



**United Nations**

Department of Economic and Social Affairs

5<sup>th</sup> Volume

# State of the World's Indigenous Peoples

Rights to Lands, Territories and Resources

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Department of Economic and Social Affairs  
Division for Inclusive Social Development  
Indigenous Peoples and Development Branch/  
Secretariat of the Permanent Forum on Indigenous Issues

# STATE OF THE WORLD'S INDIGENOUS PEOPLES

5<sup>TH</sup> Volume

**Rights to Lands, Territories and Resources**



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## Department of Economic and Social Affairs

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## **Abbreviations used in this report**

<b>AIPP</b>	Asia Indigenous Peoples Pact
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>CAO</b>	(Office of the) Compliance Advisor/Ombudsman (of the IFC)
<b>CEDAW</b>	Committee on the Elimination of Discrimination against Women
<b>ECLAC</b>	United Nations Economic Commission for Latin American and the Caribbean
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>IFC</b>	International Finance Corporation
<b>IIRSA</b>	Initiative for the Integration of Regional Infrastructure in South America
<b>ILO</b>	International Labour Organization
<b>IPA</b>	Indigenous Protected Area (Australia)
<b>IPMG</b>	Indigenous Peoples Major Group for Sustainable Development
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>IUCN</b>	International Union for Conservation of Nature
<b>IWGIA</b>	International Work Group for Indigenous Affairs
<b>LAPSSET</b>	Lamu Port South Sudan – Ethiopia Transport in East Africa
<b>MDGs</b>	Millennium Development Goals
<b>NCPs</b>	National Contact Points
<b>NGO</b>	non-governmental organization
<b>OAS</b>	Organization of American States
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>SDGs</b>	Sustainable Development Goals
<b>UNDP</b>	United Nations Development Programme
<b>UNEP</b>	United Nations Environment Programme
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UN-REDD</b>	United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
<b>VNR</b>	voluntary national review (of progress achieved in SDG implementation)
<b>WWF</b>	World Wildlife Fund



Photo: UN-DESA / Bróddi Sigurdarson

# 5th Volume

## STATE OF THE WORLD'S INDIGENOUS PEOPLES: Rights to Lands, Territories and Resources

### Foreword

**Anne Nuorgam**

*Chair of the United Nations Permanent Forum on Indigenous Issues*

At the core of indigenous peoples' struggles are their rights to lands, territories and resources. Ancestral lands are the source of indigenous peoples' cultural, spiritual, social and political identity and the foundation of traditional knowledge systems.

José Martínez Cobo<sup>1</sup>, in his capacity as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated the following:

*It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.*

Deep connections endure within this context that are unique to indigenous peoples. There is a profound relationship between indigenous peoples and their lands, territories and resources, and this relationship is characterized by various social, cultural, spiritual,

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<sup>1</sup> José R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations: Conclusions, Proposals and Recommendations*, vol. V (United Nations publication, Sales No. E.86.XIV.3 and E/CN.4/Sub.2/1986/7/Add.4).

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economic and political dimensions and responsibilities. The collective dimension of this relationship is significant, and the intergenerational aspect is crucial to indigenous peoples' identity, survival and cultural viability.

Land and resource issues, particularly the dispossession of indigenous peoples from their lands, has been at the forefront of the deliberations of the Permanent Forum on Indigenous Issues since its inception, with two dedicated thematic sessions held in 2007 and 2018.

The lack of formal recognition, non-implementation or abolition of collective land rights in many countries continues to make indigenous peoples highly vulnerable to displacement, poverty, discrimination and marginalization. Indigenous lands containing natural resources sought after for extraction have regularly been the source of disputes and conflict. The intensification of natural resource exploitation is adversely affecting indigenous peoples' lands and territories and rapidly dispossessing them of their primary sources of livelihood.

Violent conflicts directly related to land issues are increasing, and indigenous peoples are suffering systematic human rights violations, internal displacement, the loss of cultural identity, the destruction of livelihoods, poverty, permanent environmental damage, pollution, and the loss of biodiversity in their traditional lands and territories.

In addition, over the past decade, there has been an expansion in agribusiness, rising demand for more land to source "green" fuels, and the adoption of conservation measures that have restricted indigenous peoples' access to their lands and resources. The growing demand for greater "economic productivity" from indigenous lands and resources is reflected in the increasing number of agreements made with investors by third parties that have failed to obtain free, prior and informed consent from indigenous residents. These circumstances are contributing to the rising incidence of land-grabbing, forced evictions, relocations, and reprisals against human rights defenders.

Since they first came to the United Nations, indigenous peoples have emphasized the fundamental importance of their relationship with their lands, territories and resources. Recognition of their attendant rights is crucial for their survival as distinct peoples.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples to self-determination (articles 3 and 4), their collective right to own and control their lands and resources (articles 25-27), their right to free, prior and informed consent in relation to legislation, measures and projects that may have an impact on their rights (articles 10, 11, 19, 28, 29 and 32) and their right to participate in decision-making processes (articles 5, 18 and 27). The Indigenous and Tribal Peoples Convention of the International Labour Organization – ILO Convention No. 169 (1989)

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– also makes explicit reference to the land rights of indigenous peoples, and there is jurisprudence developed by human rights treaty bodies, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights that focuses on the land rights of indigenous peoples.

Ensuring the collective rights of indigenous peoples to lands, territories and resources is important not only for their well-being, but also for addressing some of the most pressing global challenges, including climate change and environmental degradation. Strengthening and safeguarding such rights constitute an effective way to protect critical ecosystems, waterways and biological diversity.

### **Article 26 of the Declaration on the Rights of Indigenous Peoples**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

## Overview

The United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council with a mandate to address indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. At its first session in 2002, the Permanent Forum called on the United Nations to produce a report on the state of the world's indigenous peoples to highlight issues relating to indigenous peoples in the thematic areas of the Forum's mandate. The first volume, published in 2009, covered the six mandated areas mentioned above. Subsequent volumes have addressed indigenous peoples' access to health services (2015), education (2017), and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (2019).

The Declaration on the Rights of Indigenous Peoples, adopted in 2007, positions the right to self-determination and rights to lands, territories and resources at its core. The right to self-determination and the right to natural resources in indigenous peoples' lands and territories were two of the most politically charged issues when the Declaration was under negotiation. More than 10 years later, the same issues remain politicized. Articles 25 through 32 of the Declaration specifically address lands, territories and resources, including indigenous peoples' spiritual and cultural relationship with their lands, redress and compensation, free, prior and informed consent, protection of the environment, and indigenous peoples' traditional knowledge.

Indigenous peoples' relationship to their lands, territories and resources is at the heart of their identity, well-being and culture. Preservation of the environment, transmitted through traditional knowledge passed down through generations, is at the centre of their existence. As the world is increasingly recognizing the negative impacts of climate change and environmental degradation on health, food security and overall peace and security, the importance of indigenous knowledge and territorial rights is beginning to be more fully acknowledged by society at large.

The 2030 Agenda for Sustainable Development offers further opportunities to promote the rights of indigenous peoples to lands, territories and resources due to its integrated approach to economic, environmental and social development within a human rights framework – providing space to demonstrate how indigenous stewardship of lands, territories and resources can accelerate the implementation and achievement of several Sustainable Development Goals (SDGs).

This publication offers a wide-ranging perspective on indigenous peoples' rights to lands, territories and resources, analysing legislation and agreements at the national and international levels as well as customary law. It examines both successful practices



and continuing obstacles to realizing indigenous peoples' rights to lands, territories and resources and suggests ways forward.

**Chapter I, written by Mattias Åhrén,** offers an overview of the international indigenous rights framework as it pertains to lands, territories and natural resources historically used by indigenous peoples.<sup>2</sup> It identifies and summarizes the underlying rationale behind indigenous rights to lands, territories and resources deriving from the inherent connection between indigenous peoples' identities and the lands they have traditionally used. The chapter explains how the international indigenous *corpus juris* (body of law) has not only taken into account that indigenous peoples' identities are de facto interwoven with their lands, but has also expanded to incorporate rights to indigenous lands, territories and resources. This becomes evident when analysing the content and scope of indigenous rights to self-determination, property and culture. The chapter focuses on those rights foremost within the land, territorial and resource rights framework, as well as other rights that are relevant to indigenous peoples' relationship with lands, territories and resources.

Following the analysis of the international regime governing indigenous rights to lands, territories and resources, the chapter provides examples to illustrate how domestic legal systems are increasingly incorporating indigenous rights to lands, territories and resources, while at the same time noting the gap between the reach of those rights as enshrined in international legal sources and their realization on the ground. Addressing this implementation gap, the chapter concludes with a set of recommendations aimed at helping Member States better operationalize indigenous rights to lands, territories and resources at the national level.

