

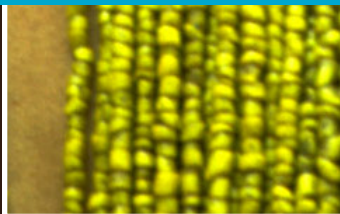


Indigenous peoples' rights to lands, territories, and resources

By Birgitte Feiring



INTERNATIONAL
LAND
COALITION



Indigenous peoples' rights to lands, territories, and resources



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Foreword

The International Land Coalition is working to promote indigenous peoples' rights to land, territories, and resources at diverse levels. It is in this spirit that, during the Global Land Forum in April 2013, ILC members pledged to work together to more effectively support indigenous peoples through the Antigua Declaration:

"We voice our concern at the extreme vulnerability of many Indigenous Peoples to land grabbing and criminalisation of customary forms of land and natural resource use, particularly in contexts of extractive industries, conservation areas and commercial agriculture. Recognising that respect for indigenous cultures contributes to sustainable and equitable development and management of the environment, we commit ourselves to work together to more effectively support Indigenous Peoples in their struggle for territorial rights and the protection of their environments."

The author of the present study, Birgitte Feiring, is a renowned anthropologist who has worked on indigenous peoples' rights and development for more than 25 years in several agencies worldwide, including as the ILO Chief Technical Adviser on Convention No. 169 and as an adviser to bilateral and multilateral agencies and to indigenous peoples themselves.

This study involved a consultative process that helped mobilise members and partners to share their experiences and perspectives regarding indigenous peoples' rights to lands, territories, and resources.

This process started during a seminar in February 2013 attached to the 2013 IFAD Indigenous Peoples Forum. This seminar aimed to build engagement and collect perspectives from 15 different organisations working on indigenous issues. In March, a technical workshop was organised to reflect on how ILC's work can be widened and consolidated to support a more strategic and systematic engagement on indigenous peoples' issues.

The ILC Secretariat surveyed ILC members to map their individual involvement, expertise, experiences, and expectations for Coalition work on indigenous peoples' land rights. A synthesis paper containing the initial findings was presented and further debated at the 2013 Global Land Forum in Antigua, Guatemala and at an ILC side-event during the UN Permanent Forum on Indigenous Issues (UNPFII) in May.

The current publication, which synthesises the outcomes of these consultations, was peer-reviewed by various indigenous peoples' representatives and experts. The study confirms what we knew: indigenous peoples entertain special relationships with their lands, territories and resources, as these are central to their world view, their cultures, livelihoods, spirituality, identity, and their continued existence as distinct peoples.

In light of this fundamental reality, the study assesses all the main international instruments, mechanisms, UN bodies, and other regional and global initiatives that address concerns relating to indigenous lands, territories, and resources. In addition, it carries out an extensive regional review, showing how the situation of indigenous peoples varies across regions and countries. It also analyses the terms in which indigenous peoples' issues are posed in core thematic and transversal issues such as women's land rights, environment, and climate change. Finally, the study concludes with an overview of global trends, challenges, and opportunities that pertain to indigenous peoples' land and territorial rights.

The reader may find of particular interest the annexed table on a possible set of indicators of progress regarding the promotion of indigenous peoples' land rights and of the implementation of the key land-related provisions in international frameworks regarding indigenous peoples' lands, territories and natural resources. These indicators are of great relevance in the current debate on post-2015 development goals and related indicators.

The June 2013 conference held in Alta, Norway, in preparation for the World Conference on Indigenous Peoples (to be convened in September 2014) reconfirms through what is known as the Alta Outcome document the relevance of this theme for securing indigenous peoples' rights and existence.

We express our profound gratitude to all ILC members, indigenous peoples' representatives, and indigenous experts who provided their inputs and comments to enrich the present publication through their participation in consultations organised as part of the study processes and/or in reviewing the draft document.

This study is an attempt to help improve the understanding of a highly complex subject: the status of and trends in indigenous peoples' land, territories and natural resources. Its ambition is to contribute to indigenous peoples' struggles for the recognition of their role as custodians of land, water, biodiversity, and other natural resources on behalf of all humanity.

A handwritten signature in black ink, appearing to read 'Madiodio Niasse', with a long horizontal line extending to the right.

Madiodio Niasse
Director, ILC

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List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AIPP	Asia Indigenous Peoples Pact
ALPFG	African Land Policy Framework and Guidelines
ASEAN	Association of Southeast Asian Nations
ADB	Asian Development Bank
CBD	Convention on Biological Diversity
CCA	Common Country Analysis
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPES	Centro Peruano de Estudios Sociales
CERD	Committee on the Elimination of Racial Discrimination
CGIP	Consultative Group for Indigenous Peoples
CSW	Commission on the Status of Women
DENR	Department for Environment and Natural Resources
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
ECOSOC	Economic and Social Council
FAO	Food and Agriculture Organization
FPIC	Free, prior, and informed consent
IADB	Inter-American Development Bank
IACHR	Inter-American Court of Human Rights
IASG	Inter-Agency Support Group
ICC	Indigenous Cultural Communities
ICCA	Indigenous and Community Conserved Area
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFI	International financial institution
ILC	International Land Coalition
ILO	International Labour Organization
IPAF	Indigenous Peoples Assistance Facility
IPRA	Indigenous Peoples Rights Act
IWGIA	International Work Group for Indigenous Affairs
MBOSCUDA	Mbororo Social and Cultural Development Association of Cameroon
NCIP	National Commission on Indigenous Peoples
NCR	Native customary rights
NES	National Engagement Strategy
OHCHR	Office of the High Commissioner for Human Rights
PAFID	Philippine Association for Intercultural Development
PRO 169	Programme to Promote ILO Convention No. 169
REDD+	Reducing Emissions from Deforestation and Forest Degradation
RIPP	Regional Indigenous Initiatives
UEFA	Union pour l'Émancipation de la Femme Autochtone
UNDAF	UN Development Assistance Framework
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNIPP	United Nations Indigenous Peoples Partnership
UNPFII	United Nations Permanent Forum on Indigenous Issues
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
WCMC	World Conservation Monitoring Centre
WISP	World Initiative on Sustainable Pastoralism

Introduction

The International Land Coalition (ILC) is a global alliance of intergovernmental and civil society organisations (CSOs) that seeks to secure equitable access to land and resources for the rural poor through advocacy, knowledge management, networking, capacity building, and dialogue. Indigenous peoples are estimated to comprise more than 370 million people worldwide. While they constitute approximately 5% of the world's population, they make up 15% of its poor and about one-third of its 900 million extremely poor rural people (DESA, 2009: 21). Indigenous peoples have strong spiritual, cultural, social, and economic relationships with their traditional lands, but their land rights are often the most precarious. Hence, indigenous peoples' issues are of central importance to ILC's mandate.

As noted in the ILC Strategic Framework (2011–2015), recent developments at the international level have created opportunities to further push the agenda for securing land rights for indigenous peoples. In particular, the 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is a milestone in this regard.

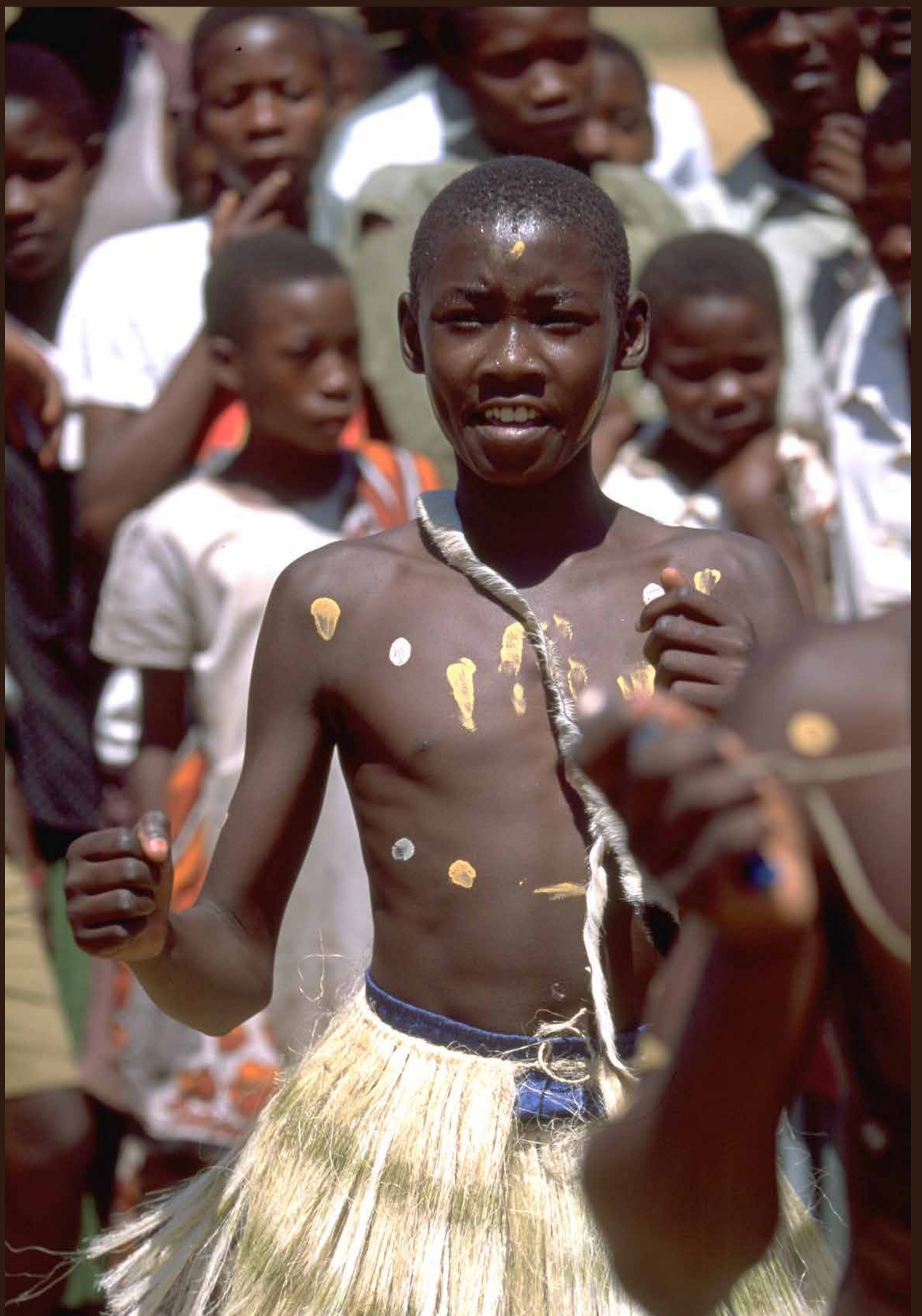
ILC and its comprehensive network of member organisations are working on a wide range of issues relevant to or directly addressing and involving indigenous peoples. However, ILC has never systematically analysed the distinctive features of indigenous peoples' rights to lands, territories, and resources and the potential implications of such an analysis for the Coalition's further engagement on certain thematic priorities and with indigenous peoples themselves. It is in this context that ILC has commissioned the present study.

Methodologically, the study builds on an extensive review of literature and materials produced by ILC (the Secretariat and members of the Coalition network) as well as other partners; interviews and interaction with ILC Secretariat staff and management, including regional coordinators and focal points; interviews and consultations with indigenous resource persons; and a technical workshop organised by ILC in Rome in March 2013 to discuss the main outline and features of the present study.

A summary of the study was presented at the ILC Global Land Forum in Guatemala in April 2013 and at the 12th Session of the UN Permanent Forum on Indigenous Issues (UNPFII) in May 2013, for further consultation, input, and enrichment by ILC members and indigenous organisations.

1

Indigenous
peoples' rights to
lands, territories,
and resources





1.1 Identification of indigenous peoples

Far from being an ethnographic or cultural category, "indigenous peoples" is a concept under international law that corresponds with a well-defined set of individual and collective rights, including to lands, territories, and resources.

Thus, identification of indigenous peoples is the basis for recognition of their collective rights. Consequently, failure to identify indigenous peoples as such incurs the imminent risk of violating the collective aspects of their human rights.

The term "indigenous peoples" is a common denominator for more than 370 million people, spread across some 90 countries around the world (DESA, 2009: 1). Given the diversity of indigenous peoples, there is a broad international consensus that a universal definition is neither necessary nor desirable. Instead, the recommended approach is to identify the peoples concerned in a given country context, putting particular emphasis on their self-identification as indigenous peoples.

Convention No. 169 of the International Labour Organization (ILO) provides a set of subjective and objective criteria, which are jointly applied to guide the identification of indigenous peoples¹ in a given country. According to these criteria, indigenous peoples:

¹ The Convention uses the inclusive terminology of "indigenous and tribal peoples" and ascribes the same set of rights to both groups. In Latin America, for example, the term "tribal" has been applied to some Afro-descendant communities.

- » Descend from populations who inhabited the country or geographical region at the time of conquest, colonisation, or establishment of current state boundaries;
- » Retain some or all of their own social, economic, cultural, and political institutions, irrespective of their legal status;
- » Have social, cultural, and economic conditions that distinguish them from other sections of the national community;
- » Have their status regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- » Identify themselves as indigenous peoples.
- » Other characteristics highlighted by a number of institutions are:
 - » A special relationship with land and natural resources;
 - » A history of oppression and ongoing conditions of non-dominance;
 - » Aspirations to continue to exist as distinct peoples

These characteristics immediately underline the importance of land, territories, and resources for indigenous peoples. The territories they have traditionally occupied, and which have shaped their distinct identities, livelihood practices, and knowledge systems, have been submerged into nation-states that often do not respect their customary tenure systems. Thus their history and, in many cases, their current situation is marked by continuous loss of control over lands, territories, and resources. It is this situation of discrimination that the international framework for the recognition of indigenous peoples' rights attempts to remedy.

While the term "indigenous peoples" is the common denominator used in international instruments, these peoples are often known in national or local contexts by terms such as *adivasis*, *aboriginals*, *hill tribes*, *hunter-gatherers*, etc., or simply by the name of the specific people.

In all parts of the world, there is growing recognition of the importance of protecting indigenous peoples' rights, as an integral element of the promotion of human rights, democracy, good governance, sustainable development, and environmental protection. This global commitment was clearly expressed in 2007, when 144 governments voted in favor of the adoption of the UN Declaration on the Rights of Indigenous People (UNDRIP). The African Commission on Human and Peoples' Rights (ACHPR) has also undertaken groundbreaking work to contextualise the concept of indigenous peoples to the African region (see ACHPR, 2005). However, some governments, particularly in parts of Africa and Asia, are still reluctant to acknowledge the existence of indigenous peoples within their states, in yet another denial of these peoples' human rights.

Most indigenous peoples have highly specialised land use practices and livelihood strategies, developed over generations and embedded in knowledge and belief systems that are often undocumented and governed by customary institutions that often remain unrecognised. In the midst of the financial, environmental, and climatic crisis facing many countries, there is growing recognition of the contribution of indigenous peoples' traditional knowledge to sustainable development and ecosystem management, biodiversity conservation, and climate change adaptation.



1.2. Land and resource rights in the Declaration and the Convention

The key international instruments that define indigenous peoples' rights are UNDRIP and ILO Convention No. 169. These two instruments are compatible and mutually reinforcing and define indigenous peoples' rights to lands, territories, and resources under international law.

Indigenous peoples' rights are not "special" rights, and UNDRIP and Convention No. 169 do not extend or invent any "new rights". On the contrary, the two instruments are articulations of universal human rights, as they apply to indigenous peoples. This means that they contextualise universal rights, which states are bound to respect, protect, and fulfil, to the situation of indigenous peoples by taking the collective aspects of these rights into account in order to overcome the historical injustices and current patterns of discrimination that indigenous peoples face.

UNDRIP was adopted in 2007 by an overwhelming majority within the UN General Assembly and thus represents a global consensus. Convention No. 169 was adopted in 1989. It becomes legally binding upon ratification and has thus far been ratified by 22 countries² (15 in Latin America and the Caribbean, four in Europe, two in Asia-Pacific, and one in Africa). A previous ILO Convention No. 107 (adopted in 1957) is still in force for 17 countries (six in Africa, four

² Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela.

in Asia, and five in Latin America and the Caribbean). Although ILO Convention No. 107 is partly regarded as outdated due to its assimilationist approach, its provisions on land rights are relatively progressive and recognise indigenous peoples' right to collective or individual ownership over the lands they traditionally occupy (ILO Convention No. 107 art. 11).

The Declaration and Convention No 169 are based on the recognition of the particular significance and cultural and spiritual values that indigenous peoples attach to their lands and territories, which go far beyond their simple monetary or productive value. As indicated in the preamble of UNDRIP, "control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs".

Further, both instruments stipulate that indigenous peoples have the right to determine their priorities and strategies for development and use of their lands, territories, and resources (UNDRIP art. 32.1; C169 art. 7.1). In general, indigenous peoples' rights to land, territories, and resources must be understood in the broader context of these peoples' right to self-determination (UNDRIP art. 3), as well the rights to property, non-discrimination, cultural integrity, and development.

The Declaration and the Convention both contain detailed provisions on indigenous peoples' rights to land, territories, and resources that are described in the following sub-sections. See section 5 for a schematic overview of these provisions, with related indicators for possible monitoring of progress towards implementation.

1.2.1. Nature and scope of indigenous peoples' right to land, territories, and resources

UNDRIP and ILO Convention No. 169 enshrine a series of fundamental principles to determine the scope of indigenous peoples' rights to lands, territories, and natural resources, as follows.

The concept of territories³

Indigenous peoples do not have rights only to the land they directly cultivate or inhabit, but to the broader territory, encompassing the total environments of the areas which they occupy or otherwise use, inclusive of natural resources, rivers, lakes, and coasts. Their rights to land and natural resources require special attention, as these are fundamental to securing the broader set of rights related to self-management and the right to determine their own priorities for development.

³ UNDRIP art. 26; C169 art. 13.2.

