's ownership over lands of the public domain as well as minerals and other natural resources.<sup>71</sup> The Supreme Court's decision in the case was inconclusive: six judges found IPRA consistent with the Constitution and voted to dismiss the petition, one voted to dismiss on procedural grounds, while seven judges voted in favour of declaring at least some provisions of IPRA unconstitutional. As the vote was tied, the case was dismissed and a presumption of constitutionality was applied. Most of the judges upholding IPRA stated, consistent with previous jurisprudence,<sup>72</sup> that indigenous land rights predated acquisition of sovereignty by Spain, were private property rights that were never part of the state's public domain, and therefore, those lands were not affected by the regalian doctrine.

With regard to Central and Latin America, whatever the status of the regalian doctrine in the past, today it holds little relevance outside of state ownership of the subsoil and other natural resources. This is true for three main reasons: 1) the majority of states in Central and Latin America, including Mexico, are parties to ILO 169, which obliges them to recognize and protect indigenous rights to lands, territories and resources derived from traditional occupation and use; 2) as the judgment of the Inter-American Court on Human Rights in the *Awas Tingni Case* demonstrates, American states are obligated by Inter-American human rights law to recognize and guarantee indigenous property rights derived from indigenous forms of tenure and defined by indigenous law and custom; and 3) the vast

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<sup>67</sup> See, generally, Daes 2001, 14-6 and, on Australia specifically, Triggs 1999.

<sup>68</sup> Among others, see, Committee on the Elimination of Racial Discrimination, *Decision (2) 54 on*

*Australia*, 18 March 1999. UN Doc. A/54/18, para. 21; and *supra*, note 5.

<sup>69</sup> *Recopilacion de las Indias*, e.g., Book 4, Title 12, Law 9 of June 1594, Book 6, Title 1, Law 32 of 1580 and Law 23 of 1609; and, the Papal Bull *Sublimis Deus* of 1537, which stated that Indigenous peoples were "by no means to be deprived of their liberty or the possession of their property."

<sup>70</sup> Presently restated in Section 2, Article XII of the 1987 Constitution.

<sup>71</sup> *Cruz and Europa vs. Secretary of the Environment and Natural Resources, et al*, G.R. No. 135385, Supreme Court of the Philippines, Judgment of December 6, 2000.

<sup>72</sup> *Cariño v. Insular Government*, 7 Phil. 132 (1906).

majority of Latin American states have adopted Constitutional and legislative provisions in the past 20-30 years that, to varying degrees, recognize pre-existing indigenous land and renewable resource rights.

This last point was made by the IACHR in its 1999 report on Colombia: “As several Colombian laws have recognized that the indigenous peoples had the right to have the State recognize their full ownership over such areas, not as a discretionary act of the State but rather as an obligation, these proceedings do not constitute mere transfers but rather should be seen as a process of ‘production of evidence establishing the prior ownership of the communities.’”<sup>73</sup> The same principle is established in Brazil, a former Portuguese colony. The Brazilian Constitution of 1988 provides that the “*original rights* of Indians on the lands they traditionally occupy are recognized, the Union being bound to proceed with demarcation of these lands and to protect and enforce respect for all their property” (Art. 231, emphasis added).

### 3.4 Indigenous rights under the Napoleonic Code in Francophone Africa

With the exception of its early colonies in North America, French colonial law paid little attention to indigenous land or other rights. This was especially the case in what is today referred to as Francophone Africa. Despite recognizing some measure of indigenous sovereignty and ownership evidenced by treaties of cession,<sup>74</sup> French colonial law facilitated and supported a highly centralized colonial administration and left little room for continued indigenous ownership based upon customary law and traditional occupation. While some laws were passed recognizing customary law regimes, the latter were only valid to the extent that they did not contradict the *Code Civil* or conflicting colonial land laws, both of which privileged colonial settlers over indigenous land holders. As one author puts it, this concerted move towards centralised authority “led the colonial state to seek to break the power of customary authorities and replace them with state management, particularly regarding forests, fisheries, etc.”<sup>75</sup>

This colonial legal heritage was for the most part retained by post-colonial Francophone states. Although the situation varies from country to country, control over land and resources was generally further centralised in the name of national unity through nationalisation programmes that amounted to an extinguishment of customary regimes and made indigenous peoples illegal occupiers of state domain lands. While some efforts were made at legal reform in the 1980’s aimed at incorporating customary tenure rights into the national legal system, indigenous peoples in Francophone Africa for the most remain without recognised rights to their lands and resources.<sup>76</sup> As noted above, the extent to which international human rights standards may affect this conclusion has yet to be tested. Finally, it should be noted that under the legal systems of Francophone African states, indigenous land rights may be recognised by Constitutional amendment or, assuming consistency with the Constitution, by Organic law and subsidiary legislation.

### 3.5 Legal obstacles to recognition of indigenous rights

As the preceding illustrates, recognition of indigenous peoples’ rights to lands, territories and resources, has increased in recent years, both at the international and domestic levels. However, in reality, many of the gains made on paper have yet to be realised in practice and the laws of many states remain substandard in relation to human rights guarantees. Violations of indigenous peoples’ land and resource rights, coupled with attendant violations of economic, political, spiritual, social and

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<sup>73</sup> IACHR 1999, Ch. X, at para 19. See, also, for example, Art. 67, 1994 Constitution of Argentina.

<sup>74</sup> Lindley 1926, 33-6.

<sup>75</sup> Lavigne Delville 2000, 99.

<sup>76</sup> The precise legal status of Indigenous peoples in Francophone Africa - in particular, whether under colonial and post-colonial laws their rights to lands traditionally occupied and used survived and may today be enforceable – requires further research. The conclusions stated here are those generally acknowledged by lawyers and scholars familiar with the issues.

cultural rights, are all too common.<sup>77</sup> This final section highlights a few of the obstacles to the full recognition of indigenous land rights.

These obstacles are amply outlined in Erica Daes' final report on indigenous land rights, the most fundamental of which is identified as "the failure of States to recognize the existence of indigenous use, occupancy and ownership, and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land."<sup>78</sup> With regard to the former, she states that

*Countries in many parts of the world are unaware or ignore the fact that communities, tribes or nations of indigenous peoples inhabit and use areas of land and sea and have done so, in many cases, since time immemorial. These areas are typically far from the capitals and other urban areas of the country and, typically, countries regard these lands and resources as public or "crown" lands. Although the indigenous people concerned regard themselves, with good reason, as owning the land and resources they occupy and use, the country itself disposes of the land and resources as if the indigenous people were not there.*<sup>79</sup>

Concerning the failure to accord legal status to indigenous peoples, she states that "In some countries, indigenous communities do not have legal capacity to own land, or do not have the capacity to own land collectively. Where the indigenous peoples or group is not recognized as having juridical status or existence, it cannot hold title to lands or resources nor take legal action to protect those property interests."<sup>80</sup>

The other problem areas are listed as follows: 1) discriminatory laws and policies affecting indigenous land rights, including according indigenous land rights second class or inferior status and unilateral abrogation of treaty rights; 2) failure to demarcate and failure to enforce or implement laws protecting indigenous lands; 3) problems concerning land claims settlements or return of lands; 4) expropriation of indigenous lands in the national interest, particularly in the name of development; 5) removal and relocation; 6) other policies or programmes including: allotment of lands to individuals and state control of sacred or cultural sites; 7) failure to protect the integrity of indigenous territories, and; 8) the failure to recognize and respect indigenous control of their territories as part of the right to self-determination.<sup>81</sup>

Expropriation of Indigenous lands in the name of development has been a severe problem. On this subject Daes observes that

*The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every part of the globe, indigenous peoples are being impeded from proceeding with their own forms of development consistent with their own values, perspectives and interests. The concentration of extensive legal, political and economic power in the State has contributed to the problem of development and indigenous peoples' rights to lands, territories and resources.*<sup>82</sup>

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<sup>77</sup> One of the recommendations of the United Nations Expert Seminar on Practical Experiences regarding Indigenous Land Rights and Claims addresses this point: "The recognition of rights of indigenous peoples to specific lands which they occupy cannot be separated from the recognition of other rights, within larger areas necessary for their material and cultural development." UN 1996, Recommendations, para. 8.

<sup>78</sup> Daes 2001, at 12.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid., at 14.

<sup>81</sup> Ibid., 12-26.

<sup>82</sup> Ibid., at 21.

Expropriation of indigenous lands in the name of national development is both a symptom and underlying cause of the overall failure of states to give adequate protection to indigenous land and resource rights. It is a symptom in the sense that, if indigenous rights were adequately recognized and protected, the resources pertaining to indigenous lands would not be available for exploitation without indigenous consent; it is an underlying cause because often states are opposed to recognizing indigenous rights precisely because indigenous lands are rich in exploitable natural resources or the lands themselves are prime agricultural production zones. Today, exploitable resources also include biological resources and indigenous knowledge pertaining thereto.

Both the HRC and the IACHR have stated a number of times that state development plans must account for and respect indigenous peoples' rights.<sup>83</sup> As one scholar puts it, the principle of state sovereignty over natural resources in international law "includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations."<sup>84</sup> These rights include indigenous ownership and control over lands, territories and resources.

Finally, Daes' last point is perhaps the most relevant. Indigenous land rights cannot be viewed as separate and distinct from cultural rights, from political rights, from economic rights and from religious and spiritual rights. These rights are inextricably connected, fundamental to a full appreciation of indigenous territorial rights and, most importantly, part and parcel of the right to self-determination. In this vein, the 1996 UN Expert's Seminar on Indigenous Land Rights and Claims recommended that "Governments should review their laws and policies in order to address the concept of the inherent rights to self-government and self-management of indigenous peoples."<sup>85</sup> Another UN Expert's meeting, this time on indigenous autonomy and self-government, concluded that "Indigenous territory and the resources that it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures."<sup>86</sup>

## **Chapter 4. Latin America: Tom Griffiths**

Almost 90% of the estimated total of 40 million indigenous people in Latin America live in rural areas and depend on the land and natural resources for making a living.<sup>87</sup> In Bolivia, Guatemala, Peru, Ecuador and Mexico indigenous peoples make up a substantial proportion of the national population. Elsewhere, aggressive colonial expansion caused the demographic collapse of indigenous peoples who today constitute minority populations (Table 1). Indigenous peoples throughout the continent suffer high levels of poverty and are more likely to be poor than non-indigenous people.<sup>88</sup> Pervasive indigenous poverty is often exacerbated by insecure and inadequate land tenure arrangements for indigenous families and communities.

This chapter draws on varied sources of information to provide an overview of the key issues surrounding land tenure, land administration and indigenous peoples in Latin America. The first section outlines the evolution of the main land tenure regimes in the region and traces the basic linkages between land tenure and indigenous livelihood security. The analysis shows how centuries of discrimination and a lack of understanding of indigenous land tenure have produced inappropriate land policies that have often made indigenous peoples poorer and generated

**Table 1: Estimate of Population of Indigenous Peoples in Latin America <sup>a</sup>**

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<sup>83</sup> *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, 10 and IACHR 1997, 88.

<sup>84</sup> Schrijver, 1997, 391.

<sup>85</sup> UN 1996, at para. 9.

<sup>86</sup> UN 1992, Conclusions and Recommendations, para. 5.

<sup>87</sup> Economic Commission for Latin America and the Caribbean 1995:99

<sup>88</sup> Psacharopoulos and Patrinos 1994b:41.

## A Survey of Indigenous Land Tenure

Country	Population (millions) <sup>b</sup>	% of total population
Guatemala	5.30	66
Bolivia	4.60	58
Peru	9.30	47
Ecuador	4.10	43
Belize	0.029	19
Honduras	0.70	15
Mexico	12	14
Chile	1.0	8
El Salvador	0.40	7
Guyana	0.08	10
Panama	0.019	8.4
Suriname	0.08 (including tribal Maroons)	10
Nicaragua	0.16	5
French Guiana	0.004	4
Paraguay	0.10	3
Colombia	0.42	1.4
Venezuela	0.316	0.9
Argentina	0.35	1
Brazil	0.3	0.2
Uruguay	0.004	0.016
Caribbean islands	0.169	-
Total	39.346	

**a** Estimates of indigenous populations vary widely depending on the definitions used in estimates and national surveys. Many countries in Latin America are experiencing a renewal in ethnic consciousness, which may mean that people categorised as “peasants” or “*mestizos*” will seek to reclaim their indigenous identity as Amerindians. Renewed affirmation of indigenous identity may alter national demographic statistics in the future, which will have repercussions for national land and agrarian policy (Plant and Hvalkof 2001:22; INI 2001).

**b** Adapted from <http://www.indigenas.oit.or.cr/cuadro.htm>;

conflicts over land and resources. Increasing pressure on indigenous territories has stimulated indigenous organisations in Latin America to press their governments to respect their land and resource rights. The chapter highlights the way in which many countries have responded to indigenous demands with constitutional reforms that value ethnic diversity and recognise the *collective* rights of indigenous peoples to own, use and manage their lands.

The country case studies show that the impacts of recent land administration schemes on indigenous peoples have been variable. In some cases, like Bolivia, ill-adapted technical rules have threatened indigenous territorial security, while in Colombia communities have been empowered by participatory land titling projects. Despite some progress in addressing indigenous land issues, the report finds that government agencies running land regularisation often lack adequate resources which slows the titling of indigenous lands. In an effort to speed up the process, indigenous peoples such as those in Venezuela are beginning to forge novel partnerships with international NGOs and government agencies to self-demarcate their territories. They are also becoming engaged in drafting new laws that affect indigenous lands in order to ensure that legal frameworks respect their customary land tenure and meet their resource needs in the present and the future.

### 4.1 Land tenure regimes and indigenous livelihood security

The current land tenure situation of indigenous peoples in Latin America is closely related to the history of colonial and nation-state policies towards indigenous peoples and their lands. Until recent policy shifts towards “multiculturalism”, “ethnoconservation” and “ethnodevelopment” at the end of the 20<sup>th</sup> century, discriminatory land policies resulted in a consistent pattern of dispossession, displacement, marginalisation and assimilation. At the same time, most administrations adopted a differential approach to upland agricultural lands and lowland forest areas.

#### 4.1.1 Colonial and governmental approaches to indigenous lands

Early Spanish colonisation and agricultural expansion first centred on the Andean valleys in South America and the interior highlands of Central America. Fertile coastal lands were also settled, particularly along the eastern seaboard of South America. Colonial authorities divided indigenous lands by creating *encomiendas*, which were entrusted to Spanish settlers (*encomenderos*) who were given the right to exact tribute from indigenous communities in the form of labour and goods. The imposition of *encomiendas* replaced indigenous subsistence and ritual-orientated agrarian structures with Iberian land tenure systems. These land use systems were based on plough agriculture geared towards the production of surpluses to supply religious missions, colonial settlements and mines (Mexico and Bolivia boxes).<sup>89</sup>

Conquered indigenous populations were confined to nucleated settlements through *reducciones* prosecuted by the Church and military. Any indigenous attempts at rebellion were ruthlessly punished. In some areas, the Spanish introduced a labour quota system of *repartimiento* where each indigenous settlement supplied a set number of workers for church farms, public institutions and private estates. Unfenced lands were seized and titled under Spanish law with little regard for Royal decrees supposed to guarantee Indian communities enough land for subsistence. The Spanish settlers lacked any understanding of indigenous communal land holding and viewed their farming systems as backward. Indian land use was viewed as an obstacle to agricultural development. These deep-seated prejudices have informed land policy throughout Latin America until recent times.<sup>90</sup>

The colonial powers only made faltering attempts to settle tropical lowlands. These areas were largely left under the jurisdiction of the Church whose missions tried repeatedly to impose the upland model of *reducciones* on tropical forest tribes without success. These areas remained largely outside the control of the colonial administration. However, lowland indigenous populations were seriously reduced by a predatory slave trade supplying colonial plantations throughout the seventeenth and eighteenth centuries.<sup>91</sup> Demographic collapse along the main rivers in Amazonia, for example,

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<sup>89</sup> Goodman and Redclift 1981; Redclift 1987: 107-113. On colonial *sesmaria* land grants in Brazil, see Monbiot 1995:143-144.

<sup>90</sup> Brockett 1990:14; Benton 1999: 22-33

<sup>91</sup> Whitehead 1998; Llanos and Pineda 1982

resulted in the elimination of indigenous riverine land use systems. Residual indigenous populations were forced to seek isolation in interfluvial areas.<sup>92</sup>

Following independence, the land tenure situation of indigenous peoples in the uplands was further undermined by the new nation states, which undertook reforms in the nineteenth century to abolish communal land titles. These reforms aimed to modernise the agricultural sector in upland areas. The result, however, was an expansion of large *hacienda* estates that appropriated more indigenous land. Liberal policies therefore consolidated the “bimodal” structure of land holdings in the highlands of Latin America. This dualistic tenure system is characterised by relatively few large commercial estates known as *latifundios* (>500 ha) and numerous small properties known as *minifundios* (<5 ha). These mainly subsistence-orientated small-holdings are farmed by indigenous and peasant households.

The integrationist policies of liberal governments were partially reversed by subsequent administrations who introduced protectionist legislation to reinstate the indigenous communal rights to land - often in response to popular resistance by indigenous peoples themselves and to the international anti-slavery movement.<sup>93</sup> Despite the legal protections, land concentration continued throughout the agricultural regions of Latin America. Land conflicts and poverty propelled the bloody Mexican revolution from 1910-1920, which was followed by redistributive land reform. By the 1940s, serious land pressures resulted in mass land invasions of *haciendas* by upland indigenous communities and peasants in Bolivia, Ecuador and Peru.<sup>94</sup>

Agrarian conflicts prompted many Latin American governments to institute land reform programmes from the 1950s until the 1970s. These reforms had land redistribution goals, but they were mainly productivist and modernist programmes that aimed to break up idle *hacienda* lands and boost national agricultural production.<sup>95</sup> The programmes were top-down (many imposed under authoritarian regimes) and did not engage indigenous peoples and rural poor in their design. Most were implemented without consideration for indigenous tenure regimes. In Peru, legally recognised indigenous communities were redefined as “peasant communities” in which land holdings were allocated through co-operatives. The imposition of non-indigenous land holding bodies based on peasant social models also occurred in Ecuador and Bolivia.<sup>96</sup>

Most land reforms had a patchy impact as commercial landowners managed to retain more fertile land, whilst indigenous households received small plots on marginal lands. At the same time, state agricultural policy focused on support, credit and technical assistance for large commercial farms. Although land reforms did liberate millions of indigenous people from obligations to provide unpaid labour to the owners of *haciendas*, it still left most families with limited land parcels that would be sub-divided due to population growth and division among descendant generations.<sup>97</sup> Moreover, decades after the reforms many indigenous households in Latin America remained without legal title to their land holdings.<sup>98</sup>

During the 1960s, 70s and 80s, Latin American governments in Brazil, Colombia, Peru and Ecuador sponsored the agricultural colonisation of tropical lowlands to relieve continuing land pressures in more populated regions. These colonisation programmes were founded upon a legal fiction that lowland forest regions constitute an “empty” and unoccupied reserve of abundant under-utilised land. Plots were allocated to colonists without consideration for prior indigenous land ownership, creating severe land conflicts between colonists and indigenous communities.

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<sup>92</sup> Roosevelt 1994; Baleé 1995.

<sup>93</sup> See Gros 1991:179; Wagua 1997; Howe 1998:292ff.

<sup>94</sup> Barraclough and Eguren 2001:223

<sup>95</sup> Johnston and Kilby 1975; Shaw 1977.

<sup>96</sup> Carter 1964

<sup>97</sup> Preston and Redclift 1980; Hess 1997:21

<sup>98</sup> Barraclough *et al.* 2001:226.



In most Latin American countries, national civil codes relating to property rights confined the *social function* of rural property to agricultural use.<sup>99</sup> Land laws underpinning colonisation schemes consequently encouraged colonists to deforest land to claim property rights for “improvements” (*mejoras*) involving the conversion of land to pasture and crops.<sup>100</sup> Colonisation programmes also involved road-building projects, which opened up indigenous lands to both state-sponsored and illegal colonisation.<sup>101</sup> During the 1960s and 1970s, many of these large-scale road, dam, mining and agricultural schemes were supported by multilateral agencies like the World Bank whose mega-projects caused resettlement, land loss, impoverishment and increased vulnerability of indigenous peoples.<sup>102</sup>

Integrationist land policies were founded on nation-building and modernisation theories based on evolutionist theories of land tenure and agricultural development. Within this framework, policy-makers and agronomists believed progress would be achieved by eliminating indigenous land use systems and archaic feudal *hacienda* holdings. From the 1950s onwards, Latin American agricultural development was dominated by the paradigm of the Green Revolution whereby rural poverty and hunger could be tackled by purely technical solutions. Lip service was paid to poverty reduction and support for peasant farming, but in reality agricultural policies targeted commercial farms.<sup>103</sup> Where governments established Indian agencies, these applied paternalistic and integrationist policies. Indian agencies like FUNAI in Brazil were directly involved in suppressing indigenous political organisation. In the worst cases, corrupt officials were involved in the exploitation and appropriation of indigenous lands and resources.<sup>104</sup> In other countries like Mexico, “indigenist” policies sought to impose education, agriculture and social programmes devised by central government, with little recognition of local cultural knowledge and indigenous governance.

### 4.1.2 Existing land tenure patterns of indigenous peoples

Variable assimilationist and protectionist policies together with land reform and colonisation programmes have produced a complex pattern of indigenous land tenure in Latin America. Given the contrasting history of upland and lowlands regions, indigenous land tenure in the Andean valleys and Central American highlands shows marked differences from the tropical lowlands.

#### 4.1.2.1 Upland areas

This complexity is particularly apparent in highland areas where indigenous peoples are typically more integrated into the market economy. In these upland regions, land ownership and use regimes have developed a hybrid quality with elements of both Iberian and Amerindian tenure. For example, it is common for private land to be fenced, while common land remains unenclosed. Indigenous households may simultaneously hold private land individually and also possess access rights to communal lands, which may include cultivable plots, grassland and moorland. Households strive to work multiple land parcels that are spread vertically across different agroecological zones.<sup>105</sup>

According to indigenous custom, access to communal land is mediated by kinship relations and traditional community institutions. Such collective institutions may also regulate land use using consensual decision-making to determine fallow periods, crop rotations and stocking densities. Private plots of land may be exchanged in informal markets, but these transactions are rarely registered in national land cadastres. Many households therefore own land without possessing legal title. Indigenous households commonly lend plots to individuals and families based on legitimate need. Lent land is usually expected to be returned to the owners upon request.

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<sup>99</sup> Grasmick 1979:765-766; Roldán 1992:47

<sup>100</sup> Hecht and Cockburn 1990; Rudel and Horowitz 1993; Mahar and Sneider 1994:162-163

<sup>101</sup> Barbira-Scazzochio 1980; Dorner 1992; Moran 1996; Bedoya and Klein 1996:169.

<sup>102</sup> Davis 1973; López 1992; Gray 1998a

<sup>103</sup> Bebbington and Thiele 1993:32-36

<sup>104</sup> Maybury-Lewis 1991:223-224

<sup>105</sup> Lehmann 1982; Hess 1997:23

In a few cases, indigenous tenure regimes in the Andean highlands cover a more or less contiguous territory associated with one ethnic group. Such is the case of the Laymi people of Bolivia.<sup>106</sup> In most of Latin America, however, indigenous lands in the uplands are constituted by fragmented holdings, often belonging to interethnic communities. These lands are interspersed with or adjacent to large- and medium-sized commercial farms that usually cover the more fertile land. As noted above, indigenous holdings form part of the *minifundio* sector within the highly inequitable *latifundio-minifundio* agrarian structure, which still dominates in upland South and Central America despite past land reforms (Bolivia box, Ecuador box).<sup>107</sup>

The fragmented nature of indigenous holdings means that they are especially vulnerable to encroachment and seizure by neighbouring commercial farms. With government policies supporting agribusiness and export crops, these farm units have expanded at the expense of indigenous holdings (Ecuador box). Constrained by surrounding properties and confronted with an exhausted land frontier, average land areas available per household decrease as land parcels are divided among family members. With no space for expansion or crop rotation, indigenous cultivators are forced to “mine” their land parcels by reducing fallow periods and engaging in continuous cultivation. This causes erosion and declining soil fertility, which leads to lower yields and increased economic vulnerability.

Population growth over time transforms *minifundios* into *micro-minifundios* (<1 ha) with land areas insufficient for adequate subsistence provisioning resulting in poverty and under-nourishment for indigenous households. With inadequate land to generate surpluses for sale, indigenous household heads are obliged to migrate and find paid work on commercial farms and in cities. Male migration increases the work burden on women who must provision the family without help from spouses and male kin. Ultimately land scarcity in bounded situations produces landless families like those found in small upland *resguardos* of Colombia.<sup>108</sup>

Land shortage and food insecurity are therefore the main problem facing indigenous communities in upland areas in Latin America. Indigenous peoples’ organisations have therefore been pressing national governments for decades to restitute land to indigenous communities and continue the expropriation of large estates. Indigenous leaders stress that their people require land to expand and support future generations. They reject agrarian policies that risk further land concentration and the expansion of large-scale agriculture.