**Chapter II, written by Cathal Doyle,** addresses the core challenges indigenous peoples face when asserting their rights to lands, territories and resources in the context of extractive industry and agribusiness operations, infrastructure development, and conservation initiatives. The author offers an overview of legal advances made in several jurisdictions in the protection of lands, territories and resources to respond to these challenges and addresses the limitations of their implementation in practice. The chapter highlights some of the unique features of the extractive, agribusiness, infrastructure and conservation sectors and how they hinder the realization of the rights of indigenous peoples. The chapter also examines two closely related challenges, namely the lack of access to remedy for violations of indigenous peoples' rights to lands, territories

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<sup>2</sup> The chapter illustrates that traditional use is undoubtedly the principal basis for indigenous peoples' rights to lands, territories and resources. The conclusions drawn are applicable, *mutatis mutandis*, to lands, territories and resources acquired through other means as well.

and resources and the critical situation faced by defenders of these rights. The chapter concludes with recommendations aimed at tackling those challenges.

**Chapter III, written by Jérémie Gilbert,** examines the implementation of indigenous peoples' rights to lands, territories and resources. The analysis goes beyond looking at simple legal proclamations or administrative measures, as these can remain far from the reality on the ground. As noted by the United Nations Permanent Forum on Indigenous Issues, while many States have started to recognize indigenous land rights in legislation, "there remains a wide gap between formal recognition and actual implementation".<sup>3</sup> Indeed, "in countries in which such rights are recognized, they are not fully implemented, or procedures for the implementation of those rights, such as land or resource mapping, demarcation and titling, have often not been completed, suffer significant delays or are shelved".<sup>4</sup> However, looking beyond the significant implementation gap, it appears that the actualization of indigenous rights is taking place on multiple levels – often via initiatives led by indigenous peoples themselves. This chapter explores relevant examples in some depth.

**Chapter IV, written by Naomi Lanoi Leleto,** focuses on the status of indigenous women and their rights to lands, territories and resources. Indigenous women play a pivotal role as central actors in the traditional relationship indigenous peoples have with the land. Through an in-depth analysis of international and regional legal and policy documents, the chapter explores frameworks and tools that support the recognition and protection of indigenous women's rights to lands, territories and resources while also highlighting relevant gaps.

Using case studies, the chapter affirms the central role indigenous women play in promoting and protecting indigenous peoples' rights to lands, territories and resources and the high price they often pay for doing so. While indigenous women are the main custodians of food, water and traditional knowledge from the land, their legal status in relation to land rights is undermined by gender discrimination and poverty-related barriers. At the same time, indigenous women are often on the front lines in defending the land and environment and are highly vulnerable to violence, abuse and murder.

**Chapter V, written by Prabindra Shakya,** examines how indigenous peoples' rights to lands, territories and resources are reflected in the 2030 Agenda for Sustainable Development and its implementation and reporting processes. The chapter details the ideas and developments relating to sustainable development and the rights

<sup>3</sup> "Permanent Forum on Indigenous Issues: report on the seventeenth session (16-27 April 2018)" (E/2018/43-E/C.19/2018/11), para. 7.

<sup>4</sup> Ibid., para. 8.



of indigenous peoples in previous instruments, including the Rio Declaration on Environment and Development and Agenda 21 (1992) and the Millennium Development Goals (2000), and how these have evolved over time. The chapter reaches beyond the direct issue of land and resource ownership to examine linkages to other SDGs and associated targets, including those relating to food security, environmental protection and climate change – whose outcomes are also strongly dependent on the way lands and resources are managed. Finally, the chapter explores the ways in which the United Nations system, Member States and indigenous peoples have responded to relevant challenges through the adoption of policies and programmes and through participation in SDG implementation and reporting processes.

### Author profiles

**Mattias Åhrén** is a Professor of Law (PhD) at the Arctic University of Norway. He holds Master of Law (LLM) degrees from Stockholm University and the University of Chicago. Åhrén has written extensively on indigenous peoples' rights internationally, and his academic publications include *Indigenous Peoples' Status in the International Legal System*, published by Oxford University Press in 2016. In addition, Åhrén has substantial practical experience working with Sámi and indigenous rights internationally, including in the negotiations leading up to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

**Cathal Doyle** is Senior Lecturer and LLM Programme Leader at Middlesex University London School of Law, where he previously held a Leverhulme Trust Early Career Research Fellowship. He has published books, chapters, articles and reports on indigenous peoples' rights and has acted as an advocate on behalf of indigenous groups and as a technical expert for the United Nations Special Rapporteur on the rights of indigenous peoples. He sits on the boards of the Forest Peoples Programme and the International Work Group for Indigenous Affairs and is a founding member of the European Network on Indigenous Peoples.

**Jérémie Gilbert** is a professor of human rights law. He has worked with several indigenous communities across the globe and regularly serves as a consultant for a number of international organizations and non-governmental organizations supporting indigenous peoples' rights. As a legal expert, he has been involved in providing legal briefs and expert opinions and carrying out evidence gathering in several cases involving indigenous peoples' land rights.

**Naomi Lanoi Leleto** is from Kenya and is an advocate for indigenous women, lands and environment. She has a Master of Arts degree in Legal Studies from the Indigenous Peoples Law and Policy Program at the University of Arizona and an MBA from Jomo Kenyatta University of Agriculture and Technology.

**Prabindra Shakya** is a human rights activist belonging to the indigenous Newar community of Nepal. He has been engaged in promoting and protecting the rights of indigenous peoples and marginalized communities, including in post-conflict transitional justice processes, for over a decade. He currently coordinates the Community Empowerment and Social Justice Network that he founded in Nepal and previously worked with different human rights organizations in the country. He graduated in 2011 with a Master of Arts degree in Inter-Asia NGO Studies from SungKongHoe University in the Republic of Korea.



Photo: UN-DESA/Broddi Sigurdarson



## Chapter I:

# RECOGNITION OF indigenous peoples' rights to lands, territories and resources

Mattias Åhrén

## 1. The foundation of the international indigenous rights framework

### 1.1 The link between indigenous peoples' identities and their lands, territories and resources

The contemporary international indigenous rights framework takes as a starting point that indigenous peoples' societies, cultures, ways of life, and ultimately their very identities are intertwined with lands, territories and resources historically used, and that legal consequences must follow from this circumstance. Broad agreement has emerged that the fact that indigenous peoples are inextricably linked to their lands, territories and resources – as these constitute the nucleus of their identities as peoples – must reasonably mean that indigenous peoples are also legally tied to such areas and resources. This understanding is at the core of indigenous rights to lands, territories and resources as reflected in international sources of authority.

The natural starting point is former United Nations Special Rapporteur José Martínez Cobo's groundbreaking 1982 study of the problem of discrimination against indigenous populations, which can be viewed as a foundational document for the modern

international indigenous rights regime.<sup>5</sup> In this first volume of the study and those that followed, Martínez Cobo's work was based on and clearly reflected the premise that indigenous peoples' identities are inseparable from lands; this deeply informed his understanding of the term "indigenous peoples". He identified as a core trait among such groups a determination "to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples".<sup>6</sup> The Special Rapporteur thus did not distinguish between but rather placed on par identity and land as prerequisites for indigenous peoples' continued existence. He infers that divorced from the land, indigenous peoples cannot exist.

Martínez Cobo's is the most elaborate and most frequently cited description<sup>7</sup> of indigenous peoples.<sup>8</sup> His observation that indigenous peoples' lands and identities are interwoven is of particular significance. Other understandings of the term indigenous peoples also emphasize this link. For example, the World Bank considers as a key feature of indigenous peoples a "collective attachment to geographically distinct habitats or ancestral territories".<sup>9</sup> For its part, the Food and Agriculture Organization of the United Nations (FAO) views as indigenous (and tribal) peoples populations that inter alia have "priority in time, with respect to occupation and use of a specific territory" and elaborates that "identity is of fundamental importance to indigenous peoples, who see their livelihood security, well-being and dignity as being inextricably linked with the ... preservation of their ancestral lands and territories".<sup>10</sup> In their understanding of indigenous peoples, both organizations emphasize the connection to land. Like Cobo, FAO explicitly connects indigenous peoples' identities with their historical lands. Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples affirms that "indigenous peoples have the right to maintain and strengthen their distinct spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories ... and ... resources and to uphold their responsibilities to future generations in

<sup>5</sup> S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford, Oxford University Press, 2004), pp. 62-63; and Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Abingdon, New York, Routledge, 2016), p. 5.