Collective rights⁴

Indigenous peoples' land rights comprise both individual and collective aspects. Whereas most indigenous peoples have customary ways of recognising land and resource rights of individual members or households, the collective aspects of their rights to lands, territories, and resources are intrinsically linked to their collective rights to self-determination, non-discrimination, cultural integrity, and development as distinct peoples.

Traditional occupation, ownership, or use⁵

Indigenous peoples have rights to the lands, territories, and resources that they have traditionally occupied, owned, or used, meaning that it is "the traditional occupation and use which is the basis for establishing indigenous peoples' land rights, and not the eventual official recognition or registration of that ownership" (ILO, 2013: 21).

Natural resources pertaining to their lands⁶

Indigenous peoples have rights to the natural resources of their territories, including the right to own, use, develop, and control these resources. As a basic principle, "these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals" (ILO, 2009: 107). In cases where states retain ownership over mineral and sub-surface resources, Convention No. 169 (article 15.2) stipulates that indigenous peoples have rights regarding consultation, consent, and participation in the benefits of resource exploitation, as well as compensation for damages resulting from such exploitation.

Lands not exclusively occupied by indigenous peoples⁷

Many indigenous peoples have traditionally had access to and used lands, territories, or resources that are also used by other communities or population groups. The ILO elaborates: "This is especially the case with grazing lands, hunting, fishing and gathering areas and forests, which may be used by nomadic pastoralists, hunters or shifting cultivators on a rotational or seasonal basis. In other cases, certain communities may have rights to certain types of resources within a shared territory, as they have developed complementary livelihood strategies. Also such non-exclusive land rights are established on the basis of traditional occupation" (ILO, 2009: 95).

Cross-border contacts and co-operation⁸

Due to processes of conquest, colonisation, or establishment of state boundaries, many indigenous peoples have been involuntarily separated by state borders that run across their territories and hamper contact. States should engage in international agreements to facilitate contact and cooperation.

⁴ UNDRIP preamble, art. 25; C169 art. 13.1; C107 art. 11.

⁵ UNDRIP art. 25, 26.1, 26.2; C169 art. 14.1; C107 art. 11.

⁶ UNDRIP art. 26; C169 art. 15.1.

⁷ C169 art. 14.

⁸ UNDRIP art. 36; C169 art. 32.

1.2.2. Procedures

The basis for indigenous peoples' land rights is traditional occupation and use, but both UNDRIP and Convention No. 169 provide guidance on adequate procedures for states' official recognition or registration of indigenous peoples' land ownership.

Transmission of land rights⁹

Indigenous peoples' own procedures for transmission of land rights should be respected, implying state recognition of customary law governing lands and resources.

As explained by the UN Special Rapporteur on the Rights of Indigenous Peoples:
"The fundamental goal of a land titling procedure is to provide security for land and resource rights in accordance with indigenous and tribal peoples' own customary laws and traditional land and resource tenure. There is some flexibility in how the demarcation and titling procedure could be developed; and the specific procedures should be sorted out in the relevant negotiations and in consultation with indigenous and tribal peoples. It could be expected, nonetheless, that the procedure for land demarcation and titling would contain, at a minimum, the following components: (a) identification of the area and rights that correspond to the indigenous or tribal community, or group of communities, under consideration; (b) resolution of conflicts over competing uses and claims; (c) delimitation and demarcation; and (d) issuance of title deed or other appropriate document that clearly describes the nature of the right or rights in lands and resources. In order to assist with the demarcation and titling process, it may be helpful to form a land commission, either within or independent from an existing appropriate ministry, with a specific mandate to facilitate the securing of indigenous and tribal land and resource rights" (UN Doc. A/HRC/18/35/Add. 7: 36).

Identification of lands or territories¹⁰

States should take steps to identify indigenous peoples' lands and territories, as the first crucial step towards recognition and protection. This process must necessarily be undertaken with the full participation of the peoples concerned and be based on traditional occupation, ownership, or use.

Adequate procedures within the national legal system to resolve land claims¹¹

The ILO states: "It is almost inevitable that the process of regularising land ownership and possession will give rise to competing land claims. In most cases, these arise between indigenous and non-indigenous communities or individuals but also, in some cases, between different indigenous communities. Therefore, the establishment of appropriate procedures for resolving land claims is absolutely essential, taking into account the general principles of ensuring consultation and participation of indigenous peoples in

9 UNDRIP art. 27; C169 art. 17.1; C107 art. 13.1.

10 UNDRIP art. 27; C169 art. 14.2.

11 UNDRIP art. 27, 40; C169 art. 14.3.

decision-making on the establishment of ‘appropriate procedures’ (ILO, 2009: 96). Further, the ILO supervisory bodies have acknowledged the complexities and time requirement involved when regularising land ownership, thus recommending the adoption of transitional measures during the course of the process in order to protect the land rights of indigenous peoples while awaiting the final resolution (ILO Doc. GB.299/6/1).

1.2.3. Mechanisms for protection

States have a duty to effectively protect indigenous peoples' land and resource rights: UNDRIP and Convention No. 169 provide for states to comply with the following duties.

Effective protection of indigenous peoples' rights to ownership and possession¹²

Effective protection will in most cases require a combined set of procedures and mechanisms, including identification, demarcation, titling, or other legal recognition, along with adequate access to justice and penalties for unauthorised intrusion.

Prevention of intrusion of dispossession¹³

States have a duty to prevent non-indigenous persons from securing ownership, possession, or use of indigenous peoples' lands or territories. Experience shows that many indigenous peoples have been tricked or forced to give up their lands to outsiders through fraud or other dishonest means.

Access to redress (restitution or compensation)¹⁴

Indigenous peoples should have access to redress for land lost without free, prior, and informed consent (FPIC).

Adequate penalties¹⁵

States must ensure that unauthorised intrusion or use of indigenous peoples' land or territories is adequately penalised. Too often, violations of indigenous peoples' rights to land, territories, and resources happen with impunity or are even state-sanctioned.

1.2.4. Preventing displacement

UNDRIP and Convention No. 169 have strong provisions to prevent displacement of indigenous peoples from their lands and territories.

Right to not be removed from lands or territories¹⁶

Any non-voluntary or forced displacement of indigenous peoples has severe impacts, not only on their economies and livelihood strategies but also on their very survival as distinct cultures. Thus, as a general principle, indigenous peoples should never be removed from their lands or territories.

¹² UNDRIP art. 26.3.; C169, art. 14.2.

¹³ C169 art. 17.3; C107 art. 13.2.

¹⁴ UNDRIP art. 28; C169 art. 16.4 and 16.5; C107 art. 12.3.

¹⁵ C169 art. 17.3.

¹⁶ UNDRIP art. 10; C169 art. 16.1; C107 art. 12.1.

Necessary relocation only with free, prior, and informed consent¹⁷

If relocation is necessary, for example in the context of adverse effects of climate change on pastoralist communities, it should happen only with the free, prior, and informed consent of the people concerned.

Right to return¹⁸

If the reason for relocation is of a temporary character, indigenous peoples should have the right to return to traditional lands or territories as soon as the reason for which they had to leave is no longer valid.

Compensation¹⁹

If indigenous peoples are relocated, they should be compensated for relocation with lands of equal quality and legal status or other means preferred by the peoples concerned. In cases where unavoidable relocation becomes a permanent situation, indigenous peoples have the right to lands of an equal quality and legal status to that of the lands they previously occupied, e.g. in terms of agricultural potential and legal recognition of ownership. If indigenous peoples so wish, they can accept other forms of payment for their lost lands.

1.2.5. Consultation and consent

Both UNDRIP and Convention No. 160 comprise general provisions related to the duty of states to consult and cooperate with indigenous peoples, in order to obtain free, prior, and informed consent.²⁰

In particular, UNDRIP establishes in article 32(2) that states have a duty to consult indigenous peoples “in order to obtain their free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

Such consultations should comply with a number of minimum requirements, including that:

- » “Consultations must be formal, full and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
- » Appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
- » Consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures;
- » Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures” (ILO, 2013: 13).

¹⁷ UNDRIP art. 10; C169 art. 16.2; C107 art. 12.1.

¹⁸ UNDRIP art. 10; C169, art. 16.3.

¹⁹ UNDRIP art. 10, 28; C169 art. 16.4; C107 art. 12.2

²⁰ UNDRIP art. 19, 32.2; C169 art. 6 and 15.2.

Further, states have the duty to undertake *impact assessment*²¹ in cooperation with indigenous peoples to determine the social, spiritual, cultural, and environmental impact on them of proposed development activities. The results of these studies should be considered as fundamental criteria for the implementation of these activities.

The Declaration and the Convention provide for consultation, with the objective of achieving FPIC, but consent is not always an absolute requirement. The UN Special Rapporteur on the Rights of Indigenous Peoples notes that: "This provision of the Declaration [article 19] should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples" (A/HRC/12/34: 46). On the other hand, undertaking consultation as a simple formality, and simply informing the potentially affected communities about a decision that has already been taken, is also not in compliance with the Declaration or the Convention. In general, the importance of obtaining consent varies in accordance with the severity of the potential impact on the indigenous peoples concerned. The UN Special Rapporteur underlines that "the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent" (A/HRC/12/34: 47). In the context of extractive industries operating on indigenous peoples' land or territories, the UN Special Rapporteur notes that the "Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent" (A/HRC/24/41: 27).

It must also be highlighted that even if the consultation process has been concluded without agreement or consent, the decision taken by the state must still respect the substantive rights of indigenous peoples, e.g. the rights to land and to property (ILO, 2013: 16).

21 C169 art. 7.3.



1.3. Broad international instruments and mechanisms to address land and resource rights

Indigenous peoples' rights, including to lands, territories, and resources, are not special rights but articulations of universal human rights contextualised to the situation of indigenous peoples, particularly by addressing the collective aspects of these rights. Consequently, indigenous peoples' rights are affirmed and underpinned by the full range of human rights instruments. Many of these instruments are accompanied by mechanisms to promote compliance, which also play an important role in monitoring, interpretation, safeguarding, and adjudication of indigenous peoples' rights. The comments, observations, recommendations, and jurisprudence of these mechanisms constitute essential guidance for the implementation of indigenous peoples' rights.

1.3.1. ICCPR, ICESCR, and ICERD

The human rights principles articulated in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), including principles of self-determination, participation, non-discrimination, and cultural integrity, as well as social and economic welfare, are foundational to the rights of indigenous peoples.

The Human Rights Committee of the UN oversees implementation of the ICCPR and has interpreted Article 27, on the right to culture, as a valid basis for indigenous land and resource claims (Anaya 2004, 134-137). For example, in *Ominiyak v. Canada*, “the committee found that Canada ... had violated its obligation under Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the [Lubicon Lake Band of Cree because] ... the Band’s survival as a distinct cultural community was bound up with the sustenance that it derived from the land” (Ibid: 135).

Article 27 of ICCPR protects the right of minorities to enjoy and develop the various attributes of their distinct cultures, including the right of indigenous peoples to maintain their cultural patterns relating to lands and resources (see Human Rights Committee General Comment 23). The Committee on Economic, Social and Cultural Rights oversees the implementation of the ICESCR. In its General Comment 21, it notes that the “strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (UN Doc E/C.12/GC/21).

The *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) is relevant to indigenous peoples’ land and resource rights. Article 5 of ICERD entitles all persons to freedom from discrimination and equality before the law, including with regards to the right to own property. General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination (CERD) calls upon states “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” (CERD General Recommendation No. 23, 1997). Also, the CERD’s early warning and urgent action procedures are increasingly being used to address cases related to indigenous peoples’ land and resource rights, e.g. in the Philippines (PIPLinks, undated) and Suriname (FPP, 2013a).

In general, it seems that UN human rights bodies are increasingly addressing indigenous peoples’ land and resource rights. For example, Forest Peoples Programme (FPP) mentions that “In the period 2011–12 ... (CERD) continued to adopt detailed and responsive observations and recommendations, including under its follow up and early warning and urgent action procedures. The Human Rights Committee again highlighted the obligation of states to ensure that indigenous peoples are able to exercise their right to free, prior and informed consent” (FPP 2013a: preface). Further,

“The Committee on Economic, Social and Cultural Rights made reference to Article 1 of the Covenant in relation to land and resource rights [...]. It also adopted an important general comment on the right to take part in cultural life, which was issued in 2009, that contains substantial text on indigenous peoples and affirms the rights recognized in the UN Declaration on the Rights of Indigenous Peoples. It relates therein territorial rights to cultural identity, using language from the UNDRIP about indigenous peoples’ right to own and control their lands, territories and resources, and stresses that states ‘should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights’” (ibid).

1.3.2. ILO Convention No. 111 and ILO supervisory bodies

Apart from ILO Conventions Nos. 107 and 169, which specifically address the situation of indigenous peoples, ILO Convention No. 111 on discrimination in employment and occupation has also proved to be relevant for indigenous peoples' land and resource rights. Convention No. 111 is considered one of the fundamental ILO conventions, and has been ratified by 172 states. It prohibits discrimination not only in formal employment but also against indigenous peoples' traditional occupations such as pastoralism and shifting cultivation. Under Convention No. 111, the ILO supervisory bodies have addressed indigenous peoples' land and resource rights, considering that:

“Access to land and natural resources is generally the basis for indigenous peoples to engage in their traditional occupations. Recognition of the ownership and possession of the lands which they traditionally occupy, access to land which they have used for traditional activities, and measures to protect the environment of the territories they inhabit are therefore crucial with a view to enabling indigenous peoples to pursue their traditional occupations” (ILO, 2007: 14).

When states have ratified an ILO convention, they have a one-year period to amend legislation and policies before the convention becomes legally binding. Thereafter, states have to submit regular reports on the implementation of the ratified convention. In addition to this regular supervision, the ILO has complaint mechanisms for alleged violations of ratified conventions. ILO procedures under Convention No. 169 (and to some extent Convention No. 111) have been used extensively by indigenous peoples to address their concerns. Most complaints brought to the attention of the ILO concern the failure of states to consult with indigenous peoples in the context of natural resource exploitation on their lands and territories.

1.3.3. The Convention on Biological Diversity and the International Treaty for Plant Genetic Resources for Food and Agriculture

Article 1 of the Convention on Biological Diversity (CBD) states that its objectives “are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. All of these concerns are of crucial importance for indigenous peoples. Further, Article 8(j) of the CBD calls on states to recognise and respect indigenous and local communities with respect to traditional knowledge and practices relevant for the conservation and sustainable use of biological diversity.

Under the CBD, a series of measures has been taken to facilitate indigenous participation, including by providing financial support through a recently established Voluntary Fund for Facilitating the Participation of Indigenous and Local Communities in the Convention Process and by the establishment in 2000 of a specific Working Group on Article 8(j) and related provisions.

Under the CBD, the parties have adopted:

The Akwé: Kon Guidelines for the conduct of cultural, environmental, and social impact assessments regarding developments proposed to take place on, or likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities; and

The Tkarihwaiéri: Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity.

Recent progress under the Convention includes:

- » The definition of indicators for implementation of Article 8(j). The indicators adopted are: 1) status and trends of linguistic diversity and numbers of speakers of indigenous languages; 2) status and trends in traditional occupations; and 3) status and trends in changes in land use and land tenure;
- » The adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. The Protocol takes note of the adoption of UNDRIP and establishes that: "Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms" (article 5.2). Further, the Protocol establishes (in article 6.2) that: "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources." The Protocol will enter into force shortly after its 50th ratification.

Likewise, the International Treaty for Plant Genetic Resources for Food and Agriculture recognises the enormous contribution of indigenous communities to the conservation and development of plant genetic resources, which constitute the basis of food and agriculture production. The Treaty requires governments to take measures to protect, inter alia, traditional knowledge relevant to plant genetic resources for food and agriculture and farmers' right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Indigenous peoples' lands and territories "often coincide with areas of high biological diversity, and a strong correlation between areas of high biological diversity and areas of high cultural diversity has been established" (DESA, 2009: 84). Thus, the crucial role of indigenous peoples in management, sustainable use, and conservation of these resources provides a strong argument for respecting and protecting their territorial rights. For example, the coverage of Indigenous and Community Conserved Areas (ICCAs) has been estimated as being comparable to that of governmental protected areas, which constitute 12% of the global terrestrial surface (ICCA Consortium, undated).



1.4. Indigenous peoples within the UN system

UNDRIP has direct implications for the entire UN system, as it stipulates that: “The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to The organs and specialized agencies of the United Nations system a The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute toute 12% of igh cultural diversity has been establbe established” (Article 41); and further that: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration” (Article 42).

Hence, since its adoption in 2007, UNDRIP has constituted the overarching framework for the UN system’s work on indigenous peoples.

1.4.1. UN mechanisms specifically addressing indigenous peoples

Three complementary UN mechanisms have been established to specifically address the situation of indigenous peoples. These are the:

- » UN Special Rapporteur on the Rights of Indigenous Peoples;
- » UN Permanent Forum on Indigenous Issues (UNPFII); and
- » Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).

These three mechanisms are accompanied by a broader coordination group of UN agencies and international organisations called the Inter-Agency Support Group (IASG).

The *UN Special Rapporteur on the Rights of Indigenous Peoples* is appointed by the Human Rights Council with a mandate to examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples and to identify, exchange, and promote best practices. The Special Rapporteur engages with states on the implementation of indigenous peoples' rights through country visits and communications and submits both country-specific and thematic reports to the Human Rights Council and the UN General Assembly. The reports of the current Special Rapporteur, Professor James Anaya, have become important reference points for understanding the contents, scope, and application of indigenous peoples' rights, including with regards to prioritised areas/themes such as land and resource rights, consultation and consent, extractive industries, and business responsibilities (see Anaya, undated, for a compilation of his reports).

In general, the communications of the Special Rapporteur reveal that displacement of indigenous peoples continues to occur. Furthermore, even where indigenous peoples are not displaced, their lands and resources are often severely affected by development projects and resource extraction that proceed without their free, prior and informed consent and for which they receive inadequate compensation. Finally, indigenous peoples' land and resource rights are often breached by violent displacement in armed conflicts and by the silencing of indigenous human rights activists.