As Luis Macas, then Director of the Confederation of Indigenous Nationalities of Ecuador (CONAIE), commented during the national protest against the 1994 agrarian reform legislation that threatened to remove inalienable protections for indigenous communal lands:

*The indigenous people cannot accept a law that promotes the renewed concentration of land in the same hands as always and prohibits indigenous access. Without space to spread out, we will have to leave and die of hunger and misery in the cities.*<sup>109</sup>

### 4.1.2.2 Tropical lowlands

In lowland areas of Latin America less affected by fragmentation under liberal and land reform policies, customary indigenous tenure regimes cover extensive contiguous territories that encompass a range of habitats including forests, savannahs, rivers, lakes and rock formations. Most lowland groups have subsistence livelihoods based on shifting cultivation, hunting, gathering and fishing. Traditional tenure exhibits a nested structure with larger collective territorial units enclosing smaller ones, which correspond to specific access and proprietary rights. The largest spatial area or “maximal territorial unit” relates to the land and resources traditionally used and occupied by an ethnic group that may be

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<sup>106</sup> Harris 1999: 114ff.

<sup>107</sup> Barraclough and Eguren 2001:247; Mozder and Ghimire 2001:196

<sup>108</sup> See Gros 1991: 178

<sup>109</sup> cited in Treacle 1998:244

composed of a number of different clans and settlement groups.<sup>110</sup> The limits of this maximum territory are defined by regular *and* intermittent resource-use patterns of the residence groups that may extend a long way from settlements: hunting trails and hunting grounds, fishing camps, rubber camps, clay pits, distant swidden fields, boat-building clearings, etc.

As well as these physical aspects of land occupancy, territorial boundaries are also defined by spiritual and sacred landmarks. These sacred locations may relate to the origin of specific clans or dialect groups or the past exploits of ancestors and culture heroes. In the Northwest Amazon, for example, different topographic features and resources relate to specific ancestral spirit “owners” whose location is known to ritual specialists. These specialists possess a spiritual “cultural geography” that defines spatial boundaries between ethnic territories. Rather than western proprietary notions of rigidly bounded properties, collective holding of the maximum territory is often expressed in the idiom of “belonging” to an ancestral homeland, birthplace or “cradle”.<sup>111</sup>

Within this overall common property regime, there is a complex pattern of collective and individual proprietary, usufruct and access rights that regulate land and resource use according to customary law and cultural norms. Allocation of lands for clearing of swidden fields is mediated by kinship relations and community institutions. Families that are new to a settlement group negotiate land allocation with traditional authorities representing the community (e.g. village headman, village elders). In more informal cases, the delineation of a block of familial land for successive fields is agreed with neighbouring families. Boundaries are normally marked by watercourses or other topographic features. In both cases, access to land is mediated through the social *collectivity* of the community or residence group.

After fields have been opened, they belong to those who cleared and planted them or the couple or family who sponsored a community work party to prepare the land. Once established, day-to-day decisions about the access and allocation of resources for the production and consumption of food rest with the individual field owners belonging to a nuclear family or extended family. Owners have clear proprietary rights in their swidden fields as long as they are used and harvested. Rights over fallow land and secondary forest varies between ethnic groups. However, most indigenous peoples have internal tenure regimes through which productive fields and orchard fallows may be transferred within and between families as gifts and loans. Land parcels may also be inherited and passed from generation to generation.<sup>112</sup> Swidden fields and fallows return to the community once they become abandoned, have no living owner or once the owners relinquish their rights over them.

Individual and family ownership rights in land are therefore temporary usufruct and proprietary rights: permanent tenure is held by the collectivity. Rights to use other forest resources including timber, forest products, fish and game are vested in a single settlement or groups of settlements. People own individually the products they have extracted or worked and transformed through their own labour. Indigenous land- tenure patterns therefore combine overarching corporate rights in combination with individual land and resource rights.

Indigenous food security in the tropical lowlands is based on access to different and dispersed resources across the landscape. Households may own and cultivate as many as 40 different land parcels in different agroecological zones.<sup>113</sup> Manioc cultivators often ensure *over*-production to retain a reserve stock of food in the ground in case of hard times or unforeseen demand. Spreading production across different swidden fields reduces the risk of food shortages due to flooding, pest damage, excessive weed infestation or fires.<sup>114</sup> Sustainable shifting cultivation on poor soils like those found in many interfluvial zones of the tropics requires long fallow rotations of between 20 and 50

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<sup>110</sup> Grasmick 1979: 770.

<sup>111</sup> See Rodríguez and Van der Hammen 1990:196-199; See also Oliveira 1989

<sup>112</sup> See for example, Ventocilla *et al* 1995:17; Alavardo 2000: 34-35

<sup>113</sup> Griffiths 1998:77;

<sup>114</sup> Baksh and Johnson 1990:212-214

years. Land productivity is therefore maintained by retaining extensive areas of land under secondary vegetation and by maintaining a dispersed pattern of small settlements.

As well as their swidden complex, households use a variety of near and distant streams, rivers and lakes for fishing. The low productivity of tropical forest ecosystems also means that adequate hunting grounds require large areas for the reproduction of wild game populations. Settlements often apply a sustainable rotation method by hunting in one particular area for some years, before shifting hunting to another area to enable the former grounds to recuperate. This pattern of sustainable resource-use based on cycles of exploitation and regeneration may involve the relocation of settlements every 10 or 20 years. Hunter-horticulturist cultures and semi-nomadic peoples therefore require large areas to maintain a viable resource base.

The precise mix of different subsistence activities in indigenous livelihoods varies according to cultural preferences and local ecological conditions. Some are especially dependent on shifting cultivation, whilst others have livelihoods more centred on fishing or hunting.<sup>115</sup> However, in all these “horizontal”<sup>116</sup> economies livelihood security is dependent upon access to extensive land areas.<sup>117</sup>

In most lowland areas of South America indigenous economies are undergoing varying degrees of monetisation. Indigenous households are therefore today engaged in mixed livelihoods that involve both subsistence activities as described above and some commercial activities to generate cash income.<sup>118</sup> Access to cultivable land through social ties and co-residence forms an integral part of this mixed livelihood strategy. Secure rights to subsistence resources are essential for self-provisioning and food security of households when commercial work is limited or during periods of unemployment. Access to communal lands therefore forms a vital safety net during hard times.<sup>119</sup>

Indigenous land and food security in the tropical lowlands are threatened in most Latin countries in areas within or adjacent to colonisation zones where roads and infrastructure open up indigenous areas to outsiders. Colonists may include permanent agricultural settlers in search of land or temporary colonists in search of minerals or timber. In the worst cases, encroachment on indigenous lands causes actual physical displacement where indigenous people must abandon their crops. More often, the adverse impacts of colonisation relate to the gradual decline in wild foods as game is hunted out and fisheries are harmed by contamination related to mining or logging.<sup>120</sup>

Colonists may also introduce illness to indigenous communities whose sick members are less able to provision themselves and their dependants. The adverse impacts of disease are particularly acute in remote indigenous communities that, prior to contact, have only experienced limited exposure to western illnesses. The high mortality rates resulting from such exposure can threaten the very survival of these groups. Where colonists are engaged in mining and logging, local levels of malaria may increase dramatically.

High levels of malaria in the indigenous community reduce their capacity for subsistence work, which creates a negative spiral of food shortage and malnutrition. The case of the Deni on the river Xerua in Brazil is typical of many lowland groups adversely affected by encroachments by illegal loggers and colonists:

*The Deni...have very high anaemia rates (...37%). The high incidence of disease in the village, the lack of food caused by the inability to recover their fields, the shortage of game*

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<sup>115</sup> Werner *et al* 1979; Baksh and Johnson 1990:214-216

<sup>116</sup> cf. Plant and Hvalkof 2001:26

<sup>117</sup> Uriarte (1985:39ff) calculates that a population of 1,198 Achuar Indians require 164,950 ha for sustainable land use. Walschburger and von Hildebrand (1988:70) report that the 3 Yucuna families (6 adults and 5 children) use multiple habitats covering c.14,000 ha to sustain their shift-cultivation and forest-based livelihood.

<sup>118</sup> Chase-Smith 1996

<sup>119</sup> Salick 1992; Hammond *et al* 1995

<sup>120</sup> See Gray 1986

*and fish in the region are consequences of the long history of exploitation... and the current encroachment by loggers.*<sup>121</sup>

Indigenous food security is undermined more gradually where indigenous settlements become surrounded by colonist land holdings which limit the supply of fresh land for new swidden fields. The resulting land pressures force indigenous cultivators to shorten fallow periods thereby causing soil impoverishment and reduced yields.<sup>122</sup> Fields that are worked on shorter rotations also become more weed-infested, which increases the workload on indigenous women, who are normally responsible for crop care.

Uncontrolled industrial activities and their associated infrastructure also destroy the integrity of the indigenous resource base. In the Ecuadorian Amazon, oil extraction and exploration has resulted in pollution of watercourses and damage to natural fisheries that supply the main protein element in local indigenous diets. Seismic operations and intense activity surrounding wells have also displaced game in the region with negative consequence for indigenous subsistence (Ecuador box). At the same time, the construction of oil and gas pipelines causes deforestation and run-off that damages fisheries and potable water supplies. Intensive hunting by outsiders to feed the construction teams also accompanies these infrastructure projects. The opening of easements for pipelines also enables illegal colonists to enter remote indigenous territories.<sup>123</sup>

Until recently, most industrial projects have failed to recognise indigenous peoples' ownership of land and have been carried out on their property without their consent. Likewise, governments have issued logging and mining concessions over areas with complete disregard to indigenous land and human rights (Bolivia and Suriname boxes).

In sum, colonisation and industrial activities result in the fragmentation of indigenous lands and degradation of their resource base, which they depend on for their health and well-being. The summary livelihood analysis above indicates that the livelihood security of lowland groups relies on a range of cultivated and natural resources. Crucially, well-being is also about maintaining the integrity of spiritual and sacred sites and resources.

#### **4.1.2.3 Indigenous concepts of land, territory and well-being**

Indigenous concepts of well-being and security focus on access to adequate subsistence resources *and* social and cultural resources within a territory. Together, the land and resources within a particular geographic area form the core of indigenous identity and the basis for specific forms of social and political organisation. This holistic concept of "territory" is central to indigenous ideas about the collective identity and welfare of the tribe and ethnic group.<sup>124</sup> In contrast to non-indigenous economic theories of land, which view land holdings as commodities and a means of production, indigenous concepts view land as the foundation of a multifaceted territory of material, spiritual, social and cultural significance. A territory is valued as an integrated resource that sustains the human community and provides autonomous space for the reproduction of present and future generations. As a Yaqui person of Mexico explains:

*The defence of our territory has deep meaning for the Yaqui, it is the defence of much more than a piece of land. For the Yaqui, the territory is...like a "nest" or "receptacle", a great space that contains. The sense of property and identity around our territories has mystical value...We feel that a Yaqui outside his territory is less of a person because being Yaqui*

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<sup>121</sup> CIMI 1996

<sup>122</sup> Beckerman 1987:72

<sup>123</sup> Hamerschlag and Soltani 1999; Griffiths 1999

<sup>124</sup> Chirif *et al* 1991; Davis 1992; Gray 1997:100ff. See also Brysk 2000:155

*includes an identity which is the sum of many things: land, water, culture, language, sea, mountains, forests and much more.*<sup>125</sup>

Indigenous concepts of livelihood security see food as a source of replenishment that gives vital life force to the body to work and care for the family. Crucially, the circulation of food sustains social networks that provide an individual and family with labour and food support in times of shortage or illness. Well-being is dependent upon the individual's social and *spatial* autonomy to produce food to feed her or his own family and give surpluses to other co-residents and visitors.<sup>126</sup> Food also feeds into ritual events that reproduce cultural identity and maintain co-operative relations within and between settlement groups. It is the regular sharing and exchange of food in daily life and ritual that maintains the peace so essential to quality of life in indigenous societies. In indigenous ideas about livelihood security then, land, food production, social welfare and the maintenance of cultural identity are all closely interconnected. It is for this reason that the loss or fragmentation of traditional territories threatens the cultural integrity and the social fabric of indigenous societies as already noted in the previous chapter.

#### 4.1.2.4 Conflicting models of land tenure

The increasing pressures on indigenous lands in tropical Latin America from colonisation and mega-projects during the 1970s and 1980s was central to the emergence of an indigenous movement in the region.<sup>127</sup> Indigenous peoples began to unite and organise to put pressure on their governments to respect indigenous rights by giving legal title to their traditional territories. Central to this movement has been the campaign to convince governments that large areas covered by forest and natural vegetation are occupied and utilised by indigenous peoples.

Indigenous peoples have struggled to refute the widespread non-indigenous racist stereotype of the “lazy Indian” who leaves productive land idle. In collaboration with scientists, indigenous peoples in Latin America have demonstrated that they manage and utilise natural resources in sophisticated ways that can enrich the resource base and biodiversity. Rather than being “pristine” natural forests, forests have been shaped and moulded by generations of indigenous management and occupation.<sup>128</sup> Indigenous organisations have urged governments and the international community to respect indigenous territorial land tenure and management regimes grounded in the special relationship indigenous peoples have to their lands. Indigenous peoples have also taken practical steps to defend their territories, which lack title and protection, from the state. Some people, like the Yekwana of Venezuela, have located new settlements on the boundaries of their territory to defend resources against encroachment. Colonists and commercial landowners often challenge these boundaries and have consistently rejected indigenous land claims.

Powerful economic and political actors including ranchers and miners use racist and inappropriate non-indigenous property and land use concepts to challenge indigenous claims, alleging that indigenous families do not need large land areas. In countries like Mexico, Brazil and Colombia powerful landowners have forcibly evicted indigenous peoples, assassinated indigenous leaders and even massacred whole indigenous communities in order to seize and claim title to their land.<sup>129</sup>

Government indigenous agencies like FUNAI in Brazil often failed to uphold indigenous claims by accepting such flawed land tenure arguments of vested political and economic interests.<sup>130</sup> Even

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<sup>125</sup> Molina 2000:101-102

<sup>126</sup> See, for example, Griffiths 1998:220ff; Gallois 1998:184

<sup>127</sup> Van Cott 1994; Brysk 2000

<sup>128</sup> Posey and Baleé 1988; Correa 1990; Baleé 1994

<sup>129</sup> Branford and Glock 1985:22; Monbiot 1995:152ff; Amnesty International 1992:77-78.

<sup>130</sup> See, for example, Wagley 1977:78; Branford and Glock 1985:269.

where government agencies managed to treat indigenous claims fairly, it was quite common for more powerful government agricultural and colonisation departments to overrule these decisions.<sup>131</sup>

Where states have sought to protect indigenous lands with formal titles these have often been determined by applying non-indigenous tenure models. In Peru, the Law of Native Communities is valued for establishing the communal status of indigenous land, but criticised for imposing an Andean land use model which has created numerous small “islands” of titled communities with intervening land being exploited and occupied by non-indigenous settlers and economic interests. The imposition of inadequate boundaries also occurs in other countries like Guyana where legal Amerindian Districts only cover a fraction of traditional territories. In cases like Guyana, communities have organised and trained themselves with NGO support to demarcate their ancestral lands using GPS technology. In both Guyana and Suriname, community maps are now being used to make legal cases to reclaim ancestral territories (Guyana and Suriname boxes).

In the process of trying to defend their lands and livelihoods, indigenous peoples’ organisations and representatives have stressed that security of land tenure must be backed by the right of local control over resources needed for subsistence and self-development. As the representative of the Harakmbut people of the Peruvian Amazon explained to the UN Working Group on Indigenous Populations:

*Even though the national Law of Native Communities guarantees that our territories are inalienable, the mining law allows the Ministry of Energy and Mines to sell concessions to anyone...Peruvian national legislation should guarantee and protect our new Arakmbut Communal Reserve which unites our ancestral territories, yet non-indigenous hunters illegally enter our hunting grounds to kill and sell animals to the market. This is another example of how we are illegally deprived of our natural resources while the Peruvian authorities provide no support for our legitimate claims.*<sup>132</sup>

Indigenous declarations made in national and international fora since the 1970s in relation to their land and territories can be summarised as follows as demands for, *inter alia*:

- prior collective, inalienable territorial *ownership* rights over traditional territories including “*baldías*”;
- access to efficient procedures for demarcation and titling lands of sufficient area to allow for customary land use and population growth;
- protection against expropriation and involuntary relocation;
- full control over the use, management and conservation of natural resources according to custom and traditions;
- protection against exploitation and theft of land and resources;
- participation in all decision-making processes affecting indigenous territories;
- secure long-term tenure for sustainable self-development and conservation of natural resources;
- respect for indigenous peoples’ traditional land and resource practices in national land use and development policies and plans;
- implementation of international standards on the rights of indigenous peoples within national legislation;
- respect for indigenous communities and cultures across national frontiers;
- protections against practices which divide indigenous peoples;

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<sup>131</sup> Wali and Davis 1992: 13

<sup>132</sup> Elias Kentehuari, cited in Gray 1997:22

- respect for the right of free and prior informed consent for activities affecting indigenous territories;
- support for indigenous self-determination and self-development based on their own priorities, values and traditional resources<sup>133</sup>

Statements relating to indigenous intellectual property rights and rights to genetic diversity within traditional territories urge governments and other relevant bodies to:

- recognise that collective intellectual rights are an extension of territorial rights;
- respect the principle of free and prior informed consent regarding the use of indigenous genetic resources and knowledge about such resources;
- support *in-situ* conservation of genetic resources within indigenous territories;
- value and protect traditional crops and guarantee indigenous food security;
- value and protect traditional practices, including dietary habits;
- implement agreed standards on indigenous peoples and biodiversity conservation established in the Convention on Biological Diversity<sup>134</sup>

#### 4.2 Constitutional reforms and indigenous land rights

The indigenous movement in Latin America has had some success in influencing progressive reforms that improve normative frameworks for securing indigenous land security. In most countries, civil codes have been reformed to recognise indigenous land rights over *baldías*.<sup>135</sup> With the removal of authoritarian governments in the 1980s, emerging democratic movements and civilian governments embarked on ambitious constitutional reforms. Between 1985 and 2000, 14 countries revised their constitutions. These reforms have eliminated the previous integrationist framework. Instead, the new “multicultural constitutions” adopt the concept of the pluri-ethnic nation-state (Table 2).<sup>136</sup>

The new multiculturalist constitutional frameworks mark a radical departure from past models of nation-building based on the elimination of cultural difference and the assimilation of indigenous peoples. It is noteworthy that the language of the reformed Latin American constitutions was often negotiated with indigenous peoples’ own representatives. Not surprisingly, provisions on land rights and self-determination tend to be strongest in constitutions drawn up with active indigenous participation (e.g., Ecuador and Colombia).<sup>137</sup> Progressive language also stems from agreed governmental commitments to respect indigenous rights under ILO Convention 169, which has been ratified by 11 countries in Latin America (Table 2).

With the significant exception of Mexico and Peru, 12 countries have established norms that protect indigenous communal rights to inalienable, imprescriptible and un-mortgageable lands. The Colombian and Ecuadorian constitutions also recognise customary legal systems and traditional authorities as legitimate public entities for autonomous land administration. In theory, such territorial entities can receive funds direct from central government (Colombia box).

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<sup>133</sup> e.g. Barbados Declaration 1971; Kari-Oca Declaration 1992; Leticia Declaration 1996; Copenhagen Declaration 1996

<sup>134</sup> COICA/UNDP 1994; COICA 1996

<sup>135</sup> Roldán 1992: 58

<sup>136</sup> Sánchez 1996; Van Cott 2000:272

<sup>137</sup> Despite active indigenous participation in the revision of the Guyanese constitution, key indigenous proposals for the recognition of autonomy rights, territorial rights and customary law have so far been rejected by the government.



**Table 2: A comparison of Indigenous Rights in Latin American Constitutions and laws<sup>a</sup>**

<i>Country</i>	<i>ILO 169/year</i>	<i>Rhetorical Recognition of Multi-culturalism</i>	<i>Recognition of Customary Law</i>	<i>Collective Property Rights</i>	<i>Official Language Recognition</i>	<i>Bilingual Education</i>	<i>Autonomy Regime</i>
Argentina 1994	✓ 1998	Indirect/weak	X	✓	X	✓	X
Bolivia 1994	✓ 1991	✓	✓	✓	X	✓	X
Brazil 1988	X	X	X	X	X	✓	X
Chile 1989, 1997	X	X	On a limited basis, by statute	X	X	X	X
Colombia 1991	✓ 1991	✓	✓	✓	Within indigenous territories	✓	✓ municipal
Costa Rica 1949/1997	✓ 1993	X	X	X	X	X	X
Ecuador 1998	✓ 1998	✓	✓	✓	Within indigenous territories	✓	✓ sectional
El Salvador 1982	X	X	X	X	X	X	X
Guatemala 1985/1998	✓ 1996	✓	✓	✓	X	X	X
Guyana 1980/2001-present <sup>138</sup>	X	✓	X no, arguably under Amerindian Act	X	X not official, but protected under the Constitution	X	✓ limited village level autonomy
Honduras 1982	✓ 1995	X	X	✓	X	X	X
Mexico 1917, 1994, 1995	✓ 1990	✓	commitment in 1996 San Andrés Accord	✓	promised	promised	limited autonomy over communal land
Nicaragua 1987	X	✓	✓	✓	In multiethnic regions	✓	✓ in multiethnic regions
Panama 1972/1983 1994	X	X	✓	✓	X	X	✓
Paraguay 1992	✓ 1993	✓	✓	✓	Guarani is official	✓	X
Peru 1993	✓ 1994	✓	✓	✓	In own zones	X	X
Uruguay 1999	X	X	X	X	X	X	X
Venezuela 1999 <sup>139</sup>	✓	✓	✓	✓	?	✓	? partial

a: Adapted from Van Cott 2000:266-268

<sup>138</sup> In Guyana, amendments to the constitution are made by individual statutes. It is therefore still not clear if some indigenous proposals will be included in the final revised constitution.

<sup>139</sup> In Venezuela, a revised Organic Law on Indigenous Peoples and Communities is still under discussion. If approved, customary law, local autonomy and official recognition of indigenous languages will be more strongly affirmed.

These constitutions have therefore in principle recognised the indigenous territorial mode of land tenure, which involves jurisdiction over the management of natural resources.

Despite strong opposition from vested interests, the new Venezuelan constitution also guarantees some degree of local autonomy and local governance of indigenous “habitats”. The same constitution also recognises the collective intellectual property rights over genetic resources used for collective benefit (Art 124).<sup>140</sup> Venezuela is also especially notable because its new demarcation law also recognises indigenous self-demarcation as a valid part of the land regularisation and titling process (Venezuela box).<sup>141</sup> Other constitutional reforms like those in Brazil still fail to recognise the ownership rights of indigenous peoples, though possession rights are recognised.<sup>142</sup> Nevertheless, the 1988 Brazilian Constitution and subsequent regulations have clarified and streamlined demarcation and titling procedures.<sup>143</sup> The indigenous movement and human rights advocates in Brazil are pressing the Brazilian government to reform the 1973 Indian statute to recognise indigenous ownership rights over their traditional lands.

### 4.2.1 Government progress in titling indigenous territories

In addition to normative changes giving improved recognition of indigenous land rights, some countries have made practical progress in demarcation and titling. In Colombia, large areas of indigenous land have been titled as integral *resguardo* territories covering hundreds of thousands or several million hectares (Colombia box). In response to intense lobbying by local indigenous communities for compliance with *resguardo* legislation, INCORA has used compensation packages to relocate third parties encroaching on indigenous titled lands in Amazonia.

Government agencies and scientists in several countries including Colombia, Venezuela and Brazil have acknowledged that large indigenous territories are compatible with conservation goals and that their extensive areas can sustain viable populations of flora and fauna.<sup>144</sup> It is also recognised that secure tenure for indigenous peoples is an important precondition for effective conservation and sustainable management of tropical forests and other habitats. Crucially, national policy-makers now concede that the common property regimes of indigenous peoples do not constitute open access systems that threaten resource conservation. Instead, it is now realised that, given secure tenure and protection from colonisation, traditional indigenous land use and knowledge of resource management can help sustain fragile ecosystems.<sup>145</sup>

In Bolivia and Colombia there are also emerging examples of formal joint agreements between government environmental agencies and indigenous authorities for the *co*-management of protected areas (Colombia box).<sup>146</sup> These cases are especially notable because they recognise full indigenous land title over areas with protected area status. Indigenous people are employed as park rangers and administration involves joint decision-making bodies whose executive members include indigenous and government representatives.<sup>147</sup> In other areas, national and international protected areas like the UNESCO Biosphere reserves in Mexico have sought to involve indigenous peoples in environmental management and conservation and development initiatives.<sup>148</sup> In countries like Ecuador, government agencies are becoming more disposed towards drawing on the skills of civil society and forging partnerships with NGOs and indigenous peoples’ organisations. In 2001, the National Institute for Agrarian Development (INDA) signed agreements with the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE) involving the self-demarcation of indigenous lands.