<sup>6</sup> "Study of the problem of discrimination against indigenous populations", vol. 5 (E/CN.4/Sub.2/1986/7/Add.4), para. 379 [emphasis added]; the factors comprising historical continuity within this context are listed in para. 380.

<sup>7</sup> Definitions of indigenous peoples as such are not relevant here. (International law does not formally define indigenous peoples and doing so may presumably be associated with substantial challenges.) What is of interest for the present purposes is the emphasis placed on the connection between indigenous peoples and their lands.

<sup>8</sup> Barelli, *Seeking Justice in International Law*, pp. 5-6.

<sup>9</sup> World Bank, *Operations Manual, Operational Policy 4.10: Indigenous Peoples* (Washington, D.C.), para. 4.

<sup>10</sup> Food and Agriculture Organization of the United Nations, *FAO Policy on Indigenous and Tribal Peoples* (Rome, 2010), paras. 4 and 5.

this regard". This article can be viewed as embedding an implicit identifier of indigenous peoples' main characteristics. Proclaiming that indigenous peoples are entitled to maintain and strengthen the relationship with their lands only becomes comprehensible if indigenous peoples are in fact populations with such relations.<sup>11</sup>

The sources above are clearly indicative of international recognition that the identities of indigenous populations as distinct peoples are inextricably intertwined with the lands, territories and resources they have historically used.<sup>12</sup>

## **1.2 The relevance of indigenous peoples' connection to their lands, territories and resources for rights to such resources**

Indigenous peoples' ways of life and cultures are inherently rooted in their homelands; as a natural consequence, they have established societies in such territories that are strongly attached to the land. For the most part, indigenous peoples have managed to maintain at least the core features of those societies to the present day, despite colonization and other hardships. For these reasons, one early focus of the international indigenous *corpus juris* was to allow indigenous peoples to maintain and develop these societies to exist side by side with the majority society.<sup>13</sup> Clearly, this principal norm relates closely to the one mentioned above recognizing that indigenous identities are

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<sup>11</sup> In a similar vein, paragraph 7 of the Declaration's preamble recognizes "the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources". Similar provisions are included in article 13 of ILO Convention No. 169 (1989).

<sup>12</sup> The same conclusion has been drawn by the Permanent Forum on Indigenous Issues. See E/2018/43-E/C.19/2018/11, para. 4; "Permanent Forum on Indigenous Issues: report on the sixth session (14-25 May 2007)" (E/2007/43-E/C.19/2007/12), paras. 4-6; "International expert group meeting on the theme 'Sustainable Development in the Territories of Indigenous Peoples'", note by the Secretariat (E/C.19/2018/7), para. 1. See also, for example, Claire Charters, "Indigenous peoples' rights to lands, territories and resources in the United Nations Declaration on the Rights of Indigenous Peoples, articles 25, 26, 27 and 10", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Commentaries on International Law, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018); Lorenzo Cotula, "Land, property and sovereignty in international law", *Cardozo Journal of International and Comparative Law*, vol. 25, No. 2 (2016), pp. 219-286.

<sup>13</sup> Patrick Macklem, "Indigenous recognition in international law: theoretical observations", *Michigan Journal of International Law*, vol. 30, No. 1 (Fall 2008), p. 208. Compare also Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford, Oxford University Press, 2007), pp. 31 and 272-293.

intertwined with their lands.<sup>14</sup> Together, these principal norms could be described as the foundation of the international indigenous rights framework.<sup>15</sup>

Among international and regional judicial and quasi-judicial bodies, the Inter-American Court of Human Rights has been most active in defining the contours of indigenous rights to lands, territories and resources. In the trailblazing case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court confirmed for the first time that indigenous peoples' identities are interwoven with lands that they have historically used. In this case, the leader of the Mayagna (Sumo) Awas Tingni community of Nicaragua lodged a petition before the Inter-American Commission on Human Rights concerning the State's failure to demarcate the Awas Tingni community's communal land and to take the measures necessary to protect the community's property rights over its ancestral lands and natural resources. In addition, the community complained that the Government had failed to guarantee access to an effective remedy for the community's claims regarding the then-imminent concession of 62,000 hectares of tropical forest to be commercially developed by a company on communal lands.<sup>16</sup> The Court reiterated that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, ... their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element ... to preserve their cultural legacy and transmit it to future generations." The Inter-American Commission on Human Rights then proceeded to proclaim that from this factual basis must follow that the link to the land is protected by a right.<sup>17</sup> The Court has subsequently echoed and elaborated on the basic inference that a necessary consequence of indigenous peoples' inherent ties to their lands is that they have rights to those lands. For instance, in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights initially noted that the "culture of the members of indigenous communities reflects a particular way of life, ... the starting point of which is their close relationship with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part

<sup>14</sup> Compare Charters, "Indigenous peoples' rights to lands, territories and resources", p. 397; Cotula, "Land, property and sovereignty in international law", pp. 244-245.

<sup>15</sup> These basic features of indigenous rights are also what principally distinguishes them from minority rights. It is underlined that this is not a distinction of "status hierarchy" but of "status difference". Compare Daniel Viehoff, "Power and equality", in *Oxford Studies in Political Philosophy*, vol. 5, David Sobel, Peter Vallenty and Steven Wall, eds. (Oxford, Oxford University Press, 2019), p. 16.

<sup>16</sup> Inter-American Court of Human Rights, "Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*: Judgment of August 31, 2001", Series C., No. 79.

<sup>17</sup> *Ibid.*, para. 149.

of ... their cultural identity". For these very reasons, the Court held, the community had established a right to its land.<sup>18</sup>

Other human rights institutions have concurred with the basic finding of the Inter-American Court of Human Rights that indigenous peoples' identities are tied to their lands and that this circumstance must carry legal effects. In the case of the *Endorois Welfare Council v. Kenya*, the African Commission on Human and Peoples' Rights understood the basis of indigenous land rights in largely the same manner as the Inter-American Court of Human Rights. It held that the Endorois had established a right to their land through historical use.<sup>19</sup> By the same token, the Committee on Economic, Social and Cultural Rights has called on States to recognize indigenous peoples' rights to their ancestral lands "to prevent the degradation of their particular way of life ... and, ultimately, their cultural identity".<sup>20</sup> The Committee on the Elimination of Racial Discrimination has expressed similar opinions; particularly noteworthy is its observation that indigenous land rights are unique in that they include a cultural identifier of the holder of the right.<sup>21</sup> Read together, articles 25 and 26.1 of the United Nations Declaration on the Rights of Indigenous Peoples confirm the norms articulated by the sources above. As mentioned, article 25 affirms that indigenous peoples are entitled to "maintain and strengthen their distinct spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories ... and other resources and to uphold their responsibilities to future generations in this regard", and article 26.1 states that "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". These two articles affirm indigenous peoples' unique relationship with their lands and that the

<sup>18</sup> Inter-American Court of Human Rights, "Case of the *Sawhoyamaya Indigenous Community v. Paraguay*: Judgment of March 29, 2006 (merits, reparations and costs)", Series C, No. 146, para. 118. For adjacent rulings, see, for example, Inter-American Court of Human Rights, "Case of the *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (merits, reparations and costs)", Series C, No. 125, para. 135; Inter-American Court of Human Rights, "Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012 (merits and reparations)", Series C, No. 245.

<sup>19</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision), paras. 174-238. In the more recent Ogiek case (African Union, African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017), the African Court on Human and Peoples' Rights confirmed that indigenous land uses have established rights under the African Charter on Human and Peoples' Rights (arts. 122-131).

<sup>20</sup> United Nations, Committee on Economic, Social and Cultural Rights, "General comment No. 21: right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)" (E/C.12/GC/21), para. 36.

<sup>21</sup> United Nations, Official Records of the General Assembly, Fifty-fourth Session, Supplement No 18 (A/54/18), decision 2 (54), para. 4.



Photo: Ben Powless

interconnectedness between indigenous peoples' lands, territories and resources and their identities carries legal implications.<sup>22</sup>

In sum, principal international norms provide (a) that indigenous peoples' cultures, societies, ways of life, and ultimately their very identities are inherently tied to lands, territories and resources historically used; (b) that from this circumstance logically follows that indigenous peoples have rights to such lands and resources; and (c) that indigenous peoples are entitled to preserve and develop the distinct societies they have formed on such lands. The foundational character of these norms allows the conclusion that they collectively form part of international customary law.<sup>23</sup>

<sup>22</sup> Compare Charters, "Indigenous peoples' rights to lands, territories and resources", p. 410-414; Barelli, *Seeking Justice in International Law*, p. 53.