The *United Nations Permanent Forum on Indigenous Issues* (UNPFII) was established in 2000 as an advisory body to the UN Economic and Social Council (ECOSOC). The Permanent Forum is made up of 16 individual experts and meets annually for two weeks in New York. Its annual sessions convene more than 1,500 indigenous participants from all parts of the world, in addition to government representatives and UN agencies and intergovernmental entities. The Permanent Forum is mandated to discuss indigenous issues related to economic and social development, culture, the environment, education, health, and human rights. Its mandate is to:

- » Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds, and agencies of the United Nations, through the Council;
- » Raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system; and
- » Prepare and disseminate information on indigenous issues.

In its 10th Session, the UNPFII adopted one recommendation addressing ILC, welcoming "the adoption by CBD of two additional indicators for traditional knowledge, one regarding land use and tenure, the second on the practice of traditional occupations, and urges CBD, UNESCO, ILO, FAO, IFAD and International Land Coalition to cooperate in view of fully operationalizing those indicators".

The *Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP) was established in 2007 as a five-member expert body appointed by the Human Rights Council. EMRIP has a mandate to provide the Council with thematic advice, in the form of studies and research, on the rights of indigenous peoples. It meets annually in Geneva. Since its establishment, EMRIP has thematically focused on indigenous peoples' rights to education, participation in decision-making, implementation of UNDRIP, and access to justice. In 2010, it issued a report on participation in decision-making with a particular focus on extractive industries.

The *UN Inter-Agency Support Group on Indigenous Issues* (IASG) was established in 2001 to coordinate, support, and promote the mandate of the UN Permanent Forum and to support indigenous-related mandates throughout the intergovernmental system. A total of 31 UN agencies and international organisations belong to the IASG, including ILC. The IASG's main objectives are: (1) to provide an opportunity for the exchange of information in regards to members' work on indigenous issues; (2) strengthen inter-agency cooperation to promote the human rights and well-being of indigenous peoples, including the dissemination and implementation of UNDRIP; (3) analyse, disseminate, and contribute to the implementation of the recommendations of the UNPFII; (4) interact with the UNPFII and its members to provide and seek information, advice, and substantive inputs; and (5) advise on the mainstreaming of indigenous peoples' issues within the UN system, and strengthen mutual collaboration.

The IASG has regular biannual meetings (one held in the context of the annual sessions of the UNPFII and the other by its own rotating chair). The IASG reports regularly to the UNPFII; it facilitates joint activities and initiatives and serves as a forum for thematic discussions and exchange and sharing of experiences, including through informal networking amongst members. One of the most important accomplishments of the IASG was the elaboration of the 2008 UNDG Guidelines on Indigenous Peoples' Issues (see section 1.4.2).

All of these mechanisms have diverse mandates and roles, but operate from a common framework, as explained by Special Rapporteur Anaya:

"While the Permanent Forum, the Expert Mechanism and the Special Rapporteur have different roles, a common purpose that joins them is the advancement of the human rights of indigenous peoples worldwide. Clearly, an important point of reference for pursuing this common purpose is the United Nations Declaration on the Rights of Indigenous Peoples. In article 42 of the Declaration, the General Assembly calls upon all United Nations bodies and agencies to 'promote respect for and full application of the provisions of this Declaration'" (UN Doc. A/HRC/12/34: 14).

The UNPFII provides for thematic discussions and recommendations on its six mandated areas, as well as broad opportunities for coordination in connection with the annual sessions. EMRIP has a more specific thematic focus, providing opportunities for in-depth analysis related to the implementation of UNDRIP, while the mandate of the Special Rapporteur allows him to address specific situations of human rights violations:

"The Special Rapporteur has a clear mandate to investigate and make recommendations on specific human rights situations of indigenous peoples. Nevertheless, [...] numerous indigenous groups attend the annual sessions of the Permanent Forum and the Expert Mechanism with the intention of presenting allegations of specific situations of human rights violations, despite the fact that there is no specific mandate and no procedural mechanism currently in place for the Permanent Forum and Expert Mechanism to take action on these allegations" (ibid: 11).

1.4.2. UN system mandate and policies for implementation of UNDRIP

In order to ensure a coherent response to the mandate derived from UNDRIP, the UN Development Group (UNDG) has developed the system-wide Guidelines on Indigenous Peoples' Issues (UNDG, 2009) to assist the UN system to mainstream and integrate indigenous peoples' issues in operational activities and programmes at the country level, including in the Common Country Analyses and UN Development Assistance Framework (CCA/UNDAF). The Guidelines set out the broad normative, policy, and operational framework for implementing a human rights-based and culturally sensitive approach to development and provide lines of action for planning, implementation, and evaluation of programmes involving indigenous peoples.

Further, a number of UN agencies and funds have developed institutional policies in support of indigenous peoples' rights, including the UN Food and Agriculture Organization (FAO, 2010), the International Fund for Agricultural Development (IFAD, 2009), the UN Development Programme (UNDP, 2001), and UN-REDD (UN-REDD, 2012; UN-REDD, 2013) (see more on UN-REDD in section 3.3).

Several UN agencies also have targeted programmes on indigenous peoples' rights, such as the Programme to Promote ILO Convention No. 169 (PRO 169) of the ILO, the Regional Indigenous Initiatives (RIPP) of the UNDP in Asia, targeted interventions of the United Nations Population Fund (UNFPA) in Latin America, and the Indigenous Peoples Assistance Facility (IPAF) of IFAD. In 2010, the Office of the High Commissioner for Human Rights (OHCHR), the ILO, UNDP, and UNICEF launched the United Nations Indigenous Peoples' Partnership (UNIPP), a collaborative effort to promote indigenous peoples' rights through joint programmes at the country level.

All of the above have contributed to increased attention and inter-agency collaboration on indigenous issues. It can be assumed that the system-wide efforts to promote indigenous peoples' rights will be further enhanced in the context of the World Conference on Indigenous Peoples, which will take place in connection with the UN General Assembly session in September 2014.



1.5 Regional instruments and mechanisms

In Latin America and Africa, regional human rights mechanisms have been instrumental in addressing indigenous peoples' rights, particularly to lands and territories. In South-East Asia, the recently adopted Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) is noted to fall "below international standards on human rights particularly on the duties and responsibilities of states in upholding the universality and non-derogability of and the enjoyment and exercise of human rights by citizens" (AIPP, 2012). Further, it does not include recognition of indigenous peoples as "distinct from the majority and systematically discriminated and exploited through the non-recognition and violation of [their] collective rights" (AIPP, 2012). Fortunately, while there is no immediate prospect of addressing indigenous peoples' rights through regional mechanisms in Asia, national human rights institutions are increasingly addressing their situation. In Malaysia, for example, the national human rights institution (SUHAKAM) has undertaken a comprehensive national inquiry into the land situation of indigenous peoples.

1.5.1. The inter-American human rights system

The American Convention on Human Rights is widely ratified in the Americas. It affirms and protects civil and political rights, democratic institutions, personal liberty, and social justice. Importantly, it provides for the establishment of the Inter-American Court of Human Rights and expands the jurisdiction and functions of the pre-existing Inter-American Commission on Human Rights. The Inter-American Commission periodically holds hearings, issues reports

regarding human rights situations in member states of the Organization of American States (OAS), and has a complaints procedure through which it receives complaints and issues recommendations to member states and to states parties to the American Convention. The Inter-American Court adjudicates and issues binding decisions in cases referred to it by the Inter-American Commission or OAS member states. Both the Commission and the Court base their jurisprudence on the inter-American treaties and declarations, interpreted in the light of other international instruments such as Convention No. 169. The Inter-American Commission and Inter-American Court have contributed extensively to the understanding and development of indigenous peoples' rights, particularly in areas of collective land rights and duty of states to consult.

The *Awas Tingni* case in Nicaragua "was the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so" (Anaya and Campbell, 2009: 117-118). The case involved Nicaragua's granting of a forestry concession, without consultation, on lands traditionally occupied by the *Awas Tingni* community. The community had no formal legal title to the lands and sought international remedies for the non-recognition of its traditional land rights.

The Inter-American Court found that Nicaragua had violated the community's right to judicial protection under Article 25 of the American Convention by failing to provide adequate domestic mechanisms for titling of communal property, and also that it had violated the community's right to property under article 21 by not recognising its traditional land tenure (ibid: 139). The Court held that "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property" (Inter-American Court of Human Rights, 2001: 146), and ordered Nicaragua to demarcate and provide legal title for the land.

The *Awas Tingni* case "signals that indigenous peoples' rights to ancestral lands and resources are a matter of already existing international law derived from the domain of universally applicable human rights. The community of *Awas Tingni*'s successful invocation of the universal human right to property calls on states and the international community to avoid the discrimination of the past and embrace indigenous modalities of property rather than exclude them. In doing so, it marks a new path for understanding the rights and status of the world's indigenous peoples" (Anaya and Campbell, 2009: 152-153).

Subsequent cases before the Inter-American Court have resulted in further elaboration and consolidation of indigenous peoples' land rights. In *Sawhoyamaya Indigenous Community v. Paraguay* (IACHR, 2006), the Court drew the following conclusions:

- » Traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title.
- » Traditional possession entitles indigenous peoples to demand official recognition and registration of property title.
- » The members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith.

- » The members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extent and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights (ibid: 128).

In a groundbreaking ruling on the requirement for FPIC, in a case involving the Saramaka people of Suriname, the Inter-American Court of Human Rights held that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions” (IACHR, 2007).

1.5.2. The African Commission on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights affirms and protects basic freedoms and human rights for individuals and peoples in the African continent. The African Commission on Human and Peoples’ Rights (ACHPR) is the regional human rights monitoring and promotion body, created by the African Charter. It has a complaints procedure and also receives periodic reports from African state parties. In 2000, the ACHPR created the Working Group of Experts on Indigenous Populations/Communities, which has been instrumental in contextualising the concept of indigenous peoples to the continent and analysing indigenous peoples’ situations in numerous countries (see IWGIA, undated for a comprehensive compilation of ACHPR-IWGIA publications).

In the groundbreaking Endorois case (ACHPR, 2010), the ACHPR affirmed the rights of the Endorois over their traditional lands, on the basis of provisions of the African Charter on Human and Peoples’ Rights. The case involved Kenya’s forced displacement of the Endorois people from their traditional lands on the banks of Lake Bogoria. The Endorois alleged that Kenya had violated their rights under the African Charter by granting a concession to mine on their land, failing to recognise their customary land tenure, and forcibly relocating them for the purposes of developing a game reserve. The ACHPR found that Kenya’s Government actions had violated the provisions of the African Charter relating to:

- » Article 8 (right to religion): “the Endorois’ forced eviction from their ancestral lands [...] interfered with the Endorois’ right to religious freedom and removed them from the sacred grounds essential to the practice of their religion and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion” (ACHPR, 2010: 173);
- » Article 14 (right to property), concluding that the “property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law”(ibid: 238);
- » Article 17 (right to culture): “By forcing the community to live on semi-arid lands [...], the State has created a major threat to the Endorois pastoralist way of life [...] the very essence of the Endorois’ right to culture has been denied, rendering the right, to all intents and purposes, illusory” (ibid: 251);

- » Article 21 (right to freely dispose of wealth and natural resources): "The Endorois have never received adequate compensation or restitution of their land. Accordingly, the [...] State is found to have violated Article 21" (ibid: 268);
- » Article 22 (right to development): "...the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the ... State did not adequately provide for the Endorois in the development process" (ibid: 298).

In its analysis of the case, the Kenya Land Alliance (KLA, 2010) states that the ruling "will remain a landmark in the efforts to promote a community based approach, working in an incremental manner, and on an area by area basis, which will enhance the tackling of the rights and governance grievances which embrace much of the public land estate, including existing and future protected areas" (ibid: 5).

In 2012, the ACHPR requested the African Court of Human Rights to institute proceedings against alleged human rights violations against the Ogiek community in Kenya. This is the first indigenous rights case to come before the African Court. The case concerned an eviction note issued by the Kenyan government to the indigenous Ogiek community and other settlers of the Mau Forest. The ACHPR requested the Court to order a stop to the evictions and urged the government to refrain from harassing, intimidating, or interfering with the community's traditional livelihoods, recognise their historic land, issue legal title with consultative demarcation, and pay compensation for the loss they had suffered. On 15 March 2013, the Court declared that it found a situation of extreme gravity and urgency, as well as the risk of irreparable harm to the Ogiek people, and issued provisional measures to the Kenyan government to restrict land transactions and refrain from any act that would prejudice the application before the court.



1.6. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter “the Guidelines”) were endorsed by the Committee on World Food Security in May 2012. According to FAO, the Guidelines:

“serve as a reference and set out principles and internationally accepted standards for practices for the responsible governance of tenure. They provide a framework that States can use when developing their own strategies, policies, legislation, programmes and activities. They allow governments, civil society, the private sector and citizens to judge whether their proposed actions and the actions of others constitute acceptable practices” (FAO, undated).

The Guidelines comprise a specific section (section 9) on “indigenous peoples and other communities with customary tenure systems”. In summary, the Guidelines recognise/ stipulate that:

- » Land, fisheries, and forests have social, cultural, spiritual, economic, environmental, and political value to indigenous peoples (9.1).

- » Indigenous peoples, in the context of self-governance, should promote and provide equitable, secure, and sustainable rights, with special attention to equitable access for women, as well as effective participation of all members, (men, women, youth) in decision-making, including in the case of collective tenure systems (9.2).
- » States should ensure consistency with obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments, including Convention No. 169, the CBD, and UNDRIP (9.3).
- » States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples, taking into account the land, fisheries, and forests that are used exclusively by a community and those that are shared (9.4).
- » Where indigenous peoples have legitimate tenure rights to the ancestral lands on which they live, they should not be forcibly evicted (9.5).
- » States should consider adapting their policy, legal, and organisational frameworks to recognise tenure systems of indigenous peoples. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems (9.6).
- » There should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalised members, when developing policies and laws related to tenure systems of indigenous peoples (9.7).
- » States should protect indigenous peoples against unauthorised use of their land, fisheries, and forests and should assist communities to formally document and publicise information on the nature and location of such resources used and controlled by the community to prevent competing claims (9.8).
- » States and other parties should hold good faith consultation with indigenous peoples before initiating any project or adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior, and informed consent under UNDRIP and with due regard for particular positions and understandings of individual states (9.9).
- » State and non-state actors should strive to provide technical and legal assistance to affected communities to participate in the development of tenure policies, laws, and projects in non-discriminatory and gender-sensitive ways (9.10).
- » States should respect and promote customary approaches used by indigenous peoples to resolve tenure conflicts within communities consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments (9.11).

While it is positive that the Guidelines comprise a specific section on “indigenous peoples and other communities with customary tenure systems”, there are also some concerns in areas where the Guidelines may not be interpreted consistently with international law, as enshrined in UNDRIP and Convention No. 169.

- » The Guidelines use the terminology “indigenous peoples and other communities with customary tenure systems” and (with the exception of section 9.9 on consultations) do not differentiate between the rights of these two groups. Also, the Guidelines do not make reference to the concept of territories as enshrined in UNDRIP. This implies a risk that the specific nature and dimensions of indigenous peoples’ interlinked rights to lands, territories, and resources, as linked to their rights to self-determination, self-governance, cultural integrity, etc. may not be understood or addressed comprehensively in the application of the Guidelines.
- » The Guidelines stipulate that states should recognise and protect the “legitimate tenure rights” of indigenous peoples and other communities with customary tenure systems. However, they do not qualify what such legitimate tenure rights are in the context of indigenous peoples; namely rights based on “traditional occupation, ownership and use” as stipulated by UNDRIP and Convention No. 169. Instead, there is a risk that “legitimate rights” may be interpreted in the context of article 4.4 of the Guidelines, which indicates that “...in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law”. Further, article 4.4 provides that “States should define through widely publicized rules the categories of rights that are considered legitimate”. The reference to national law and the prerogative of states to define legitimate rights may be problematic, as it could narrow the scope of indigenous peoples’ legitimate rights under international law. It follows that the Guidelines may not be able to provide guidance for the resolution of overlapping claims or disputes between indigenous peoples and communities with customary tenure systems, if there is no clarity on the legitimacy of rights and the broader collective rights of indigenous peoples.
- » The language of article 9.9 is somewhat ambiguous as it makes reference to the provisions of UNDRIP regarding consultation and consent, but also asserts that due regard should be given to “particular positions and understandings of individual States”.

As the Voluntary Guidelines have only recently been adopted, their practical interpretation and the potential for implementation remain to be seen, but there is no doubt that these Guidelines will become the major reference for governance of tenure in coming years. As further implementation guidelines and monitoring mechanisms are elaborated and the Guidelines are progressively used, including by ILC and its members, it will be important to keep these concerns in mind and to promote and advocate for a progressive interpretation of the Guidelines, consistent with UNDRIP and other international instruments.



1.7 Institutional policies of financial institutions and bilateral and multilateral agencies

Beyond the UN system, a number of international financial institutions (IFIs) have adopted safeguards or policies on indigenous peoples' rights. These include the Asia Development Bank (ADB, 2009), Inter-American Development Bank (IADB, 2006), International Finance Corporation (IFC, 2012), and the World Bank (World Bank, 2005) (see also section 2.2.3 on the policy of the Asian Development Bank).

As a minimum, these policies aim at mitigating harm to indigenous peoples, e.g. in the context of large-scale development and infrastructure projects that may lead to forced resettlements, etc. This "do no harm" approach has typically been the approach taken by development banks, such as the World Bank, but it is increasingly being criticised for falling below the international standards enshrined in UNDRIP. In general, the policies of IFIs are not strong on land rights. Further, there is an expectation that IFIs and donors should not only minimise harm but should also actively promote and ensure respect for human rights, including indigenous peoples' rights. Currently, the World Bank is reviewing its Operational Policy 4.10 on indigenous peoples as well as its other environmental and social safeguard policies, and has identified FPIC among a number of "emerging areas". Further, the African Development Bank has initiated discussions on the issue of indigenous peoples in Africa.

These processes provide entry points for raising concerns related to indigenous peoples' land and resource rights. Particularly, indigenous peoples are demanding that projects that affect their traditional lands, territories, and resources cannot go ahead without their free, prior, and informed consent.