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<sup>140</sup> Sendas 1999

<sup>141</sup> Sendas 2001

<sup>142</sup> Van Cott 2000:272, Survival International 2000

<sup>143</sup> Davis and Wali 1994

<sup>144</sup> Walschburger 1992

<sup>145</sup> Tresierra 1999:138-139

<sup>146</sup> Arambiza 1998; Beltrán 2000

<sup>147</sup> Griffiths 1999:51

<sup>148</sup> Canul 1999

Some initial progress has also been made regarding respect for the territories of indigenous peoples in voluntary isolation. As noted above, these remote communities are particularly vulnerable to the adverse impacts of land invasion and colonisation. After intense campaigning by indigenous organisations and the international community, the Peruvian government has made formal commitments to protect the lands of uncontacted peoples in the Madre de Dios department in the Peruvian Amazon region.<sup>149</sup>

Social mobilisation by indigenous peoples against destructive macroeconomic policies is persuading some governments to pay more attention to indigenous issues. In Bolivia, Ecuador and Peru, governments have sought international support to address indigenous poverty. Further signs of political commitment to respect indigenous rights emerged in July 2001 when five Andean governments signed the *Machu Picchu Declaration* in which they pledged to promote and protect the rights of indigenous peoples including their collective rights.<sup>150</sup>

### 4.2.2 Role of international agencies

In response to intense international criticism of the destructive impacts of its projects on indigenous peoples in the Amazon basin, the World Bank developed operational guidance for its staff on how to deal with indigenous peoples affected by its loan operations. The policy, first adopted in 1982 and revised in 1991, requires Bank staff to mitigate the adverse impacts of development by ensuring indigenous participation, and measures to guarantee indigenous land and resource security. Measures to safeguard indigenous interests are planned and budgeted in an Indigenous Peoples Development Plan (IPDP), which is developed in accordance with prior baseline studies identifying indigenous needs, including land tenure needs.

Following adoption of the Indigenous Peoples Policy, World Bank infrastructure and agricultural projects in Latin America began to feature land regularisation and titling components. A Bank review of these projects in 1992 found that land titling components were of variable quality. Bad projects were found to be the fault of poor baseline studies that failed to take account of indigenous tenure and complex situations on the ground. Relatively successful projects were associated with good baseline studies and the existence of political will and capacity of the implementing agencies to carry out land demarcation titling.<sup>151</sup>

Some World Bank projects have had serious problems with land titling, particularly where it formed a component within a wider agricultural development project.<sup>152</sup> For example, in the *Eastern Lowlands Project* in Bolivia in the mid 1990s, vested interests blocked indigenous land claims and actually appropriated and obtained title to indigenous lands resulting in displacement and hardship for affected indigenous communities.<sup>153</sup> A later national-level land administration project with a strong indigenous component also had negative impacts on indigenous territories due to the failure to involve indigenous representatives in establishing the technical rules for demarcation (Bolivia box). In Brazil, the *Indigenous Lands Project* has been successful in promoting demarcation of indigenous reserves, but the limits of some land claims have been reduced against the wishes of local indigenous communities.<sup>154</sup>

In other cases, land regularisation projects have been more successful. The *Guatemala Land Administration Project* was designed in accordance with the World Bank's Indigenous Peoples Policy (OD4.20). The project consequently involved a social assessment to determine the aspirations of indigenous communities and established bilingual legal office at the local level to assist people with

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<sup>149</sup> Amazon Alliance 2001

<sup>150</sup> Machu Picchu Declaration signed by Presidents of Bolivia, Ecuador, Colombia, Peru and Venezuela

<sup>151</sup> Wali and Davis 1992:10-13

<sup>152</sup> Wali and Davis 1992; Swartz and Uquillas 1999

<sup>153</sup> CIDOB, CANOB, CABI and TURUBO 2000

<sup>154</sup> Indigenous Council of Roraima (CIR) pers. comm. June 2001

claims.<sup>155</sup> The Bank-assisted *Colombia-Natural Resource Management Project* is a case where successful titling was carried out under complex and difficult local circumstances involving indigenous and Afro-Colombian communities and different government agencies dealing with land administration and protected areas. All parties to the project agree that success was grounded in active local participation and monitoring by community-based organisations seeking land titles (Colombia Box).

A recent review of experience with indigenous land titling in Inter-American Development Bank (IADB) projects also found patchy experience across, within and between projects in the same country. In Panama, for example, the IADB-assisted *Program for Sustainable Development of the Darien* supported the physical demarcation of the Madungandi Comarca and promoted baseline studies with indigenous organisations and local communities. However, the *Agricultural Services Modernisation Program* in the Veraguas Province more or less ignored indigenous issues and missed a valuable opportunity to help demarcate indigenous lands under pressure from colonists. In Peru, the *Programa Especial para la Titulación de Tierras* did not involve indigenous representatives in the design of the project, and while communal titles are not prohibited, most work has focused on individual titles. Indigenous organisations in Peru consequently have been critical of the project.<sup>156</sup>

#### 4.2.3 Innovative initiatives of indigenous peoples

Indigenous peoples in many parts of Latin America are using new technology in innovative self-demarcation initiatives. In the case of the Awa of Ecuador, these recent initiatives are being used in conjunction with practical self-demarcation methods of border-cutting and settlement along territorial boundaries. In Guyana, Venezuela and Suriname, indigenous communities have mapped their territories using GPS technology with technical assistance from international NGOs. They have produced their own maps detailing land use and occupancy according to their own cultural categories.<sup>157</sup> These projects have been prepared and implemented by the communities' own representative organisations. In Guyana, the resulting maps are being used in court cases to legitimate land claims in the court. As noted above, in Venezuela, community maps are being recognised by the government in a new push to demarcate indigenous lands (Venezuela box). Community mapping has been empowering for indigenous communities who have mastered technology to record the customary land use and knowledge of natural resource management. Communities hope to build on these maps in order to plan for sustainable development.

In Belize, Maya communities have produced a set of sketch maps that together constitute a Maya Atlas that details communal territories and outside threats from loggers, roads and colonists. The map has helped communities pinpoint and challenge threats to their lands and resources. The Maya mappers are now seeking further international support to refine their Atlas using GPS and geomatics methodologies.<sup>158</sup>

Under the *Ucayali Titling and Communal Reserve Project*, indigenous communities in Peru have worked with national and international NGOs to find novel ways to secure indigenous territories within the constraints of national legislation. The project used a combination of the existing Law of Native Communities and the national Forestry Law to secure land title for 209 indigenous communities over 2.5 million ha and establish the basis for access rights over a further 7.5 million ha of forest reserves.

The 10-year project, which was funded by the Danish government's aid agency (DANIDA), actively involved local communities and the regional indigenous peoples' organisation in its design and implementation.<sup>159</sup> Local community members were trained in demarcation and mapping methods and

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<sup>155</sup> Plant and Hvalkof 2001:64

<sup>156</sup> Ibid.:58-63

<sup>157</sup> Poole 1995:74, n.d.

<sup>158</sup> Poole nd.

<sup>159</sup> García, Hvalkof and Gray 1998

they worked in teams alongside government surveyors. Local communities received technical support from national and international NGOs and the project included institutional strengthening for the participating indigenous organisations.

Following capacity-building workshops on land and territorial rights, dispersed communities agreed to demarcate and obtain titles to adjoining areas of land to form one contiguous territory without intervening gaps. This patchwork of titles was established to dissuade invasion and illegal colonisation by loggers, miners and settlers. Areas for demarcation were agreed taking account of varying ethnoecological factors and community needs and priorities. Consequently, Shipibo titles covered mainly river corridor land and wetland areas in accordance with their fishing-based livelihood, more nucleated settlements and their gardening on relatively rich soils. In the case of the Ashaninka communities, the areas demarcated were determined by their traditional dispersed settlements on poorer inland soils and their cultural emphasis on hunting resulting in more extensive titles over interfluvial forests.<sup>160</sup>

In defining boundaries for communal reserves, the project took account of the territorial rights of three separate isolated and uncontacted indigenous groups. Interviews with settled communities outside the area defined the broad seasonal nomadic movements of these remote Mashco-Piro, Isconahua and Murunahua communities. The project succeeded in demarcating these territories which still await titles from the Ministry of Agriculture.<sup>161</sup>

Delays in the project were mainly due to lack of co-operation from local government officials and strong opposition from ranching and logging interests. Nonetheless, the participating communities were able to complete the project by pressuring governmental agencies at the local and national level to adhere to formal agreements made at the outset of the titling programme. The project's baseline work on forest reserves bore fruit in 2001 when the 616,000 ha El Sira communal reserve was created with full recognition of the access rights of local native communities. The reserve will be administered by the indigenous communities via a joint management agreement with the National Natural Resources Institute (INRENA).<sup>162</sup>

As well as innovative practical efforts, the indigenous movement in Latin America is also trying influence the upstream development of land policies. Indigenous participation in the democratic system aims to ensure that natural resource and land laws take account of indigenous customary land tenure and rights to own, use and control resource use on their traditional lands. In Ecuador, CONAIE lawyers are submitting detailed proposals for drawing up new laws on forests, biodiversity and land regularisation (Ecuador box). In Panama, indigenous delegates in the legislative assembly are currently proposing a new law to protect the land rights of Embera communities in the Darien district (Panama box).

Indigenous peoples' organisations have also sought to integrate land tenure projects in community-based natural resource management plans. These local level plans include support for subsistence food production, the regulation of resource use on communal land and sustainable income generation components. In Ecuador, for example, the Chachi people have developed an integrated community forest management plan. The plan addresses food security, land and game management, marketable production of Non-timber-forest-products (NTFPs), fish farming and ecotourism.<sup>163</sup> The Kuna Yala General Congress in Panama has prepared its own integrated territorial development plan that combines biodiversity conservation, land conflict resolution, sustainable livelihoods and participatory research in a territory-wide plan. Similar grassroots initiatives in defence of land rights and in search of sustainable self-development are taking place throughout Latin America.<sup>164</sup> Unfortunately, many of

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<sup>160</sup> Gray 1998:206

<sup>161</sup> Gray 1998b:206-211

<sup>162</sup> SII 2001

<sup>163</sup> Gamboa 1999

<sup>164</sup> See, for example, López 1997

these local initiatives lack long-term funding and gains made are often lost through due to insufficient external support.

**Ecuador**<sup>165</sup>

The land and resources rights of indigenous peoples in Ecuador are guaranteed under its 1998 Constitution (art.84), which recognises the collective and inalienable status of indigenous lands and affirms the right of ancestral possession of communal territory. Ancestral land can be titled by the National Institute of Agrarian Development (INDA) under the 1994 Agrarian Development law (art.36) which also allows for some degree of self-demarcation by land claimants (art.59). Titles are held by *comunas* or *asociaciones*, which have legal personalities registered by the state. However, indigenous people still lack clear legal ownership rights over their territories that are superimposed by protected areas and state forest lands that are under the jurisdiction of the Ministry for Environment (MoE). Specific access and use agreements can be negotiated between indigenous communities and the MoE, but the legal status of indigenous lands is still being negotiated at the national level.

While legal ambiguities remain to be resolved, the land tenure situation of indigenous communities in Ecuador remains critical. INDA lacks the staff and resources to deal with a backlog of land claims and land conflicts generated by past government colonisation programmes undertaken during the 1970s and 1980s. In many cases colonists were issued with land titles without taking account of indigenous land tenure. At the same time, continual reform and rapid change in the administration and mandates of government agencies during the 1990s has left departmental land tenure duties unclear.

In upland areas, indigenous communities face land shortages as the supply of cultivable land is decreasing and demand increases as the indigenous population grows. Most productive land is held by large and medium-sized commercial farms geared towards the production of export crops. Expansion of these farms has displaced indigenous holdings and traditional food crops and undermined indigenous food security. Indigenous peoples' organisations like the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) argue that governmental policies should promote sustainable production by the country's majority of poor indigenous small-holders. Part of this strategy would involve consolidating state capacity to acquire lands for communities facing land shortages.

In the Amazonian lowlands patchy progress has been made in titling indigenous territories. In 1992 the indigenous peoples of Pastaza Province received title by Presidential Decree over 1.1 million ha. This land has now been adjudicated and regularised through a joint partnership between the Organisation of Indigenous Peoples of Pastaza (OPIP) and INDA. However, in many areas indigenous communities still lack land title. In the northern Amazon region, indigenous territories and resources have been degraded by the activities of oil companies. Despite these problems, the government has awarded oil concessions over most the Amazon region. Affected communities are now seeking redress in the courts and through constitutional tribunals. These have ruled that the state has an obligation to demarcate and title the communal lands of indigenous peoples so they have a sound legal basis to defend their territories. Indigenous peoples in the Amazon region also object to the government's imposition of mega-projects like the Oleoducto de Crudos Pesados (OCP). In both Amazonia and the coastal forests of Northern Ecuador, indigenous people face displacement by commercial oil palm plantations, which in some cases have purchased 'inalienable' lands causing severe internal conflict in indigenous communities.

Amid these serious problems there are also positive efforts to address the land tenure problems facing indigenous peoples. The World Bank-assisted Indigenous Peoples and Afro-Ecuadorian Development Project (PRODEPINE), though not without problems, has succeeded in producing guidance for INDA on how to undertake participatory demarcation and titling projects with

<sup>165</sup> Tamariz and Villaverde 1997; Frente de Defensa de la Amazonia 1998; Treacle 1998; CDES 2001; CONAIE 1999a, 1999b, 2001; Uquillas 1993; Uquillas and Davis 1992; Amazon Watch 2001b; World Bank 1997, 1999; Griffiths 1999; FENOCIN 1999; Whitten 1981, 1985; Buitrón 2001.

indigenous communities. These projects have worked in direct partnership with NGOs and indigenous organisations and have involved capacity-building components to train indigenous people in land management and mapping techniques. In the uplands, PRODEPINE has been less successful in achieving land restitution due to delays in the disbursement of funds to purchase land and continuing problems with conflict resolution between non-indigenous and indigenous parties. National indigenous organisations are now engaged in drafting new national laws on forests, biodiversity and land regularisation to try and ensure Ecuadorian legal frameworks are consistent with the constitutional land rights of indigenous peoples.

### Bolivia<sup>166</sup>

The recent history of indigenous land tenure in Bolivia follows a pattern similar to that of several Andean countries. Colonial authorities first appropriated fertile indigenous lands in upland areas as *encomiendas* that gave Spanish settlers the power to conscript indigenous labour. Subsequent mining booms resulted in the expansion of large estates (*latifundios*) that further pushed indigenous communities on to marginal lands. By the mid-20<sup>th</sup> century, serious land shortages in the uplands provoked mass land invasions by indigenous peoples. The 1952 Revolution eventually resulted in state land reform in 1953, which aimed to break up *latifundios* and redistribute land. However, the reforms only achieved patchy redistribution, and in some cases exacerbated inequitable agrarian structures. Meanwhile, land reform did not affect the tropical lowlands. Under state land policy these areas were viewed as a zone for colonisation to relieve land pressures in the uplands. Throughout the 1960s-80s, Bolivian military and civilian governments promoted colonisation and the expansion of commercial export agriculture. As late as the mid-1990s, the World Bank-assisted Eastern Lowlands Project supported commercial-scale soya production which resulted in a 400% increase in deforestation, appropriation of indigenous lands, displacement of indigenous communities and degradation of the resource base.

In 1990, the lack of land security in the lowlands provoked the first “Indigenous March for Land and Dignity” from the lowlands of Santa Cruz to the upland capital of La Paz, which resulted in titles by Presidential decree for some territories (Decretos 22609-11). The Sánchez de Lozada government instituted constitutional reforms in 1994, which recognised the inalienable collective property rights of indigenous peoples over their lands and their surface resources (Art 171). When a new land law was proposed in 1996, tensions between agribusiness interests and indigenous priorities resulted in another protest march. After forcing negotiations with the government, the Indigenous Confederation of Bolivia (CIDOB) achieved the legal recognition of inalienable collective *Tierras Comunitarias de Origen (TCO)* under the final 1996 Agrarian Reform Law (*Ley INRA*). This TCO status is important because it applies the concept of *territory* that allows for indigenous jurisdiction over their lands and resources.

Implementation of *Ley INRA* was supported by bilateral donors and the World Bank. However, the new land policy turned out to be seriously regressive. Lowland indigenous organisations criticised its technical rules because they applied inappropriate peasant economic parameters that *diminished* the area recommended for demarcation. The rules also gave titling priority to colonists illegally occupying indigenous lands causing the fragmentation of indigenous territories. The process of *saneamiento* (regularisation) was also incredibly slow: between 1997-2000, only a handful of indigenous land claims were titled and many were “immobilised” due to unresolved conflicts generated by the complicated rules. Upland indigenous peoples criticised the law for only giving

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<sup>166</sup> Navia 1993; Solón 1997; de Vries 1998; Marinissen 1998; Ñee Jeroata 1999c, 1999b, 1999c; Orellana 1999a, 1999b; Ossio 1999; Griffiths 1999; Griffiths and Colchester 2000; Van Cott 2000; World Bank 1995; Amazon Alliance 2000a, 2000b; IWGIA 2001; CIDOB 2001.

rhetorical treatment to land redistribution. Scrutiny showed that in practice the law would not result in expropriation of *latifundio* lands. Indigenous organisations also complained that natural resource legislation had been developed without indigenous participation. Studies by CIDOB publicised the fact that almost all TCO claims were blanketed by timber, oil and mineral concessions issued by central government. In 1999, a decree converting former rubber and brazil nut concessions into forestry concessions also threatened to adversely affect forest areas traditionally used by native people and peasants

The indigenous movement organised another mass protest in 2000 to persuade the government to address these problems. This “Third Indigenous and Peasant March for Land Territory and Natural Resources” persuaded the government to annul the forest concession decree and remove obstacles to the land titling process. The flawed land regularisation procedures have also been *partially* rectified allowing four “immobilised” indigenous land claims to receive authorisation to receive titles covering 1.8 million ha. Despite these important victories, agribusiness interests are launching counter reforms to limit indigenous gains. Meanwhile, at the end of 2001, 16.6 million ha of indigenous land claims still require regularisation. The case of Bolivia shows that (i) land policy must use appropriate implementing legislation and technical rules to safeguard the land rights of indigenous people and (ii) natural resource legislation and macroeconomic policy should be consistent with land policy for indigenous peoples.



## Colombia<sup>167</sup>

Indigenous peoples in Colombia number around 420,000 people whose lands and communities are spread across 27 administrative departments. Eighty five per cent of this indigenous population resides within inalienable collective *resguardos* (indigenous reservations) titled by the Colombian Institute for Agrarian Reform (INCORA). Land titles are based on traditional and immemorial occupancy. Titles are held by the indigenous *cabildo*, which is the legally constituted governing body for a community and its *resguardo*.

The institutions of the *resguardo* and *cabildo* stem from the colonial era when the Spanish authorities recognised the right of Indian communities to own communal lands in upland areas. During the nineteenth century, the new Republican state introduced liberal reforms that sought to dissolve *resguardos* by authorising land sales. This fragmentation was blocked by Law 89 of 1890 that nullified land transactions and reinstated the inalienable and collective status of indigenous territories. Law 89 remains the keystone of Colombian indigenous legislation. Law 135 of 1961 recognises indigenous ownership rights over lands they have traditionally occupied including state lands formerly defined as *baldíos* (empty lands). The application of this law in the late 1960s resulted in the titling of over one million ha. Throughout the 60s, 70s and 80s, a series of law reforms removed certain ambiguities in land tenure legislation in Colombia to reinforce indigenous land rights.

Notwithstanding these legislative gains, integrationist state policies aimed to consolidate the settlement of national territories throughout the 1950s-70s by encouraging peasants to move to the eastern lowlands. The colonisation programme resulted in widespread deforestation in western Amazonia. In the 1980s, the state reversed its colonisation agenda and adopted a policy of tropical forest conservation centred on the recognition of indigenous peoples' rights to their traditional territories. After a major decade-long government push to title indigenous lands, by 1990, more than half the Colombian Amazon, covering 18.5 million ha, had been designated as indigenous *resguardos*.

In 1991, Colombia adopted a progressive new Constitution that recognises indigenous territories as jurisdictions that may be governed by customary legal systems (art.246). The Constitution also enables the consolidation of different *resguardos* into autonomous self-governing Indigenous Territorial Entities (ETIs)(art.329). However, 10 years on, implementation legislation is still being negotiated for the creation of ETIs. Despite continuing instability in rural areas, the government has managed to continue titling indigenous lands. Between 1992-2000, 45 indigenous *resguardos* were titled in the Pacific region as part of the World Bank-funded Natural Resource Management Project (NRMP). The same project also titled 43 Afro-Colombian "collective territories" covering 1.7 million ha. The success of this novel project is due to the fact that, albeit after local pressure for improved project management, indigenous peoples' organisations and community-based organisations were directly involved in the design, implementation and monitoring of the land regularisation and titling process. Participation in the NRMP was facilitated by the creation of "Regional Committees" that held regular meetings to assess progress and hear local concerns and proposals. These meetings were used to train local people in legal and land rights issues and to distribute information about the project and its components.

Advances have also been made in clarifying land administration for the 14 protected areas in Colombia that superimpose *resguardo* lands. In 1997, the government adopted a "parks with the people" policy that recognises that *resguardos* are compatible with conservation management. In June 2001, the Ministry of Environment signed a "joint management" agreement with the Miraña people whose *resguardo* overlaps 85% of the Cahuinari National Park in Amazonas. The agreement is important because it is the first time local *cabildos* have been treated as legitimate *public* authorities

<sup>167</sup> DNP 1993; Gros 1991; Roldán 1992, 1993; Bunyard 1989; Arango 1992; Jimeno 1988; Santacruz 1992; IACHR 1999; Van Cott 2000; INCORA 2000; Ng'weno 2000; IWGIA 1997, 2000,2001; Ortega n.d.

in accordance with the new constitution. Indigenous organisations complain that despite their legal rights, their territories are still subject to damage by loggers and commercial coca production. In parts of the Amazon, gold extraction is also resulting in mercury contamination and degradation of local fisheries that supply the bulk of protein in indigenous diets. Little progress is being made in the uplands where INCORA's land restitution programmes are stifled by budget shortages and opposition by local *latifundistas* who continue to intimidate indigenous leaders involved in the struggle for land.

## Guyana<sup>168</sup>

Bordered by Suriname, Brazil and Venezuela, Guyana is the only English speaking country in South America. It is home to nine Indigenous peoples – Arawak, Akawaio, Arecuna, Macusi, Warrau, Wapisiana, Wai Wai, Patamona and Carib – comprising 60-80,000 persons, approximately 8-10% of the total population. They occupy the coastal forests, interior tropical forests and savannahs encompassing about 60% of the country. First colonised by the Dutch in the 16<sup>th</sup> century, Guyana was formally ceded to Great Britain in 1814, which governed until independence in 1966. The British formulated a policy of isolation and wardship in the 19<sup>th</sup> century followed by the establishment of a reservation system in the 1900's and a combination of wardship, integration and assimilation beginning in the 1930-40's. Independent Guyana's policy towards Indigenous peoples is essentially based upon colonial policy and law maintaining strong elements of wardship, indirect rule and assimilation.

Both the Dutch and the British, and the successor state of Guyana, asserted that all lands not held under grant from the state were crown lands. However, the Independence Agreement between Great Britain and Guyana contained a condition relating to indigenous peoples requiring that "the legal ownership of lands, rights of occupancy and other legal rights held by custom or tradition" be legally recognised without distinction or disability. To comply with this, an Amerindian Lands Commission was established in 1966. In 1969, it issued a report which recommended that 128 Indigenous communities receive title to 24,000 square miles. To date only 74 communities have received title covering 6,000 square miles and these titles are subject to substantial statutory limitations that render indigenous tenure dependent upon the good will of the government of the day.

The primary law relating to indigenous peoples, the 1951 *Amerindian Act*, is essentially a modified version of the 1902 *Aboriginal Indians Protection Ordinance*. Among others, the Act authorises a Minister to arbitrarily take, modify or suspend indigenous land titles in six different ways. The Minister may also: take, sell or otherwise dispose of indigenous property for purposes of its "care, protection and management"; may relocate indigenous communities by issuing regulations; may prohibit cultural and religious activities that the Minister believes may be harmful; and, requires that any non-Amerindian wishing to visit indigenous lands, even if invited by the community, receive the permission of the Minister under penalty of fine and imprisonment.

The Amerindian Act does provide for limited indigenous self-government, exercised through an appointed, presently elected, village council. The village council is elected by the community for a two year period and is presided over by a Captain, who is also elected for a two-year period. The Council holds the community's land title in trust for all members, is authorised to manage and care for titled lands, may make rules and regulations for a number of prescribed purposes and specify and enforce penalties for failure to comply therewith. The rules made by the Village Council must be approved by the Minister, who has the authority to suspend, change or revoke any rule, at any time, for any reason. Indigenous peoples have been pushing for revision of the Act since 1988, however, despite a number of promises to do so, it remains law.