<sup>23</sup> Compare Charters, "Indigenous peoples' rights to lands, territories and resources", p. 397; Barelli, *Seeking Justice in International Law*, pp. 15, 29 and 54; Anaya, *Indigenous Peoples in International Law*, pp. 141-148; Cotula, "Land, property and sovereignty in international law", pp. 239-240.



## **2. The principle of indigenous rights to lands, territories and resources**

### **2.1 Introduction**

The rights of indigenous peoples to lands, territories and resources can include both political and civil rights. The principal political right is the right to self-determination, and as touched upon in the introduction, there are numerous civil rights potentially relevant to indigenous lands, territories and resources.<sup>24</sup> The rights to property and culture must be considered pivotal within this latter category and are the only ones dealt with in this chapter.

### **2.2 The political right to self-determination**

#### **2.2.1 The right to self-determination**

After decades of intense debate and deliberations, international law has recently resolved that indigenous populations constitute “peoples”. As such, they are bestowed with peoples’ rights, including the right of self-determination, which, as a political right, attaches to indigenous peoples “already” in their capacity as peoples. A chain of events led to the recognition of indigenous peoples as “peoples” with the right to self-determination.<sup>25</sup> It is merely noted that indigenous peoples are beneficiaries of this right and that this is clear today. A higher level of uncertainty surrounds what the right means in an indigenous context; the ambiguity lies not so much with the form the right takes when attaching to indigenous peoples, but with its reach.

As conventionally understood, only peoples in the aggregate – meaning populations of States (or territories) – were beneficiaries of the right to self-determination, irrespective of whether the State hosted more than one ethnically/culturally distinct population.<sup>26</sup>

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<sup>24</sup> For example, if resource extraction on indigenous land creates health risks for the inhabitants, the right to health might prohibit the activity; if an extraction endangers a sacred site, the right to religion is surely engaged; and the destruction of traditional housing can compromise, inter alia, the right to family life.

<sup>25</sup> For an account of this development, see Mattias Åhrén, *Indigenous Peoples’ Status in the International Legal System* (Oxford and New York, Oxford University Press, 2016), chap. 5, with references; Marc Weller, “Self-determination of indigenous peoples: articles 3, 4, 5, 18, 23 and 46(1)”, in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Commentaries on International Law, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018).

<sup>26</sup> Ian Brownlie, “The rights of peoples in modern international law”, in *The Rights of Peoples*, James Crawford, ed. (Oxford, Clarendon Press, 1988), pp. 4-16.

When applied to peoples in this understanding, the resource dimension of the right – the component that awards peoples the right to determine the disposition of natural resources – largely implies that the entire population of the State is entitled to be involved in resource management within the State through its political system. The resource dimension cannot, however, reasonably take this form when exercised by indigenous peoples, who constitute distinct societies within the larger society of the State. When indigenous peoples exercise their right to self-determination as peoples, it allows them to determine within the group how resources in their distinct territories should be managed. The ruling of the Inter-American Court of Human Rights in *Kaliña and Lokono Peoples v. Suriname* is informative. Here, the Court affirms that the Kaliña and Lokono peoples (as distinct from “people”, meaning the aggregate population of the State) are entitled to “freely dispose of their natural wealth and resources to ensure that they are not deprived of [their] own means of subsistence”.<sup>27</sup> In this context, “their resources” can only be understood as referring to resources which the indigenous peoples are specifically entitled to control. This understanding is also reflected in article 4 of the Declaration on the Rights of Indigenous Peoples: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs.” That indigenous peoples shall exercise their right to self-determination first and foremost through autonomy arrangements is also reflected in extensive State practice<sup>28</sup> and finds further support in the legal doctrine.<sup>29</sup>

The above provides that, in principle, indigenous peoples have the right, as distinct autonomous polities (as opposed to as parts of general populations of States), to determine

<sup>27</sup> Inter-American Court of Human Rights, “Case of the *Kaliña and Lokono Peoples v. Suriname*: Judgment of November 25, 2015 (merits, reparations and costs)”, Series C, No. 309, para. 122 [emphasis added]. Notably, the Inter-American Court of Human Rights cites article 1.2 of the International Covenant on Economic, Social and Cultural Rights, thus confirming that the right to self-determination indigenous peoples enjoy is the one generally recognized in international law, as opposed to a sui generis version of the right particular to them. Another matter is that the general right must crystallize in a particular manner in indigenous contexts, as discussed here.

<sup>28</sup> See section 4 of this chapter.

<sup>29</sup> See Åhrén, *Indigenous Peoples’ Status in the International Legal System*, chap. 6.2, with references; see also, for example, Martin Scheinin, “Indigenous peoples’ rights under the International Covenant on Civil and Political Rights”, in *International Law and Indigenous Peoples*, Raoul Wallenberg Human Rights Library, vol. 20, Joshua Castellino and Niamh Welsh, eds. (Leiden and Boston, Martinus Nijhoff Publishers, 2005), pp. 9-15; Anaya, *Indigenous Peoples in International Law*, pp. 150-153; Alexandra Xanthaki, “Indigenous rights in international law over the last 10 years and future developments”, *Melbourne Journal of International Law*, vol. 10, No. 1 (2009); Marc Weller, “Towards a general comment on self-determination and autonomy: working paper”, submitted to the Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities (E/CN.4/Sub.2/AC.5/2005/WP.5), paras. 12 and 16; Martin Scheinin and Mattias Åhrén, “Relationship to human rights, and related international instruments”, in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Commentaries on International Law, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018), p. 67.



priorities as to how lands, waters and resources situated within their historical territories should be used. What remains to be resolved under such circumstances is the reach of this autonomy. In particular, what must be established is what happens when indigenous peoples' priorities for resource management conflict with those of the State and/or the majority population. This is where uncertainties and divergent opinions are found.

It may be suggested that indigenous peoples' right to autonomy in practice takes the form of a right to consultation. In this context, having determined its priorities for resource management within the group as a distinct autonomous polity, an indigenous people would, through consultation, have to convince the State and/or majority population to accept its position, with the failure to do so resulting in the State/majority position prevailing. With this understanding of indigenous peoples' right to self-determination, realizing the right is always contingent on State/majority acceptance. Put differently, this version of the right to self-determination is formal rather than real. Both the Vienna Convention on the Law of Treaties and reason argue against such an understanding. Pursuant to article 31.1 of the Convention,<sup>30</sup> a treaty provision shall be given a meaning that follows naturally from an ordinary understanding of its wording. Article 3 of the Declaration on the Rights of Indigenous Peoples proclaims that "indigenous peoples have the right to self-determination" – wording which strongly suggests that indigenous peoples are beneficiaries of precisely that right as distinct from the right to consultation. Whether the right to self-determination applies to indigenous peoples – and, if so, in what form – has been at the core of the indigenous rights discourse essentially since it emerged. Self-determination deliberations took centre-stage throughout the process leading up to the adoption of the Declaration, signaling that if indigenous peoples were to be beneficiaries of this right, it would be a key principle.<sup>31</sup>

There are compelling arguments against equating indigenous peoples' right to self-determination with their already existing right to consultation. If, however, this clarifies what the right to self-determination is not, existing international legal sources offer limited guidance as to what the right is. Still, from the principle that indigenous peoples' right to self-determination is different from and more than the right to consultation, one

<sup>30</sup> The Vienna Convention on the Law of Treaties formally only applies to treaties and not to declarations such as the Declaration on the Rights of Indigenous Peoples. Still, article 31 of the Vienna Convention is widely considered to reflect customary international law; see, for example, Antonio Cassese, *International Law* (Oxford, Oxford University Press, 2005), p. 187. The general nature of the norm argues for reliance on the Convention when interpreting texts similar to treaties.