A number of donor agencies have already adopted policies that reflect more ambitious goals of supporting indigenous peoples' rights, in line with UNDRIP. These include the European Union (EC, 1998a; EC, 1998b) and the bilateral development agencies of Denmark (Danish Ministry of Foreign Affairs, 2004), Norway (Norwegian Ministry of Foreign Affairs, 2004), and Spain (AECI, 1998).

In spite of the promising policy developments mentioned above, most agencies face challenges in terms of coherent application of their policies. This is particularly the case in regions and countries with weak legislative and policy protection of indigenous peoples where respect for indigenous peoples' rights implies taking an independent stand from government policies. In this regard, it is worth noting that, while the safeguard policies of IFIs such as the World Bank may fall below international standards, they usually stipulate strict procedural steps to be followed when a project affects indigenous peoples. Further, they have strong mechanisms in place to ensure enforceability of the safeguards, such as the inspection panels of the World Bank and regional banks. In contrast, some of the most progressive bilateral policies (e.g. the Danish and Norwegian policies in support of indigenous peoples) do not provide mandatory procedures. Hence, implementation may vary considerably across regions and sectors and may be subject to individual assessments rather than institution-wide commitments.

There is no doubt that the indirect and "soft law" approach provided for by such institutional safeguards and policies provide leverage for indigenous peoples, especially in countries that deny the existence of indigenous peoples. However, such instruments also have clear limitations, particularly when it comes to lands rights. As argued by Albert Barume at the ILC workshop held in 2013,

"the soft law approach is important, particularly in weaker states or corrupt/ failed states. However, the soft law approach has to feed a strategy to achieve legal recognition of indigenous peoples' rights to lands, territories and resources. Ultimately, land claims come to the judiciary, as it is a legal act to transfer property. Hence, redress requires a legally empowered body. The soft law approach to safeguarding some elements of indigenous peoples' rights is likely to prevail among international and non-State actors due to operational and reputational risks, but it is not an end in itself and should contribute to stronger protection of indigenous peoples' rights to lands in national legislations. Further, there is a need to carefully monitor the soft law approach in countries where stronger national laws or regional and international instruments are in force but not implemented, such as the Philippines, the Republic of Congo and the Central African Republic."



1.8 The responsibility of business to respect indigenous peoples' rights

The UN Framework for Business and Human Rights, which has been endorsed by the UN Human Rights Council, rests on three pillars: 1) the state's duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; 2) the corporate responsibility to respect human rights, which means acting with due diligence to avoid infringing on the rights of others; and 3) greater access by victims to effective remedy, judicial and non-judicial (UN Doc. A/HRC/14/27).

The UN Special Rapporteur on the Rights of Indigenous Peoples has contextualised the responsibility to respect the situation of indigenous peoples, as follows:

"In the context of indigenous peoples, the corporate responsibility to respect human rights means that companies must exercise due diligence by identifying, prior to commencing their activities, various matters relating to the basic rights of indigenous peoples, and by paying adequate attention to those matters as the activities are being carried out. Such matters include recognition of the existence of indigenous peoples and of their own social and political structures; indigenous possession and use of land, territory and natural resources; exercise by the State of its duty to consult indigenous peoples in relation to activities that might affect them, and the related responsibility of business; impact studies and mitigation measures; and benefit sharing with indigenous peoples.

“As observed by the Special Representative of the Secretary-General, due diligence is not limited to respect for the domestic regulations of States in which companies operate, which are inadequate in many cases, but should be governed by the international standards that are binding on those States and on the international community as a whole. Consequently, companies wishing to exercise due diligence with respect to indigenous rights should be guided in their activities by the rights recognized under the relevant international rules, including the United Nations Declaration and ILO Convention No. 169, even if they operate in countries that have not formally accepted or ratified these rules” (UN Doc. A/HRC/15/37: 45-46).

In countries that have ratified ILO Convention No. 169:

“[P]rivate sector actors risk being caught between the standards of a legally-binding instrument, which can be enforced through the national legal system and which is monitored through international supervisory mechanisms, and the practice of a given State, which has not taken the necessary measures to effectively implement the Convention. A lack of a proper domestication of Convention No. 169 in countries that have ratified it has led to conflict in many cases between companies and indigenous peoples and put the investments of private sector operators at risk. Private sector actors have a direct interest in acting in accordance with the principles of the Convention, for issues of legal security, legitimacy, partnerships and sustainability” (ILO, 2013: 25).

2

Regional
perspectives
on indigenous
peoples' land and
resource rights





2.1. Africa

2.1.1. Indigenous peoples in Africa

In 2005, a Working Group under the African Commission on Human and Peoples' Rights (ACHPR) issued a Report on Indigenous Populations/Communities in Africa. The Report recommended an approach to identify rather than define indigenous peoples, and emphasised the following characteristics for identification of African indigenous peoples:

- » Their cultures and ways of life differ considerably from those of the dominant society;
- » Their cultures are under threat, in some cases on the verge of extinction;
- » The survival of their particular way of life depends on access and rights to their traditional land and resources;
- » They often live in inaccessible, geographically isolated regions; and
- » They suffer from political and social marginalisation and are subject to domination and exploitation within national political and economic structures (ACHPR, 2005).

Practically, in Africa the term "indigenous peoples" is applied mainly to pastoralists and hunter-gatherers such as the Maasai, Turkana, Ogiek, Sengwer, Hadzabe, Endorois, Samburu, Mbororo, Touareg, El Molo, etc. of West and East Africa, the San of Southern Africa, and the so-called Pygmies of the Central African region. Both pastoralists and hunter-gatherers are characterised by non-permanent use and occupation of lands, which have made their traditional lands and territories appear unoccupied to the outsider, resulting in specific land-related injustices throughout history.

In spite of the contextualisation of the concept provided by the ACHPR, the issue of definition or identification is still ongoing in many African countries. Far from being an academic debate,

this has grave consequences in terms of failure to address the desperate situation of many indigenous peoples in the region. On the positive side, there is growing recognition of African hunter-gatherer communities as “indigenous peoples”. For example, a survey undertaken by the OHCHR in seven countries in the Central African region shows that there is common acceptance of the existence of indigenous peoples in all the countries concerned (Burundi, Cameroon, Central African Republic, Chad, Gabon, Republic of Congo, Rwanda) (OHCHR, forthcoming).

In contrast, the application of the concept to pastoral communities is still disputed by many governments and international agencies. For example, the World Bank remains reluctant to systematically apply its Operational Policy 4.10 to pastoralist communities in Africa. Also, there are differences with regards to the self-identification as “indigenous” of pastoralist peoples in Africa, depending on the situation and history of a given country and people. For example, while the Mbororo in Cameroon and the Maasai in Tanzania and Kenya identify themselves as indigenous, pastoralists in Benin have not come forward to do the same.

The non-recognition of indigenous peoples in Africa also leads to a lack of specific data on their situation, which again hampers the possibility of devising adequate legislative and policy responses. According to IWGIA (undated) there are approximately 50 million indigenous people in Africa and where data is available, often through case studies, it provides a grim picture of their situation, which is frequently characterised by severe poverty, marginalisation, discrimination, and human rights violations (see, for example, ACHPR 2005; ILO and ACHPR, 2009).

2.1.2. Key trends regarding indigenous peoples’ land rights in Africa

Only a few countries in Africa have developed legislation or policies to protect indigenous peoples and “in particular laws concerning land and land-related issues, do not provide any specific recognition or protection of the livelihood and needs of indigenous populations” (Barume, 2010). In general, “states continue to hold legally defined *de jure* ownership rights over lands ... in much of rural Africa, while rural communities and individuals exert *de facto* rights which are partly defined in terms of customs and partly by ongoing adaptations of practices and rules to changing circumstances” (Cousins, 2000: 169, cited in Barume, 2010: 65). According to research by the ILO and the ACHPR, this “is particularly the case in countries that were former British colonies, where, post-independence, the State replaced the Crown as the trustee [...] meaning that the possibility of indigenous peoples acquiring ownership over their lands is negligible. Land held in trust is inherently unstable, and open to arbitrary changes in status, and dispossession” (ILO and ACHPR, 2009: 89).

“[D]ue to the fact that indigenous peoples’ methods of land use are often considered outdated, the assumption may be that indigenous peoples’ lands are not used ‘productively’. This could be considered to constitute a form of discrimination” (ILO and ACHPR, 2009: viii).

Even in countries that have some recognition of collective rights to property and lands, indigenous peoples are often not able to make use of such provisions, as the “requirement that indigenous communities should have legal status before being able to claim collective rights to land prevents many indigenous communities from being able to enjoy the rights provided in national law” (ibid: 119). Likewise, provisions regarding recognition of customary land rights “are often based on an understanding of customary forms of land use that is essentially sedentary in nature, which excludes nomadic, pastoralist and hunter-gatherer communities, which comprises most of the indigenous peoples in the region” (ibid: 102). Furthermore, “where customary occupation or use of land confers rights to individuals or communities, those rights are rarely, if ever, in the form of ownership rights, and are at best use or possession rights which means that the communities or individuals in question remain in a precarious position as regards land security” (ibid: 118).

Provisions for community forestry would potentially be of key importance for indigenous forest-dwellers in the Congo Basin, but as the following example from Cameroon shows, the existing legal provisions remain inadequate:

- » “One of the preconditions for the acquisition of a community forest is the designation of a legal representative institution of the community. In addition, the request for a community forest is complex and has a number of technical requirements, including a map of the area and a management plan. The ‘Pygmy’ communities do not generally have sufficient education to be able to fulfil these conditions.
- » Community forest cannot be acquired unless the community making the request has preexisting customary land rights. In general, ‘Pygmy’ communities living along roads do not have any customary rights to land, as it is the Bantu communities who are in possession of these rights. In the Permanent Forest Reserve, where the ‘Pygmies’ would be most likely to claim customary rights, the law does not authorise community forests. Thus, the ‘Pygmies’ are largely excluded from the beneficiaries of such rights.
- » The maximum possible size of a community forest is 5000 hectares. This is inadequate for ‘Pygmy’ communities who often use larger areas for their subsistence activities and are nomadic or semi-nomadic” (ibid: 112).

“[T]he fact that indigenous peoples’ occupation of forests has rarely been recognised in customary or statutory law explains the fact that they rarely, if ever, have land titles” (ILO and ACHPR, 2009: 97).

In general, the “low-impact subsistence strategies of these communities make the land and resources they have traditionally occupied and used appear available for other intensive use – wherefore they are vulnerable to encroachment and dispossession” (Feiring and Stidsen, 2013: 24-25). In consequence, most indigenous peoples in Africa do not have secure access to the lands, territories, and resources that they depend upon for their livelihoods, as illustrated by the following examples:

- » A recent report by Rainforest Foundation UK confirms that “new industrial oil palm expansion projects currently underway cover 0.5 million hectares in the Congo Basin, which will result in a fivefold increase in the area of active large-scale palm plantations in the region” (Rainforest Foundation UK, 2013: 5). Further, “details of many of the new oil palm developments – including even geographical locations and agreements/contracts – are missing from publicly available information sources. Governments and investing companies may not have records of the presence of local and indigenous communities or important natural resources within the concessions earmarked for development” (ibid).
- » A recent study on the Babongo, Bayaka/Baka, Hai||om, Topnaar, Ogiek, Maasai, and Turkana communities in the Republic of Congo, Namibia, and Kenya indicates that all of these communities “traditionally practiced hunting, gathering, fishing or pastoralism, which require mobility, flexibility and, consequently, access to land and natural resources. Although supplemented with other livelihood elements, the communities are still dependent upon traditional knowledge and practices related to the use of wild plants and game, livestock-keeping and fishing. They face, to varying degrees, disruption of traditional livelihood practices, mainly due to factors beyond their control, such as discriminatory land rights regimes, influx of settlers, and large-scale development projects” (Feiring and Stidsen, 2013: 36).
- » The ILC Land Matrix Database shows that Africa is the most targeted region for reported large-scale land acquisitions: “754 land deals covering 56.2 million ha are located in Africa, compared with 17.7 million ha in Asia, and 7 million ha in Latin America. Reported land deals in Africa concern an area equivalent to 4.8% of Africa’s total agricultural area, or the territory of Kenya” (ILC et al., 2012).

However, recent legislative developments show a positive tendency in the region:

- » The 2010 Kenya Constitution includes in its definition of marginalised communities indigenous communities that have retained and maintained traditional lifestyles and livelihoods based on a hunter or gatherer economy; or pastoral persons’ communities, whether or not they are nomadic; or settled communities with only marginal participation in the integrated social and economic life of Kenya as a whole.
- » In 2010, the Central African Republic ratified ILO Convention No. 169 on indigenous peoples’ rights – the first African country to sign up to this international legally binding convention.
- » In 2011, the Republic of Congo adopted a specific Law on Indigenous Peoples Rights (CAR, 2011). Article 31 of the Law states that indigenous peoples have individual and collective rights to own, possess, access, and use traditional lands and natural resources.
- » The ACHPR has developed important jurisprudence on indigenous peoples’ land rights, based on the African Charter on Human and Peoples’ Rights. In the Endorois case, the Commission affirmed the Endorois’ rights over traditional lands, indicating that forced dislocation from these lands had violated the provisions of the African Charter relating to Articles 8 (right to religion), 14 (right to property), 17 (right to culture), 21 (right to freely dispose of wealth and natural resources), and 22 (right to development) (ACHPR, 2010).

2.1.3. Africa Land Policy Framework and Guidelines

In 2010, the African Union, the African Development Bank, and the Economic Commission for Africa adopted the Framework and Guidelines on Land Policy in Africa (AUC-ECA-AfDB Consortium, 2010). The Framework is said to reflect “a consensus on land issues; and serves as a basis for commitment of African governments in land policy formulation and implementation and a foundation for popular participation in improved land governance” (ibid: xi).

The Africa Land Policy Framework and Guidelines (ALPFG) acknowledge the particularly marginalised position of indigenous peoples, in stating that:

“[B]eyond the frequently acknowledged inequalities due to race, class and gender, the marginalization of particular ethnic groups with respect to access to adequate land remains a perpetual source of conflict. The marginalization of certain categories of indigenous people such as the San of Botswana; the Herero of Namibia; the Bakola, Bagyeli and Batwa of the countries of Central Africa; and the Ogiek of Kenya, has become contentious. Land policy reforms must also address these concerns” (ibid: 9).

They further state that:

“[L]and policies should seek to remove age-old rigidities in traditional structures and systems which tend to discriminate against women while at the same time building on and thereby improving indigenous tenure arrangements. In thus acknowledging the legitimacy of indigenous land rights, land policy processes must also recognize the role of local and community-based land administration/management institutions and structures, alongside those of the State [...] Colonial legacies which tended to denigrate indigenous land rights systems and suppress and sabotage their evolution and which ignored community land administration structures must now give way to new and innovative policies including the provision of statutory frameworks for the documentation and codification of informal land rights regimes” (ibid: 14).

Although the term “indigenous” may be used in a broader sense in the quotation above, there is no doubt that the ALPFG, in conjunction with UNDRIP, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, the African Charter on Human and Peoples Rights, and the Policy Framework for Pastoralism in Africa (see section 2.1.4 below), provide numerous entry points for addressing the situation of indigenous peoples in Africa.

2.1.4. Pastoralists

The situation of pastoral communities is of particular importance in Africa, where pastoralists “constitute an estimated 16% of the population of the Sahelian Zone of Africa, but in a few countries such as Somalia and Mauritania, they are the majority of people” (WISP, undated).

Pastoralist tenure systems are generally non-recognised, as:

“[T]here seems to have been little difference in the ways range management and pastoral development have been perceived and approached by encroaching

outsiders over time. As opposed to previous forms of contact and exchange, western colonialists were not satisfied with the profits from trading in livestock and other range products: they targeted rangelands as a whole. A common feature between different colonial experiences was that lands not continuously occupied and 'properly' exploited [...] were perceived as 'unproductive' and defined as having no owner, and ended up being classified as State or Crown property. This approach meant that grazing lands and migratory corridors could be parted or foreclosed without consulting, or even informing, local communities" (ILC, 2007: 14).

Furthermore:

"This discourse [against pastoralism] developed along two major lines that addressed the social and natural dimensions of pastoral livelihoods: Pastoral production systems are not economically efficient, Rangelands are degrading as a result of unregulated access and use" (ibid: 14).

This discriminatory attitude against indigenous peoples' land use, livelihood strategies, and traditional occupations is mirrored in equally erroneous perceptions about shifting cultivators (particularly in Asia), hunter-gatherers, etc., and has had disastrous consequences for development policies and land tenure arrangements. In the case of pastoral communities, the development framework "hinged upon two major aspects:

- » Sedentarization of pastoral communities through agricultural pilot projects, primary service provision of forced settlement programmes.
- » Relocation of rangeland tenure rights through nationalization and/or privatization schemes" (ibid: 15).

Despite the negative perceptions of pastoralism, a comparison between Borana pastoral production in northern Ethiopia and modern cattle ranching systems in Kenya²² and Australia, undertaken by the International Livestock Center for Africa²³, indicated that:

- » "Compared to ranchers, pastoralists are poor people, not because of low productivity, but because their numbers per unit are high.
- » Pastoralists try to optimize the number of people supported per unit area, whilst ranchers aim at optimum economic returns.
- » The Borana system directly supports six to seven people per km², while Kenyan ranches support no more than 0.5 people/km² and the Australian ranches 0.002 people/km²" (ILC, 2007: 21).

Current approaches to pastoralism in different African countries vary from active hostility to ambivalence, to recognition and legislation for pastoralism and associated land rights (ILO and ACHPR, 2009: 95).

22 A 2011 study by Oxfam GB presents in detail land occupation in Laikipia, a Kenyan district traditionally occupied by Maasai. http://landportal.info/sites/default/files/land_deals_in_kenya-initial_report_for_laikipia_district2.pdf

23 Currently merged with the International Laboratory for Research on Animal Diseases to form the International Livestock Research Institute (ILRI)

In 2010, the Department of Rural Economy and Agriculture of the African Union adopted the “Policy Framework For Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities” (African Union, 2010). The Policy Framework is the first continent-wide policy initiative that:

“aims to secure, protect and improve the lives, livelihoods and rights of African pastoralists. The policy framework is a platform for mobilizing and coordinating political commitment to pastoral development in Africa, and emphasizes the need to fully involve pastoralist women and men in the national and regional development processes from which they are supposed to benefit. The framework also emphasizes the regional nature of many pastoralist ecosystems in Africa and therefore the need to support and harmonize policies across the Regional Economic Communities and Member States” (ibid: i).