In 1999, Guyana reformed its 1980 Constitution. While indigenous peoples promoted major reforms that would recognise their rights, the majority of these were not incorporated. The reformed Constitution established an Indigenous Peoples Commission (yet to be operationalised) and, in the fundamental rights section, provides protection for indigenous peoples' rights to their cultural heritage, ways of life and languages.

Multinational and local resource exploitation activities, which have substantially increased since 1990, have had a substantial impact upon indigenous subsistence and other rights, both through

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<sup>168</sup> Colchester 1997; UMADC, APA, FPP 2000.

restrictions on access and through environmental degradation and social disruption. Indigenous peoples have attempted to address these threats by mapping their land use and occupation of their territories and by filing a law suit seeking recognition of indigenous land rights based upon immemorial occupation and use. The Amerindian Peoples Association, an indigenous organisation, has supported 31 communities to map their territories to date. While these maps have been praised by international organisations, such as the Organisation of American States, the government has refused to recognise them. The law suit is still pending in the courts.

### Suriname<sup>169</sup>

Suriname is a small former Dutch colony on the northeast coast of South America. It is home to five distinct Indigenous peoples, approximately 20,000 Indigenous people and 40-60,000 tribal people (Maroons), in total comprising between 15-20% of the total population. Maroons are the descendants of escaped African slaves who fought for and won their freedom from the Dutch colonial administration in the 18th century. Their freedom from slavery and rights to territorial and political autonomy were recognized in treaties concluded with the Dutch and by two centuries of colonial administrative practice. They succeeded in establishing viable communities along the major rivers of the rainforest interior and consider themselves, and are perceived, to be culturally distinct from other sectors of Surinamese society, regulating themselves according to their own laws and customs.

The rights of Indigenous peoples and Maroons to own and administer their ancestral territories are not recognised nor guaranteed in any way in the laws of Suriname. Almost all land in Suriname is classified as domain or state land, privately owned by the state, and the Constitution vests ownership of all sub-surface and surface resources in the state. The 1982 L-Decrees, the primary legislation in Suriname concerning state land, provide that indigenous and Maroon “customary entitlements” to their villages and agricultural plots shall be respected “unless there is a conflict with the general interest”. Consequently, mining, logging, nature reserves and other activities identified as “the general interest” are exempted from this requirement. Also, customary entitlements only apply to indigenous and Maroon villages and present agricultural plots and do not account for other lands occupied and used for hunting, fishing and other subsistence activities or for sites of cultural and religious significance.

Under the L-Decrees legal persons are entitled to request a piece of unencumbered state land from the government, specifically the Ministry of Natural Resources. Land lease, which is a lease of state land for 15-40 years, is presently the only form of land title that may be obtained in Suriname. However, this land titling procedure does not permit collective ownership of land and resources; provides no protection against logging, mining or other activities that may detract from the peaceful use and enjoyment thereof; and may be withdrawn at the discretion of the government for failure to comply with conditions of issuance. Indigenous peoples and Maroons may only obtain collective land lease title if they adopt a recognised corporate structure, known as a *Stichting* (Foundation).

In 1992, the state signed an agreement with indigenous and Maroon insurgents. Known as the Peace Accord, this agreement concluded a six-year-long civil war that pitted Maroon and indigenous insurgents against each other and the military dictatorship of the 1980s. Article 10 of the Peace Accord stipulates that: “...The Government shall endeavour that legal mechanisms be created, under which citizens who live and reside in a tribal setting will be able to secure a real title to land in their respective living areas; ...[in certain areas]...the government will establish an economic zone where the communities and citizens living in tribes can perform economic activities, including forestry, small scale mining, hunting and fishing”. Article 10 has not been implemented by the state, which asserts that it is a non-binding political agreement. It maintains a similar position regarding the historical treaties with the Maroons, even though strong arguments can be made that the treaties, even if not international in character, are enforceable public law contracts. Faced with logging and mining concessions that cover the majority of their territories, indigenous peoples and Maroons have begun to map their own territories in an attempt to seek a negotiated settlement with the state.

Indigenous rights are recognised to some extent by international legal instruments ratified by Suriname. According to the Suriname Constitution, ratified international treaties, “directly applicable to everyone”, are self-executing and may be invoked as authority in domestic legal proceedings. Whether this may offer some measure of protection has not been adequately tested in Surinamese

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<sup>169</sup> Kambel and Mackay 1999

courts. Nonetheless, Suriname clearly has international obligations under ratified human rights instruments to recognise and respect Maroon and indigenous land and other rights. Saramaka Maroons have filed a case with the Inter-American Commission on Human Rights citing violation of human rights due to Suriname's failure to recognise their territorial rights and further violations due to logging and mining concessions granted in their territory without consultation or their agreement.

## Panama<sup>170</sup>

The seven distinct indigenous peoples of Panama number some 200,000 people: the Kuna, Emberá, Wounaan, Naso-Teribe, Ngöbé, Buglé and Bri-bri. They are mainly located in the eastern and western provinces of Panama. The right of indigenous peoples to collective ownership of lands is guaranteed by the state under the 1972 Constitution (Art.123). However, while the 1946 Constitution recognised the indigenous *Comarcas* as a legal form of collective land holding, Article 5 of the 1972 constitution only establishes “Provinces, Districts and Special Regimes” as legal land administration entities. The land law in Panama is therefore ambiguous. Nor is there a nation-wide legislative framework to secure indigenous land rights. Instead, communal lands are titled by separate *Comarca* laws that establish indigenous “autonomous” territorial units. The degree of autonomy in each *Comarca* varies according to its founding legislation. This general law is then shaped to fit local circumstances using *cartas orgánicas* that make specific amendments to the general law. Once a *Comarca* is established, the communities compile their charter for the territory that sets out its “internal law”. This law is debated and then approved by the *Comarca* General Congress. The statute is then given legal status by the national government.

To date, five *Comarcas* covering over 20 % of Panama have been established: Kuna Yala (Law 16 of 1953), Embera-Wounaan (Law 22 of 1983), Madungandi (Law 24 of 1996), Ngöbe-Buglé (Law 10 of 1997) and Wargandi (Law 34 of 2000). A draft law for the creation of a *Comarca* for the Naso-Teribe people is being developed. Although these *Comarcas* have legal titles over a territory, most have problems with land regularisation at the local level due to invasion by colonists. This is a serious problem along the Pan-American Highway which has facilitated an influx of colonists into Madungandi and the Darien. Land conflicts remain unresolved in many areas due to a shortage of funds for compensation and land surveys. Land regularisation duties are also spread across several different government agencies, including the Department of Indigenist Policy (DNPI), the local *Comite de Limites* and National Environment Authority (ANAM). Indigenous peoples are also concerned that extensive mining concessions have been imposed on indigenous territories. Many indigenous communities also lie outside the boundaries of *Comarcas* and lack legal protections for their territories. The Emberá are now seeking to consolidate their territories by proposing a local law of “Collective Territories”. This is not a general land law, but a specific piece of legislation relating to the Emberá.

As in other Latin American countries, the status of indigenous ownership of land in protected areas in Panama remains unclear. Protected areas that overlap indigenous lands remain under the jurisdiction and unilateral administration of the state. In some cases, ANAM has negotiated *cartas orgánicas* with indigenous communities allowing some use rights. Nevertheless, problems still exist. ANAM staff, who lack training in multiple land use, still impose restrictions on indigenous communities against their will. While the 1998 Environment Law does respect existing *Comarcas*, indigenous demands, that the law be clarified to secure their rights to ownership and co-management in protected areas, remain unaddressed.

Despite these problems, there has been substantial progress on indigenous land and resource rights in recent years. In one case, government proposals to promote mining in indigenous territories has been successfully challenged by the “internal law” of the Kuna Yala *Comarca*, which prohibits mining within its boundaries. NGOs have also worked with government agencies to demarcate new *Comarcas* like Madungandi and have engaged in participatory land conflict resolution in Wargandi *Comarca*. This work has demonstrated that land and resource issues on the ground are very complex and require careful negotiation and training workshops on land and legal issues. Most of these

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<sup>170</sup> Mendoza 1992; López nd; Valiente nd; Howe 1998; World Bank 1999; Alvarado 1998; López pers. comm. 2000; Alvarado pers. comm. 2000; Colindres 2000; Dobbo Yala 2000; ANAM 2000; Colindres 2000; Plant and Hvalkof 2001; GEF 1998; IWGIA 2001:100-103

successful exercises were funded by bilateral donors. The World Bank is currently preparing a *National Land Administration Project* in Panama (PRONAT). One aim of the project is to resolve the contradictions in land law relating to indigenous peoples. Paradoxically, PRONAT is yet to consult widely with indigenous peoples and has not established early coordination between the different government departments dealing with land policy. Meanwhile, indigenous land tenure issues continue to be addressed in a piecemeal way in individual projects such as the Interamerican Development Bank-assisted *Program for the Sustainable Development of the Darien* and the GEF-funded *Panama Atlantic Mesoamerican Biological Corridor Project*.



Mexico<sup>171</sup>

From the outset of the Spanish conquest, indigenous peoples in Mexico have suffered the adverse effects of destructive land policies that eliminated or weakened their sustainable agricultural systems. The Spanish destroyed indigenous irrigation and land-use structures by imposing new tenure and resource regimes geared towards the production of tribute and surpluses. In order to undermine indigenous resistance, colonial authorities also prohibited the cultivation of traditional nutritious crops like *amaranth*, which was central to indigenous diet and ritual organisation. At the same time, the *encomienda* system relocated indigenous cultivators to steep hillsides and other marginal lands. The process of land expropriation was intensified during the 19<sup>th</sup> century when the area of land under plantations and large *hacienda* estates increased across the country. In some areas like the Chiapas, indigenous peoples lost as much as two-thirds of their traditional lands.

The tumultuous revolution that followed the expansion of commercial agriculture was driven by rural indigenous and peasant movement seeking restitution of lands and livelihoods. After the revolution, article 27 of the 1917 Constitution guaranteed indigenous rights to inalienable communal lands. Indigenous communities with clear documented occupancy were given “communal property” titles with some degree of autonomy. Others were allocated plots which could be inherited but could not be sold. Property rights in these plots were vested as communal land holdings known as *ejidos*. While land reform was more effective in redistribution than in most Latin American countries, it did not succeed in eliminating the bimodal land tenure system. In practice, much redistributed land related to infertile ground and steep slopes on “state lands”. Commercial farms retained fertile land and agrarian policies often favoured large-scale agriculture. Population growth throughout the twentieth century intensified pressures on *ejido* land resulting in land degradation and increasing poverty. Social surveys in the 1990s indicate that indigenous communities are particularly prone to poverty and food scarcity. Among rural communities in Guerrero state, for example, nearly 60% of indigenous children under five years of age suffer some form of malnutrition or under-nourishment.

A turning point in Mexican land administration occurred in 1992 when the new Constitution removed restrictions on the sale of *ejido* lands. Although Mexico had ratified ILO 169 in 1990, its provisions were weakly integrated into the new Constitution (Art. 4) and have not been implemented by new legislation. In contrast, the 1992 Agrarian law quickly ended agrarian reform and formalised the new market-orientated approach to land policy. The threat of privatisation of indigenous lands has been strongly opposed by the indigenous movement in Mexico, which views it as a threat to land security. In practice, the voluntary privatisation of lands has been limited because households retain their land parcels as the most vital element in their mixed livelihood strategies. Communal land is particularly valued as a safety net in hard times when other livelihood activities fail. Examples such as the *Plan Piloto Forestal* in Quintana Roo demonstrate that *ejidal* common property regimes can foster sustainable forest enterprises provided there is strong community organisation, leadership and adequate technical and institutional assistance. The World Bank-assisted *Mexico Community Forestry Project* has also had some success in the sustainable management of *ejido* forest resources. Both these projects have been successful in building on indigenous land tenure and institutions through partnerships with indigenous producers’ organisations. In other cases, NGOs have been successful in revitalising traditional crops like *amaranth* to increase food security and generate sustainable income for indigenous organic farmers.

Overall, however, the Mexican state retains its liberalised land policy which favours foreign investment and agricultural and forestry production for export. This has stimulated the expansion of oil palm plantations, agribusiness and industrial shrimp farming at the expense of local communities

<sup>171</sup> Wolf 1959; Swepston 1978; Brockett 1990; IACHR 1998; World Bank 1998; Althaus 1998; Molina 2000; Mendoza 2001; IWGIA 2001; INI 2001; WRM 1999,2000,2001a, 2001b, 2001c; Richards 1997; Faust 1998; Grindle 1990; Cruz-Torres 2001; Oxfam 2000; Fox and Gershman 2000; Garza and Hernández 2001; Anon. 2001

who face more land scarcity. An uprising in southern Mexico in 1996 rooted in local land conflicts ended in the San Andrés Peace Accords that contain government promises to ensure indigenous land security and introduce new territorial autonomy. In 2001, a national indigenous march from the Chiapas to Mexico City protested against the failure of the government to implement the 1996 Accords. After new government commitments to address indigenous issues directly after the march, the state legislature is stepping back from reform, as it is opposed by commercial landowning interests.

### Venezuela<sup>172</sup>

According to the 1991 Indigenous Census, there are some 316,000 indigenous people in Venezuela, of whom 58% live widely dispersed in some 1,500 rural communities. They remain among the poorest sections of Venezuelan society and have less access to health services and formal education than average. Under Article 77 of the 1961 constitution, the Venezuelan government pursued an integrationist policy, which did however allow for the adoption of local laws and administrative regimes adopted to indigenous circumstances. Authority over indigenous affairs in remote areas was entrusted by archaic laws to Catholic missions. Congressional adoption of ILO Convention 107 was recognised in the *Gaceta Oficial* in 1983, but the ILO was never informed of this decision and the provisions of the law were not applied.

Under Article 2d of the 1960 Agrarian Reform law, efforts were made in the 1970s and 1980s to provide indigenous people with land titles. Initially, some land titles were given out to indigenous persons as individuals and later, modelled on a notion of cooperative farming whereby lands were entrusted to peasant enterprises (*empresas campesinas*) – a model that bore little relation to *campesino* reality in Venezuela – provisional collective titles were granted to indigenous enterprises (*empresas indígenas*). Many of these titles embraced quite small parcels of land and failed to encompass the much wider areas used by indigenous peoples for hunting, fishing, gathering and for their mobile systems of rotational farming. After being criticised for ‘peasantising’ the indigenous peoples, the indigenous lands programme of the National Agrarian Institute (IAN), began to hand out provisional titles to more adequate areas, though still through the imposed institutional structure of *empresas indígenas*, which did not correspond closely to existing indigenous institutions. Between 1972 and 1982, 152 provisional collective land titles were handed out to indigenous communities in 7 states, but very few were converted into definitive titles by the Ministry of Agriculture and Livestock Husbandry, owing to pressure from competing interests. In 1984, a land conflict between the Piaroa Indians and a rich cattle rancher escalated into a national scandal and IAN’s indigenous land titling programme was halted due to political pressure from landowners.

In 1999, a revised Constitution was adopted recognising the multiethnic character of the Bolivarian Republic of Venezuela and guaranteeing indigenous peoples the right to their lands and ‘habitats’ as their inalienable, un-leasable, un-mortgageable, untransferable collective property. In December 2000, the Venezuelan Congress not only endorsed ILO Convention 169 (a decision which has yet to be reported in the *Gaceta Oficial*) but also passed a Demarcation Law, which allows communities to go ahead and demarcate their lands, recognises prior demarcations as allowable under the act and establishes that a Demarcation Commission will assess the validity of demarcations and pass those approved to the Procuraduría General de la República for legal recognition. The Demarcation Commission was established on 31 August 2001 and comprises 8 indigenous members and 7 representatives of government agencies. The constitution and the law do not yet clarify in which bodies the collective titles to habitat will be vested, nor the criteria for the acceptance or rejection of demarcations.

Two draft Organic Laws, on Land and on Indigenous Peoples and Communities, are currently being discussed by Congress. The draft Organic Law on Land does not offer clarification of the key

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<sup>172</sup> Arvelo-Jimenez 1972; 1980; 1982; 1992; 1993; Arvelo-Jimenez et al. 1977; Bello 1999; Clarac 1983; Coppens 1974; Colchester 1984; 1995; OCEI 1992.

questions noted above. However, the draft Organic Law on Indigenous Peoples and Communities is more helpful. It reaffirms the Constitutional right of indigenous peoples and communities to their 'habitats' as collective property. It offers an open definition of the legal personality of indigenous communities and peoples and affirms their right to free, prior and informed consent in the case of mineral exploitation on their lands and in the case of resettlement. It also requires respect for indigenous territorial rights and traditional land use in protected areas. It provides somewhat clearer definitions of 'habitat' and 'land'.

There is currently a widespread mobilisation of indigenous organisations seeking to carry out their own demarcations, the most advanced of which is a multi-ethnic land use and land claim map made by the Ye'kwana and Sanema Indians of the Caura river valley, which has been proposed as a model for other communities to follow. The land demarcation has been carried out by the communities themselves using GPS devices and GIS software. The resulting map and its underlying database have been registered as the intellectual property of the representative organisations set up by the indigenous communities. The same communities are now seeking to use the map to develop a management plan based on customary law and traditional ecological knowledge.

**Chapter 5. Sub-Saharan Africa:****John Nelson**

Over the past decade there has been a rapid growth in the literature on African land tenure. However, there are relatively few studies of the land tenure of African hunter-gatherers in particular and other self-identified African indigenous peoples. The point made that "The literature on land tenure is one of the largest - and one of the poorest - in all of social and legal science" made by Bohannon in the 1960's<sup>173</sup> apparently still holds true for indigenous groups in Sub-Saharan Africa (SSA). The weak literature base is particularly true for semi-nomadic forest dwellers in Central Africa, whose landholding practices have rarely been studied in any detail. There are notable exceptions.<sup>174 175</sup> In addition, some data is available on customary tenure arrangements of San bushmen from southern Africa,<sup>176</sup> even though many effectively lost their customary rights many years ago and are now seeking to reclaim them.<sup>177</sup> There has also been extensive work to assess land reform initiatives, along with steps being undertaken to codify customary land holding systems, develop new land policies, and implement registration systems.<sup>178</sup> These and other sources form the basis for this chapter, which reviews customary land tenure in SSA and the State's role in defining legal entitlements to land, the practice and persistence of customary tenure arrangements, and the linkages between land tenure and livelihood security. As in the other chapters of this report, the emphasis is on collective land tenure.

Much of the work on land tenure that has been carried out has targeted the agricultural sector. This is not surprising, given the huge amount of work that has been done under various forms of economic development which have been promoted since the days of colonialism. However, many African indigenous peoples do not engage in agriculture, or agriculture is not their primary concern. For example, some Baka pygmies may have small garden plots which they cultivate to provide grains and vegetables which they use to supplement their mainly hunting and gathering diet, semi-nomadic pastoralists may not cultivate at all, and most Rwandan Batwa are landless, so any agriculture they engage is mostly on other peoples' lands in return for cash or in kind payments. More recently, extensive work has been done to synthesise the available knowledge on customary and "modern" tenure, as the development and research community has begun to appreciate fully the importance of understanding the long-term impacts of land holding systems on household food security, sustainable rural livelihoods and poverty reduction in general.<sup>179</sup>

**5.1 Customary land tenure**

Customary land tenure remains the predominant model of land holding in rural Africa today and for most or all African indigenous peoples it has been the dominant system used to assert rights to land.<sup>180</sup> An old fashioned view is that the manifestation of customary land tenure systems in Africa was governed mainly by structural factors, the "productive mix," with population density being a critical factor guiding the evolution of land use systems.<sup>181</sup> However, more recently it has been accepted that "land concentration is not necessarily the most important or even a major determinant of African agricultural performance", and that "under customary law access to rights in land was often based

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<sup>173</sup> Bohannon, 1968:77

<sup>174</sup> eg, Bahuchet et al., 2001; Biesbrouck, 1999; Turnbull, 1965, 1983

<sup>175</sup> eg, Benhke and Scoones.

<sup>176</sup> Woodburn, 1968; Newman, 1970; Wily, 1979; Hitchcock and Holm, 1993; Chennells, 2001

<sup>177</sup> See Box

<sup>178</sup> eg, Downs and Reyna, 1988; Bruce and Migot Adholla (1994); Lavigne-Delville, 2001; Toulmin et al 2001; Wily 2001.

<sup>179</sup> Ibid,

<sup>180</sup> eg Bahuchet et al 2001:87.

<sup>181</sup> See Tiffen et al 1994 for a review of the debates.

upon social identity".<sup>182</sup> Indeed, many of these customary regimes are regional and inter-ethnic and provide differentiated rights of tenure or access to different social groups.

Reviews of the common features where "customary tenure principles and local regulatory systems prevail" in Africa<sup>183</sup> overwhelmingly emphasise the importance of social status in gaining and securing access to natural resources, and the social aspect of securing and holding land rights under customary systems is critical for indigenous peoples. Location, culture, status, and production system all count towards how most rural Africans access and maintain property rights. These rights are often overlain across land farmed or otherwise used by others. The "bundle of sticks" <sup>184</sup> analogy holds: rights can be distributed across many different parcels of land for different purposes, and even though most of the rights cannot be sold, they are often divisible, individual rights transferring easily between individuals or groups. This system of validation and exchange is underpinned by the maintenance of social relations between the different groups who are involved, including indigenous peoples, many of whom face social discrimination from society and the State.

## 5.2 The Roots of State Law

State land law in Africa springs from several European legal traditions, which came into force during the colonial era, and which take legal precedence over customary principles in the eyes of States, even though most land holding and transfer in rural Africa has continued to be arbitrated by customary authorities. Briefly, three main juridical traditions form the basis for State land law across Sub-Saharan Africa, and their geographical application is directly related to the colonising powers' own systems that they imposed.<sup>185 186</sup>

These include:

- 1) English Common Law, in countries such as Kenya, Tanzania, Uganda, Malawi, Zambia, which incorporate principles of divided rights of ownership and the separation of what is owned from the physical substance of the land itself.
- 2) Roman Dutch Law in countries including South Africa, Namibia, Swaziland, Lesotho and Zimbabwe, whose development, like Old English Law, draws from precedent, which does not recognise divided rights of ownership.
- 3) Laws in countries drawing from Civil Law Traditions, covering countries such as Senegal, Burkina Faso, Mauritania, Ivory Coast, Mali, Madagascar, and Niger, which do not rely heavily on judicial precedent, relying more on a deductive approach flowing from the concept of ultimate owner of land ("dominium"), retained by the State.

In all of these countries the "new" legal traditions of the colonisers were imposed and took precedence over the customary systems that were in operation, and in many instances, vested ultimate ownership of land in the State, with an emphasis on individual titling as a corollary. Although the customary systems have continued to be the most important framework for accessing land by rural people, the effect of these laws on IP's access to land and security of tenure has often been profound.

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<sup>182</sup> Berry, 1988:53; Berry 1993.

<sup>183</sup> after Lavigne Delville, 2001:98.

<sup>184</sup> "The collection of rights pertaining to any one land parcel may be likened to a bundle of sticks. From time to time the sticks may vary in number (representing the number of rights), in thickness (representing the size or "quantum" of each right, and in length (representing the duration of each rights. Sometimes the whole bundle may be held by one person or it may be held by a group of persons such as a company or a family or clan or tribe, but very often separate sticks are held by different persons. Sticks out of the bundle can be acquired in many different ways and held for different periods, but the ownership of the land is not itself one of the sticks; it must be regarded as a vessel or container for the bundle, the owner being the person (individual or corporate) who has the "right of disposal" as it can be called " Simpson, 1976.

<sup>185</sup> After McAuslan (2001), Lavigne Delville (2001) and Talbot (1991).

<sup>186</sup> also see MacKay, this report.

### 5.3 Customary land tenure in practice

Most land held under African customary tenure rules can be considered to be 'common property', in the sense that land is considered the property of defined collectives and is subject to, and managed in accordance with, detailed customary laws which regulate access by groups and individuals.<sup>187</sup> The notion is not without perils, however, as in some instances 'common property' regimes have been used as an excuse by administrators to treat indigenous peoples' lands as common pool resources<sup>188</sup> and taken over by the State to be allocated to other interests, including, for example, land speculators, conservation organisations and logging interests.<sup>189</sup>

Chanock<sup>190</sup> has underlined how, in the past at least, the label "communality" implied lack of advancement, and therefore labelling land with this adjective made it easier to justify its expropriation. However, the reality is that African communal tenure is usually mixed, individual and communal at same time.<sup>191 192</sup> In fact, in most parts of Africa it should be assumed that someone controls the land,<sup>193</sup> although contrary to the evidence some claim that when the population is sparse, land rights may be non-existent.<sup>194</sup> However in many of these cases, the rights of hunter-gatherer groups may be neglected, as they often do not make the kind of investments in land generally recognised by governments,<sup>195</sup> and they are politically weak. This raises key questions which are particularly important to African indigenous peoples, namely, how can marginalised indigenous peoples assert rights to lands which are not evidently occupied, and how can they convince the State that they need these lands to survive?