<sup>31</sup> For example, S. James Anaya, "The right of indigenous peoples to self-determination in the post-colonial era", in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA Document No. 127, Claire Charters and Rodolfo Stavenhagen, eds. (Copenhagen, International Work Group for Indigenous Affairs, 2009), pp. 184-185; Åhrén, *Indigenous Peoples' Status in the International Legal System*, pp. 96-119 and chap. 6, with references; Barelli, *Seeking Justice in International Law*, p. 48.

may presumably draw certain conclusions. This reasonably means that when an indigenous people and the State/majority population cannot agree on priorities for land and resource management, the State/majority position does not — unlike under the right to consultation — always prevail. Rather, there are instances in which the indigenous people's position takes precedence. Such situations, when they arise, are not easily resolved based on existing legal sources.<sup>32</sup> Still, that such instances do exist implies a right to self-determination that is not only formal but also real in certain respects.<sup>33</sup>

It would follow that while it is difficult to locate the precise level of the floor of the right to self-determination as it applies to indigenous peoples, it is above that of consultation. At the same time, the right to self-determination discussed here is a human and hence a relational right; it is necessarily exercised in relation to the State within which indigenous peoples reside. This places a certain ceiling on the right's potential. It cannot be an omnipotent right to free, prior and informed consent akin to a right to sovereignty.<sup>34</sup> Rather, indigenous peoples' right to self-determination must be pursued in relation to the larger segment of the national population's exercise of the right to self-determination.

### **2.2.2 A right to free, prior and informed consent?**

Recognition of indigenous peoples' right to self-determination as a human right does not preclude the recognition of self-determination as a sovereign right.

<sup>32</sup> Ghai, among others, notes that international norms offer limited information on the content of autonomy; see Yash Ghai, "Ethnicity and autonomy: a framework for analysis", in *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Yash Ghai, ed. (Cambridge, United Kingdom, Cambridge University Press, 2000), p. 21. Some years have passed since this observation, but it is almost as accurate today as when it was made.

<sup>33</sup> That said, note should be taken of article 32.2 of the Declaration on the Rights of Indigenous Peoples, pursuant to which "States shall consult ... in good faith with the indigenous peoples concerned ... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories". Article 32.2 obliges States to seek, but not to obtain, consent prior to approving industrial projects in indigenous territories. The provision could be understood to contradict the argument above, but it could also be read as providing a minimum standard (cf. articles 43 and 45 of the Declaration). Given the described illogical consequences associated with understanding indigenous peoples' right to self-determination as a mere reaffirmation of their right to consultation, it could appear more reasonable to view article 32.2 of the Declaration as providing a floor for States' obligations rather than a ceiling. Thus understood, article 32.2 obliges States to endeavour to obtain indigenous peoples' consent prior to authorizing projects in their territories but is silent on what happens when no agreement is reached. Then, the outlined norm that follows from the nature of the right to self-determination, as distinct from the right to consultation, applies.

<sup>34</sup> Human rights norms stem from the State sovereignty principle. They can (and indeed are often established to) limit but not abolish State sovereignty. See Patrick Macklem, *The Sovereignty of Human Rights* (New York, Oxford University Press, 2015), pp. 29-45; compare S. James Anaya and Sergio Puig, "Mitigating State sovereignty: the duty to consult with indigenous peoples", *University of Toronto Law Journal*, vol. 67, No. 4 (2017), pp. 448 and 452.

The nature and very existence of the right to self-determination both within and outside the State context have constituted a source of ongoing discussion and debate. One key argument revolves around the concept of an original right of indigenous peoples to sovereignty. This is based on the contention that indigenous peoples constituted sovereigns at the time of colonization and have never ceded this status.<sup>35</sup> This assertion and variations thereof warrant testing against the backdrop of how international law conventionally understands sovereignty<sup>36</sup> and require substantiation. It has recently been argued that a right to free, prior and informed consent as it pertains to indigenous peoples takes a form akin to the sovereign right<sup>37</sup> just described.<sup>38</sup> This would mean that indigenous peoples have a right to be free from essentially all outside interference not consented to, including from the State or States in which the indigenous people reside today. A right to free, prior and informed consent of such a ubiquitous nature requires substantiation in much the same way as does the above-mentioned sovereign right.<sup>39</sup>

## **2.3 The civil right to property**

### **2.3.1 Legal subjects**

As a civil right, the right to property (unlike the right to self-determination) does not attach to indigenous peoples in their capacity as political entities. Rather, indigenous

<sup>35</sup> See, for example, John Howard Clinebell and Jim Thomson, "Sovereignty and self-determination: the rights of Native Americans under international law", *Buffalo Law Review*, vol. 27, No. 4: Law and Indigenous Populations (1978), pp. 669-714; Benedict Kingsbury, "Reconciling five competing conceptual structures of indigenous peoples' claims in international and comparative law", *New York University Journal of International Law and Politics*, vol. 34, No. 1 (Fall 2001), pp. 189-252, with references.

<sup>36</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, United Kingdom, and New York, Cambridge University Press, 1995), pp. 67-100 and 141-158; James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), pp. 215-252 and 447-455.

<sup>37</sup> Compare Anaya and Puig ("Mitigating State sovereignty"), who note that free, prior and informed consent arguments could come across as euphemisms for historical sovereign rights claims.

<sup>38</sup> See, for example, Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge Research in Human Rights Law (Abingdon, United Kingdom, and New York, Routledge, 2015), in particular chaps. 5 and 6; Tara Ward, "The right to free, prior, and informed consent: indigenous peoples' participation rights within international law", *Northwestern University Journal of International Human Rights*, vol. 10, No. 2 (2011), pp. 54-84.

<sup>39</sup> In this context, reference can be made to article 19 of the Declaration on the Rights of Indigenous Peoples, pursuant to which "States shall consult ... with ... indigenous peoples ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them". Clearly, the structure of article 19 of the Declaration is adjacent to that of article 32.2, discussed above. These provisions are sometimes advanced as evidence of indigenous peoples' political right to free, prior and informed consent. However, as noted with regard to article 32.2, these provisions oblige States to seek, but not necessarily to obtain, free, prior and informed consent.

property rights to lands, territories and resources most often arise as a result of historical use. This legal basis also identifies the holder of the right. As traditional use establishes the right, the holder of the right is, by definition, the traditional user. That indigenous peoples do not possess property rights in the capacity as peoples does not preclude that they have been the historical users of land and for this reason property rights holders. Under such circumstances, an indigenous people's civil property rights to land geographically coincides with its political territory. Often, indigenous communities that are part of a larger indigenous population have historically used distinct land areas within the indigenous people's political territory, rather than the entire territory being used by the people as one.<sup>40</sup> Under such circumstances, indigenous communities have established a number of distinct civil property rights to lands, territories and resources within the indigenous people's political territory. Assuming this to be the norm, the following discussion refers to indigenous communities as relevant legal subjects.

### **2.3.2 The link between the rights to non-discrimination and property**

To properly understand indigenous communities' property rights to lands, territories and resources, one must be mindful of the link between the rights to property and non-discrimination and of how the latter right is understood today. The right to property recognized in international law is at its core a right to have the same opportunity as others to acquire (or establish) property and to not be arbitrarily deprived of this property once it has been acquired. Put differently, the right to property is inherently based on the right to non-discrimination.<sup>41</sup> This means that changed perceptions of what amounts to discrimination have immediate implications for the understanding of the right to property.

The right to non-discrimination is today understood to have different aspects. In addition to equal treatment of equal situations (the conventional understanding), the right calls for differential treatment of those that are culturally different from the majority population. In *Thlimmenos v. Greece*, the European Court of Human Rights notes that it has "so far considered the right [to non-discrimination] ... violated when States treat differently persons in analogous situations". The Court adds that it "considers that this is not the only facet of the ... [right to non-discrimination]. The right ... is also violated when States without an objective and reasonable justification fail to treat differently

<sup>40</sup> Jeremy Webber, "The public-law dimension of indigenous property rights", in *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*, Nigel Bankes and Timo Koivurova, eds. (Oxford, Hart Publishing, 2013), pp. 85 and 87.

<sup>41</sup> See, for example, how the right to property is articulated in international human rights instruments, including in article 17 of the Universal Declaration of Human Rights and article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination.



persons whose situation are significantly different.”<sup>42</sup> In a similar vein, the Committee on the Elimination of Racial Discrimination has held that “to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect” and has observed that “the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration”.<sup>43</sup> The African Commission on Human and Peoples’ Rights<sup>44</sup> and the Inter-American Court of Human Rights<sup>45</sup> have expressed kindred positions. In a sense, Ribot captures the norm, stating that “the step from nature to commodity requires a moment of vision in which the social uses of nature are apprehended. This is the first step in the commodification of what we call natural resources. ... Nature as a commodity, however, is a kind of fiction.”<sup>46</sup> “Commodification” may fit less well in an indigenous context. The point here, though, is that different societies see value in different aspects of nature based on their utilization of nature. The right to non-discrimination no longer allows the majority society to determine that its values and land uses constitute the norm and are consequently property rights generating, while (from the majority culture’s perspective) different kinds of land uses common to an indigenous people have not resulted in and are not protected by rights. Rather, today the right to non-discrimination requires domestic property rights frameworks to have as a point of departure that other societies’ values as they relate to nature and their uses of nature are equally relevant – and rights generating. Consequently, all aspects of domestic property law must take indigenous peoples’ particular cultural backgrounds into account. That indigenous peoples use lands, territories and resources differently from the majority population must not be to their disadvantage in any aspect of the application of the right to property.