The Policy Framework has two main objectives and a set of strategies to reach these objectives, as follows:

- » “Objective 1: Secure and protect the lives, livelihoods and rights of pastoral peoples and ensure continent-wide commitment to political, social and economic development of pastoral communities and pastoral areas.
- » Objective 2: Reinforce the contribution of pastoral livestock to national, regional and continent-wide economies” (ibid: i).

2.1.5. Hunter-gatherers

Hunter and gatherer communities are numerically few compared with pastoralists in Africa. Their foraging economy (hunting wild game, fishing, and gathering wild plants and fruits) is largely dependent on diminishing forest resources or fragile arid or semi-arid ecosystems, which are currently being affected by climate change.

These hunter-gatherer societies have developed highly specialised livelihood strategies, based on in-depth traditional knowledge and practices, which have allowed them to manage natural resources in an environmentally sustainable manner. In general, hunter-gatherer communities depend on flexible and unrestricted access to traditional land and resources, but are currently under pressure from multiple factors, including discriminatory land rights regimes.

A report by the then UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, on a visit to Kenya in 2006, recommended that the:

“rights of indigenous hunter-gatherer communities [particularly the Ogiek in Mau Forest] to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants. Illegal commercial logging should be stopped” (UN Doc. A/HRC/4/32/Add3: 102).

2.1.6. Parks and conservancies

In many countries in Africa, indigenous peoples' rights are violated when protected areas and game reserves are established. Displacement due to such protected areas, although of universal concern, has been especially prevalent in recent communications between Special Rapporteur Anaya and African States (see UN Doc. A/HRC/15/37/Add.2: 64-75)".

As exemplified by the above, violation of indigenous peoples' rights to land and resources through the establishment of parks or protected areas is often initiated by states. Additionally, establishment of privately owned conservancies, where outsiders buy huge areas of land to run private businesses for tourism, with the establishment of luxury hotels and airstrips, etc. under the name of nature conservation, are becoming more frequent in Africa. However, examples of community-owned conservancies emphasise that it is possible to establish protected areas while also securing indigenous peoples' rights. The Il Ngwesi Group Ranch in Kenya provides such an example. The ranch is a huge area of land, owned and run by many Maasai villages, in a way that allows them to maintain their traditional way of living and improve their livelihoods by profiting from tourism, while also protecting wildlife and its habitat. The income from the ranch supports several community projects along with conservation initiatives (Il Ngwesi Group Ranch, undated).

2.1.7. Barriers and opportunities in Africa

Africa combines features of high pressure on land resources, low levels of recognition of indigenous peoples as such and their land rights in particular, and limited data on the situation of indigenous peoples, along with disregard of and discrimination against their traditional livelihood practices. This helps create the extreme vulnerability that characterises most African indigenous peoples. In March 2013 an ILC working group summarised the challenges regarding indigenous peoples' rights to land, territories, and resources in the African region as follows:

- » *Unsuccessful implementation of emerging good practices:* For example, non-implementation of the Law for indigenous protection in Congo, ILO Convention No. 169 in the Central African Republic, rulings of ACHPR, and land provisions of the new Kenyan Constitution;
- » *Continuing non-recognition of indigenous peoples by many African countries and related non-recognition of traditional occupations and livelihoods, such as pastoralism:* Policies and law reforms still fail to provide protection of indigenous peoples' rights and most law reviews are carried out in conditions of secrecy, with the laws being made public only once the process has finished;
- » *Scaling-up of extractive industries and nature conservation-oriented businesses on indigenous peoples' lands and territories:* Proliferation of logging operations, mining, oil exploitation, dams, and private ranches run for business (conservancies) but often presented as nature conservation projects;
- » *Leasing of large areas of land to foreign investors in agriculture:* Cases of hundreds of thousands of hectares of lands leased in the Republic of Congo, Tanzania, and Ethiopia, related to the global food market.

Some suggested ways forward to overcome these challenges would be to:

- » Provide support to the progressive countries in the region, to ensure that emerging good practices become “success stories”. Rather than continuing to refer to the lowest common denominator, focus on supporting progressive approaches and emerging good practices;
- » Explore opportunities within processes related to climate change and in sectors such as forestry, mining, and agriculture for promoting stronger legal protection of indigenous peoples’ rights. However, attention must be paid to ensure that “soft law” approaches do not lower applicable national and international standards;
- » Facilitate access to complaints mechanisms under the African Commission on Human and Peoples’ Rights;
- » Use the Africa Land Policy Framework and Guidelines, in conjunction with UNDRIP, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, the African Charter on Human and Peoples Rights, and the Policy Framework for Pastoralism in Africa, as a complementary package of instruments for addressing the situation of indigenous peoples.



2.2. Asia

The practice of shifting cultivation is of particular importance for numerous indigenous peoples in South and South-East Asia. In Cambodia, for example, shifting cultivation generates 40–60% of indigenous peoples' products (AIPP and ILO, 2010). In Bangladesh and Nepal, however, forest and land laws do not sufficiently recognise the right to practise shifting cultivation. In some countries, government programmes even adversely affect the rights of shifting cultivators. Alternative livelihood options, for instance, are promoted through cash crop-oriented programmes, which adversely affect food security and create negative perceptions about shifting cultivation. Vietnam and Laos have undertaken resettlement programmes aimed at putting a stop to shifting cultivation. Further, Vietnam does not recognise indigenous ownership of lands and resources, which has weakened or caused traditional sustainable practices to disappear. The extinction of traditional knowledge related to shifting cultivation is due to enforced limitations/prohibitions on shifting cultivation (ibid).

2.2.1. Indigenous peoples in Asia

It is estimated that approximately two-thirds of the world's indigenous peoples live in Asia, with the majority in India (80–100 million), followed by China (60–80 million), and Indonesia (50–70 million) (data presented by AIPP, 2013).

Asia presents a mixed picture with regards to recognition of the concept of indigenous peoples. While in the Philippines the term "indigenous peoples" is used explicitly, most Asian countries use national terms such as ethnic or national minorities, hill tribes, *adivasi*, *Masyarakat Adat*,

cultural communities, scheduled tribes, etc. It follows that most national legal frameworks do not recognise indigenous peoples as distinct collective rights-holders. However, many ethnic groups that remain distinct from the majority of the population increasingly identify and assert themselves as indigenous peoples, who are entitled to their lands, territories, and resources, cultural heritage, and traditional socio-political institutions. Also, several countries do recognise certain “categories” of people as distinct collective rights-holders, e.g. scheduled tribes under the Fifth and Sixth Schedules of the Indian constitution, natives of Sarawak and Sabah, and ethnic minorities in Vietnam.

According to the UN Special Rapporteur on the Rights of Indigenous Peoples:

“[I]n the Asian context, the term indigenous peoples is understood to refer to distinct cultural groups [...] who are indigenous to the countries in which they live and have distinct identities and ways of life, and who face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression. Today these groups are among the most discriminated against, socially and economically marginalized, and politically subordinated parts of the societies of their respective countries” (UN Doc. A/HRC/15/37/Add.1: 213).

Given the vast diversity of indigenous peoples in Asia, they also represent a diversity of traditional livelihood strategies, including pastoralism, small-scale agriculture, hunting and gathering, fishing, trading and, not least, shifting cultivation, which is predominant among indigenous peoples in hilly and forest areas of South and South-East Asia.

2.2.2. Key challenges in Asia

Many indigenous peoples in Asia have a problem with non-recognition of citizenship. Some indigenous peoples were forced to migrate to Thailand from neighbouring countries, mostly because of conflict. Hence, these people are indigenous to the wider regions. Organisations representing indigenous peoples in Thailand have taken this into account by coming together under the banner of the Network of Indigenous Peoples in Thailand.

As in other parts of the world, indigenous peoples' land tenure and resource use have traditionally been governed by customary law and institutions, but these have gradually been eroded, undermined, or even criminalised in processes of colonisation and nation-building. For example, the process of nation-building and border drawing has resulted in the division of the traditional/customary territories of indigenous peoples, so that their territories fall within two or several countries. This is the case of the territories of the Karen between Thailand and Myanmar, the Dayak between Malaysia and Indonesia, and the Tripura between India and Bangladesh, among others. Further, traditional land use and livelihood practices, such as shifting cultivation or hunting and fishing, are criminalised in many countries. National legal frameworks relating to

land and resources have largely adopted the right of the state over “public” lands and resources for national development. Likewise, conflicting laws in relation to protection, management, and utilisation of lands and resources have further marginalised indigenous peoples.

The economic and commercial pressures on indigenous peoples’ land and resources are continuing on an unprecedented scale, resulting in massive land grabbing. This may be further accelerated by the free trade agreements and investment plans of the Association of Southeast Asian Nations (ASEAN), which imply, inter alia, a rapid increase in foreign direct investments, construction of interconnecting roads and highways, mining, dams and power projects, etc. The region has already experienced an explosion in large-scale land acquisitions for palm oil, biofuels, and other forms of commercial agriculture.

A 2011 ILC report notes:

“Rapid expansion of oil palm estates in Southeast Asia is being driven by rising global demand for edible oils and biofuels. Two countries – Malaysia and Indonesia – dominate world production. The characteristics of the crop encourage large-scale monocropping. Industry requirements for extensive tracts of land are overwhelming weak governance and legal regimes, which provide little protection of indigenous peoples’ rights, as recognised in international and customary laws. Land conflicts and serious human rights abuses are widespread. Court rulings and international treaty bodies have concurred that violations are taking place. Indigenous peoples have lost extensive tracts of land, small-holders have been immiserated and women have been marginalised by the way estates and schemes have been implanted without participation or consent. Concerted efforts to gain redress have had mixed results. While the courts in Sarawak have upheld indigenous peoples’ rights, the government has tightened restrictions instead of recognising their rights in land. Voluntary certification processes have yet to have wide effect although precedents of land restitution and improved company-community negotiations have resulted” (Colchester, 2011).

A recent film by Global Witness confirms the systemic corruption and illegality at the heart of government in Sarawak, Malaysia’s largest state.²⁴ The research notes:

“Today, less than five per cent of Sarawak’s rainforest remains in a pristine state, unaffected by logging or plantations. Sarawak continues to export more tropical logs than Latin America and Africa combined. Much of this destruction has occurred on the ancestral land of Sarawak’s indigenous population, who depend upon access to farmland and healthy forests for their livelihood and whose rights are protected under Malaysian law. These rights have been systematically ignored by the Sarawak Government, resulting in widespread environmental degradation, social disenfranchisement and economic deprivation” (Global Witness, 2013: 2).

²⁴ The 15-minute film can be accessed at: <http://www.globalwitness.org/library/corruption-malaysia-laid-bare-investigation-catches-sarawak’s-ruling-elite-camera>

A common trend and major challenge throughout the region is the increasing privatisation/individualisation of land ownership. This is happening even in areas where indigenous peoples are largely in control of their land and resources, such as in the Sixth Schedule areas and the “tribal states” (Nagaland, Mizoram, Meghalaya, Arunachal Pradesh) in northeast India. In Cambodia, a programme pushing for registration (and titling) of individual land holdings is undermining the community land rights act, as people fear (and have been told) that if they do not get their plots registered now they will end up having nothing at all. In northeast India privatisation of hitherto communal land is a complex process which is caused by state policies, changing land use (promoted by the government), the weakening of customary institutions, and the general underlying discourse of “modernisation”. As can be expected, such processes are captured by local elites and the result is a concentration of land in the hands of a few and the growth of landlessness.

On the positive side, the region has experienced some legislative developments over recent decades, with the recognition of indigenous peoples’ land and resources rights in national legal frameworks now ranging from legal recognition in the Philippines (through the 1997 Indigenous Peoples Rights Act – IPRA) to outright denial in, for example, Lao PDR. In Thailand, on 3 August 2010, a Thai Cabinet Resolution was adopted on policies regarding the restoration of the traditional practices and livelihoods of the Karen people. This resolution states unequivocally that the Karen have the right to stay in their ancestral lands and to continue their traditional farm rotation system, and prohibits the arrest of indigenous Karen forest dwellers.

The most complete law to protect indigenous peoples’ land and resource rights in the Asian region is the 1997 Philippine Indigenous Peoples Rights Act (IPRA), which is “anchored in several legal instruments, including the 1987 Constitution, ILO Convention 169, the Draft Declaration on the Rights of Indigenous Peoples and Philippine Native Land Titles” (Corpuz in Colchester and Chao, 2011: 70). Further:

“In terms of indigenous peoples’ rights to ancestral domains and ancestral lands, IPRA stipulates that indigenous peoples may own such lands with a native title, and have the right to develop and manage lands and natural resources as well as remain within their territories. The entry of migrants into ancestral lands and domains is to be regulated. Conflicts within the community are to be resolved through customary law. The FPIC (free, prior and informed consent) of indigenous communities is required before development or other projects are initiated on their lands” (ibid: 71).

In 2007, Nepal became the first Asian country to ratify ILO Convention No. 169. The ratification was part of the comprehensive peace agreements that put an end to a decade of civil war, which saw the marginalisation of the approximately 40% of the population who belong to one of the 56 recognised indigenous peoples.

Several other countries in the region have developed legislation to recognise some aspects of collective community land rights. For example, the Indian Forest Rights Act of 2006 provides for collective management of forest resources by adivasi/tribal communities, and the 2001 Cambodian Land Law provides for collective ownership of lands and participation of customary institutions in decision-making.

An example from Malaysia illustrates how existing legal provisions to protect indigenous peoples' land rights can be distorted to actually work against their original purpose. Indigenous peoples in Sabah (approximately 60% of the population, according to the 2000 census) can prove their historical presence and occupation of land prior to colonisation and independence. However, most communities have no, or inadequate, recognition of their lands, although native customary rights (NCR), including communal titles, are recognised in the 1930 Sabah Land Ordinance.

Communal titles were originally intended for non-irrigated (hill) rice production with a shifting cultivation cycle of production and fallow periods. However, an amendment of the law in 2009 provided for the transformation of state land into communal titles that are conceived as joint ventures between a "developer" and the Land and Survey Department (LSD). The Director of the LSD holds the title in trust on behalf of the natives and the land is used for large-scale oil palm plantations. This is regarded as a poverty reduction programme, and indigenous individuals are selected as "beneficiaries" of the project. According to Datuk Osman Jamal, Director of the LSD, "The noble intention is to expedite land alienation and to ensure the natives develop their land at the same time. If you give land to village people, they don't develop it. They need a developer to create jobs, facilitate government investments, and develop infrastructure. Through this, the villagers get jobs and learn how to do things. When they are all above the poverty line, then the areas can be sub-divided and they can get their land." (Interview with Datuk Osman Jamal by Birgitte Feiring, 2011).

The key challenge related to these legal provisions is their generally weak implementation, which is due to various factors, including:

- » Discriminatory attitudes against indigenous peoples' traditional occupations and lack of political will due to decision-makers' economic interest in indigenous peoples' lands and resources. The implementation of the Forest Rights Act in the State of Jharkhand, India, provides an example. As of December 2012, 42,003 claims had been received but only 15,296 titles had been issued, involving as little as 37,678 acres of forest land since 2006 (Government of India, 2012);
- » Excessive bureaucratic and administrative steps. For example, until 2012 only three indigenous communities in Cambodia had gone through the community registration process to achieve registration of communal land (STAR Kampuchea and ILC, 2012: 14). Likewise, the Philippine Association for Intercultural Development (PAFID) reports that the progressive provisions of IPRA have been diluted. For example, the titling of indigenous peoples' ancestral domains is a lengthy and expensive process, which requires a minimum cost of USD 25,000 and can take up to five years. This provides extractive industries with opportunities for manoeuvring, e.g. by offering to support the process if the community allows mining within the domain;
- » Contradictory legal provisions and distortion of operational guidelines. For example, in the Philippines, even communities with recognised titles cannot freely make use of their natural resources as the Department for Environment and Natural Resources (DENR)

- claims that no resources can be utilised without permits issued by itself, although this is contrary to the provisions of IPRA. Further, the Department of Justice upholds that a title can only be legalised if the Department confirms that there are no overlapping claims. This is illegal, as it does not recognise the decisions made by the National Commission on Indigenous Peoples (NCIP). The consequence is that IPRA is not implemented according to its intention: for example, in 2012 not a single title was issued in favour of indigenous communities (PAFID, interview 2013);
- » Approval of economic land concessions, mining licenses, and infrastructure projects on indigenous peoples' lands, either disregarding their traditional occupation of these lands or manipulating/coercing community members to provide consent. For example, in the Philippines the requirement for FPIC is often interpreted in a purely formalistic way, particularly in the context of resource extraction from indigenous land. Often, consent is sought by the proponent from indigenous individuals, without a proper consultation process that would ensure broader community support for the proposed measure (OHCHR, forthcoming);
 - » State-sponsored transmigration programmes for non-indigenous settlers by some governments, e.g. Bangladesh, Indonesia, and Vietnam, have resulted in massive loss of land of indigenous communities and have severely altered the demographic composition of transmigration areas in favour of non-indigenous settlers. These programmes have now been abandoned but the in-migration of so-called spontaneous settlers, often following friends and relatives, continues and the indigenous communities in the affected areas are still affected by the legacy of these programmes and the continued loss of land to settlers;
 - » National Parks and Conservation Areas as a means of disenfranchising indigenous peoples of their land rights in countries such as Thailand, Indonesia, and Malaysia;
 - » Lack of rehabilitation and restitution of destroyed lands, e.g. mining, dams, logged-out forests, etc.;
 - » Political repression, militarisation, persecution, and extra-judicial killings of indigenous land rights activists in countries such as the Philippines, India, Malaysia, and Indonesia. "Most human rights violations faced by indigenous peoples are connected to their right to their land, territory and resources. These cases include politically motivated killings, extra judicial killings, militarization of their ancestral territories, forced displacement, harassment, threats and intimidation, vilification as insurgents or supporters of insurgents, forced recruitment to paramilitary groups, sexual violence including rape, abandonment of impregnated women by state forces, among others" (AIPP 2013: 4);
 - » Limited access to justice and lack of redress or grievance mechanisms in relation to violation of land rights of indigenous peoples. "The lack of or limited access for indigenous peoples to seek justice remedies on violations arising from development projects on their lands is exacerbated by their non-recognition as rights-holders, as many of them are not recognized as indigenous peoples by the governments in their countries" (AIPP 2013: 3-4). This is aggravated by linguistic barriers, as many indigenous people are not functionally literate in the national languages (ibid: 4). In particular, "poverty, lack of education, and illiteracy limit indigenous women's awareness of their rights and their ability to make use of them" (ibid: 31)