For example, the Bagyeli of Cameroon (see Cameroon Box) have a low population density and are discriminated against, and their land claims not well defined within the general community.<sup>196</sup> The Cameroon government has not validated their customary rights, due to their political marginalisation, and because their claims to land overlap those of their more numerous neighbours. Hence, with the advent of pressures from outside, their rights to land have become insecure, evidenced by recent losses.<sup>197</sup> The lack of state-sanctioned legitimacy is an important problem faced by indigenous peoples who lay claims to land which they traditionally occupy. Because of their weak social status, and the fact that States have expropriated the ultimate authority for allocating lands over which indigenous peoples claim hunting, gathering, grazing and cultivation rights, without due recognition of customary practices, many indigenous peoples consider that their rights to the lands where they live are very insecure under current government law. This, in spite of the fact that, in most cases, they were in possession of the land when others arrived.

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<sup>187</sup> Bruce, 1994; Bromley and Cernea, 1989.

<sup>188</sup> Cousins 2001 the following definition of Common pool resources: "public goods which are used simultaneously or sequentially by different users because of difficulties in claiming or enforcing exclusive rights, or because they are so sparse or uncertain that it is not worth doing so"

<sup>189</sup> Sang 2001; FPP 2001.

<sup>190</sup> 1991, op cit.

<sup>191</sup> eg, Cousins, 2001.

<sup>192</sup> "The capacity to hold land in *common* is a central tenet of customary tenure regimes throughout Africa and delivers a wide range of common properties, among which forests and woodlands are major. Its absence in modern law has most undermined local forest tenure". Wily 2001:8.

<sup>193</sup> eg, Dembner, 1998:67, Bahuchet et al 2001.

<sup>194</sup> eg, Goody, 1980.

<sup>195</sup> eg, through the *mise en valeur* principle under the francophone system.

<sup>196</sup> Nelson et al, 2001.

<sup>197</sup> Ibid.



Cameroon<sup>198</sup>

Three main groups of Pygmy peoples live in Cameroon. The Bagyeli/Bakola live in the south-western region around Lolodorf, Bipindi and Kribi and extend over the border to Gabon and Equatorial Guinea. They are associated with Bulu, Ngoumba, Fang and Bassa 'Bantu' farmers. The Bagyeli live in the northern part of this area, while the Bakola are further to the south. The total population is about 3,500 to 4,000. The Baka, also known as the Bangombe and Babinga, numbering 40,000-50,000, live in the southern and south-eastern areas towards the borders with Gabon, Republic of Congo and Central African Republic. They are associated with Bangando, Bakwele, Konanbemebe, Vonvon, Zime and Dabjui farmers. In general the pygmy groups in Cameroon face severe marginalisation and discrimination.

Since the late 19th century the land rights of all rural forest dwellers in Cameroon have not figured in the major decisions made by the rulers concerning forest lands. All unoccupied or undeveloped lands "*vacant et sans maîtres*" became property of the state, and many lands were then opened for timber exploitation, which closed those areas for hunting by Pygmies. Meanwhile, local populations managed lands through community based customary institutions, elaborated through agreements between the earliest inhabitants, the pygmies, and the sedentary communities of farmers with whom they have been associated for aeons. However, since colonialism, especially since France became the dominant colonial power early this century, all lands have been considered under state law to be the property of the State, even though almost all land is held under customary principles. Exceptions have been made for titled lands - only 2.3 % of Cameroon's lands have been titled since 1974, principally benefiting the elite - and cultivated and developed lands, whose 'owners' are provided with inheritable usufructory rights as long as the government do not want to use the land for another purpose. Title, however, is not provided. Apart from the granting of alienable usufruct rights in forests, no provision is made in State law for hunter gathers to become identified with a definite "territory" where they "produce" and so gain inheritable rights, even though they are generally recognised by their neighbours to be the "first inhabitants of the forest", their livelihoods are forest based, and they are heavily implicated in the trade of forest products with their more sedentary neighbours. Many rights to forest resources overlap with agricultural lands, and this forms the basis for much interaction between hunter-gatherers and farmers under customary principles.

The inevitable conflicts between local aspirations and national laws which have resulted were meant to be addressed through 1994 reforms of the forest laws, which formalised the involvement of local people in forest management. Both the Council forests (*forêts communales*) and especially the communal forests (*forêts du domaine nationale*) allowed for inputs by the local population into local forest management plans. Within this legislation there is also the provision for communities to apply for community forests of up to 5,000 hectares, that "communities" (which must be a legalised entity) are allowed manage for themselves on a 25 year renewable allocation. However, this legislation is not targeted at hunter gatherers, despite the 1995 Wildlife Decree's mention of community hunting zones (*territoire de chasse communautaire*), and the gap between hunting rights as set out in the legislation and traditional hunting rights as they are actually practised by forest dwellers is excessively wide.

Sedentary agricultural communities have begun to go through the cumbersome and expensive application process to secure rights to these areas for themselves. Many key components of this legislation are open to a high decree of local administrative interpretation adding another level of external patronage and insecurity, especially since the forest services in Cameroon (MINEF) have very low credibility in the eyes of locals. The insecurity that pygmy groups in Cameroon have long faced with respect to their land is being perpetuated through their unequal access to the law and the fact that their hunting and gathering way of life is not recognised as a valid livelihood system. As the weakest members of a system where overlapping rights are the norm, they risk having their rights extinguished by local communities dominated by agricultural and logging interests.

<sup>198</sup> Jackson, 2001; Djeumo, 2001; Biesbrouck, 1999; Brown, 2001; Egbe, 2001; Lavigne Delville, 2001.



The irony of this is that under almost all African customary systems, it is well understood that occupancy is generally the key to "ownership,"<sup>199</sup> and land is allocated by those claiming prior occupancy through lineages and clans to individuals, a "hierarchy of estates"<sup>200</sup> linked together by affinity to local arbitration authorities. But under most customary arrangements in SSA, ownership by first occupants does not mean that the land can be sold - alienation rights are generally denied to individuals,<sup>201</sup> and only rights of use are easily transferable.<sup>202</sup> Within these systems it is important for landholders to reaffirm a recognition of who in that system holds absolute "title," by, for example, paying tribute of some form. In addition, land rights systems overlay one another. For example, hunter gatherer pygmies are often allowed to hunt on farmer's cropland, and even cultivate small plots, farmers have access to areas of forests for hunting,<sup>203</sup> and pastoralists in the Sahel may be allowed to take their livestock onto farmers' lands in order to graze upon crop stubble.<sup>204</sup> And finally, change is central to customary systems of land allocation, the "historical dynamism of resource access,"<sup>205</sup> and the flexibility within customary systems is one of the reasons that they have endured.

### 5.4 The Persistence of Customary Land Tenure Regimes

In precolonial times, access rights to land in Africa was usually contingent on membership in social groups and on allegiance to traditional authorities.<sup>206</sup> Early evidence<sup>207</sup> indicated these systems were slow to be replaced even under colonial pressures, and this has continued to present day.<sup>208</sup> A key reason for this is the continuing importance within customary systems of social status in securing and holding land rights.<sup>209</sup>

Land scarcity does have a role to play in changes that have taken place with respect to human:land ratios. For example, using data on rural cultivators, it has been observed that increasing land scarcity leads to a reduction in the genealogical depth and size of access groups (kin) and/or increased stress on inheritance rights, and that restrictions on access to and concentration of rights in land are becoming more common in Africa,<sup>210</sup> and there is also ample evidence to suggest that increasing transfers of land are taking place along with the increasing individualisation of land holdings, and sales of land.<sup>211</sup> The pressures from this quarter on African indigenous peoples and their lands have

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<sup>199</sup> Biebuyck in Biebuyck, 1963

<sup>200</sup> Gluckman, 1943

<sup>201</sup> eg, Goody, 1980, Netting, 1968, Freudenberger, 1993, Bahuchet et al 2001

<sup>202</sup> eg, Netting, 1968, Hill 1977, etc..

<sup>203</sup> "Close relationships between pygmies and farmers extend to their perception of rights to land. Each farmer clan has rights which are recognised by all neighbouring farmers clans to a specific area of forest, which they may clear for crop cultivation or where they may hunt, fish, gather and extract the materials required. The clan of pygmies traditionally associated with that same farmer clan also has recognised rights to exploit the same area of forest. The farmers assist their pygmy partners in maintaining exclusive rights to this area, and violations by either pygmies or other farmers are contested through negotiation, or sometimes violence."p67, Dembner, 1998. - Bahuchet et al 2001 make a similar point about forest peoples in general.

<sup>204</sup> Eg, Tanzania (Wily p17) and this is also well observed in the African Sahel.

<sup>205</sup> Mortimore 1997:5; also see Malinowski, 1961; Hill, 1977, Berry, 1988; Shipton and Goheen, 1992; Berry 1993.

<sup>206</sup> Berry 1993, also "the hierarchy of estates is paralleled by primary and frequently fuller grades of estates in land (Allen 1965:364) - echoing Gluckman (1943) "the law of property is intricately intertwined with the law of status".

<sup>207</sup> eg, Nafziger, 1977; Hill, 1977

<sup>208</sup> Bruce 1988:23: "access to land in most of rural Africa continues to be determined by individual systems of land tenure, even where the State is the nominal owner of the land .

<sup>209</sup> Chanock, 1991: "... a transition from status to contract could not be accomplished as long as the material basis of life, access to land, depended upon status. It is this contradiction that remains the basis of the continuing importance of customary law"

<sup>210</sup> Biebuyck, 1963; Netting 1968; Mortimore et al..., 2001; Downs and Reyna, 1988; Bruce and Migot, 1994; Platteau, 1996; Toulmin et al 2001.

<sup>211</sup> Migot and Bruce, 1994; Feder and Noronha, 1987; Berry, 1988

also been recorded, although similar trends towards the individualisation of land are not well documented amongst these groups. But these processes of change and evolution are taking place within customary, community-based frameworks still operating across Africa, in spite of attempts to replace or transform them via the various land reform measures which have been put in place over the past century.

## 5.5 Land Reform

Land reform<sup>212</sup> has been a key concern of administrators since colonial times. Earlier this century Lord Hailey, noting a change to land holding in East Africa towards individualisation, advocated limited reforms, including encouragement for boundary demarcation, and encouragement to "native tribunals to penalise trespass,"<sup>213</sup> and accepted that some form of survey would be needed to define some sort of "presumptive" title. Since that time there have been numerous reforms which have been put in place across Africa,<sup>214</sup> including the individualisation of tenure,<sup>215 216 217 218</sup> for example, via titling, the co-operativisation of land holdings,<sup>219</sup> the reform of inheritance rules,<sup>220</sup> the nationalisation and bureaucratisation of land administration,<sup>221</sup> and, most importantly for indigenous peoples, re-institutionalisation.

Re-institutionalisation is "reform that emphasises change in the institutions that administer the tenure system (changes in the specific substantive rules may or may not be involved), while preserving the element of kin group or other community control"<sup>222</sup> and offers an important approach. Impacts of this include the institution of "family lands" in Nigeria and Ghana, and, earlier on, the empowerment of Ethiopian communities to codify their own land tenure systems, an innovation eliminated during the revolution. In Botswana 'tribal land boards' were created while indigenous tenure systems were left intact, and upon achieving independence, customary law was integrated into state law, although no provision was made for registering communal lands,<sup>223</sup> which are essential to indigenous peoples' livelihoods, and chiefs were stripped of the land allocation powers.<sup>224</sup>

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<sup>212</sup> The "redefinition of terms and conditions on which land is held, rather than a straightforward redistribution of the land itself" Bruce, 1986:51.

<sup>213</sup> 1938:876

<sup>214</sup> after Bruce, op cit.

<sup>215</sup> The 1955 report of Royal Commission on East Africa advocated a swift move towards freehold titles, as it was perceived to increase tenure security and support investment

<sup>216</sup> McAuslan (2001) But Hailey thought that legislating to confer title was a mistaken policy - (see Chanock, 1991).

<sup>217</sup> In Kenya land titling started in 1956 and continues to this day

<sup>218</sup> Pickney et al 1994.

<sup>219</sup> This includes Tanzania's programme of *ujamaa* villagisation, and other top-down approaches put into place (eg Ethiopia during 1970s) to centralise labour and capital.

<sup>220</sup> In Kenya it is now possible for the courts to recognise indigenous land allocation rules in wills.

<sup>221</sup> This occurred in a number of countries, including: Senegal, Nigeria, Sudan, and Zaire, In these instances most land was nationalised, but in fact the customary systems of arbitration continued to dominate at field level, leading to a situation of "legal pluralism".

<sup>222</sup> Bruce 1988:37

<sup>223</sup> Wily, 2001:8.

<sup>224</sup> Hitchcock and Holm, 1993.

### San in Botswana, South Africa and Namibia<sup>225</sup>

San from southern African are by tradition hunter-gatherers, inhabiting lands within the modern countries of South Africa, Namibia, Botswana, Angola and Zimbabwe. They share in common a sad history of dispossession from their land during the 18<sup>th</sup> and 19<sup>th</sup> century, driven by the quest for land, water and diamonds, and persistent discrimination from society and governments which has kept them with a standard of living that is consistently lower than their compatriots. In South Africa, Botswana and Namibia, they are all now involved in processes to reclaim their land rights from the State, with mostly promising results. In Namibia and Botswana the Ju/'hoansi San have established locally owned and managed community organisations that promote their interests, and in Namibia they have become actively involved in Community Based Natural Resources Management (CBNRM) and gained secure possession of their lands through the government-sanctioned conservancy programme, in which Ju/'hoansi were able to set up new communities based on traditional arrangements. In South Africa in 1994 the =Khomani San began to claim back their rights to their traditional lands in the Southern Kalahari under South Africa's new constitution. This led, a few years later, to the return to them of some lands from the Kgalagadi Transfrontier Park via a trust arrangement, and secure access to a large proportion of the park, where they are able to practice their culture. This process was aided by rapid constitutional changes stemming from the end of apartheid, and an innovative cultural and territorial recovery programme during which the government agreed to substitute San place names for those put in place by previous governments. This highlights the importance of governmental recognition of indigenous peoples - San imagery is now part of the new South Africa coat of arms, and the constitution recognises indigenous peoples.

By contrast, in Botswana, the San community has faced serious threats of eviction from their lands that they gained access to during post-independence reforms to land and wildlife legislation, especially in the Central Kalahari Game Reserve, from which many were relocated in 1997. They have now formed a team to negotiate with the government and secured legal assistance to help them pursue *de jure* legal control over their areas within the reserve through the courts. In all three of these cases community-driven capacity building and development initiatives, coupled with support from external NGOs played a key role in fostering the unity and skills San needed to address their quest for land.

The promotion of state control of land allocation in Africa, coupled with the persistence of customary systems has led in various countries to a situation characterised by a "legal pluralism" which is strongly associated with uncertainty amongst land users because locally legitimate rights are often not legally recognised<sup>226</sup>. One of the best documented cases is that of Niger, whose government after 1960 took a stand against the customary system, limiting the powers of chiefs to allocate land in their areas, while the system continued to operate *de facto*. By 1970 government began to integrate the formal and customary systems into one legal framework called the "Code Rurale".<sup>227</sup> In this framework the government took on a key role in conflict arbitration, and increased responsibilities for "other" lands, especially "*terres sans maîtres*",<sup>228</sup> uncultivated rural land, and forests. The process of developing this continued throughout the 1980s, and is still ongoing. Within this framework there is a strong impulsion for titling, but because titling directly contradicts local customary systems, and government is mistrusted, the customary rules continue to apply.<sup>229</sup> The increased uncertainty experienced by

<sup>225</sup> Hitchcock and Holm, 1993; Hitchcock and Bieseke, 2000; NNDFN, 2000; Chennells, 2001; /Useb, 2001.

<sup>226</sup> Lavigne-Delville, 2001

<sup>227</sup> see Lund 1993.

<sup>228</sup> Literally, lands without masters - much of this land was already claimed and used by local people, but the State did not recognise this.

<sup>229</sup> Mortimore et al 2001

rural people stems from the fact that there is now a State-sanctioned avenue through which their rights to the land they use may be challenged in the courts, which operate according assumptions broadly based around "*mise en valeur*" validation, and State titling.

For all of the reforms mentioned the customary arrangements of hunters and gatherers generally have been neglected, and although pastoralists have received new protection in Tanzania, and women are gaining recognition for their rights all over Africa, ceilings on size of land holdings are also being imposed,<sup>230</sup> and in the language of the legislation the interests of marginal groups and women are not well represented.<sup>231</sup>

The integration of received (*de jure*) and indigenous (*de facto*) law is widely recognised as a way to go forward with new reforms, although substantive integration in Africa is rare. Wily points out that with the exception of Botswana, customary tenure has only been permissively recognised and not provided with statutory machinery, but "for the majority of citizens in the region (East and Southern Africa), the fate of customary tenure is the issue of land reform that most directly affects them".<sup>232</sup> Uganda, Tanzania and Mozambique all recognise customary land rights as lawful landholding, and in Uganda, indigenous Batwa near Bwindi National Park are already making claims on this basis.<sup>233 234</sup>

### 5.6 Livelihood security and gender considerations

A cornerstone of rural livelihood security, and thus poverty reduction, is security of access to natural resources. For indigenous peoples in SSA this is particularly important, and African women in particular are affected by decreasing security brought about by changing tenure relationships.

Under customary systems most rights for women are derived through men, and for most women, ownership of land is rare, but becoming more common.<sup>235</sup> Inheritance of land is also rare, and marriage is a key avenue for securing access to land. In some places, for example, the cocoa growing areas of Cameroon, where primary rights had always been held by men, women's rights are becoming more secure for some plots of land.<sup>236</sup> In Rwanda, 65% of the population is female due to an excess of male deaths during the genocide. Many households are female-headed, and many widows have found themselves unable to access their husband's land. In some cases they opted to return to their own family's land. Women in informal and polygamous marriages have particular difficulty in asserting claims to land. A new inheritance law in 1999 did much to equalise rights of women to own and manage property and resources, but it is ambiguous whether this applies to land as land still legally belongs to the State.<sup>237</sup> The new land policy will give women equal rights of access to land.<sup>238</sup>

But many IP women in Africa are still "invisible" to outsiders, and subservient to men in many areas. They, with indigenous peoples, face a pattern of discrimination that reinforces their weaknesses in negotiating for and protecting their rights within existing customary systems, especially when juxtaposed against reforming moves by the State, which often make it harder for these groups to gain or retain land rights.<sup>239</sup>

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<sup>230</sup> Wily 2001

<sup>231</sup> McAusland (2001:92

<sup>232</sup> 2001:15.

<sup>233</sup> "the land laws of Mozambique, Tanzania and Uganda make it explicit that not only person or even two, but any group of persons (family, clan, community, village, tribe) may be recognised as owning land, and able to register this fact and receive a title deed expressing it" Wily 2001:16

<sup>234</sup> FPP, 2001

<sup>235</sup> Migot-Adholla and John (1994).

<sup>236</sup> Guyer, 1980:349.

<sup>237</sup> RISD, 2001.

<sup>238</sup> Rwanda, 2001:61.

<sup>239</sup> Eg, Saul, 1993:77-8.

### **Batwa and land pressure in Rwanda<sup>240</sup>**

There are an estimated 25,000 Batwa in Rwanda, predominantly in the mountainous and western parts of the country. They are widely considered to be the prior inhabitants of the country, preceding the settlement of the area by Hutu farmers and Tutsi herders. Traditionally, forest-dwelling hunters and gatherers, the Batwa have progressively lost access to their lands and resources as forests were cleared for farmland and pasture. The last 'forest-dwelling' Batwa were denied rights in their forests with the establishment of forest protected areas in the last few decades. Batwa survive as a highly marginalised and impoverished community, and are discriminated against by other ethnic groups who consider them backward and polluting.

In Rwanda, the average population density is 300 people per square kilometre, and up to 800 people per square kilometre in some areas, with an average plot size of 1/2 hectare. Population size is predicted to double by 2020 to 16 million. The basis for Rwanda's national land laws is derived from Belgian civil laws, and these have remained unchanged since Independence. Although recognised by national tenure laws, customary rights are unregistered, with the state retaining total control over land. All statutes, decrees and customary laws were suspended after the 1994 war and genocide, pending approval of the draft National Land Policy, which proposes a form of communal rights by promoting families cultivating in common to prevent fragmentation through inheritance and to try to create a minimum landholding size of 1 hectare. The draft land law specifies that people with customary holdings under 2 hectares and those with customary holdings between 2 and 30 hectares where the owner has a project and a development plan will revert to the state private domain after 3 years. Land will be tradeable, but not in a way that fragments plots below 1 hectare.

The Forest Peoples Programme's 1993 and 1995 surveys of showed that 84.2% of the few Batwa who had land were living on land given to them by the Kings prior to 1959. So some Twa communities, at least, have obvious customary rights but they are vulnerable to being dispossessed by more powerful neighbours. Communities can create communal work groups (associations) and, providing the district authorities recognise the association, the association can be allocated use rights to marshland within the district. The new land policy states that marshland remains in the state's private domain and will be allocated to individuals on a concession by the Ministry of Lands on condition of good management. Twa are now forming associations and getting access to land this way. How the Twa will fare under the new policy of recognising customary rights in the long run is not known but, given the persistent discrimination that Twa face in Rwanda, there is a clear risk that the surveys to settle titles, highlighted in the Rwanda's Poverty Reduction Strategy, will be biased against their communities, most of which still do not have secure access to lands where they live.

The idea that individual titling can provide adequate security<sup>241</sup> of possession<sup>242</sup> for African indigenous peoples runs counter to what we now know about the effects of individual titling schemes on these vulnerable groups. The promotion of individual land titling may cause more harm than good, leading to discrimination against subordinate rights holders (or those perceived to be subordinate), the urban poor, women, elders, people who rely on herding - including pastoralists, hunters, gatherers and other minorities,<sup>243</sup> and, as in Niger, the multiplicity of arbitration authorities can increase local insecurity.<sup>244</sup> The fact that security of rights to land under African communal systems is usually based

<sup>240</sup> Lewis and Knight 1995; Government of Rwanda, 2001; Jackson, 2001b; Wily, 2001.

<sup>241</sup> Migot- Jones also, on Africa: "it is reasonable to consider tenure security more practically as the socially sanctioned ability to make productive use of specified land resources, to dispose of the produce therefrom without challenge from any source, and to engage in transactions involving more or less permanent transfers"p24 See also, Matlon, 1994.

<sup>242</sup> Eg, Shipton and Goheen, 1992, Sjaastad and Bromley, 1997

<sup>243</sup> Shipton and Goheen, 1992:316; Platteau, 2001:66-7; Wily, 2001:7,9

<sup>244</sup> Lavigne-Delville, 2001.

upon social identity,<sup>245</sup> and that the rules of social classification may be manipulated to suit certain groups,<sup>246</sup> means that administrators must be careful when they start talking about fundamental reforms of the social relations governing access to the principle source of indigenous peoples' livelihoods.

### 5.7 Institutional and Policy Issues

This chapter raises a number of issues for policymakers and researchers concerned with indigenous peoples land tenure in SSA. Indigenous peoples in Africa facing discrimination and increasingly insecure tenure relationships will need to be allowed to transform their relationships with their neighbours and governments in order to protect their interests.<sup>247</sup> Land security is central to livelihood security and therefore poverty reduction and most indigenous peoples in Africa hold land through customary principles. Researchers and policymakers seeking to address poverty concerns need to take this as a starting point for their investigations of future reforms. And indigenous peoples will need to address questions about the legitimacy of their claims to land;<sup>248</sup> documentation of their customary arrangements, by community mapping or otherwise, is needed if they are enter into constructive negotiation with States - and before they are totally disenfranchised due to the pressures bearing upon them and their societies.

A central platform of reforms now being proposed should emphasise the importance of community based solutions, perhaps facilitated by outsiders<sup>249</sup> and a re-institutionalisation of indigenous land tenure, without replacing existing customary systems.<sup>250</sup> Rather, governments should look to ways to legalise customary arrangements. The integration of received and indigenous law will be a corollary of this,<sup>251</sup> and States will need to recognise community-based tenure and customary rights in law.<sup>252</sup> This is possible,<sup>253</sup> if governments avoid putting definitional obstacles in front of change, especially when they are not necessary.<sup>254</sup>

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<sup>245</sup> Anthony et al (1979) "In most traditional African economies, the security of rights in land is guaranteed and protected by the very principle under which the initial rights were acquired" p213- the key is to maintain the social relations which give rights to land.

<sup>246</sup> Berry, 1993

<sup>247</sup> Channock, 1991 .

<sup>248</sup> Mutebi, 2001

<sup>249</sup> Platteau, op cit.

<sup>250</sup> As happened with the San (Hitchcock and Holm, op cit).

<sup>251</sup> McAusland, op cit.

<sup>252</sup> Wily, 2001; Lavigne Delville, 2001; Bahuchet, 2001.