To conclude, the right to non-discrimination obliges States not to require that indigenous communities have used and continue to use lands in manners common to the majority society to establish property rights. On the contrary, if an indigenous community has utilized lands, territories and resources in ways characteristic to its culture, this has resulted in a property right.

<sup>42</sup> European Court of Human Rights, *Thlimmenos v. Greece* (app. 34369/97), Judgment of April 6, 2000, 31 EHRR 411, para. 44. The European Court subsequently and repeatedly reiterated this understanding of non-discrimination.

<sup>43</sup> United Nations, Committee on the Elimination of Racial Discrimination, “General recommendation No. 32: the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination” (CERD/C/GC/32), para. 8.

<sup>44</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision), para. 196.

<sup>45</sup> Inter-American Court of Human Rights, “Case of the *Saramaka People v. Suriname*, Judgment of November 28, 2007”, Series C, No. 172, para. 103.

<sup>46</sup> Jesse Ribot, “Foreword”, in *Governance of Natural Resources: Uncovering the Social Purpose of Materials in Nature*, Jin Sato, ed. (Tokyo, New York and Paris, United Nations University Press, 2013), p. xv.

### **2.3.3 Circumstances under which indigenous property rights to lands, territories and resources can be lawfully limited: material requirements**

#### **2.3.3.1 Starting point: limitations in indigenous property rights require substantiation**

The foregoing has offered an explanation of how indigenous communities' historical land uses have resulted in property rights to lands, territories and resources. This subsection explores the circumstances under which property rights thus established (as well as property rights indigenous communities may have acquired through other means) can be lawfully taken or otherwise infringed. The contemporary understanding of the right to non-discrimination and the underlying rationale behind indigenous rights to lands, territories and resources as surveyed in this section are critical to understanding this aspect of indigenous communities' property rights to lands, territories and resources as well.

As with human rights in general, the principal norm is that States shall respect property rights to land. The right to non-discrimination guarantees that this is true also for indigenous communities' rights as established through historical use. Thus, the starting point is that States must not limit indigenous communities' property rights. For example, as a general rule, resource extraction should not occur on lands subject to indigenous communities' property rights. This general rule is not without exemptions, however. Further, the right to property is subject to limitations, as are human rights in general. In the *Yakye Axa Indigenous Community v. Paraguay* ruling, the Inter-American Court of Human Rights notes that while indigenous communities have property rights to land, this "does not mean that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former".<sup>47</sup>

Still, limitations in property rights must not be arbitrary. For limitations to be lawful, certain legally defined criteria must be met. Again, the right to non-discrimination provides that this aspect of the right to property applies also to indigenous communities. The Inter-American Court of Human Rights has articulated that "a State may restrict the use and enjoyment of the right to property where the restrictions are: (a) previously established by law; (b) necessary; (c) proportional; and (d) with the aim of achieving a legitimate objective in a democratic society".<sup>48</sup> In the *Endorois and Ogiek*

<sup>47</sup> Inter-American Court of Human Rights, "Case of the *Yakye Axa Indigenous Community v. Paraguay*", para. 149.

<sup>48</sup> *Ibid.*, para. 144; Inter-American Court of Human Rights, "Case of the *Saramaka People v. Suriname*", paras. 127-129.



cases, the African Commission on Human and Peoples' Rights<sup>49</sup> and the African Court on Human and Peoples' Rights<sup>50</sup> respectively applied a similar formula. Former Special Rapporteur on the rights of indigenous peoples James Anaya has articulated that "in order for a limitation to be valid ... [it] must be necessary and proportional in relation to a valid State objective motivated by concern for the human rights of others".<sup>51</sup> The outlined norm ostensibly reflects an international standard.<sup>52</sup>

A limitation in a property right is foreseeable if the circumstances under which the limitation could occur are governed by sufficiently clear and accessible law. This requirement is normally not problematic and is beyond the scope of this chapter.

### **2.3.3.2 Substantiation requirements: necessity and genuine societal aim**

When a State maintains that a limitation in a property right is motivated by a genuine societal need, the tendency is to impose said limitation without much scrutiny, assuming that there are good reasons for the State's position.<sup>53</sup> Two prerequisites are that the societal aim appears plausible and that it is substantiated to some degree.<sup>54</sup> The right to non-discrimination requires that the evaluation of whether there is a genuine societal aim is the same with regard to the indigenous and the non-indigenous property right to lands. If there is no public need for one, then the same applies to the other. As noted by former Special Rapporteur Anaya, a public need for limiting indigenous rights to lands, territories and resources "is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits ... are primarily for private gain".<sup>55</sup> Judicial institutions generally do not give the necessity/genuine societal aim test much consideration.

<sup>49</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision), paras. 211-213.

<sup>50</sup> African Union, African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017 [Ogiek case], para. 129.

<sup>51</sup> "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: extractive industries and indigenous peoples" (A/HRC/24/41), para. 34.

<sup>52</sup> Compare European Court of Human Rights, *Hutten-Czapska v. Poland* (app. 35014/97), Judgment of June 19, 2006 (merits and just satisfaction), 45 EHRR 52.

<sup>53</sup> See, for example, European Court of Human Rights, *James and others v. United Kingdom* (app. 8793/79), Judgment of February 21, 1986, Series A, No. 98, 8 EHRR 123.

<sup>54</sup> Compare African Union, African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017 [Ogiek case], para. 130.

<sup>55</sup> A/HRC/24/41, para. 35.

### **2.3.3.3 Substantiation requirements: proportionality**

For a limitation in a property right to be proportionate, the societal aim and associated activity that motivates the limitation, such as the implementation of an industrial project, must generate benefits for society at large that outweigh the harm the limitation causes the property right holder. It is, in other words, not sufficient that a limitation in a property right is necessary and fulfils a genuine public aim. There is a threshold that must be reached before a State can demand that the few sacrifice for the benefit of the many.<sup>56</sup>

To assess whether a limitation in an indigenous community's property right to lands, territories and resources is proportionate, the harm the limitation causes to the community (such as that generated by an industrial project) must be "quantified", as this damage shall be measured against the benefits the project generates for society as a whole. To assign the harm the proper weight, it is of paramount importance to recall (a) how the right to property is based on the right to non-discrimination, (b) that the latter right requires differential treatment of those culturally different (with regard to all aspects of the right to property), and (c) how international law recognizes that indigenous peoples' societies, cultures and ways of life, and ultimately their identities, are intrinsically connected to lands, territories and resources historically used and that this fact must have legal implications.

Proportionality presupposes that the benefits accruing to society at large from, for example, an industrial project outweigh the harm the project would cause to the indigenous community as an indigenous community. In other words, the proportionality evaluation must take into account that limitations in an indigenous community's property right to lands, territories and resources inflict harm on the community's way of life and identity. The described norm is well reflected in international legal sources.

The Inter-American Court of Human Rights has found that the inherent link between indigenous peoples' cultural identities and the lands, territories and resources historically used has established legal ties between them and their lands, and it has found the identity-land connection equally relevant for resolving under what circumstances these ties might be legally severed. In the case of the *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court considered whether an indigenous community's property rights to land could be infringed for industrial purposes. The Court held that in such situations, States "must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture ... and to carry out their life aspirations. Property of the land ensures

<sup>56</sup> Compare, for example, European Court of Human Rights, *Hutten-Czapska v. Poland*.



that the members of the indigenous communities preserve their cultural heritage.”<sup>57</sup> The Court then added that “disregarding the ancestral right of the members of the indigenous communities to their territories could affect ... [their] right to cultural identity and to the very survival of the indigenous communities and their members”.<sup>58</sup> Similarly, in *Saramaka People v. Suriname*, the Court first noted that in indigenous contexts, proportionality considerations must include elements additional to those that apply to other property right holders because of the special nature of indigenous communities’ relationship with their lands.<sup>59</sup> Elaborating on those additional elements, the Court underlined that “the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access [to] and use of natural resources in their territory ‘that are related to their culture and are found therein’. ... Without [lands and resources] ... the very physical and cultural survival of such peoples is at stake.” Based on these observations, the Court identified the need for special measures to protect their right to property to “guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States”.<sup>60</sup>

The Inter-American Court has been exceptionally meticulous in articulating the contours of indigenous rights to lands, territories and resources. Still, the core of the Court’s conclusions is supported in findings by other international judicial institutions. In the *Endorois* case, the African Commission on Human and Peoples’ Rights understood the basis for indigenous communities’ property rights to land and when those could be limited in much the same way as did the Inter-American Court of Human Rights.<sup>61</sup> The Committee on Economic, Social and Cultural Rights has not stopped at recognizing that indigenous peoples’ ways of life and cultural identities are inherently tied to their lands, territories and resources but has proceeded to infer that this fact obliges States to “protect the rights of indigenous peoples to ... control ... their communal lands”.<sup>62</sup>

<sup>57</sup> Inter-American Court of Human Rights, “Case of the *Yakye Axa Indigenous Community v. Paraguay*”, para. 146.