2.2.3. Opportunities in Asia

Opportunities identified at the ILC technical workshop held in Rome in March 2013 include the following:

- » *The presence of strong indigenous peoples' movements and networks* in many countries and regions, e.g. Indonesia, the Philippines, and parts of India where communities are claiming rights under the 2006 Forest Act 2006. Indigenous peoples are engaging, at the local to national levels, in campaigns and community mobilisation to defend their lands, territories, and resources. At the regional and international levels the network of indigenous peoples, the Asia Indigenous Peoples Pact (AIPP), is engaging in numerous processes to advocate for indigenous peoples' rights to lands, territories, and resources, including in the context of climate change and REDD+, resource management, international finance, extractive industries, human rights monitoring, development, support to indigenous women and human rights defenders, etc. (see more at www.aippnet.org).
- » *REDD+ as leverage for recognition of rights*: Some governments and other key actors are relatively open to engaging in dialogue on forest rights under the REDD+ Cancun Agreement. This agreement includes social and environmental safeguards as a result of the strong advocacy of indigenous peoples and CSOs and, specifically, citing UNDRIP, it stipulates respect for the rights and traditional knowledge of indigenous peoples and local communities. It sets the framework for the engagement of indigenous peoples with governments and other key actors in REDD+, including UN-REDD and the Forest Carbon Partnership Facility of the World Bank. Likewise, the REDD+ agreement indicates the need to address land tenure issues relating to forests as well as benefit sharing, in which effective engagement with indigenous peoples is critical. This trend has been noted in Indonesia, Cambodia, Lao PDR, Thailand, Vietnam, and Myanmar. For example, in Indonesia in 2011 the national alliance of indigenous peoples, Aliansi Masyarakat Adat Nusantara (AMAN), and the National Land Authority signed a Memorandum of Understanding allowing indigenous peoples to register their land and territories, which have been documented over recent years through community participatory mapping. In November 2012, AMAN officially handed over 265 maps of ancestral domains covering 2,402,222 hectares to the relevant government authorities. Also in 2011, the national parliament officially decided to give priority to a Draft Act on the Recognition and Protection of Indigenous Peoples' Rights.
- » *Proper implementation of the Safeguard Policy Statement (2009) of the Asia Development Bank (ADB)*: In cases where the ancestral domains, lands, or natural as well as cultural resources of indigenous peoples are affected by an ADB project, the government has to comply with certain "special requirements". These include the conduct of a social impact assessment, conduct of meaningful consultation with affected peoples, and preparation of an indigenous peoples plan, including support in establishing legally recognised rights to lands and territories traditionally owned, occupied, or used by indigenous peoples, through titling or acquisition of such lands. If a project involves commercial development of natural resources (such as minerals, forests, hunting, or fishing grounds) within customary lands under use that will affect the livelihoods of indigenous peoples or cultural ceremonies and spiritual use of these resources, or involves physical

displacements from traditional or customary lands, the free, prior, and informed consent of affected communities must be ascertained. Good faith negotiation is to be undertaken to resolve differences and disagreements, and consent through broad community support is sought. In a case where a borrowing member country needs technical support for the development of policies and strategies related to strengthening indigenous safeguard policies domestically, the ADB can provide financial assistance, including strengthening local legislation that recognises traditional or customary land tenure systems; institutional capacity-building of indigenous people's organisations and government agencies; and increasing participation of indigenous peoples in the development process, etc.

- » *Increasing recognition of indigenous peoples' rights in domestic law:* In a groundbreaking ruling in May 2013, the Constitutional Court of Indonesia affirmed AMAN's claim that forest that has been inhabited by indigenous groups for generations should not be regarded as "state forest". According to AMAN, the ruling will recognise community ownership of "customary forest". As stated by Abdon Nababan, Secretary-General of AMAN, "About 40 million Indigenous Peoples now are rightful over our customary forests because the State has become unable to expel us out of our customary forests that have become our source of livelihood from generation to generation" (AMAN, 2013).



2.3. Latin America

2.3.1. Indigenous peoples in the Latin American context

Latin America is a multi-ethnic and multi-cultural region with over 650 indigenous peoples currently recognised by states, over half of whom are settled in tropical forest areas (ECLAC, 2006: 143). In total, they are estimated to number approximately 40 million people (IWGIA, undated), constituting numerically small but highly diverse minorities in countries such as Brazil (over 200 distinct groups, totalling approximately 1% of the population) but majority populations in Bolivia and Guatemala. Territorially and demographically, “these peoples are highly diverse and their socio-political status within the countries they inhabit varies widely. Their common denominator, however, is the structural discrimination they suffer in the form of marginalization, exclusion and poverty” (ECLAC, 2006: 143).

Indigenous peoples in Latin America are descendants of the populations that inhabited the region prior to the European colonisation. These include, for example, the Quechua and Aymara peoples of the Andean highlands, the Guaraníes, the various Maya groups in the Meso-American region, the Nuaa in Mexico, and the Mapuche in the southern part of South America. Further, building on the similarities in terms of cultural features (existence of distinct cultures, knowledge systems, customary law and institutions, attachment to territories) as well as socio-economic and political conditions (widespread poverty and marginalisation, including in terms of participation in decision-making), some Afro-descendant communities are recognised as collective rights-holders with the same rights as other indigenous peoples under national and international law. This, for example, is the case with the Garífuna in the Caribbean region.

The International Work Group for Indigenous Affairs (IWGIA) estimates that there are approximately 200 indigenous groups in isolation in the Americas, numbering approximately 10,000 people (IWGIA; 2013: 8). These comprise “indigenous peoples or segments of indigenous peoples who do not maintain or have never had regular contacts with the population outside their own group, and who tend to refuse contact with such outside persons” (ibid). As noted, “unlike other rights-holders, indigenous peoples living in isolation by definition cannot advocate for their own rights before national or international fora. Therefore, the protection of their life and culture become particularly relevant for the Inter-American system of human rights” (ibid: 9).

In some parts of the Andean highlands and parts of Central America, indigenous peoples are categorised as *campesinos* (peasants). While this has reference to the sedentary agriculture that is the main livelihood strategy of these communities, the denomination in occupational rather than ethnic terms is largely a result of land reforms that took place in the 1950s and 1960s. For example, in Peru, through the agrarian reform in 1969, the country’s semi-feudal system was abolished and large landholdings on the coast and in the highlands were divided up and handed over to indigenous labourers, resulting not only in land reforms but also in citizenship rights (CEPES, 2009: 21). While this was a “turning point for wider processes of democratization and recognition of citizenship rights for the deprived rural indigenous population” (ibid), it also led to the individualisation of land rights and, to some extent, the hiding of ethnic and cultural identity. It is only in the past decade that the *campesino* communities in some parts of Bolivia and Peru have reframed their struggle with regards to the international instruments for recognition of indigenous peoples’ collective rights. Still, for example, the Ministry of Energy and Mines in Peru questions the identity of the *campesino* communities as indigenous, with an intention to limit these communities’ rights to consultation and consent (see e.g. CAOI, 2013).

In contrast, most indigenous peoples of the lowlands and forested areas of Latin America are numerically smaller communities of hunters-gatherers and shifting cultivators, who hardly had any recognised land rights until the 1980s. When they started making their claims heard, these were from the outset framed by the claim for collective rights to territories. These historical processes provide for highly diverse patterns and trends with regards to recognition of land, territories, and resources in the different countries and eco-regions of Latin America, ranging from individual titling to recognition of territories.

2.3.2. Key trends regarding indigenous land rights in Latin America

Latin America is the region where most progress has been made with regards to constitutional and legal recognition of indigenous peoples’ rights. For example, 14 countries in the region have ratified ILO Convention No. 169 and most countries have developed legislation to recognise indigenous peoples’ rights to lands, territories, and resources. The legislative recognition has paved the way for comprehensive programmes to map, demarcate, and title

indigenous lands and territories in some countries – for example in Bolivia, where 21,689,280 hectares were regulated or titled as collective property of indigenous peoples and peasants between 1996 and 2009 (IWGIA, 2010: 44). In Nicaragua, 21 collective land titles have been approved, recognising 30% of the country's territory as being under the administration of communal/territorial indigenous governments. However, there are still some countries in the region where indigenous issues have only recently emerged on the agenda, e.g. Belize and El Salvador. In some countries, the recognition of indigenous territories provides for a consolidation of indigenous governance and resource management institutions, and some countries have included the indigenous development concept of *buen vivir* ("good living") in legislation and policies. However, in most countries, the main challenge is the actual implementation of constitutional and legal provisions regarding indigenous peoples' rights and the persistent patterns of exclusion, marginalisation, and poverty.

Latin America as a region has in-depth expertise and experience on all matters relating to indigenous peoples' land and resource rights and there is a wealth of data, information, studies, and maps available. Further, given the relatively well elaborated constitutional and legislative frameworks and the high number of ratifications of Convention No. 169 – combined with relatively weak implementation – there is also a wealth of jurisprudence coming out of national courts, the inter-American system, and ILO supervisory bodies, particularly concerning land and resource rights. Key issues in the region include the following.

Natural resources and the duty to consult

States have a duty to consult with indigenous peoples on decisions that may affect their lands, territories, and resources. In all Latin American countries, the state retains the right over sub-surface minerals such as oil and gas, but the duty to consult and seek FPIC also applies in such cases. However, licences and concessions are still being given to private enterprises without prior consultation with indigenous peoples. For example, 72% of the Peruvian Amazon has been given in concessions to oil and gas companies (CEPES, 2009).

In recent years, consultation with indigenous peoples has been at the top of the political agenda in a number of Latin American countries, particularly in the context of natural resource exploitation, hydro-electric plants, and other mega-projects initiated without prior consultation or consent. In spite of the commitments of the region to UNDRIP and Convention No. 169, the widespread constitutional and legal recognition of indigenous peoples' rights, and the jurisprudence generated by the Inter-American Court of Human Rights (see section 1.5.1), only a few countries have developed specific legislation, regulations, or institutions to operationalise the duty to consult. Consequently, conflicts between governments and indigenous peoples are constantly increasing and governments are faced with pressure to produce legislative and regulatory frameworks on consultation. A number of countries have engaged in such processes, but with mixed results. For example, Peru has completed the process of adopting a law and a related operational regulation, but some of the main indigenous organisations have withdrawn their support for the process and have questioned the outcome.

Overlapping and contradictory laws and regulations

A frequent problem is the existence of overlapping and contradictory legislation and policies that hamper the effective implementation of indigenous peoples' rights. This, for example, is the case in Nicaragua, where Law 445 (GoN, 2003) provides for demarcation and titling of indigenous territories, along with recognition of indigenous territorial governments. For instance, the Rama-Kriol territory in the Southern Atlantic Autonomous Region is currently inhabited by more than 10,000 settlers and, although the Rama-Kriol have legal title, there have been no initiatives from regional or national government authorities to relocate the settlers. Further, the territory overlaps with protected areas, which are administered by the Ministry of the Environment, while the regional autonomous government and municipalities also have competencies in the area (GTRK, 2009). All of this contributes to a situation where the *de facto* ability of the Rama-Kriol territorial government to govern the territory and manage the resources is limited.

This is not an isolated case. It is estimated that indigenous territories constitute 25.3% of the Amazon basin and that protected areas constitute 20.9%. The overlap between the two territorial categories is 41.2 % (TIG, undated).

Indigenous land governance institutions

Comprehensive constitutional and legislation reforms in Latin America have paved the way for increasing indigenous autonomy in countries such as Bolivia, Colombia, Ecuador, Panama, Peru, and Nicaragua. There are basically three models of indigenous autonomy in Latin America: the regional, municipal, and territorial modalities.

The regional model, as seen in Nicaragua with the establishment of the North and the South Atlantic Autonomous Regions, provides for regional autonomy and the transfer of competencies from central government to regional governments.

The municipal modality, as seen for example in Bolivia and Ecuador, implies the transformation of a municipality with a majority indigenous population into an "indigenous municipality". In this model, the indigenous government operates through the political parties and the general laws of the country. However, some indigenous peoples see this as a pathway towards the establishment of their own forms of democracy and government. For example, in Bolivia an indigenous municipality can establish its own statutes, in accordance with indigenous customs (TIG, undated).

The territorial modality is a process through which the state recognises indigenous peoples' self-government or autonomy to govern and administer justice in their territory, through their governance institutions and based on customary law. As the majority of indigenous territories overlap with municipal, departmental, and provincial limits, this modality requires a redefinition of the political-administrative divisions of the state (ibid). This model is, for example, established through the indigenous *comarcas* in Panama, the *resguardos indígenas* in Colombia, the *tierras colectivas de origen* in Bolivia, and the communal titles and governance institutions in Nicaragua.

In general, indigenous peoples' governance institutions, be they traditional or innovative, have been systematically marginalised and undermined in historical processes. Consequently, most of these institutions have only limited institutional capacity to claim indigenous rights.

2.3.3. Barriers and opportunities in Latin America

Barriers include:

- » Reluctance to identify some indigenous communities in the Andean region as indigenous;
- » In spite of strong constitutional and legislative frameworks, the non-implementation of indigenous peoples' rights, particularly with regards to state implementation of the duty to consult in the context of projects that affect their lands, territories, and resources;
- » Overlapping and contradictory legal and policy provisions that hamper the effective implementation of indigenous peoples' rights.

Opportunities include:

- » Incipient experiences with indigenous peoples' governance institutions, which are an indispensable requirement for the full enjoyment of their rights;
- » The draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States, which is an effort by indigenous peoples to expand and deepen their rights at the regional level and which would further strengthen the work of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

3

Key thematic
issues concerning
indigenous
peoples' land
rights





3.1. Indigenous women's rights and access to land and resources

Indigenous women have a close relationship with their land, and play a key role in families, communities, and nations as the primary food providers (CEPES, 2009; ILC Kathmandu Declaration, 2009). In Nepal, for example, where indigenous peoples constitute at least 38% of the population, women account for 66% of the agricultural labour force but own only an estimated 8% of the land (Feng, 2011: 15). In economic terms, too, women are highly dependent on land, as cash income is often derived directly from natural resources found on their community lands (e.g. non-timber forest products). In some areas of Andhra Pradesh in India, 77% of women's income comes directly from forests, yet women's crucial role in forest management is often not recognised under community forest management systems (Feng, 2011: 30). When land is lost or degraded, women's daily life is seriously affected, as the burden of providing for the family's subsistence becomes heavier. Psychologically as well as socially, women are under huge pressure, and their dignity and status in society are threatened (AIPP, 2013; FAO, 2013; Tebtebba, 2011).

As noted by ILC in the case of pastoral societies:

"Customary practices regarding access to livestock and land used to be especially adverse for women. Women's ambiguous kinship ties put them de-facto out of the corporate unit, thus depriving them of basic resource control and inheritance rights. With the roles of men and women being distinct and complementary

in pastoral societies, women's traditional rights are in fact usufruct ones, while ultimate control of resources is invested in men. As a result, pastoral women seldom enjoy full rights to access productive resources, but need to continuously negotiate as secondary claimants through male relatives " (ILC, 2007: 10-11).

It continues:

"Gender and generational relationships are particularly impacted by the reshaping of the pastoral societies from within. As reported from all regions [...] recent changes in the economic and socio-political conditions affecting pastoral livelihood patterns, trends of migration and food and physical insecurity are giving women more decision-making power. [...] Despite the growing socio-political and economic responsibilities for pastoral women, intensified competition for resources has led them to become increasingly excluded from access to productive assets, thus provoking a worrisome erosion of women's rights" (ibid: 16).

Notwithstanding indigenous women's crucial role in transforming land as a resource into life-sustaining food for their communities, traditional gender roles often limit their decision-making power in land use governance, and their benefits from land can easily be jeopardised, as they often do not have recognised ownership rights (FAO, 2013; Feng, 2011).

In 2011, the African Commission on Human and Peoples' Rights issued a Resolution on the Rights of Indigenous Women in Africa, The Resolution affirmed the concern of the Commission "that the expropriation of indigenous populations' ancestral lands and the prohibition of their access to the natural resources on these lands has a particularly serious impact on the lives of indigenous women". Further, the Commission urged State Parties to "pay special attention to the status of women in their countries and to adopt laws, policies, and specific programs to promote and protect all their human rights".

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) enshrines indigenous peoples' collective rights to lands, territories, and resources, and in Article 44 also specifically states that all rights recognised under the Declaration apply equally to men and women (Tebtebba, 2011: XVII). Further, UNDRIP is underpinned by international human rights law, including the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). Convention No. 169 also emphasises that its provisions apply equally to men and women and further, in article 20, provides specifically for protection of women against unequal access to employment and against sexual harassment. Likewise, the Commission on the Status of Women (CSW) has urged states to support the economic activities of indigenous women, "in particular by enhancing their equal access to productive resources and agricultural inputs such as land, seeds, financial services, technology, transportations and information" (UN Doc. E/2012/27: 22).

Hence, as a general principle, indigenous customs cannot be justified if these are in violation of fundamental human rights, such as the equal rights of men and women. This is, for example, the case with customary inheritance rights, which prevent women from owning land.