<sup>253</sup> eg, Palmer 1998, Matlon 1994

<sup>254</sup> Egbe, 2001

## Chapter 6.

## Asia:

## Marcus Colchester

Stretching from the Urals and the Bosphorus in the west to New Guinea in the east, the Asian continent contains a vast diversity of 'indigenous peoples'. This chapter can only touch on some of the salient issues that arise in the region. It omits detailed consideration of indigenous peoples in the Middle East and Central Asian Republics, although legal and administrative provisions for 'tribal' self-government and relatively autonomous systems of land administration are prevalent in countries such as Pakistan, Iran and many Arab countries. Likewise this chapter mentions only cursorily those indigenous peoples in the communist states of China and Indochina.

### 6. 1 Definitional issues:

Asian governments have been the most outspoken in denying that the concept of 'indigenous peoples' as used by the United Nations, applies to their countries with such statements being recorded at the Working Group on Indigenous Populations by delegates from Japan, Bangladesh, India, Malaysia, Indonesia and China. Some governments, like Bangladesh, which have protested to the United Nations that the term 'indigenous' has no place in their national context have been wrong-footed when indigenous peoples have pointed out that the term 'indigenous' is already used in national laws. A landmark case in Japan, decided on 28 March 1997 in a local court in Sapporo, recognised the Ainu as an indigenous and minority people.<sup>255</sup>

Nevertheless, summarising the view of many Asian countries, the Chinese government continues to reject the concept of indigenous peoples, denying that it applies to their national situation and arguing that the term 'indigenous peoples' only applies to those peoples who have been dispossessed of their ancestral homes by European colonial policies.<sup>256</sup> The statement, which is designed to deny the right to self-determination to China's 'minority nationalities', conveniently ignores the fact that in its early years the Chinese Communist Party itself had explicitly recognised exactly this right.<sup>257</sup> A report by Cuban Special Rapporteur, Alfonso Martinez, presented to the Working Group on Indigenous Populations of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1998 has also argued that the term 'indigenous peoples' does not apply to ethnic groups in Africa and Asia, but only to those in countries which have suffered European colonisation and where the settlers have remained to become the politically dominant population.<sup>258</sup> However, the African Commission on Human and Peoples' Rights of the Organisation for African Unity has ignored this suggestion and set up a Working Group on Indigenous Peoples and Communities in 2000.<sup>259</sup>

Moreover, other Asian governments such as those of the Philippines have readily accepted that the international legal concept of 'indigenous' does apply to their own politically marginalised ethnic groups which are now officially referred to as 'Indigenous Peoples' or 'indigenous cultural communities'. In Nepal, too, the term indigenous is commonly applied to the distinctive ethnic groups in the Terai by forestry officials. In recognition that there are indigenous peoples in Nepal, in 1993 the national government formed a National Committee on the International Year of Indigenous Peoples. In Mid-1999, the Nepali government explicitly recognised the existence of 61 indigenous peoples in Nepal, who make up some 60% of the population.<sup>260</sup> In Indonesia, too, the reformist governments of the Post-Suharto era have accepted that the term 'indigenous peoples' applies to *masyarakat adat* groups, who claim collective land rights under customary law. The Cambodian legislature has likewise discussed the rights of indigenous peoples in Ratanakiri in the north-east. In 1998, the Asian Development Bank adopted a policy on Indigenous Peoples very similar to that of the World Bank's

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<sup>255</sup> and see Siddle 1996

<sup>256</sup> Kingsbury 1996

<sup>257</sup> MacKerras 1994; Grunfield 1987:228.

<sup>258</sup> Alfonso Martinez 1998.

<sup>259</sup> MacKay 2001.

<sup>260</sup> and see Tamang 1996.

1992 policy. The ADB policy calls for a strong commitment to recognise the socio-cultural rights of indigenous peoples. Development interventions, it argues, should be compatible in substance and structure with the affected people's culture and socio-economic institutions. The ADB calls for a poverty alleviation approach that address 'intangibles such as feelings of powerlessness and lack of freedom to participate'.

In short, once it is accepted that the situation of 'indigenous peoples' cannot be considered independently of national contexts and histories, the term 'indigenous peoples' will gain increasing acceptance in Asia. It is widely used by self-identified peoples throughout the region.

## **6.2 Forms of tenure, equity and legal personality:**

Generalising about trends in the administration of indigenous lands over such a vast area is problematic. In general, Asian countries have been reluctant to admit collective forms of land ownership or possession preferring instead to promote individual land titling according to the Torrens system thereby undermining traditional economies.<sup>261</sup> Even in communist countries, the denial of land rights to indigenous peoples has often led them into abject poverty, obliging them to live outside the law in order to make a living.<sup>262</sup> However, where governments recognised indigenous collective tenures, these rights have in almost all cases been recognised on the basis of immemorial possession or customary use.

Two broad tendencies can be detected. In one set of countries, such as most of the Pacific Islands<sup>263</sup> and, recently, the Philippines, the laws recognise indigenous collective tenures as providing the equivalent of strong rights of ownership. In others, such as Malaysia and Indonesia, the laws grant what administrators understand to be much more limited usufructory or possessory rights, considered to be much weaker than full ownership. As noted below, these interpretations are now being contested in the courts and indigenous spokespersons have argued that the downgrading of indigenous property rights in comparison to those of other citizens constitutes a violation of the Convention on the Elimination of All Forms of Racial Discrimination.

In contrast to Latin America, where most collective tenures are deemed inalienable, and although in India and Bangladesh administrative measures exist (on paper) to prevent the sale of tribal lands to *non-tribals*, in general most collective tenures in Asia allow land sales and other transfers of rights. Land markets and markets in timber are thus prevalent in indigenous areas but, contrary to the expectations of those who have favoured land markets as an engine for 'development', there is widespread evidence that land and resource mobilisation has actually increased poverty, landlessness and environmental damage in indigenous areas.<sup>264</sup>

The provision of alienable collective tenures presents particular challenges. If lands, and/or resources on these lands, can be sold or negotiated with outsiders not bound by customary laws, then legal clarity on just who has the right to enter into such contracts becomes essential. Unfortunately, legal imprecisions, about in which indigenous institutions lands are vested and, thus, who has legal personality in negotiating contracts, are widespread and have prompted the emergence of entrepreneurial indigenous elites who have profited at the expense of the wider group. This has exacerbated the process of impoverishment in indigenous areas.

## **6.4 The issue of shifting cultivation:**

South and South-East Asia are remarkable in the extent to which widespread prejudices against the practice of shifting cultivation have been used as a basis for denying indigenous rights. The prejudice

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<sup>261</sup> Eg Brewer 1988

<sup>262</sup> Jager 2001

<sup>263</sup> Lundsgaarde 1974; Crocombe 1987a; 1987b; van Trease 1987; Damas 1994; Crocombe and Meleisea 1994.

<sup>264</sup> Eg India: Furer Haimendorf 1983; Viegas 1991; Bangladesh: Colchester 1984; Indonesia: Simbolon 1999; General: Colchester and Lohmann 1993.



has deep roots, dating back to pre-colonial times, but was considerably reinforced in the colonial era with the introduction of 'scientific forestry'.<sup>265</sup> The need to 'eradicate' shifting cultivation has since been used to justify the forced resettlement of indigenous peoples throughout the region including in India, Bangladesh, Burma, Thailand, Laos, Cambodia, Vietnam, Malaysia, Indonesia and the Philippines. The result has only been to fuel land conflicts, increase poverty, and open up forests to competing interests who have been no less reckless in their use of resources. A detailed re-appraisal of shifting cultivation is outside the scope of this report but it needs to be recognised that national policies towards indigenous land rights and those towards shifting cultivation and forest management are intimately related. They need to be addressed together.

### 6.5 Gender issues and indigenous tenure in Asia:

Customary forms of land ownership in many parts of Asia have recognised women as having equal rights to land as men and in some areas matrilineal inheritance is common. However, many interventions in indigenous peoples' lives have not dealt with men and women even-handedly. Processes such as the introduction of individualised land holding in indigenous areas, forced resettlement, compensation, registration of heads of households for taxation or benefit sharing purposes, the provision of jobs in extractive industries, have all tended to select males over females. The result has been a marked erosion of indigenous women's rights and resulting poverty and loss of status.<sup>266</sup>

### 6.6 Community-based natural resource management:

Notwithstanding the widespread reluctance of many Asian governments to recognise and regularise indigenous land rights, Asian countries have gone further than many in promoting various forms of community-based watershed, forest and fisheries management. Pilot experiments in community-based wildlife and protected area management have also been tried, with enough success to encourage their more widespread application.

Reviews of these experiences reveal a continuing reluctance of state official to relinquish authority over resources to local users, even though the most successful examples of community-based natural resource management in the region are those that have transferred rights to local communities, built on customary institutions and given scope for indigenous peoples' knowledge and traditional skills. Recognition of rights of tenure in community-based natural resource management regimes is now being more and more strongly advocated but is still widely resisted by forestry and fishery departments.<sup>267</sup>

#### India<sup>268</sup>

*Adivasi* ('aboriginal people') are estimated to make up some 7% of the population of India. These 70 million people speak some 200 distinct languages and are concentrated in the 'tribal belt' of central India, with a second concentration in the North East. These areas also contain the majority of the remaining forests of the country. Historically treated as exotic beings outside the caste system and Hindu pollution laws, they continue to suffer severe discrimination and socio-economic marginalization. British efforts to abolish village autonomy and introduce *zamindari* (tax-gathering landlords) into tribal areas in the C18th and early C19th led to tribal rebellions in West Bengal, Bihar and Jharkhand. The British responded by removing *zamindari* and passing Land Settlements aimed at

<sup>265</sup> Ghuriye 1963; Dove 1985; Colchester 1990; Bryant 1997.

<sup>266</sup> Kelkar and Nathan 1991; Wickramasinghe 1994; Heyzer 1996; Griffen 2001

<sup>267</sup> Hobley 1995; Kothari et al 2000; Colchester and Erni 1999; Colchester 2000; Sarin 2001; Kalpavriksh 2001; Apte and Kothari 2001.

<sup>268</sup> Ghurye 1963; Moser 1972; Fuchs 1973; Furer Haimendorf 1982; Morris 1982; Sharma 1990; Viegas 1991; Fernandes 1992; Bhanage 1993; Mahapatra 1994; Erni 1996; Poffenberger and McGean 1996; Lynch and Talbot 1996; Joshi 1998; Griffiths and Colchester 2000.

securing tribal tenure in these areas.

The 1901 Land Revenue Code similarly prevented the sale of tribal land without permission of the Collector. Later, the administration classified most *adivasi* as 'Schedule Tribes' and established 'Scheduled Areas' to protect them from incursions. Land outside these 'areas' was alienable. The policy continued after independence coupled with measures of positive discrimination. Two separate 'Schedules' were elaborated: the 5<sup>th</sup> Schedule for tribes in Peninsular India and 6<sup>th</sup> Schedule for tribes in the North East. A number of higher educational places and positions in the legislatures are reserved for *adivasi* in proportion to their numbers in each state. Although, India has also ratified ILO Convention 107, which recognises *adivasi* rights to the collective ownership of their traditional lands, no legal measures have been taken to promote collective titling in Peninsular India.

In the mid-19<sup>th</sup> century, the British reclassified large areas of India as 'forests' subject to new Forest Acts and under the control of Forest Departments. 'Forests' now encompass some 22% of the country and include the traditional lands of millions of tribal people. C19<sup>th</sup> British administrators argued about whether to recognise tribal peoples as having 'rights' or 'privileges' in forests. The later Forest Acts recognised only privileges and subsequent regulations and administrative decisions progressively eroded these privileges – effectively rendering these people landless. Since independence, an estimated 600,000 tribal people have also been displaced by protected areas. Recent programmes of Joint Forest Management do not modify tenure and have been criticised for further impoverishing *adivasi*.

In Central India, British administration promoted registers of individual land title (*patta*), with all other lands being considered 'wastelands' and thus Crown lands. Collective land ownership was not recognised, except in Chota Nagpur, and 'wasteful' forms of land use – such as hunting and shifting cultivation – were not considered a basis for land ownership. Since independence, protection of tribal farmlands was limited to 'Scheduled Areas' and only unevenly extended to other tribal landholdings. Market pressures, usury, bureaucratic obstacles and lack of education have combined to deprive many tribals of their lands. *Benami* transfers – in which lands are informally passed to non-tribals by indebted tribals - have effectively alienated much land even in protected blocks. The 1996 Panchayats (Extension to Scheduled Areas) Act now recognises 'tribal self-rule' at the local level, giving greater authority to *adivasi* themselves to control future land transfers. The Act does not provide for recognition of common property regimes, however.

In North-East India, where formal systems of administration were extended only towards the end of British rule and then only lightly and indirectly, the 6<sup>th</sup> Schedule recognises Autonomous District Councils, gives them authority over land and recognises collective land ownership. Similar provisions have been applied in Nagaland and Mizoram where the 6<sup>th</sup> Schedule does not apply. Most of these institutions can be seen as modified versions of earlier customary governance systems, with modified leadership systems such that heritable chieftainships have been made subject to election by assemblies of all adult males. Women are however excluded from participation in assemblies. Customary laws are respected within the jurisdictions of these councils and relatively small areas in these states are subject to the Forest Acts. Legal imprecisions about who has legal personality and vigorous land and timber markets have led to rapid deforestation, rising concern about soil erosion, the emergence of village elites and growing social inequalities. Increasingly, communal lands are being claimed and held by individual families and some are using the land laws to register private titles. Intra-community land conflicts are now becoming a problem.

**Thailand<sup>269</sup>**

There are an estimated 700,000<sup>270</sup> members of so-called *chao khao* ('hill tribes') in Thailand, distributed in some 20 provinces, mainly in the upland areas in the north of the country. The government officially recognises nine ethnic groups as hill tribes subject to its 'tribal welfare' policy. Two other ethnic groups, the Mrabri and Palaung, are also treated as 'hill tribes' by government researchers, who actually count as many as 23 tribal groups in Thailand. Some of these ethnic groups have been in the region now known as Thailand longer than the majority Thais. Other groups have migrated into the region more recently, some prior to and others since the incorporation of the northern provinces into the modern Kingdom of Thailand.

Prior to 1959, the hill tribes enjoyed considerable autonomy and were administered by local principalities through indirect rule, leaving scope for traditional leaders to exercise their authority and for land and natural resources to be managed in accordance with customary law. However, since 1959, the State has sought to sedentarise tribal villages and integrate them into the national mainstream with the aims of curbing rotational farming, halting cultivation of the opium poppy and promoting national security. While the armed forces and Royal Forestry Department (RFD) have preferred a policy of forced resettlement, the King has personally promoted a programme of sedentarising and developing tribal villages in the uplands, in combination with crop substitution and marketing projects, in which opium poppies have been replaced as cash crops with vegetables and wild flowers. Financial support has come from the World Bank, UN agencies and bilateral donors. Although donor agencies admit that regularising tenure is necessary to make these projects sustainable, no concerted effort to overcome government resistance to providing tenure to 'hill tribes' has been made.

Property rights, including possessory rights, are protected by the Thai Constitution, however, the land laws of Thailand do not make provisions for collective land ownership and indeed lowland peasants encounter many difficulties securing even individual rights to land. Hill tribes face special obstacles to regularising tenure. First, all land above 600 metres is designated as Crown Land and is administered as Royal Forest by the RFD. Secondly, many members of the hill tribes lack citizenship papers and have difficulties obtaining them due to lack of birth certificates and discriminatory behaviour by public officials. Without ID cards they are denied the normal rights and protections of Thai citizens. As pressure on land has increased due to population increase, expansion of commercial farming and plantations, and migration of lowland Thais into the northern provinces, members of the hill tribes have faced increasing landlessness and poverty. Land security is vital to communities trying to break out of this downward spiral.

Since the mid-1990s, hill tribes organisations have allied with peasant groups and social justice NGOs to press for usufructory rights to use, manage and control community forests in the uplands. However, a Community Forestry Act adopted in 1997 was fiercely denounced by national conservation groups before it could be applied. The 'green NGOs' fomented riots and violent protests by lowlander farmers in order to limit the application of the law in upland forests. Consequently, the law was amended in June 1998, to prevent the recognition of communal forests in areas zoned as watershed protection and priority conservation zones. The movement for a recognition of communal forests and a revalidation of rotational farming continues but meanwhile conflicts between lowlanders and hill tribes have become more bitter.

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<sup>269</sup> Tapp 1986; McKinnon and Wanat 19986; McKinnon and Vienne 1989; Colchester and Lohmann 1990; 1993; Lynch and Talbot 1995; Nicholas and Singh 1996; Carrere and Lohmann 1996; Hirsch 1997; Poffenberger 2000; Colchester 2000.

<sup>270</sup> In 1988 the Tribal Research Institute in Chiang Mai counted some 550,000. Higher estimates allow for natural increase since that date.

### Indonesia<sup>271</sup>

According to official figures between 1.2 and 6 million people are classified as *suku suku terasing* (isolated and alien tribes) or *masyarakat terasing* (isolated and alien people) by the Department of Social Affairs (Depsos) and the Department of Agriculture. These groups are officially considered to be 'underdeveloped' and in need of 'modernisation' and have been the subjects of programmes of forced resettlement, re-education and the extirpation of so-called backward cultural practices - including the torching of longhouses, the burning of ceremonial goods and the banning of communal rituals. Although the more brutal aspects of this programme ceased with the ending of the Suharto dictatorship, the government has yet to revise its underlying assimilationist policy. Since the fall of Suharto, a vigorous social movement has emerged claiming to represent some 60 - 120 million Indonesians who consider themselves to be *masyarakat adat* (people governed by custom) and who refer to themselves as 'Indigenous Peoples' in international discourse. These are the speakers of most of the 600 languages in the country. They claim rights to the collective ownership of their lands, a form of tenure ambiguously recognised in Indonesian law.

The concept of *adat* (custom) as a unifying marker of Indonesian identity provided a powerful rallying point in the struggle for Indonesian independence. Accordingly, the 1945 Constitution recognises *adat* and, somewhat rhetorically, establishes it as the basis for national law, thus abandoning the legal dualism which had been practised by the Dutch. Notwithstanding, during the 1950s and 1960s, *adat* courts and other *adat* legal procedures were progressively abolished and a body of 'positive law' (*hukum positif*) evolved to replace it. In the same way, although the Basic Agrarian Law (BAL) of 1960 apparently makes provision for the recognition of customary rights to land as usufructs (*hak ulayat*), the law has been interpreted and applied in ways that deny collective land rights. Recent assessments under the World Bank Land Administration Project show that the government entirely lacks the capacity to recognise or administer collective tenures.

Further limitations on customary land ownership were imposed by the 1970 Forestry Act, by which some 70% of the national territory was handed into the jurisdiction of the Forestry Department and treated as State-owned lands. In practice, procedures for consultation with resident communities prior to the delineation of State forests were often omitted. In effect, if not in law, the Forest Act extinguished the rights of some 30 to 60 million people. Indigenous institutions were further eroded by the Village Government Act of 1979, which imposed a single model of local government, based on Javanese administrative traditions, on the whole country. The result was that *adat* systems of self-government were denied and lost legal personality.

Since the fall of Suharto, a period of legal and institutional reform has begun. The 1999 Human Rights Act provides for the protection and recognition of *adat* communities including *ulayat* land. Authority over land and forest issues has passed to the district administrations and a new Local Government Act of 1999 - which has yet to be widely applied - provides a legal basis for the re-empowerment of *adat* institutions. However, a revised Forestry Act, widely expected to recognise community rights in forests, disappointed many by only recognising the possibility of cooperatives securing forestry concessions. A Decree from the Agrarian Ministry does now admit the possibility of collective usufructs and district level decrees, *perda*, have begun to recognise a diverse range of community forest tenures. Many lawyers argue that a fundamental revision of the BAL is necessary before collective tenures can be legally secured.

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<sup>271</sup> Ter Haar 1948; Hooker 1978; Holleman 1981; Colchester 1986; 2001; Barber and Churchill 1987; Brewer 1988; Burns 1989; Lynch and Talbot 1995; Murray Li 1999; Meijl and Benda Beckman 1999; Eghenter 2000; Lev 2000.

### Malaysia<sup>272</sup>

Malaysia has a Federal System in which land and forest issues fall under the jurisdiction of State authorities. Although a single Constitution applies to the whole Federation and recognises custom and customary law, the indigenous situation and the related legislation is best understood in three parts – Peninsular Malaysia, Sabah and Sarawak.

#### *Peninsular Malaysia*

There are some 100,000 aboriginal people (*orang asli*) from 18 different ethnic groups in Peninsular Malaysia, the descendants of hunting and gathering peoples who have inhabited the interior forests for millennia. Under the British colonial administration, these peoples were confined to ‘Reserves’, which were considered to be Crown lands temporarily set aside for the communities but which could be annulled at the stroke of a pen. Both the legislation, and this interpretation of the law, were adopted almost without modification by Malaysia at independence. Reserves now encompass some 15% of the village areas occupied by *orang asli* leaving the remainder with even less land security. During the 1950s and 1960s, many of the widely dispersed *orang asli* communities were forcibly relocated into larger, supervised settlements as part of a counter-insurgency programme and this has continued as part of a national policy of integration. *Orang Asli* have since suffered an almost continuous erosion of their land base due to logging, road-building, resort development, hydropower projects, the extension of plantations and protected areas. A 1997 court case in Johor, by *orang asli* dispossessed to make way for a dam, effectively challenged the administration’s interpretation of the law and upheld the principle of aboriginal rights as unextinguished traditional rights of occupation and use. The judgment was upheld on appeal. Since then, other *orang asli* have filed further suits arguing for recognition of the principle of aboriginal title.

#### *Sabah*

In Sabah, there are some 1,350,000 indigenous people drawn from 39 indigenous groups, referred to collectively as *Dusun* and *Kadazan*. Partly as a result of a long history of colonially and then State-imposed land annexation and plantation development, partly because the indigenous groups are numerically strong, and partly because pressure on land is not so intense, indigenous land conflicts have not been so serious in Sabah as elsewhere in Malaysia. Notwithstanding, collective rights to land are relatively weak in Sabah. The legislation creates ‘Native Reserves’ on State lands and recognises Native Customary Rights, interpreted as rights of usufruct, which are however extinguished in areas declared to be forests, areas of State projects or protected areas. Few NCR areas are demarcated. The majority of indigenous communities lack any legalised rights and are merely tolerated as tenants-at-will on State lands. Although the Land Ordinance is meant to give priority to those claiming customary rights on ‘unalienated country land’, in practice lands are allocated to other claimants without natives having a chance to object. Official procedures require customary rights holders with unregistered lands to make their claims known within a specified time when others make claims to State lands but notices of such claims are rarely distributed to local villages. In urban and peri-urban settings, indigenous people have secured individual titles to secure their presence and participate in the vigorous land markets. Where plantation small-holder schemes have been promoted, individual land holdings have been provided to indigenous participants.

#### *Sarawak*

In Sarawak, where there are currently some 800,000 indigenous people from 28 ethnic groups, land issues have been a cause of international controversy since the 1980s. The State was administered as a private *raj* by a British subject until WWII and land tenure legislation evolved idiosyncratically to accommodate two contrary tendencies, on the one hand affirming and recognising Native Customary

<sup>272</sup> Porter 1968; Hong 1987; Colchester 1989; Teck Ghee and Gomes 1990; Erni 1996; Colchester and Erni 1999; WRM, FPP and Forests Monitor 1999; Nicholas 2000; Jomo and Chan Yui Tan (forthcoming); Nor Anak Nyawai et alii vs Borneo Pulp and Paper Sdn. Bhd. 12 May 2001; Press Release Sahabat Alam Malaysia 31 October 2001.

Rights (NCRs), the authority of native chiefs, and the jurisdiction of native courts, while on the other hand discouraging shifting cultivation and mobile villages. Since WWII, colonial and independence administrations have all pursued the second objective while progressively limiting native rights and institutions. Native systems of land use have been officially criticised as wasteful, backward and as obstacles to modernisation. Extension of NCRs without permit has been officially frozen since 1955, and an administrative decision not to grant any further such permits was passed in secret in 1974. Maps of NCR areas, which the administration has admitted cover 22% of the State, have since been suppressed, native courts discouraged and native chiefs gradually co-opted into supporting the National Front coalition, which dominates both the State Parliament and the political economy, based on logging, plantations and, more recently, rapid industrialization. Community forests, conceived as State lands leased to communities, have been reduced in extent. Forestry laws have the effect of curtailing NCRs but logging concessionaires are encouraged to negotiate with customary rights-holders to secure unimpeded access.

State promotion of extractive industries on native lands has led to frequent blockades on access roads since the 1970s. While laws have been amended to make such blockades illegal, they persist. Since the 1990s, the State has amended the land laws to grant companies legal personality as 'natives' and thus facilitate their access to areas zoned as native land. The promotion of oil-palm and paper-pulp plantations on native lands has further intensified native protests. Increasingly, communities have sought redress through the courts, seeking injunctions to halt proposed development schemes pending clarification of their land rights. Since official maps of the extent of NCR lands have been suppressed, communities have begun to carry out their own mapping projects to demonstrate their traditional areas. Legal argument has focused on whether NCRs extend to include areas of 'tall forest' where community members hunt, fish, gather forest products and use as a reserve for extending their rotational farming, and whether or not the 'aboriginal rights' of native groups have been extinguished by subsequent legislation.