<sup>58</sup> *Ibid.*, para. 147.

<sup>59</sup> Inter-American Court of Human Rights, “Case of the *Saramaka People v. Suriname*”, para. 128; see the final three lines of the paragraph: “... only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people” [emphasis added]; also refer to paras. 120-122.

<sup>60</sup> *Ibid.*, paras. 120 and 121.

<sup>61</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision), paras. 174-238.

<sup>62</sup> E/C.12/GC/21, para. 36.

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The United Nations Declaration on the Rights of Indigenous Peoples captures the norm well; articles 25 and 26.1, read together, underscore that indigenous peoples' cultures and cultural identities are interwoven with lands historically used and that they have established rights to such lands. Pursuant to article 26.2, then, the inherent link between indigenous peoples and their lands has resulted in the establishment of rights that include control of those lands to which the rights apply.

In conclusion, international legal sources provide that the quantification of the harm a limitation causes to an indigenous community's property rights to lands, territories and resources shall have as a basis that any harm caused to those rights is harm caused to the community's culture, society and way of life, and ultimately to its identity and that of its members. Naturally, the damage caused to this very nucleus of an indigenous community carries substantial weight, which needs to be measured against the benefits to resolve whether there is proportionality. Presumably, a proportionality test sensitive to the particularities of indigenous cultures will be problematic for non-indigenous entities involved in land and resource exploitation. As considerable harm to land is largely



Photo: UNDP / Mónica Suárez Calindo



inherent in industrial projects of scale such as copper mines or palm oil plantations, it might be relatively rare that there is more weight in the benefits-to-society-at-large scale in comparison with the weight of the damage to the indigenous community. Former Special Rapporteur James Anaya shares this viewpoint.<sup>63</sup> The forced emigration of indigenous peoples from their traditional lands – because of either the taking of those lands or the environmental degradation caused by resource extraction projects – has had an overall negative impact on indigenous cultures and social structures. Many of these projects have provided little or no compensation for those forced to relocate. This problem is reported to have had an especially negative effect on Adivasi women, who have apparently experienced the loss of social, economic and decision-making power when removed from their traditional territorial- and forestry-based occupations. Non-indigenous migration into indigenous territories and its related consequences also have a negative effect on indigenous social structures. Examples identified of non-indigenous migration into indigenous lands include illegal settlement by loggers or miners, the influx of non-indigenous workers and industry personnel brought in to work on specific projects, and the increased traffic into indigenous lands owing to the construction of roads and other infrastructure in previously isolated areas.

#### **2.3.4 Circumstances under which indigenous property rights to lands, territories and resources can be lawfully limited: procedural requirements**

If a limitation in an indigenous community's property right to lands, territories and resources in the form of, for example, an industrial project carries such negative consequences that it fails to meet the proportionality requirement or is not foreseeable or not necessary/motivated by a genuine societal aim, the project is, at the outset, prohibited. In legal parlance, there is, under such circumstances, a *prima facie* breach of the property right. The breach is *prima facie* (self-evident) rather than final because if the community has consented to the project irrespective of its negative impacts, it has waived its property right and there is thus no breach of the right after all. Put differently, if the indigenous community has provided its free, prior and informed consent for the project, perhaps motivated by the receipt of benefits or the conclusion of benefit-sharing agreements, the *prima facie* breach never becomes final.

Even if an industrial project simultaneously meets the foreseeability, necessity/genuine societal aim and proportionality tests, multiple sources of authority provide that there is still an obligation to consult the indigenous community. This obligation applies irrespective of whether the impact of the industrial project is in itself severe enough to amount to a material breach of the property right. A two-tier approach applies with respect to

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<sup>63</sup> A/HRC/24/41, paras. 35-36.

limitations in indigenous communities' property rights to lands, territories and resources. Lawfulness requires that the limitation simultaneously (a) does not inflict damage that exceeds the threshold the right allows (the material requirement) and (b) has been duly discussed through consultation with the community (the procedural requirement).

## **2.4 Indigenous rights to lands, territories and resources as cultural rights**

### **2.4.1 The material obligation**

During the early days of the contemporary international indigenous rights discourse, indigenous rights to lands, territories and resources were predominantly couched in terms of cultural rights. This was not necessarily a result of a deliberate strategy. Instead, it was probably more a by-product of indigenous peoples arguing a right to control their territories under the right to self-determination, including through the individual complaint mechanism before the Human Rights Committee. The Committee was, however, not comfortable with taking explicit positions in concrete cases on whether States were complying with the right to self-determination enshrined in article 1 of the International Covenant on Civil and Political Rights vis-à-vis segments of the population of the State. It recused itself by arguing that only individuals had recourse to the individual complaint mechanisms and that individuals could not bring complaints alleging violations of peoples' rights before the Committee. Against the backdrop of this explanation, the Human Rights Committee interpreted communications by indigenous peoples' representatives asserting breaches of the right to self-determination pursuant to article 1 of the Covenant as de facto claims of violations of the individual right to culture enshrined in article 27.<sup>64</sup> The Committee's choice allowed a constructive interpretation of article 27 of the Covenant, resulting in the formulation of a norm that

<sup>64</sup> Martin Scheinin, "The right to self-determination under the Covenant on Civil and Political protects culture also in the form of indigenous livelihoods and other forms of traditional culturally based uses of lands, territories and resources – something that is not explicit in the wording of the provision. According to its wording, article 27 of the Covenant only places a negative obligation on States to not interfere with cultural practices. The Human Rights Committee has clarified, though, that the provision nonetheless embraces a positive obligation. It requires States to positively intervene to prevent third parties from acting in ways contrary to article 27. As formulated, this article sets an extremely high threshold for the provision to be engaged by prohibiting outright denials of the continuous pursuit of traditional livelihoods or other culturally Rights", in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Pekka Aikio and Martin Scheinin, eds. (Turku, Finland, Institute for Human Rights at Åbo Akademi University, 2000). See also Human Rights Committee, general comment No. 23, paras. 2 and 3.1.



today constitutes an important component in the international indigenous land, territorial and resource rights framework.<sup>65</sup>

The Human Rights Committee has confirmed that article 27 of the International Covenant on Civil and Political Rights based uses of lands, territories and resources. The Human Rights Committee has lowered this bar, holding that article 27 also prohibits interference that has a significant negative impact on the pursuit of indigenous livelihoods or other culturally based land uses.<sup>66</sup> When resolving whether the article 27 threshold is exceeded, one must take cumulative impacts into account.<sup>67</sup> The Human Rights Committee has underlined that when an infringement has a significant negative impact on the pursuit of a traditional livelihood or other culturally based land use, it is strictly prohibited. Article 27 does not allow for a proportionality test.<sup>68</sup> The Human Rights Committee has read a strong collective dimension into the right to culture enshrined in this article when applied in indigenous contexts. However, it has not pronounced indigenous collectives as formal legal subjects of the right the provision enshrines. Consequently, it is (at least in principle) sufficient that an infringement has a significant negative impact on one member of an indigenous group's practice of a traditional livelihood or other culturally based use of lands, territories and resources for the right to be breached. Importantly, the formal individual nature does not preclude that the right to culture's collective dimension also extends to the group to which the indigenous individuals belong. Naturally, if

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<sup>65</sup> The Human Rights Committee's understanding of article 27 of the International Covenant on Civil and Political Rights appears to have been largely accepted, or at least not contested, by States. One may therefore assume that it reflects an international standard; cf. article 31.3(b) of the Vienna Convention on the Law of Treaties; see also Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, United Kingdom, Cambridge University Press, 2007), p. 241.

<sup>66</sup> United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *Poma Poma v. Peru*, Comm. No. 1457/2006, 27 March 2009 (CCPR/C/95/D/1457/2006), paras. 7.6 and 7.7.