The FAO Technical Guide on responsible land tenure (FAO, 2013) notes that in a gender-equitable land governance system, women's access to land – and to the institutions that administer it – is not limited by traditional gender roles. Gender-equitable governance ensures that women and men can participate equally in their relationships to land, through both formal institutions and informal arrangements for land administration and management (FAO, 2013: 3-5). Women's access to both formal and customary land governance institutions needs to be secured, which again requires capacity-building of women, who need to be informed and learn to claim their rights, and the systems that need to learn to be responsive to women's needs and their active engagement.

In Bolivia, CSOs have promoted indigenous women's land rights both as a constitutional matter and within the customary governance institutions. When the 2006 Constitution was drafted, women's organisations contributed by providing research and evidence to promote change and by formulating policy proposals, which led to an increased recognition of women's land rights (FAO, 2013: 28). Likewise, the practice of indigenous land management institutions has been influenced through training and leadership workshops promoting women's participation (ibid: 52).

While the principle of gender equality is clear and well reflected in UNDRIP, the particularities of the collective aspects of indigenous peoples' rights will also have to be taken into account. Indigenous women largely see themselves as part of communities, and their well-being as being strongly inter-linked with the overall situation and well-being of their communities. Thus, while indigenous women are particularly vulnerable to loss or degradation of community land, and are also often subject to gender-based discrimination, the solution to securing their land rights is not necessarily the promotion of individual land rights for women.

A recent interpretation of indigenous women's rights under CEDAW formulates this concern:

"Introducing individual land titling systems ... fails to take account of the demands of indigenous women themselves, who have emphasised the importance of collectively held indigenous territories for the preservation and development of their collective identity and the very survival of their peoples. Finally, evidence from around the world shows that introducing individual land title systems in indigenous lands, which can be sold and mortgaged, does not alleviate poverty, but rather facilitates the loss of land of the entire community and directly undermines indigenous strategies to preserve their livelihoods" (Kambel, 2012: 23).

The particular risks involved with individualisation of lands for indigenous women are widely evidenced by research:

"Within customary systems of common property, balancing the rights of the individual and the group in an equitable manner may be a challenge [...]. Women's access to common property is often indirect, through male

relatives [...]. This form of secondary access may serve to protect and maintain minimal rights for women under two conditions: (a) as long as they are married/and their husband is alive, and (b) for as long as common property is not individualized" (ILC and CAPRI, 2008: 17).

Hence, if common property is individualised, it may often be the men who become title-holders, thereby undermining the minimal rights that women enjoyed under customary arrangements.

In the Democratic Republic of the Congo, ILC has been involved in a legal awareness campaign promoting women's land rights in Pygmy communities. Three inter-connected strategies proved to be a model of good practice (FAO, 2013: 94):

Capacity-building of women, including training on land law, communication skills, and support for formulating memoranda;

Targeting local leaders, and establishing direct communication between them and women who know their rights;

Using local modes of communication, such as songs, dance, and visuals.

In conclusion, rather than seeing indigenous women's rights as purely individual and contradictory to collective rights, the complementarity between individual and collective rights – as complementary equality provisions – needs to be highlighted and promoted. Hence, equality should be respected also in decision-making within customary institutions, and indigenous women should take the lead in making necessary changes. There are two factors that make this approach feasible: 1) the flexibility and adaptability that often characterise customary law, as customary practices change over time in interaction with other societal changes; and 2) the emergence of indigenous women's organisations all over the world (see, for example, the website of the International Indigenous Women's Forum: <http://www.fimi-iiwf.org>).

This flexibility and adaptability of customs is illustrated by the following example from Australia:

"Australia's Aboriginals, who comprise 3.1 percent of Western Australia's population of 2.3 million people, have always had a very strong spiritual attachment to the land and strongly gendered knowledge about land. Traditionally, responsibility for land was patrilineal, and knowledge relating to land still resides largely in men, especially senior men. Women's knowledge is limited to women-only sites largely related to food collection, birthing and so on. The 1993 Native Title Act established a clear legal process for Aboriginal groups to claim and register native land titles, and legally recognizes their right to participate in decision-making about land. However, Aboriginal land claims are highly contested and legal recognition of native land titles depends on proof based on the patrilineal traditions and customs. In the meantime, however, Aboriginal law and custom

have changed to a cognatic system, which recognizes descent from the mother as well as the father. Aboriginal women, and young men, have assumed greater responsibilities in their communities, including as spokespeople and decision-makers in some land settlements, which have a broader governance base than the traditional decision-making structures centred around senior men. These changes to law and custom have strengthened women's claim to the right to be involved in land management. Through case law, judges are broadening what is accepted as proof for land claims – adapting the law to reflect changes in gendered information and knowledge, such as by legally recognizing cognatic descent in certain cases. Although women and men in Western Australia's Aboriginal communities will retain their different roles in land management for the foreseeable future, they are transferring knowledge about land and land claims in flexible ways in response to changing gender roles" (FAO, 2013: 29-30).



3.2. Indigenous and Community Conserved Areas

In most countries, there is a considerable overlap between indigenous peoples' lands and territories and areas of high biological diversity. This is the case in the Philippines, as illustrated by the map below, which shows a high degree of overlap between forest areas, biodiversity hot spots, and ancestral domains of indigenous peoples. The latter by far exceed state protected areas, but the value of indigenous peoples' community-based governance is still not recognised by governments (PAFID, 2013, see map at page 74).²⁵

There seems to be a growing momentum around the recognition of Indigenous and Community Conserved Areas (ICCAs), which is based on the recognition that a "considerable part of the Earth's biodiversity survives on territories under the ownership, control, or management of indigenous peoples and local (including mobile) communities. However, the fact that such peoples and communities are actively or passively conserving many of these sites through traditional or modern means has hitherto been neglected in formal conservation circles" (World Parks Congress, Recommendation v.26, 2003). ICCAs are defined as: "natural and modified ecosystems including significant biodiversity, ecological services and cultural values voluntarily conserved by indigenous and local communities through customary laws or other effective means" (ibid).

²⁵ Further information on PAFID's study of ICCAs in Philippines, available at: <http://www.newcapp.org/images/whatsnew/download/12052011020306NewCAPP%20Initial%20Experience.pdf>



As indicated by the World Conservation Monitoring Centre (WCMC), the “total area covered by protected areas under this type of governance is not currently clear and as a result is likely to be severely underestimated” (UNEP-WCMC, undated). Further, while “the conservation practice of ICCAs is potentially the oldest on earth, it is under-recognized and not well understood, thus leaving it in jeopardy of lacking political and financial support and increasingly vulnerable to external threats”.

In the Philippines, a pilot project is working with five indigenous communities to identify conservation zones within their ancestral domains and to have these registered with Ancestral Domain, declare and register this with UNEP-WCMC (ILC workshop, 2013: Dave Devera, PAFIG). The registration is a simple notification but “provides another layer of security, as governments report this as progress under their compliance with the CBD” (ibid).

While the ICCA model may provide opportunities for indigenous peoples, concerns raised by it include: 1) the possibility of indigenous peoples’ lands and territories being reduced to community conserved areas, with a limiting focus on conservation; and 2) the risks of ICCAs leading to co-management arrangements, where indigenous peoples risk being marginalised by government authorities or NGOs. In this regard, the model may still be worth exploring, if equitable decision-making as well as protection of livelihoods are ensured (ILC workshop 2013: Joan Carling, AIPP).



3.3. Climate change and REDD+

The Intergovernmental Panel on Climate Change (IPCC, 2007) has identified indigenous peoples and women who are dependent on natural resources as groups who are likely to be particularly vulnerable to climate change (Feng, 2011: 15). This calls for a thorough focus on indigenous peoples' rights and their role in relation to climate change mitigation, as well as solutions to the challenges that they face in terms of adaptation.

In relation to climate change mitigation, it is broadly acknowledged that deforestation and forest degradation contribute between 12% and 20% of greenhouse gas emissions worldwide (IPCC, 2007; Werf et al., 2009). Against this backdrop and in the context of negotiations under the United Nations Framework Convention on Climate Change (UNFCCC), the parties have agreed to develop a mechanism that addresses emissions from forest loss, by "Reducing Emissions from Deforestation and Forest Degradation" (REDD+). The fundamental idea of REDD+ is to establish a flow of funds in order to create positive incentives to protect forests in developing countries and thereby cut emissions from deforestation and forest degradation. REDD+ rests on the principles of measuring forest carbon stocks and assigning a monetary value to these. Hence the forests become objects of investment, which could be beneficial for indigenous peoples.

However, this new value placed on forests related to their carbon stocks also potentially threatens the access and control of indigenous forest communities to the land and forest resources that they have traditionally relied on for subsistence and cash income, as well as spiritually, socially and culturally (Feng, 2011). Land tenure is often addressed in a limited manner in the context of REDD+, and many activities are implemented in countries with poor

governance and weak coordination of government institutions, which implies a vacuum of uncertainty as to who has the right to benefit from REDD+. This has severe consequences worldwide, as the expectations of many actors of gaining benefits from REDD+ in the future may be a driver of forest land grabbing, and thus in itself a threat to indigenous peoples' control over their forest resources (Feng, 2011: 34). Moreover, distorted implementation guidelines e.g. favouring individual land rights, do not support the collective aspects of indigenous peoples' rights to land, territories, and resources, which are intrinsically linked to their collective rights to self-determination, non-discrimination, cultural integrity, and development as distinct peoples (UNDRIP preamble, art. 25; C169 art. 13.1; C107 art. 11).

The linkages between the effects of climate change, governance, and land and resource rights were evidenced by a series of case studies undertaken in 2012 with indigenous communities in Namibia, Kenya, and the Republic of Congo (Feiring and Stidsen, 2013). All of these communities are experiencing severe effects of climate change, including droughts, floods, extreme rainfall, strong winds, disruption of seasons, drying up of rivers, rising temperatures, and frost. These hazards threaten their economic, social, and cultural survival as the decreasing predictability of weather conditions is undermining their traditional livelihood strategies, knowledge, and cultural notions of causal relationships.

The research found: "The communities traditionally practiced hunting, gathering, fishing or pastoralism, which require mobility, flexibility and, consequently, access to land and natural resources. Although supplemented with other livelihood elements, the communities are still dependent upon traditional knowledge and practices related to the use of wild plants and game, livestock-keeping and fishing. They face, to varying degrees, disruption of traditional livelihood practices, mainly due to [...] discriminatory land rights regimes, influx of settlers, and large-scale development projects. Further, they live in countries with generalized poverty situations and relatively weak governance institutions [...]. The situation is aggravated by discriminatory attitudes against indigenous peoples' cultures and livelihood strategies, reflected in non-recognition of their traditional governance institutions and exploitative relationships with neighbouring communities" (ibid: 36).

The study concludes by recommending "a human rights-based approach to climate change adaptation, in line with international and regional human rights instruments", and recognition and respect for "indigenous peoples' right to land, territories and natural resources as an indispensable element of strengthening their long-term resilience towards climate-induced stresses" (ibid: 84).

Nevertheless, while in some aspects REDD+ implies risks and negative consequences, it is increasingly recognised that its mechanisms are more likely to be successful if they correspond to, rather than conflict with, the interests of forest communities, local communities, and indigenous peoples (Springate-Baginski and Wollenberg, 2010). The forest tenure security of indigenous and local communities has received increasing attention in terms of its key roles in sustainable forest management and reducing deforestation in recent decades (Feng,

2011: 31). Indonesia and Cambodia, among other countries, are opening up to indigenous peoples' rights through REDD+ (see section 2.2.3). Therefore, REDD+ can be seen not only as a response to climate change but also as a window of opportunity to promote indigenous peoples' rights, as the protection of their rights is a logical step when aiming to protect forests in a sustainable way e.g. through REDD+. Necessary steps on this path are to resolve issues of ownership, to promote and encourage knowledge about sustainable forest management, climate change, indigenous peoples' way of life, and spiritual beliefs etc., and to ensure that consultations happen in good faith, leading to FPIC of the communities concerned. In this regard, REDD+ provides leverage for community-level implementation of international policy commitments to UNDRIP.

Although REDD+ has attracted much attention, some predict that its importance in terms of policy leverage has already been exhausted and that indigenous peoples' rights in the context of adaptation to climate change will emerge as the next area of focus. It is generally recognised that indigenous peoples' limited engagement in policy-making makes it very difficult for them to benefit from adaptive measures to meet their real needs (Feng, 2011: 15).

4

Summarising
key trends,
challenges, and
opportunities



This study presents an overview of indigenous peoples' rights to lands, territories, and resources and analyses thematic and regional issues emerging in that context that are of particular relevance for the work of the International Land Coalition. From this analysis, some key trends, challenges, and opportunities can be identified.

Trends and challenges

- » Generalised misconceptions about indigenous peoples' land and resource use, perceived as environmentally harmful, outdated etc., leading to discrimination against indigenous peoples' occupations and traditional livelihood strategies (e.g. shifting cultivation, pastoralism, etc.);
- » Non-recognition of traditional occupation of lands, territories, and resources as the basis for determining the scope of indigenous peoples' rights;
- » Non-recognition of indigenous peoples' tenure rights and, in particular, the collective aspect of these rights;
- » Discrimination against indigenous women, including in their access to land;
- » Continuing loss of lands, territories, and resources due to commercial pressures, establishment of conservation areas, and criminalisation of indigenous peoples' traditional livelihood activities;
- » Non-implementation of constitutional, legislative, and policy provisions concerning indigenous peoples' rights;
- » Overlapping and contradictory laws and regulations, e.g. de-linking indigenous peoples' rights to lands from their rights to natural resources, distortion of operational guidelines, and excessive bureaucratic and administrative requirements for recognition of rights;
- » Importance of indigenous peoples' lands and territories for conservation of biological diversity;
- » Vulnerability of indigenous peoples to climate change, due to their immediate dependency on lands and natural resources;
- » States' neglect of the duty to consult and to reach consent on measures affecting indigenous peoples' lands, territories, and resources, and failure of private sector actors to respect indigenous peoples' rights or to operate with necessary due diligence;
- » Political repression, militarisation, persecution, and extra-judicial killings of indigenous land rights activists;
- » Limited data and weak monitoring of indigenous peoples' access to and control over lands, territories, and resources.

Opportunities

- » Strong or emerging indigenous peoples' organisations;
- » Emerging organisations of indigenous women;
- » Progressive legislative and policy developments with possibilities for supporting implementation and scaling-up of good practices;
- » Increased jurisprudence of national courts as well as regional and international human rights mechanisms to guide implementation processes;

- » “Soft law” commitments of international financing institutions, UN agencies, bilateral donors, and sectoral policies (e.g. in the context of REDD+), which provide leverage for advocacy and promotion of indigenous peoples’ rights;
- » The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests, the African Land Policy Framework and Guidelines, and other instruments, which carry a potential for promoting and advocating for indigenous peoples’ rights, in line with UNDRIP and other international instruments.

Indigenous peoples' land, territories, and resources rights and related indicators

The following table attempts to provide an overview of the main provisions of international law regarding indigenous peoples' rights to lands, territories, and natural resources in accordance with international law, as enshrined in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. For each aspect of indigenous peoples' substantive rights to lands, territories, and natural resources, a possible set of indicators of progress and implementation has been identified. The indicators are organised in accordance with the OHCHR principles for dividing human rights indicators into process, structural, and impact indicators.

As the table is structured according to the provisions of international law, it mainly provides indicators of the fulfilment of obligations by states as the primary duty-bearers. Therefore, an extra column has been added to reflect indicators of indigenous peoples' own capacity to claim and promote their rights, as an essential component for the promotion and enjoyment of their rights and for holding states accountable.

Although the table is generic, it attempts to be relevant to diverse and complex regional and country situations by capturing both individual and collective aspects of land rights, as well as *de jure* and *de facto* progress towards protection of indigenous peoples' rights. In order to keep the table as simple as possible, where appropriate the same indicators have been used to illustrate several aspects of indigenous peoples' substantive rights.