In a recent case in the High Court at Kuching, the judge ruled in favour of Iban communities seeking the removal of the Borneo Paper and Pulp company from their lands. The ruling implies that natives in Sarawak enjoy radical collective rights to their customary land, that these rights extend over all the lands they have customarily used and occupied (including 'tall forest' and not just their areas of permanent cultivation), moreover their rights do not depend on an affirmative act of recognition by the State. Further cases are now expected contesting the extension of logging concessions over native lands and questioning the constitutionality of forest laws, which extinguish native rights in areas unilaterally deemed to be Permanent Forest Estate.

The Sarawak State Government has clearly been alarmed by these legal developments. In November 2001, the Sarawak legislature passed the Land Surveyors Act 2001 that criminalises community mapping. The act seeks to make it illegal for any except licensed surveyors to make maps which delimit 'the boundaries of any land, including State land and any land lawfully held under native customary rights'. The move has been denounced by local NGOs who have called for the restrictive sections of the law to be struck from the Act.

### Philippines<sup>273</sup>

The 6-7 million indigenous people in the Philippines belong to some 40 self-defined ethnic groups. Although a 1909 legal case during American colonial rule recognised indigenous ownership basis on immemorial possession, in practice indigenous rights in land were denied after independence. This denial, coupled with imposed large-scale development schemes under the Marcos regime provoked serious conflicts and contributed to insurgency and then counter-insurgency in many indigenous areas. Since the fall of Marcos, Philippine law has been overhauled to promote a recognition of indigenous peoples' rights to 'ancestral domain'.

The 1992 Constitution recognises indigenous peoples' rights to ancestral domain. A 1993 Administrative Order allowed the Department of Environment and Natural Resources (DENR) to give interim recognition of these rights by the issuance of Certificates of Ancestral Domain Claims (CADC), to afford protection against unilateral expropriation or exploitation until ownership could be determined. The 1997 Indigenous Peoples Rights Act (IPRA) establishes procedures for recognition of individual and communal ownership of 'ancestral domains' and 'ancestral lands'. 3 million hectares now enjoy some protection under CADC and IPRA. IPRA:

- ❑ clearly recognises the principal of indigenous ownership and control of their territories;
- ❑ accepts the exercise of customary law in the adjudication of disputes and for community decisions about resource management and land allocations;
- ❑ establishes the principal of '*free and informed consent*' before lands can be alienated or communities relocated;
- ❑ places certain bureaucratic trammels and defences in the way of third parties wishing to exploit indigenous lands;
- ❑ insists on the '*full participation*' of indigenous peoples in the establishment of protected areas and watershed management regimes on their lands.

The law has also been criticised for:

- ❑ making a problematic distinction between 'ancestral lands' and 'ancestral domains', which may encourage the fragmentation of indigenous territories;
- ❑ bureaucratizing the administration of lands and thus weakening community control and unity;
- ❑ facilitating of legalised access to indigenous lands by third parties especially mining interests.
- ❑ permitting the alienation of lands under two of the three types of title allowable under IPRA
- ❑ failing to make clear how the right of consent should be exercised.

Critics say that the law has commoditised lands and given power to outsiders to re-allocate indigenous resources, at the same time encouraging the emergence of indigenous entrepreneurs bent on privatising the indigenous commons. Under the IPRA, communities' legal defences against expropriation lie in provisions for free and informed consent and the exercise of customary law. However, where community organisation is weak and awareness of the law insufficient, it has proved

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<sup>273</sup> Carino v Insular Government – 41 Phil. 935, 212 U.S. 449 (1909); Bello, Kinley and Elinson 1982; ASS 1983; Drucker 1985; Fay 19987; Fiagoy 1987; TABAK 1990; Teck Ghee and Gomes 1990; Wiber 1995; Lynch and Talbott 1995:90; Nicholas and Singh 1996; Leonen 1998; Colchester 2000.

all too easy for the unscrupulous to manipulate these provisions to their advantage. The lessons from this experience are that indigenous land titling should come with unbiased institutional support, legal training and capacity building to enable communities to select the appropriate title, manage their lands and make decisions in ways that ensure genuine consent. A legal challenge by the mining lobby to the constitutionality of the IPRA was successfully defeated in 2000. The case also challenged the 'Regalian Doctrine', whereby the State claimed *ownership* of all untitled lands on the basis of the C16th Spanish conquest.



### **Papua New Guinea<sup>274</sup>**

The four million people of Papua New Guinea are among the most linguistically diverse of the globe, speaking some 700 languages. Although natives comprise the great majority of the population, no one group is in a majority. In an effort to overcome a prevailing sense of marginalization from the State power, the country has adopted a highly decentralized administrative structure with many provincial ministries. The elaborate bureaucracy that has resulted absorbs some 40% of the State budget. It has created what has been described a national ‘super-tribe’ that acts in its own interest and has exacerbated a community sense of alienation from government.

Under the law, some 97% of land in Papua New Guinea is owned by the indigenous peoples under customary law, considered the equivalent of collective freeholds, in which legally ill-defined clans are the land-owners. Only about 1% of these lands have been legally registered. The small portions of alienated lands include the few coastal coconut and palm oil plantations established during the colonial era. Lack of precision in the law about who exactly owns and controls customary lands, coupled with the fact that legal personality can be acquired by land-owner groups under a number of different laws, has led to serious land conflicts in some areas.

Although clan lands are technically alienable under PNG law, they can only be sold or leased to the State in the first instance. Development agencies have thus argued that collective land ownership and traditions of consensual decision-making have impeded the evolution of land markets. The World Bank has attempted to circumvent this perceived constraint by promoting ‘lease-lease-back’ arrangements, whereby a clan leases a portion of its lands to the State and the State then leases the land back to an entrepreneurial individual or sub-group of the clan for development. Armed with this lease as collateral, the entrepreneur can secure bank loans to develop the lands. Highland coffee estates and ranches established by these means have proved quite lucrative, but have led to growing disparities in wealth and power. In some cases, resentment against those who have thus grown rich has led to a re-emergence of ‘tribal’ warfare.

Notwithstanding clan ownership of the land, in PNG forests, rivers and sub-surface minerals remain under the jurisdiction of the State, which reserves to itself the power of eminent domain. Where enforced land alienation is not resorted to, access to and development of these resources by outsiders is subject to negotiation with land-owners, who may demand benefit-sharing and compensation or mining royal equivalents. Lack of clarity in the law about negotiation processes and the legal personality of land-owner groups, coupled with the fact that many groups have little experience with the cash-economy, have allowed developers to manipulate land-owners, by bribery, the creation of non-representative associations and unfulfilled promises of careful land management and the provision of services.

Foreign logging companies, mainly from Malaysia, have thereby secured access to the majority of the forested areas of PNG. Investigative commissions have exposed persistent malpractice by logging companies, which have also been accused of bribery and the manipulation of parliament to modify laws to facilitate their access to the resource. Church-based organisations and environmental groups have protested against this situation and have sought to promote small-scale community logging using portable petrol-driven mills, *wokabaut somils*. Large-scale open-caste mines have also been established on clan lands and have been found to have very serious impacts on rivers and the livelihoods of downstream riparian groups. Unresolved conflicts between mining companies and aggrieved land-owners are now clogging up the courts.

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<sup>274</sup> Brown 1978; James 19985; Good 1986; Renner 1990; Marshall 1990; Donigi 1994; Wanek 1996; Filer 1997; Fingleton 1998; WRM, FPP, Forests Monitor 1999.

# Russia<sup>275</sup>

There are currently some 250,000 people in Russia officially classified as ‘small-in-numbers peoples of the North and Far East’. They include the Saami people on the Archangel Peninsula in the west across to the Aleuts in the Pacific and include Turkic groups in the south on the border with China and Mongolia. Several million people from larger ‘nationalities’, such as the Buryat Mongols and Yakuts (Sakha), which have their own named republics, sometimes refer to themselves as ‘indigenous peoples’ but are not dealt with further below.

During the early period of Russian expansion, the land rights of native peoples were almost totally ignored. Feudal notions of control of land and peasants by overlords, *boyars*, were extended by conquest, spearheaded by Cossack armies loyal to the Tsar. The Speransky reforms of the C19th, later criticised for their paternalist intent, did give recognition to customary rights to land and advocated measures to determine these areas and secure them from settlement. The application of these reforms was ineffective, but the extortionate system of taxation, *yasak*, by which the native peoples had to yield tribute in furs was imposed with great brutality.

After the Russian revolution, all land was considered property of the State and although administrative units were created, as autonomous districts, provinces, territories and regions, designed to protect national minorities, these were also guided by the centralised administration. Under the Soviet system, traditional systems of land use were modified and ‘modernised’. Wealthier individuals and shamans were targeted as *kulaks* and reactionaries. Native resistance to State expropriations and imposed administrative regimes was put down by force of arms. Traditional systems of fishing, trapping and reindeer-herding were collectivised, which implied the forced resettlement of dispersed peoples into collective farms (*kolkhoz*). In the 1960s, most collective farms were nationalised as state farms, *sovkhoz*, meaning further concentration of settlements and the imposition of strict bureaucratic controls on community life. In the last year of the Soviet era, the USSR subscribed to ILO Convention 169, although the ILO itself was not informed of this decision. The transition to a market economy has brought further disruptions. State farms have been dismantled and collective farms and centralised settlements have been thrown onto the market. Serious poverty and ill-health has resulted.

Land tenure legislation is now in a process of reform to accommodate these changes. The new Constitution recognises international principles of human rights and Article 69 specifically guarantees the rights of ‘small in numbers’ indigenous peoples. Decrees passed in 1992 propose the creation of official bodies of self-government in areas traditionally inhabited by indigenous peoples and delegate responsibility for allocating lands to regional authorities. A 1999 Federal law states that indigenous peoples ‘have rights to protection by the courts of indigenous lands, ways of life, economies and trades...’ A 2000 Federal law recognises that clan communities (*obshchina*) can obtain collective land rights but does not explain how. Finally, in early 2001, a Federal law was passed recognising indigenous peoples’ rights to ‘Territories of Traditional Nature Use’ (TTPs), intended to provide them with secure areas where they can carry out ‘traditional’ economic activities. Alienation of land from TTPs would only be allowed subject to a referendum of all constituent communities. However, none of these Decrees and Federal Laws has been followed up with clear regulations which would allow federal or regional authorities to put them into effect in an agreed way. Thus while the prospects for securing indigenous land rights in Russia brighten, no such land rights have yet been properly secured, though some regions and republics have moved ahead unilaterally to allocate *obshchina* lands.

<sup>275</sup> Vakhtin 1992; Forsyth 1994; IWGIA 1999b; Fondahl 1998; Pika 1999; Anderson 2000; Phipps and Colchester 2001.

## Chapter 7. Conclusions and Recommendations:

*Our policy of development is based, first, on guaranteeing our self-sufficiency and material welfare, as well as that of our neighbours; a full social and cultural development based on the values of equity, justice, solidarity and reciprocity, and a balance with nature. Thereafter, the generation of a surplus for the market must come from a rational and creative use of natural resources developing our own technologies and selecting appropriate new ones.*

Charter of the Indigenous and Tribal Peoples of the Tropical Forests, 1992.

Indigenous peoples stress that their own notions of development differ fundamentally from the notions of economic progress that evolved principally in western Europe and North America. Development is seen first and foremost as a matter of achieving security – in terms of access to land and resources, institutional recognition and self-sufficiency – before being about increased access to markets and trade.<sup>276</sup> Maintaining social relations and building on custom and traditional knowledge are seen as central elements of community development and not ancillary or secondary objectives. These perspectives weave together social, economic and environmental objectives into a single and coherent whole.

This is not to romanticise or overlook the conditions in indigenous communities where standards of health, hygiene, income and education often fall far below those enjoyed by national majorities. Most indigenous spokespeople readily admit the need for, and actively seek, improvements in their conditions of life. However, they seek to achieve these improvements without prejudice to other valued aspects of their ways of life, which give their life meaning and dignity. Such aspirations are entirely in line with the recently agreed ‘right to development’ adopted by the United Nations.

Indeed, in response to a five year dialogue with indigenous peoples, this year, the UNDP also adopted a new policy on Indigenous Peoples, which accepts the validity of these distinctive visions of development.

*The UNDP Human Rights Policy recognizes the rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands. This embraces a concept of development that incorporates indigenous peoples' own aspirations, spirituality, culture, social and economic aims.*<sup>277</sup>

### 7.1 Institutional challenges and procedures for recognising indigenous tenure

Despite recent gains in the recognition of indigenous peoples’ rights in particular countries and development projects, indigenous communities still face serious obstacles to the titling of their lands. As noted, these obstacles are particularly severe in Asia and Africa where the advantages of recognition of indigenous peoples’ collective rights to land have yet to be widely appreciated. However, even in Latin America, significant obstacles to the recognition of indigenous tenure rights remain to be overcome.

In Brazil, indigenous communities still suffer land invasions and endure intimidation by henchmen hired by powerful landed interests.<sup>278</sup> In Colombia, assassinations of indigenous leaders pushing for extensions to *resguardo* lands are still commonplace.<sup>279</sup> In Guyana and Suriname, the general legal framework still fails to recognise indigenous tenure and livelihood regimes that involve a combination

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<sup>276</sup> Colchester 1992; Chase-Smith 1996; Gray 1997.

<sup>277</sup> UNDP 2001

<sup>278</sup> Survival International 2000

<sup>279</sup> Almaciga 2001

of cultivation, hunting, fishing and gathering (Guyana Box, Suriname Box). In many countries rural development strategies are still devised and implemented with little or no indigenous participation.<sup>280</sup>

Where countries have undertaken constitutional reforms to safeguard indigenous land rights, there are still numerous obstacles to the implementation. In the Philippines, indigenous communities face major financial obstacles to securing their lands under the IPRA, as the costs of carrying out land surveys have to be born by the communities. Some communities are even reclaiming their territories piecemeal, to bring the survey costs down to levels that they can afford. Moreover, even where indigenous communities have been awarded legal titles, government agencies may lack resources and capacity to protect such titled lands from encroachment. In Costa Rica, for example, 49% of the area of indigenous reserves is occupied by illegal settlers. In particular reserves, as much as 85% is settled by outsiders.<sup>281</sup> In short, despite progress in legal protections for indigenous territories, such laws are often not enforced on the ground. In many cases, due to a lack of training, local communities are unable to use legal measures to counter the predatory activities of illegal businesses on their lands.

Despite commitments to secure indigenous land tenure, few governments have well-funded national-level demarcation and titling programmes for indigenous peoples. In most countries, indigenous agencies are a low priority for governments and consequently they suffer repeated budget cuts which limits their capacity to fund land titling and restitution programmes.<sup>282</sup> In 2000 and 2001, Latin American indigenous organisations in several countries were again obliged to stage mass protests to urge their governments to honour past commitments and speed the titling process (Boxes on Ecuador, Bolivia and Mexico). In the meantime, indigenous land issues continue to be treated in a piecemeal way within wider infrastructure and rural development projects. These isolated projects are often at odds with wider macroeconomic and agrarian policies.

Since the 1980s, governments have increasingly adopted market-orientated land policies as part of neoliberal reforms. Land policies have halted agrarian reform and set the goals of establishing efficient land markets, modernising cadastres and progressive tax revenue structures, and securing private property titles. In Latin America, four countries enacted legislation that removed blanket protections prohibiting the sale of indigenous lands in the 1990s: Nicaragua (1990), Mexico (1992), El Salvador (1992) and Peru (1993). In Russia, slow progress with legal measures to promote land security is also blamed on government prioritisation of extractive industries. The mining lobby was also responsible for legal challenges to the law for the recognition of indigenous land rights in the Philippines. These market-based policies have so far failed to achieve poverty reduction among indigenous and peasant small-holders whose small land parcels or legal landlessness constrain their ability to obtain loans from private credit facilities. There is evidence that these market-based approaches have actually increased real landlessness in many rural areas.<sup>283</sup>

Land policies continue to apply a narrow productivist focus within strategies geared towards processing and registering individual property titles. The logic here is that more efficient markets will squeeze out unproductive and inefficient farm units and so boost agricultural production. Indigenous tenure is only recognised insofar as the overall policies contain protective clauses to safeguard existing communal titles. A recent survey of land titling in Latin America, carried out for the Inter-American Development Bank, found that land policies have failed to build on customary tenure regimes. Despite protective clauses, land privatisation has increased pressure on indigenous lands.<sup>284</sup> The survey also revealed that while social scientists working for multilateral agencies may promote interventions based on communal tenure and ethnodevelopment, economists design agrarian programmes with no indigenous components. In Kenya, national programmes to promote livestock

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<sup>280</sup> IWGIA 2001:96

<sup>281</sup> Ardito 1996:67

<sup>282</sup> Indian agencies have recently suffered major budget cuts in Argentina and Paraguay (IWGIA 2001: 149,162).

<sup>283</sup> Mozdzer and Ghimire 2001:283

<sup>284</sup> Plant and Hvalkof 2001:55

development, have undermined pastoralists' communal tenure systems, privatised land holdings and increased poverty and land scarcity.<sup>285</sup>

These conflicting approaches to land issues often occur within the same country and in the same development institution.<sup>286</sup> As a consequence, indigenous involvement in the formulation of land policies has been of mixed quality. Whilst there are positive examples, like the *Guatemala Land Administration Project* noted above (section 4.2.2), other land administration programmes have failed to ensure adequate indigenous participation. If effective participation does occur, it is often late in the preparation phase or not until the implementation of the policy (Panama Box). Lack of early participation requires reactive measures to correct policy gaps where indigenous land tenure needs have been overlooked (Bolivia Box). In Peru, the recently formed National Indigenous Commission for Amazonia (CINA) has urged the government to reform its land administration programme in full collaboration with indigenous peoples' organisations to agree improved technical methods and policies for land demarcation and titling.<sup>287</sup>

In conjunction with market-based land policies, international financial institutions continue to promote national economic development based on export-based agriculture, the withdrawal of the state, and increasing natural resource exploitation. Throughout the region, governments in partnership with the private sector, development agencies and multilateral development banks are consolidating resource extraction infrastructure with pipelines, roads and electricity grids.<sup>288</sup> At the same time, transnational energy networks and intergovernmental agreements on energy are laying the foundations for regional integration and intensified resource extraction. Timber, hydrocarbon and mineral concessions continue to advance into forest territories - often affecting isolated indigenous groups. Both indigenous and non-indigenous commentators therefore observe that while decades of indigenous struggle have eliminated cultural and education policies of assimilation, indigenous peoples are now faced with another homogenising policy based on market integration.<sup>289</sup>

Indigenous peoples therefore criticise multilateral agencies and governments for having contradictory policies. While land titling and ethnodevelopment projects may have positive impacts, these gains are undermined by macro-economic and structural reforms, which are intensifying pressure on indigenous lands and resources, deepening poverty and limiting the government's capacity to address indigenous issues and regulate natural resource use.<sup>290</sup> Policy analysts point out that the poverty alleviation impacts of agrarian programmes have been limited due to wider macroeconomic policies that have degraded the land and resulted in further land concentration.<sup>291</sup>

Across the region subsoil rights are held by the state and so indigenous communities are confronted with mineral and hydrocarbon extraction on their territories with little legal powers to object to or control such activities. Natural resource legislation often disregards, supersedes or undermines indigenous land tenure protections. Indigenous peoples complain that forestry, biodiversity, mineral, and water resource laws are drawn up without their participation.

Recent surveys by indigenous peoples' organisations, NGOs and multilateral agencies have also found that government departments responsible for developing National Forest programmes and National Biodiversity Action Strategies still lack adequate participatory mechanisms to take indigenous peoples' concerns and needs into account in national land-use planning.<sup>292</sup>

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<sup>285</sup> Davis 1992

<sup>286</sup> Ibid.:64-66

<sup>287</sup> CINA 2001:31-32

<sup>288</sup> Amazon Watch 2001a; Vidal 2001; IWGIA 2001:113

<sup>289</sup> e.g., Tresierra 1999:151; Viteri 2001:125

<sup>290</sup> Griffiths 1999

<sup>291</sup> Dorner 2001:100-101

<sup>292</sup> GEF 1998:47; FAO 1999; Verolme *et al* 2000

The regional surveys undertaken for this report reveals a consistent pattern of legal, technical, economic and political impediments to securing indigenous land tenure and livelihood security:

### *Legal obstacles*

- National legal frameworks contain ambiguous and contradictory elements that limit indigenous rights to own, control and use their traditional lands. This is especially the case as regards biodiversity, forestry, hydrocarbon and mining legislation.
- Forestry laws, protected area and natural resource legislation are developed and adopted with limited indigenous participation.<sup>293</sup>
- National laws to implement constitutional norms on indigenous land tenure and autonomous land administration do not yet exist or are only slowly being adopted
- Measures to increase indigenous land security and local autonomy are challenged by vested interests in national legislatures and in local government
- Constitutional gains are reversed and diluted by subsequent counter-reforms in both general laws and the detailed provisions and derogation in organic law
- Country legal frameworks remain inconsistent with international human rights standards and contradict the provisions of ILO Convention 169

### *Institutional, technical and policy obstacles*

- Administrative procedures for demarcation, titling and registration of ownership remain slow, cumbersome and may even complicate land conflicts
- Technical rules for determining the spatial extent of indigenous land titles fail to recognise indigenous tenure regimes and their close attachment to ancestral territories resulting in inadequate titled areas
- Land demarcation and regularisation policies are developed without detailed field baseline studies assessing indigenous land tenure needs and priorities
- Land policies still tend to have a narrow agricultural and economic focus
- Roles and duties of different government agencies in adjudicating indigenous lands and regulating resource management are confused or overlapping
- Government agencies continue to issue timber, oil and mineral concessions on indigenous lands without prior consultation
- Government environmental, forestry and agricultural departmental staff lack training and understanding in indigenous issues and land tenure regimes
- Government agencies do not have adequate mechanisms and incentives for participatory policy making
- National policies on land administration and natural resource management are developed without meaningful indigenous participation and fail to properly integrate indigenous land and resource rights
- Agrarian policies are pro-export and pro-agribusiness and fail to support alternative food policy based on indigenous and peasant small-holders

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<sup>293</sup> Gray, Padellada and Newing 1996; Colchester and Erni 1999. In Peru, recent laws on Forestry, Land Administration and Natural Resource Exploitation have all been developed and adopted without consultation with indigenous peoples: IWGIA 2001:133

## A Survey of Indigenous Land Tenure

- Mitigation programmes associated with large infrastructure projects employ external consultants who impose top-down solutions without consultation and with little understanding of indigenous tenure regimes and prior land claims

### *Economic obstacles*

- Macro-economic programmes fail to consider indigenous land and resource issues and often exacerbate pressures on indigenous lands
- Agencies responsible for demarcation and titling lack adequate budgets and staff for processing claims, carrying out field surveys and issuing titles
- Shortage of funds for purchasing land for land restitution programmes
- Limited funds for compensating relocating third parties illegally occupying indigenous territories
- Land speculation by third parties obstructs state land purchase and compensation schemes
- Deficient government staff and resources to protect titled indigenous territories from invasions and encroachment

### *Political and cultural obstacles*

- Lack of will to implement agreed international standards on human rights and indigenous peoples
- Little interest among provincial government staff and agencies to promote demarcation and titling of indigenous lands
- Indigenous issues are of low priority for macroeconomic policy-makers
- Reluctance to title large indigenous territories due to persistent ethnocentric view that indigenous lands are under-utilised
- Strong opposition by vested interests and local elite who challenge and try to limit indigenous land claims
- Intimidation of indigenous leaders
- Lack of political will to remove illegal colonists encroaching on indigenous lands;
- Unfounded fears that indigenous territorial autonomy will weaken national unity and result in secession

Many of the obstacles listed above derive from deep discrimination stemming from previous policies of the colonial and nation-building periods.<sup>294</sup> These structures of discrimination have proven static and difficult to reform. Nonetheless, indigenous peoples themselves are drawing on their new constitutional rights and international law to challenge threats to their land security and cultural integrity. Indigenous peoples' organisations have forged alliance with national and international NGOs to submit land claims to national courts, constitutional tribunals and the public prosecutor. A body of jurisprudence is now growing that demonstrates governments have a duty to *take action* to demarcate indigenous lands and protect their collective rights (see the Awas Tingni case in section 3).<sup>295</sup> Indigenous communities are also gaining experience in making claims to international courts and tribunals through the Organisation of American States, the World Bank's Inspection Panel and similar fora. On the ground, indigenous organisations are seeking formal commitments by government agencies to guarantee the practical protection of indigenous territories from encroachment by outsiders.<sup>296</sup>

## **7.2 Communal tenure, legal personality and self-governance:**

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<sup>294</sup> Urteaga 2001; Iturralde 2001; Stavenhagen 2001

<sup>295</sup> See Mackay 1999:230ff; CDES 2001; CPESC 2001.