INDIGENOUS PEOPLES' RIGHTS TO LANDS, TERRITORIES AND RESOURCES

Indications of states' fulfilment of their duty to respect, protect, and promote indigenous peoples' rights	Impact indicators (de facto enjoyment of rights)	Structural indicators (domestic legislative, administrative regulations, and institutions)	Process indicators (efforts to make rights effective through institutional capacity-building, core procedures, access to remedy, etc.)	Indications of indigenous peoples' capacity to claim and promote their rights
Substantive right				
1.1. Recognition of the foundational principles				
Recognition of indigenous peoples' rights to lands or territories based on traditional occupation, ownership, or use (C169 art. 14.1; UNDRIP art. 25; 26.1., 26.2; C107 art. 11)	Indigenous peoples' traditional territorial boundaries are recognised and respected.	Laws and policies recognise indigenous peoples' collective right to lands or territories based on traditional occupation, ownership, or use. Laws and policies recognise indigenous peoples' individual rights to lands or territories based on traditional occupation, ownership, or use.	Existence of process to identify lands or territories traditionally occupied, owned, or used by indigenous peoples. Existence of process to identify lands or territories traditionally occupied, owned, or used by indigenous individuals.	Indigenous peoples are knowledgeable about the basis of their land and territorial rights (traditional occupation, ownership, or use). Indigenous peoples are knowledgeable about the boundaries of their traditional lands and territories.
Recognition of indigenous peoples' collective right to lands or territories, respecting the cultural and spiritual values of lands or territories (C169 art. 13.1; UNDRIP preamble, art. 25; C107 art. 11)	Title deeds or other binding agreements are issued in recognition of indigenous peoples' collective right to lands or territories.	Indigenous peoples' collective right to lands or territories is reflected in law and policies. National legislation contains provisions regarding village/community rights, etc., which indigenous peoples can use to ascertain their collective right to land or territories.	Dialogue between indigenous peoples and governments to elaborate legislation and policies to recognise indigenous peoples' collective right to lands, territories, and resources. Indigenous peoples make use of existing provisions regarding village/community rights/co-management, etc. to ascertain their collective right to land or territories.	Indigenous peoples have representative organisations that claim collective rights to lands, territories, and resources.
Recognition of the concept of territories, encompassing the total environments of the areas which indigenous peoples occupy or otherwise use (C169 art. 13.2; UNDRIP art. 26)	Indigenous peoples can practise their customary laws relating to collective management of lands, territories, and resources. Indigenous peoples can perform their traditional occupations (such as pastoralism, hunting/gathering, shifting cultivation, fishing) without restrictions.	Title deeds or other binding agreements encompass rights over natural resources and areas of cultural and spiritual significance. National legislation contains provisions regarding co-management etc, which indigenous peoples can use to ascertain their collective right to natural resources.	Indigenous peoples make use of existing provisions regarding co-management etc. to ascertain their collective right to natural resources.	Indigenous peoples have customary law and/or self-governance institutions to collectively manage lands, territories, and resources.
Measures to safeguard right to use lands not exclusively occupied by indigenous peoples, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention to the situation of nomadic peoples and shifting cultivators				
Respect for indigenous peoples' own procedures for transmission of land rights (C169 art. 17.1; UNDRIP art. 27; C107 art. 13.1)	Indigenous peoples practise their customary laws concerning land and resource ownership, transfer, and other arrangements.	National legal system recognises customary laws for inheritance and transmission of land rights that are in accordance with internationally recognised human rights.		Indigenous peoples have customary law institutions that govern issues concerning inheritance and transmission of land rights in accordance with internationally recognised human rights.
Equal treatment with regards to provision of more lands when necessary for providing the essentials of a normal existence or for increase in population numbers (C169 art. 19 (a); C107 art. 14 (a))	Indigenous peoples have sufficient lands to provide for their needs. Social and economic indicators show no gap between indigenous and non-indigenous peoples.	Indigenous peoples' needs are considered in land reform policies and programmes. Measures for equitable land distribution and ownership are in place and enforced.	Indigenous peoples participate in consultations and decision-making concerning land reform policies and programmes.	Indigenous peoples' representative institutions define and present their land-related needs and claims.
Ensure appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous peoples across borders				

1.2. Procedural and protective measures

<p>Steps to identify indigenous peoples' lands or territories (C169 art. 14.2, UNDRIP art. 27)</p> <p>Establishment of adequate procedures within the national legal system to resolve land claims by indigenous peoples (C169 art. 14.3; UNDRIP art. 27, 40)</p>	<p>Indigenous peoples' lands or territories are surveyed, demarcated, and registered; communal and/or individual maps are produced.</p> <p>Land claims by indigenous peoples are resolved in the national legal system in accordance with internationally recognised human rights (as reflected in UNDRIP, C169).</p> <p>Rulings or recommendations of international and/or regional human rights bodies and mechanisms are implemented by states.</p>	<p>Existence of procedures and institutions for identification, demarcation, and registration of indigenous peoples' lands or territories.</p> <p>Existence of procedures and institutions for identification, demarcation, and registration of indigenous individuals' lands.</p> <p>National legislation reflects indigenous peoples' right to lands, territories, and resources.</p> <p>Mechanisms to resolve conflicting land claims are established.</p>	<p>Identification, demarcation, mapping, and registration of indigenous peoples' or individuals' lands or territories begun.</p> <p>Budget allocations for identification, demarcation, and registration of indigenous peoples' or individuals' lands or territories.</p> <p>Land claims are accepted by the national legal system and/or regional and international human rights bodies and mechanisms.</p> <p>Judges and legal workers are trained on indigenous peoples' rights.</p>	<p>Indigenous peoples have collectively identified or demarcated their territories.</p> <p>Indigenous peoples' organisations and/or individuals have the capacity to present land claims to the national legal system and/or regional and international human rights bodies and mechanisms.</p>
<p>Effective protection of indigenous peoples' rights to ownership and possession (C169 art. 14.2; UNDRIP art. 26.3.)</p>	<p>Dispossession or encroachment on indigenous peoples' lands or territories are effectively prevented by states.</p>	<p>National legislation reflects indigenous peoples' right to lands, territories, and resources.</p> <p>Law enforcement institutions uphold indigenous peoples' right to lands, territories, and resources.</p>	<p>Violations of indigenous peoples' right to lands, territories, and resources are reported to the competent authorities.</p> <p>Respect for indigenous peoples' land and territorial rights is communicated and promoted among non-indigenous sectors of the population.</p> <p>Non-indigenous persons and private enterprises are prosecuted if encroaching on indigenous peoples' lands and territories.</p>	<p>Indigenous peoples' organisations and/or individuals monitor their lands and territories and are able to report violations to the competent authorities.</p>
<p>Prevention of non-indigenous persons securing ownership, possession, or use of indigenous peoples' lands or territories (C169 art. 17.3; C107 art. 13.2).</p>	<p>Indigenous peoples have received redress for land lost without their free, prior, and informed consent.</p>	<p>National legislation reflects indigenous peoples' right to lands, territories, and resources.</p> <p>Mechanisms for restitution/compensation are set up and functioning.</p>	<p>Claims for redress for land lost without free, prior, and informed consent through national legal system and/or regional and international human rights bodies and mechanisms.</p>	<p>Indigenous peoples' organisations and/or individuals have the capacity to claim redress for land lost without free, prior, and informed consent.</p>
<p>Access to redress (restitution or compensation) for land lost without free, prior, and informed consent (UNDRIP art. 28; C169 art. 16.4 and 16.5, C107 art. 12.3.)</p>	<p>Unauthorised intrusion or use of indigenous peoples' land or territories is punished with adequate penalties.</p>	<p>The law establishes adequate penalties for unauthorised intrusion or use of indigenous peoples' land or territories.</p>	<p>Cases are filed against people or enterprises intruding or using indigenous peoples' land or territories without authorisation and are acted upon.</p>	<p>Indigenous peoples' organisations and/or individuals monitor their lands and territories and are able to report violations to the competent authorities.</p>

DISPLACEMENT AND RELOCATION

Indications of states' fulfilment of their duty to respect, protect, and promote indigenous peoples' rights		Structural indicators	Process indicators	Indications of indigenous peoples' capacity to claim and promote their rights
Substantive right	Impact indicators			Process indicators
Right to not be removed from lands or territories (UNDRIP art. 10; C169 art. 16.1; C107 art. 12.1)	There are no registered cases of involuntary removal, relocation, or resettlement of indigenous peoples. Indigenous peoples have full control over their lands, territories, and resources.	National legislation reflects indigenous peoples' right to lands, territories, and resources.	Impact assessments are undertaken prior to approval of projects that may affect indigenous peoples' lands, territories, or resources. Adverse impact on indigenous peoples leads to non-approval of proposed projects.	Indigenous peoples are aware of their rights to lands, territories, and resources. Indigenous peoples have the capacity and opportunity to participate in impact assessment studies.
Necessary relocation should happen only with the free, prior, and informed consent of indigenous peoples (UNDRIP art. 10; C169 art. 16.2; C107 art. 12.1.)	Cases of relocation happen only with the free, prior, and informed consent of indigenous peoples. Indigenous peoples fully participate in any decision-making related to necessary relocation.	Procedures and institutions for undertaking consultations with indigenous peoples in accordance with the provisions of the UN Declaration on the Rights of Indigenous Peoples are established at national level. Indigenous peoples' representative institutions are recognised and have the financial and technical means to undertake consultations with their constituents and negotiate with states. Independent mechanisms to monitor, evaluate, and/or verify the free, prior, and informed consent process in relation to relocation are established.	Indigenous peoples are consulted in order to obtain their free and informed consent prior to approval of projects affecting their lands, territories, or resources, in accordance with the provisions of the UN Declaration on the Rights of Indigenous Peoples.	Indigenous peoples define which are their representative institutions, following adequate procedures for consultations with constituents. Indigenous peoples' representative institutions consult with their constituents on any projects prior to approval of projects affecting their lands, territories, or resources. Indigenous peoples have the capacity to undertake their own collective decision (consent/no consent) without any undue interference.
Appropriate procedures in national laws and regulations providing for indigenous peoples' effective representation in the context of necessary relocation (C169 art. 16.2)	Indigenous peoples return to their traditional lands or territories after temporary relocation.	The right to return to traditional lands or territories is comprised in any voluntary relocation agreement with indigenous peoples, when possible.	Indigenous peoples fully participate and give their free, prior, and informed consent to any relocation scheme.	Indigenous peoples are aware of their right to return once the reason for relocation ceases to exist.
Right to return to traditional lands or territories when reason for relocation ceases to exist (UNDRIP art. 10; C169 art. 16.3)	Indigenous peoples are fully compensated for relocation with lands of equal quality and legal status or other means preferred by the peoples concerned.	Compensation in terms of lands of equal quality and legal status or other means preferred by the peoples concerned is comprised in any voluntary relocation agreement with indigenous peoples.	Indigenous peoples fully participate and give their free, prior, and informed consent to any relocation scheme.	Indigenous peoples are aware of their right to receive compensation in the case of voluntary relocation. Indigenous peoples have the capacity to effectively negotiate fair and just compensation.

USE OF LAND, TERRITORIES, AND NATURAL RESOURCES

Indications of states' fulfilment of their duty to respect, protect, and promote indigenous peoples' rights		Indications of indigenous peoples' capacity to claim and promote their rights
Substantive right	Impact indicators	Process indicators
Substantive right	Structural indicators	Process indicators
Right to the natural resources pertaining to their lands (C169 art. 15.1; UNDRIP art. 26)	Indigenous peoples have full control over all natural resources pertaining to their lands or territories.	Indigenous peoples are consulted on all legislative and administrative measures concerning the natural resources pertaining to their lands or territories.
Right to determine priorities and strategies for development and use of lands, territories, and resources (UNDRIP art. 32.1; C169 art. 7.1)	Indigenous peoples are able to determine and pursue their own development priorities. Indigenous peoples are managing the natural resources pertaining to their lands and territories in accordance with their customary law through self-governance institutions.	Indigenous peoples' self-governance institutions develop resource management strategies and plans, with the participation of their constituents.
States' duty to consult in order to obtain the free and informed consent of indigenous peoples prior to approval of projects affecting their lands, territories, or resources (particularly in the context of exploitation of water and mineral resources) (UNDRIP art. 19, 32.2; C169 art. 6 and 15.2)	Indigenous peoples are consulted in order to obtain their free and informed consent prior to approval of projects affecting their lands, territories, or resources, in accordance with the provisions of the UN Declaration on the Rights of Indigenous Peoples. Indigenous peoples' representative institutions are recognised and have the financial and technical means to undertake consultations with their constituents and negotiate with states.	Indigenous peoples define which are their representative institutions, following adequate procedures for consultations with constituents. Indigenous peoples' representative institutions consult with their constituents prior to approval of any projects affecting their lands, territories or resources.
States' duty to undertake impact assessments in co-operation with indigenous peoples to determine the social, spiritual, cultural, and environmental impact of proposed development activities (C169 art. 7.3)	Indigenous peoples give or withhold their free, prior, and informed consent to projects affecting their lands, territories, or resources, based on full knowledge of the potential social, spiritual, cultural, and environmental impacts. Adverse impact on indigenous peoples leads to non-approval of proposed projects.	Impact assessments are undertaken prior to approval of projects that may affect indigenous peoples' lands, territories, or resources.

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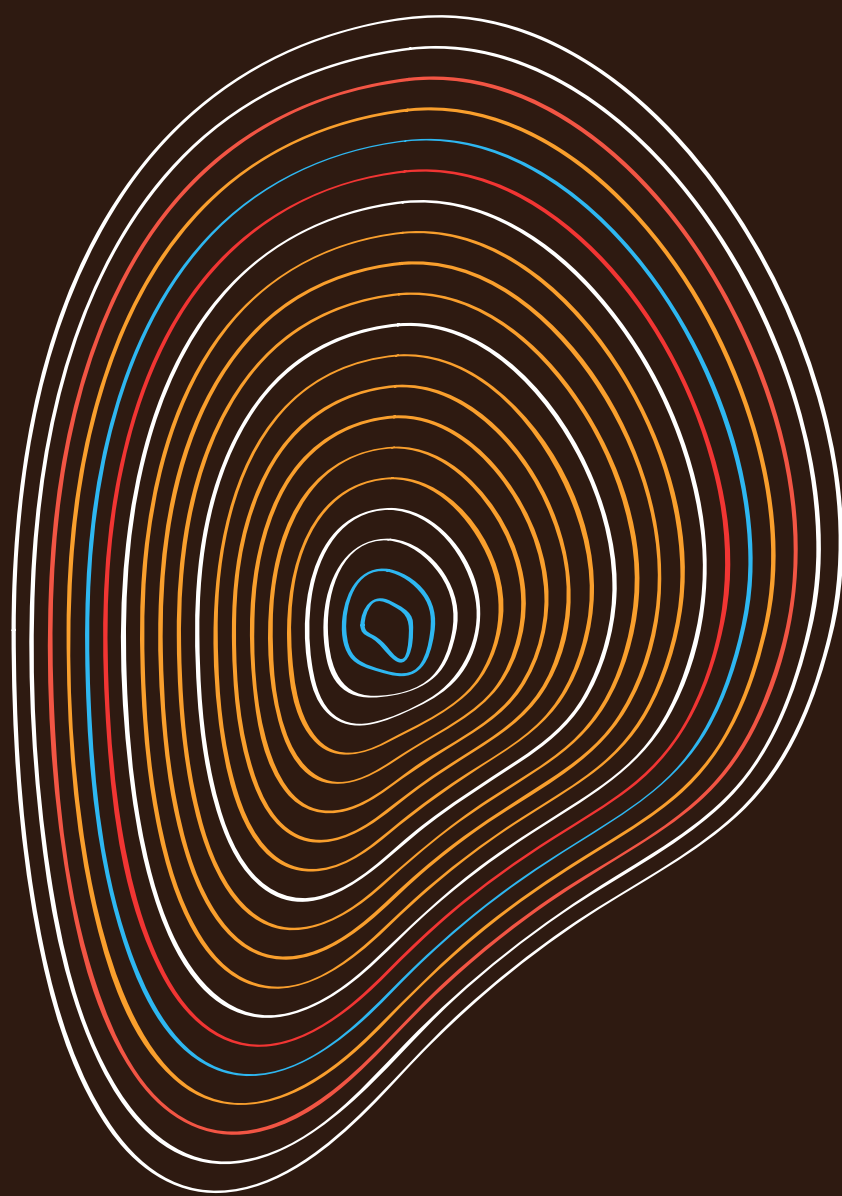
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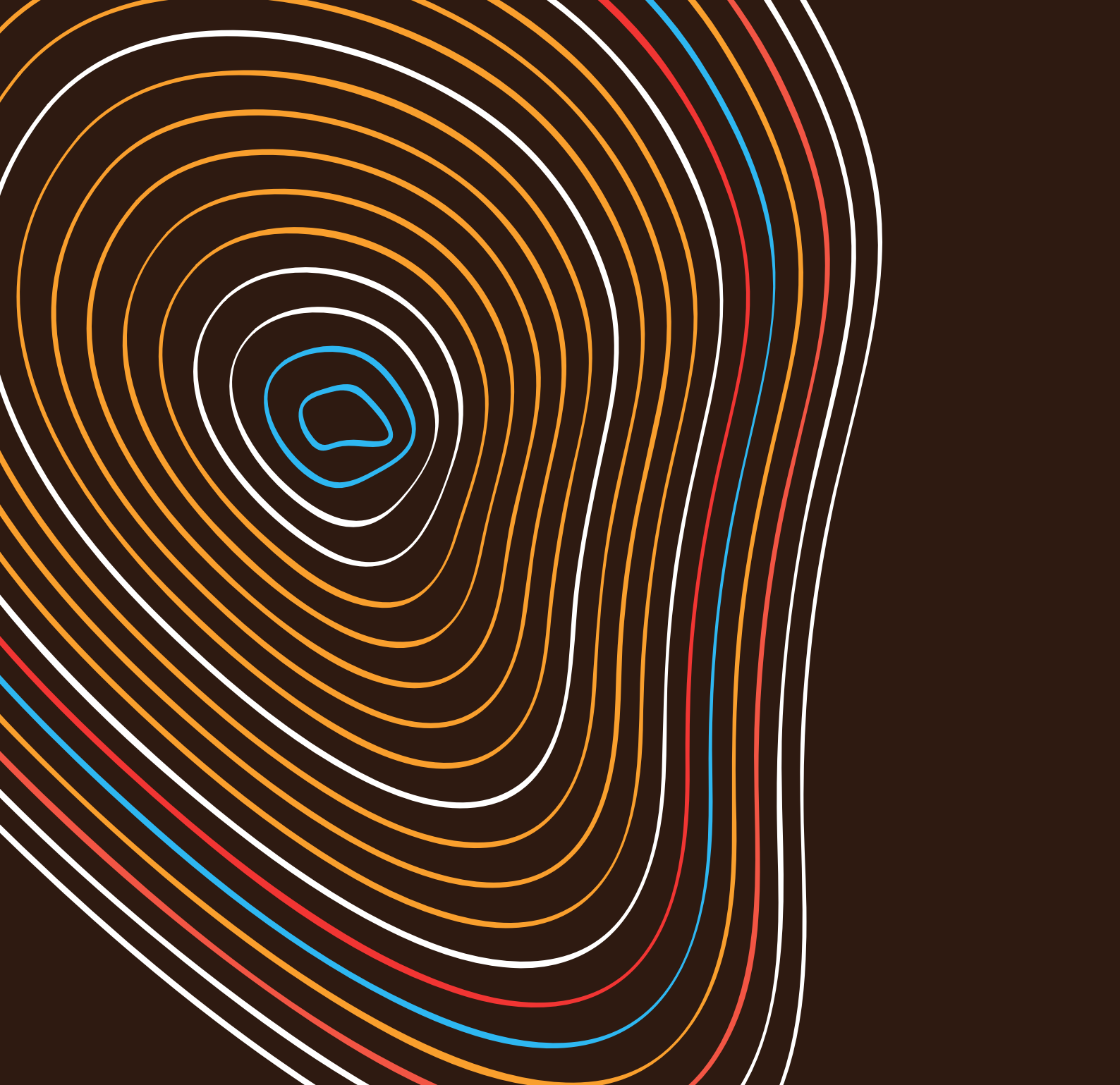
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Our Mission

A global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing, and capacity building.

Our Vision

Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity, and inclusion.

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