<sup>296</sup> See, for example, Proyecto Serjali 2001

Collective land ownership offers many advantages to administrators. By recognising relatively large areas of land as collective tenures, administrators are freed from the burden of surveying, registering and compiling cadasters of a multitude of small-holdings and then keeping track of them as they change hands. By also recognising a measure of self-governance within collective tenures, the burden on the administration is further reduced, as adjudication of disputes, land inheritance and land management can be left to customary authorities and dispute resolution mechanisms. The advantages of such 'indirect rule' have been recognised since early Roman times. These 'economies of scale' for administrators vary hugely from one locale to another depending on the way states recognise collective tenures and the degree to which they recognise customary institutions and self-governance. This survey has not managed to identify detailed studies, which have appraised collective tenurial regimes from this point of view.

Collective tenures do, however, also present quite distinctive problems of their own. Lack of clarity in the law about which institutions own land and who is authorised to negotiate on behalf of the collective with third parties have led to misunderstandings, have facilitated manipulation by outside interests and have also allowed the mismanagement of communal resources by indigenous factions, individuals and elites, who may take advantage of the mismatch between market opportunities and indigenous land management systems to advance their personal interests at the expense of the wider group. This survey has encountered this problem even where lands are effectively inalienable. In Papua New Guinea this has occurred because lease-lease back arrangements have allowed factions to dominate land use for personal gain; in the Philippines and Brazil, because customary centralised chieftaincies were not adapted to market conditions and have thus permitted chiefs to enter into contracts with outsiders without community mechanisms to achieve broad consensus. National laws and local customs may prohibit land alienation but not provide comparable controls over sales of timber and minerals. In Africa, inter-ethnic customary regimes have also led to marginal social groups being excluded from access to land and resources as populations increase and market pressures intensify competition for land.

### **7.3 Communal tenure and gender implications:**

Generalising about the relations between indigenous tenure regimes and the rights and interests of indigenous women is highly problematic as customary systems are so diverse and afford such different rights to women in different circumstances. Many Amazonian peoples provide very secure rights to women, for example, and consider shifting cultivation plots, even though they have been cleared by men, to be women's property once they have planted the area with crops. Many Dayak groups in Borneo reckon descent and inheritance cognatically, giving equal rights to men and women in securing rights to communal lands. On the other hand, some tribal groups in India and Africa consider fields that are ploughed by men, to be the property of men, which women gain access to through marriage or male kin. Commonly, indigenous women do play central roles in food production, preparation and distribution and tend to make decisions about crop choice and cultivation methods, which favour food security and self-sufficiency over cash production.<sup>297</sup>

Indigenous women have been severely impacted by government programmes aimed at transforming indigenous livelihoods (and see section 6.5). US policy towards indigenous peoples in the second half of the 19<sup>th</sup> century, for example, dismantled collective land systems and parcelled out allotments to indigenous households with titles being granted to male heads of families. Indigenous women were disenfranchised by the process and expected to become subordinate housewives.<sup>298</sup> Lack of understanding of customary systems of land tenure and traditional systems of inheritance, land rights and residence, have undermined development projects. For example, in the Republic of the Congo, efforts by the UNDP and ILO to promote agricultural development and rural cooperatives actually led to decline in farm income, the marginalization of women and the replacement of matrilineal forms

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<sup>297</sup> Maxwell and Wiebe 1998:23.

<sup>298</sup> Debo 1940; Carter 1999



of inheritance with patrilineal ones, echoing the social changes that were also induced by the slave trade in 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>299</sup>

Laws which establish who indigenous people have been found to discriminate unfairly against women, such that while indigenous men in mixed marriages retain their legal entitlements indigenous women do not. The Indian Act in Canada was amended in the 1980s to remove this discrimination but, for example, in Guyana, indigenous women in mixed marriages lose their rights of access and use of natural resources on State lands.

Insofar as it is true that indigenous men tend to produce more for the market while indigenous women prioritise production of subsistence and self-sufficiency, the monetisation of indigenous economies and the shift in values towards cash, leads to women losing prestige and authority in the communities. In general, in Africa, women enjoy less secure access to land and resources than men and therefore tend to suffer disproportionately from land pressures and market –driven changes. These tendencies are exacerbated in those areas where indigenous women are given less formal education, are therefore less literate and so marginalized from market transactions and administrative procedures. On the other hand, the decline in the importance of hunting in the denuded hills of Northern Thailand has also negatively affected male self-esteem and contributed to the high rates of drug addiction and anomie found in indigenous communities.<sup>300</sup>

Given these very different situations, the generalised call by the Convention on the Elimination of Discrimination Against Women to afford women individual land titles to avoid them being kept in dependency seems inappropriate. Some customary tenure regimes afford considerable security to indigenous women and individual titling may worsen not better their lot. A case by case approach, in which the pros and cons of tenurial reforms are carefully weighed up by the communities concerned, with the full participation of indigenous women, would seem to be the safest route forward.<sup>301</sup>

### 7.4 Self-demarcation and mapping

One of the most significant developments of the past thirty years have been the pro-active initiatives undertaken by indigenous peoples and supportive NGOs to map and demarcate their own lands. Using a wide variety of technologies and methods, indigenous communities from the Arctic to the Amazon and from the Americas to Papua New Guinea have been making their own maps of their lands as a way of confronting the imposed land use plans of government and establishing the complexity and validity of their own visions of land. Techniques used have varied widely, from simple sketch mapping and community level discussion groups, to highly technical surveys involving qualified cartographers and registered surveyors. Some of the most progressive techniques involve training community members in the use of Global Positioning System devices so that they are able to precisely ‘waymark’ locations of cultural, economic and historical significance. Importing such georeferenced data into simple Global Information System grids along with scanned in base maps allows indigenous communities to own and control the content of maps without compromising on technical quality. Community experiences with these techniques have proven their value not just for validating indigenous knowledge and securing indigenous rights but also as mechanisms for overcoming inter-ethnic rivalry, promoting inter-generational transmission of customary law (and lore) and promoting land-use planning.

Choice of the techniques has varied depending mainly on national laws and political contexts as well as the degree of autonomy sort by the mappers. In some countries, such as Peru and the Philippines, independent surveys, verified by government surveyors, are accepted as a basis for land claims and the registration of land titles. In other countries, like Guyana and Sarawak, governments have refused to survey indigenous lands, leaving the communities no choice but to carry out independent surveys themselves. Such maps have proved crucial in the subsequent assertion of land claims through the

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<sup>299</sup> Desjeux 1987; Harms 1981.

<sup>300</sup> Von Geusau 1986.

<sup>301</sup> Cf. DfID/ODI 1999.

courts (see also boxes on Venezuela, Guyana and Malaysia) or, where government agencies have proved open to discussion, have provided a sound basis for the renegotiation of indigenous land claims, as in South Africa.<sup>302</sup>

Although some governments have proved hostile to these initiatives, even going so far in the case of Sarawak to make such mapping illegal, in general there has been a widespread appreciation that 'social mapping' techniques provide an important means by which indigenous people can enter into dialogue with decision-makers and land use planners on a more equal basis.<sup>303</sup>

### 7.5 Communal tenure and sustainable natural resource management:

Since the 1978 Jakarta Forestry Congress, an appreciation of the need for a people-centred approach to natural resource management has steadily gained ground. Forest management systems that give rights to communities have been widely promoted but only recently has the realisation grown that effective community-based management requires tenure reforms and not just shared or devolved management.<sup>304</sup>

Conservation agencies have also begun to accept the value of community-based conservation. In 1994, the IUCN revised its protected area categories to accept that protected areas could be owned and managed by, *inter alia*, indigenous peoples and since then new policies and guidelines advocating a respect for indigenous peoples rights. In 1996, following several years of intensive engagement with indigenous peoples' organisations, the World Wide Fund for Nature-International adopted a *Statement of Principles on Indigenous Peoples and Conservation*, which endorsed the UN Draft Declaration on the Rights of Indigenous Peoples, accepts that constructive engagement with indigenous peoples must start with a recognition of their rights, upholds the rights of indigenous peoples to own, manage and control their lands and territories and to benefit from the application of their knowledge.<sup>305</sup> The same year the World Conservation Congress, the paramount body of the World Conservation Union, adopted seven different resolutions on indigenous peoples, which *inter alia*, recognise indigenous peoples land rights.<sup>306</sup> In 1999, the World Commission on Protected Areas adopted guidelines for putting these principles into practice.<sup>307</sup>

A series of four regional conferences being organised by the Forest Peoples Programme and the International Work Group for Indigenous Affairs, in collaboration with regional indigenous peoples' organisations is presently evaluating the extent to which these new principles adopted by conservationists are being put into practice. The three conferences so far held in Latin America, South and South East Asia and Sub-Saharan Africa have revealed only a few cases where these principles are already being applied. More often, especially in Asia and Africa, application of these principles is still a long way off, some of the main obstacles being:

- National conservation policies and laws are still framed by the 'classical model' of *in situ* conservation which deny the rights of resident peoples
- Lack of training and awareness in national and international conservation agencies in social issues, participatory approaches and joint management
- National policies and laws which deny indigenous peoples' rights
- Lack of secure tenure

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<sup>302</sup> Poole 1995 a, b, forthcoming; Eghenter 2000; Colchester 2000.

<sup>303</sup> Social mapping has also been advocated by the United Nations General Assembly Special Session (UN 2001).

<sup>304</sup> Colchester 1992; Sarin 2001; Wily and Mbaya 2001.

<sup>305</sup> WWF, 1996.

<sup>306</sup> IUCN 1997.

<sup>307</sup> Beltran and Phillips 2000.

- Mutual mistrust between conservation agents and indigenous people.

On the other hand, the conferences revealed a genuine wish on the part of both indigenous peoples and conservationists to find mutually acceptable solutions that accept their different but complementary priorities and goals.<sup>308</sup>

These are important advances but what still needs wider appraisal and recognition is the extent to which indigenous systems of tenure and land use can by themselves secure environmental values and services, without having to be classified as ‘forests’ and ‘protected areas’. Progressive conservation agencies are already working directly with indigenous peoples to help them secure their land rights and modify their land use systems to meet social, economic and conservation goals.<sup>309</sup>

## 7.6 Communal tenure and community development

As noted, a widely held but little substantiated prejudice among development specialists is that collective land ownership acts as a brake on development by discouraging individual entrepreneurship, investment in more productive land use, the use of land as collateral for loans and active land markets. From this point of view, the dismantling of collective tenures is seen as a necessary step towards the promotion of modern agriculture and land use.<sup>310</sup> Community level studies in Guatemala have shown that collective land management systems tend to be more conservative in terms of crop-choice and to prioritise self-sufficiency and food security above immediate profits. Individualised land ownership, on the other hand, has been favoured by those prepared to take more risks and who also eschew customary patterns of sharing wealth and surplus. However, good data are lacking on which systems most benefit people as whole in the longer term.<sup>311</sup>

In Africa, research on communal tenure undertaken by the World Bank have revealed that communal tenure systems are dynamic and flexible, allocating individual, household and family rights within communal properties. These systems have shown that they are able to balance demands, take into account the welfare of less well-off members of the community and cushioning farmers against poverty.<sup>312</sup> Summarising these studies the World Bank concluded in its 1992 *World Development Report*:

*...indigenous systems of communal tenure appear flexible enough to evolve with the increasing scarcity of land and the commensurate need for greater security of land rights. At the same time, the retention of some community control over landownership helps prevent the emergence of landlessness.*<sup>313</sup>

Moreover, what those who advocate the dismantling of collective tenures so often fail to take into account is that politically marginal groups, like indigenous peoples, often fare particularly badly in ‘free’ land markets of individualised holdings, because cultural differences, social marginalisation and discrimination prevent them having equal access to information, technical assistance, the administration, capital, justice and markets. Not all indigenous peoples do seek to maintain their collective land ownership systems, but development specialists need to accept that those who wish to maintain their customary regimes may have good reasons for so choosing.

The process of ethnic reaffirmation among indigenous peoples during the 1970s and 1980s was accompanied by their rejection of top-down integrationist development projects. Indigenous peoples’ organisations and grassroots NGOs began to advocate an alternative development concept, based on

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<sup>308</sup> Padellada, Gray Newing 1998; Colchester and Erni 2000.

<sup>309</sup> Weber, Butler and Larsen 2000.

<sup>310</sup> France 1969

<sup>311</sup> Annis 1987

<sup>312</sup> Migot-Adholla et al 1991; Blarel et al 1992; Place and Hazell 1992.

<sup>313</sup> World Bank 1992:144.

indigenous territorial autonomy, self-determination and “self-development”.<sup>314</sup> Self-development or “ethnodevelopment” is about indigenous peoples themselves controlling the development process to recuperate, maintain or enhance livelihood security and quality of life according to their own priorities.<sup>315</sup> This bottom-up approach is based on the assertion that development interventions can only be effective if they build on existing social strengths and are consistent with local cultural values and aspirations.<sup>316</sup> For indigenous peoples, the first precondition for effective ethnodevelopment is security of land tenure and local jurisdiction over natural resources within an ethnic territory. Once the resource base is secured, indigenous communities use their understanding of their needs, strengths and weaknesses to design and implement grassroots development projects.

### 7.7 Aid agency experiences:

In the 1990s, in response to their own empirical surveys in Latin America that revealed a strong correlation between ethnicity and poverty<sup>317</sup>, the World Bank began to explore possible strategies to tackle indigenous poverty. In rethinking its approach to indigenous peoples the Bank has sought to move away from reactive “mitigation” and damage control towards a proactive “do good” development targeting indigenous peoples. Following an initial study that recognised the value of ‘ethnodevelopment’, the Bank commissioned a survey of 28 “successful” indigenous development cases in Latin America. The study identified 10 preconditions for effective indigenous development:<sup>318</sup>

- ❑ respect for human rights
- ❑ food security
- ❑ secure land and resource rights
- ❑ indigenous participation in project planning and implementation
- ❑ intercultural education and social capital building
- ❑ strengthening of indigenous civil organisations
- ❑ diversification of production
- ❑ appropriate financial assistance
- ❑ technical assistance and training
- ❑ state support for indigenous self-development.

In 1997, the Bank put these principles into practice in Ecuador in its first ever national-level poverty reduction project targeting indigenous and Afro-Ecuadorian peoples. The project was developed directly with indigenous peoples’ organisations and the government and contains land titling components for lowland areas and land restitution for land-hungry communities in the uplands (Ecuador box). Field projects are supported on the basis of local development plans elaborated by base communities. Based on the aspirations of local communities, the project has sought to combine land tenure, food security, natural resource and water regularisation, education, institutional strengthening and support for cultural events.<sup>319</sup>

The ethnodevelopment approach is being used in World Bank and GEF natural resource management projects including, among others, the *Peru-Sierra Natural Resources Project*, the *Paraguay-Natural Resource Management Project* and the *Panama Atlantic Biological Corridor Project*.

The Bank is now extending its ethnodevelopment portfolio via Learning and Innovation Loans (LILs) targeting indigenous poverty in Peru, Bolivia and Argentina. The main goal of these projects is to

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<sup>314</sup> Bonfil Battalla 1981

<sup>315</sup> Gray 1997:252-254

<sup>316</sup> The ethnodevelopment model also has origins in the “appropriate” technology and community development work of NGOs working with rural peasant and indigenous communities during the 1970s (see Bebbington and Thiele 1993:36-37).

<sup>317</sup> Psacharopoulos and Patrinos 1994a, 1994b

<sup>318</sup> Partridge, Uquillas and Johns 1996; Roper, Frechione and De Walt 1996:4-5

<sup>319</sup> van Nieuwkoop and Uquillas 1999; Griffiths 1999

build up indigenous and government capacity to administer development projects. These pilot projects may be followed by larger long-term national-level projects.<sup>320</sup> The willingness of governments to take on these dedicated loans for indigenous peoples indicates that they are beginning to show some interest in the cultural and social aspects of development and poverty reduction. This is a major departure from past government policies that sought to apply western technological solutions to alleviate poverty among “backward” indigenous communities.

Other multilateral agencies like the International Fund for Agricultural Development (IFAD) have also adopted the ethnodevelopment model in their field projects with indigenous communities in Bolivia, Colombia and Brazil. Several of these projects combine land tenure, food security and sustainable income components.<sup>321</sup>

The regional development banks are also beginning to develop similar approaches. The Inter-American Development Bank has followed the World Bank’s lead and recently carried out a detailed survey of land titling and indigenous peoples in Latin America with the aim of developing a programme to address the economic and cultural needs of indigenous peoples, within the framework of its agricultural and poverty alleviation programmes. The review found that hitherto the IDB had paid only limited attention to indigenous peoples in its land administration and land titling projects. Projects directly targeting indigenous peoples and aimed at securing their rights are only now being contemplated by the IDB, but previous land titling projects have shied away from addressing collective tenures. The review is critical of new IDB land titling projects in Ecuador and Peru, which aim to provide individual titles to peasants and indigenous highlanders, in order to promote more vigorous land markets. *‘The programs were not designed on the basis of careful baseline studies in those communities, nor does the available project documentation point to detailed knowledge of communal land tenure systems or their degree of market interaction’.*<sup>322</sup> The report stresses the lack of knowledge about the connections between poverty and land tenure patterns and recommends a much more engaged policy interaction with indigenous peoples. It warns against imposed visions that assume *a priori* that individualised land holdings and vigorous land markets provide the best options for indigenous peoples.

The Asian Development Bank adopted a policy on indigenous peoples in 1998 and is currently in the process of developing a poverty alleviation strategy targeting indigenous peoples. Titled ‘technical assistance for capacity-building for indigenous peoples/ethnic minority issues and poverty reduction’, the programme has commenced with poverty assessments of indigenous peoples in four countries, as well as a general overview of indigenous tenure regimes in the Asia-Pacific. These studies have yet to be released but a preliminary finding of the Indonesian country study is that insecure tenure of indigenous peoples is a major contributor to poverty.<sup>323</sup>

The African Development Bank stands out as the one regional development bank yet to develop a policy on indigenous peoples or a culturally tuned approach to dealing with land tenure.

### 7.8 Recommendations

The cases of participatory and collaborative demarcation, titling and joint management initiatives identified in this report provide examples of best practice that need to be mainstreamed in legal frameworks and replicated in practice at the country level. Likewise, the multiple obstacles to the effective implementation of progressive constitutional reforms need to be eliminated. Together, the lessons from the positive and negative findings of this report generate a number of recommendations for strategies to improve indigenous land tenure and livelihood security:

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<sup>320</sup> World Bank 2000, 2001a

<sup>321</sup> IFAD-CAF 1998; Iturri and Schulze 1998

<sup>322</sup> Pland and Hvalkof 2001:4.

<sup>323</sup> Safitri and Bosko 2001.

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- ❑ Support governments to undertake institutional and legal reforms to implement relevant international standards relating to land and indigenous peoples (e.g., American Convention on Human Rights, ILO 169 etc.)
- ❑ Assist governments to fulfil commitments on land tenure and indigenous peoples made under international agreements on forests, biodiversity conservation and sustainable development (e.g., Agenda 21; Article 10c of the CBD; IPF/IFF Proposals for action)
- ❑ Address indigenous land tenure issues in the formulation of National Forest programmes, National Biodiversity Action Plans, National Sustainable Development Strategies and Poverty Reduction Strategy Papers
- ❑ Guarantee compliance with the principle of *prior* consultation and free, prior and informed consent in relation to policies and activities affecting indigenous lands
- ❑ Ensure land administration policies and legal frameworks are developed and adopted with the full and effective participation and *consent* of indigenous peoples and their representative organisations
- ❑ Adopt a broad cross-sectoral approach to national land policy that takes account of the socio-cultural, political, economic and environmental aspects of land tenure
- ❑ Train government agricultural, forestry and conservation staff in indigenous issues
- ❑ Build capacity of government staff to work directly in collaboration with indigenous organisations and base communities
- ❑ Train and recruit indigenous professionals in relevant government departments
- ❑ Treat indigenous land tenure as a cross-cutting theme in drafting general and organic law relating to natural resources, agrarian development and the extractive industries
- ❑ Ensure the active participation of indigenous peoples' representatives in the drafting of national plans and laws on natural resources, biodiversity and economic development
- ❑ Remove legal ambiguities and contradictions in laws and civil codes that weaken or supersede legal protections for indigenous land tenure
- ❑ Support the participatory development and adoption of national laws to enable community and collaborative demarcation of indigenous lands
- ❑ Recognise and protect indigenous territorial models of land tenure
- ❑ Promote land policies that consolidate indigenous land and title "maximum territorial units" in order to meet livelihood and cultural integrity criteria and establish areas large enough for sustainable land use and conservation
- ❑ Process indigenous titles as a priority in land regularisation programmes (i.e., process indigenous claims prior to "third parties" encroaching on indigenous lands)
- ❑ Prohibit the involuntary displacement or resettlement of indigenous peoples
- ❑ Penalise people occupying indigenous territories illegally
- ❑ Annul resource concessions superimposed on indigenous territories without prior consultation
- ❑ Annul illegal contracts affecting indigenous lands
- ❑ Support efforts to process applications for extension to titled lands
- ❑ Develop the technical rules and field methods for land demarcation through collaborative field studies with indigenous peoples to assess customary land tenure regimes, livelihood strategies and local priorities and aspirations
- ❑ Involve indigenous surveyors in intersectoral teams for the delineation of boundaries
- ❑ Support partnerships between indigenous peoples, NGOs and government agencies for baseline studies of land demarcation and regularisation activities

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- ❑ Build up indigenous capacity to demarcate and administer their own territories
- ❑ Streamline and simplify the administrative procedures for land demarcation, titling and registration
- ❑ Establish permanent spaces for the participation of indigenous peoples in land titling programmes at the local, regional and national level
- ❑ Combine titling programmes with capacity building for local beneficiaries on national and international legal aspects of land regularisation
- ❑ Agree benchmarks for evaluating titling programmes and establish participatory monitoring mechanisms with base communities
- ❑ Establish participatory land conflict resolution procedures giving aperture to customary law and conflict resolution mechanisms
- ❑ Make land title documentation accessible in cadasters at the *both* the local and national level to enable indigenous communities to access titles to defend their territories
- ❑ Clarify the legal personality of land owner collectives
- ❑ Recognise ownership of traditional lands superimposed by protected areas
- ❑ Promote indigenous territories and traditional authorities as effective entities for land administration and natural resource management
- ❑ Support national-level programmes for the co-management of protected areas and forest reserves through joint management agreements between indigenous land owners and government agencies
- ❑ Remove duplication and ambiguity regarding the roles of different state agencies in land and natural resource administration
- ❑ Support government agencies charged with land regularisation duties with dedicated funds for indigenous land tenure work
- ❑ Ensure budgets for land regularisation are developed according to detailed baseline studies
- ❑ Provide long-term funding and streamlined disbursement procedures for land restitution programmes
- ❑ Support budgets for the resolution of land conflicts and removal of people encroaching on indigenous lands
- ❑ Acknowledge and support indigenous plans for sustainable food production and community development
- ❑ Support indigenous Community-based Natural Resource Management initiatives

Whilst there is a need to support positive joint management and self-development initiatives, there is general agreement that there is also a need to rethink wider macro-economic policies that create pressures on indigenous lands and undermine their livelihood<sup>324</sup>. Devising these alternative sustainable development strategies will require effective and meaningful dialogue with indigenous peoples' own representatives. In many countries, indigenous peoples' organisations have developed alternative agrarian and development policies that are not acted on by the government. Progress towards developing new cross-sectoral and sustainable land use policies will require policy-makers to take indigenous development proposals seriously.

All these recommendations point to the need to improve the participation of indigenous organisations in national development planning and democratic processes. As well as the specific recommendations listed above, one key strategy for improving land policies over the medium to long term must

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<sup>324</sup> Dorner 2001

therefore be to increase support for the institutional strengthening of indigenous peoples' representative community-based and political organisations.

### **7.9 Knowledge gaps**

This survey does not claim to be exhaustive. It has been limited by both by the time available to the study and by the available literature. This survey did not identify any previous comprehensive study of indigenous customary land tenure regimes. Available information on this subject is partial and embedded within the ethnographic and human ecology literature. The available information is also regionally of very varied quality and depth. Whereas information about indigenous tenure systems and their relations to the law is relatively complete for Latin America and the Pacific, information of comparable quality is much harder to access for indigenous peoples in Asia and especially Africa, where human rights lawyers have only recently begun to make assessments of the way land tenure regimes encompass indigenous rights. Information about the way collective tenures articulate with taxation regimes has been even harder to find.

A more obvious knowledge gap which seems to emerge from this survey, is the absence of national-level poverty assessments that explore the links between indigenous land tenure systems and food security. This gap is one that the FAO is well-placed to help fill by encouraging in-depth national level participatory studies of customary land tenure regimes and their linkages to livelihood security. Studies should be carried out in a participatory way with indigenous peoples and the findings should be used to improve the formulation of future land, natural resource and poverty reduction policies. These studies need to be reinforced by legal framework studies of domestic laws and policies to identify gaps and contradictions. Again, such legal studies should involve the active participation of indigenous lawyers and representatives, possibly through the formation of national commissions.



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