<sup>67</sup> United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *Jouni E. Länsman et al. v. Finland*, Comm. No. 671/1995, views adopted 30 October 1996 (CCPR/C/58/D/671/1995, 22 November 1996), paras. 10.6-10.7.

<sup>68</sup> This understanding follows already from the wording of article 27 of the Convention on the Rights of the Child, read in the light of the Convention as a whole, but is also reflected in Human Rights Committee jurisprudence (for example, *Poma Poma v. Peru*). This means that the structure of the right to culture as enshrined in article 27 of the International Covenant on Civil and Political Rights differs from most human rights, including the right to property. As seen, the latter right defines the scope of the right broadly but allows considerable limitations in the right; conversely, the right to culture articulates the right narrowly but then accepts no limitations.

the individuals' culturally based land uses are protected, this in turn — in practice, if not formally — also shields the group from interference.<sup>69</sup>

#### **2.4.2 The procedural obligation**

It is thus clear that if an infringement has a significant negative impact on the pursuit of a traditional livelihood or other culturally based uses of lands, territories and resources, it is at the outset not allowed. There is, as discussed in the context of the right to property,<sup>70</sup> a prima facie breach of the right to culture unless the right has been waived. In other words, if free, prior and informed consent is provided, there is no breach of the right to culture, irrespective of the fact that the infringement as a starting point was severe enough to amount to a violation of the right.<sup>71</sup>

As the judicial bodies overseeing the implementation of the right to property have done with respect to that right,<sup>72</sup> the Human Rights Committee has read a free-standing consultation requirement into article 27 of the International Covenant on Civil and Political Rights. Added to the fact that an infringement must not have a substantial negative impact on a traditional livelihood or other culturally based land use, those pursuing the land use must have been consulted about the infringement before it ensues. The material and procedural requirements are thus cumulative. The State must comply with the latter irrespective of the level of impact the infringement carries.<sup>73</sup>

<sup>69</sup> Article 30 of the Convention on the Rights of the Child articulates a right to culture that essentially mirrors the one found in article 27 of the International Covenant on Civil and Political Rights. The Committee on the Rights of the Child, the United Nations treaty body that oversees the implementation of the relevant Convention, has had less time than the Human Rights Committee to flesh out the contours of the right to culture as enshrined in article 30 of the Convention on the Rights of the Child as it applies to indigenous children (and indirectly to the groups to which indigenous children belong). As the Committee on the Rights of the Child accelerates its work in this respect, one may expect a right to crystallize that resembles that found in article 27 of the International Covenant on Civil and Political Rights (as understood by the Human Rights Committee), albeit naturally with a particular focus on the situation of indigenous children. See in this regard United Nations, Committee on the Rights of the Child, "General comment No. 11 (2009): indigenous children and their rights under the Convention" (CRC/C/GC/11).

<sup>70</sup> See section 2.3.4 of this chapter.

<sup>71</sup> Compare *Poma Poma v. Peru*, paras. 7.5-7.7.

<sup>72</sup> See section 2.3.4 of this chapter.

<sup>73</sup> The HRC first established the consultation requirement in the *Ilmari Lämsmä* case (CCPR/C/52/D/5111/1992) and has reiterated it on a number of occasions; compare also "Final report of the study on indigenous peoples and the right to participate in decision-making: report of the Expert Mechanism on the Rights of Indigenous Peoples" (A/HRC/18/42), annex: Expert Mechanism advice No. 2 (2011).



### **3. International indigenous rights to lands, territories and resources at the national level**

The subsections above have outlined how an international indigenous *corpus juris* has crystallized over a relatively brief time period, founded on the following:

- ☰ Formal recognition of the fact that indigenous peoples' cultures, ways of life, and ultimately their very identities are inherently tied to lands, territories and resources historically used and that they have established societies and livelihoods that are deeply rooted in those lands and territories and are bound to those resources;
- ☰ Acknowledgement that this reality must carry profound legal consequences.

It has further been described how, based on these principal recognitions, international law has come to hold the following:

- ☰ Indigenous peoples are bestowed with the right to self-determination, to be exercised through autonomy arrangements, including with respect to managing lands, waters and resources situated within their traditional territories — though there is some lingering uncertainty as to the reach of this autonomy.
- ☰ Indigenous communities hold property rights to lands, territories and resources traditionally used, where the room for limiting these rights is comparatively narrow.
- ☰ Indigenous individuals directly and indigenous collectives indirectly are protected from infringements that have a significant negative impact on their pursuit of traditional livelihoods and other culturally based uses of lands, territories and resources.

These international norms are steadily finding their way into domestic legal systems. Most Latin American States have introduced autonomy arrangements for indigenous peoples that involve land management and have also recognized collective land rights

in other ways.<sup>74</sup> The story is similar in Western States with indigenous peoples.<sup>75</sup> The majority of Pacific States have constitutional provisions or legislation endowing indigenous peoples with land management rights. For example, the 1840 Treaty of Waitangi (the founding document for New Zealand), the status of which was confirmed by the Constitution Act of 1852 and the Native Lands Act of 1862, serves as the foundation for the Waitangi Tribunal process, which regularly produces arrangements according to which Māori peoples manage lands, territories and resources.<sup>76</sup> From the Arctic comes the Act on Greenland Self-Government, which allows the Inuit extensive land (and ice) management authority.<sup>77</sup> In Asia, the Indigenous Peoples' Rights Act<sup>78</sup> in the Philippines draws heavily from the draft version of the Declaration on the Rights of Indigenous Peoples, awarding indigenous peoples autonomy and self-governance rights, including with regard to lands, territories and resources.

A number of examples from the Inter-American and African human rights systems have been presented in this chapter. Similar cases are being considered and judgments rendered by courts at the national level. In the Richtersveld case, the Supreme Court of Appeal of South Africa held that it was discriminatory to not recognize that an indigenous community had established ownership rights to land through historical use while at the same time protecting the registered title of the non-indigenous population. The Court concluded that the community's traditional land utilization had produced a right to exclusive occupation and use.<sup>79</sup> In Asia, the Constitutional Court of the Republic of Indonesia recognized in 2013 that indigenous peoples hold rights over lands and natural resources historically used and ordered the return of customary forests to their traditional users.<sup>80</sup> In the Cal and Coy case, the Supreme Court of Belize affirmed that a Maya indigenous community holds property rights to its traditional land. The Court based its finding in large part on the right to non-discrimination, noting that Belize law

<sup>74</sup> E/2018/43-E/C.19/2018/11, para. 7; "Report of the International Expert Group Meeting on Indigenous Peoples and Forests" (E/C.19/2011/5), para. 30; Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, pp. 80-81, 103-104, 108 and 249; Joji Carino, *Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples*, Loreto Tamayo, ed. (n.p., Indigenous Peoples Major Group for Sustainable Development, 2019), p. 39.

<sup>75</sup> Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, pp. 80-81, 103-104, 108 and 249; and Ghai, "Ethnicity and autonomy: a framework for analysis", p. 7.

<sup>76</sup> E/2018/43-E/C.19/2018/11, para. 7; Carino, *Global Report*, p. 32.

<sup>77</sup> Act No. 473 of 12 June 2009.

<sup>78</sup> Republic Act No. 8371 of 1997.

<sup>79</sup> Constitutional Court of South Africa, *Alexkor Limited and the Government of the Republic of South Africa v. the Richtersveld Community and others*, Judgment of October 14, 2003 (Case CCT 19/03).

<sup>80</sup> Constitutional Court of the Republic of Indonesia, Decision No. 35/PUU-X/2012 in the case of the testing of Law No. 41 of 1999 of the concerning Forestry against the 1945 Constitution of the Republic of Indonesia.



discriminates against the Maya when denying them property rights because of the way they use the land.<sup>81</sup> In North America, the Supreme Court of Canada has held that the Tsilhqot'in Nation has aboriginal title to its traditional territory, awarding the Nation significant control over it.<sup>82</sup> From the Arctic, there is the Svartskogen case.<sup>83</sup> Here, the Supreme Court of Norway awarded a community largely composed of indigenous Sámi ownership rights over a land area historically used.

The examples above are only a few of many that might be considered good practice. It is therefore more appropriate to refer to them as illustrations of how indigenous rights to lands, territories and resources are increasingly being recognized in domestic jurisdictions. They are, in all likelihood, a vanguard for developments to come.

#### **4. Economic and social aspects of recognizing indigenous rights to lands, territories and resources and the implementation gap**

The foregoing has illustrated how domestic legal systems are increasingly absorbing the norms that are crystallizing within the framework of the international indigenous rights regime governing lands, territories and resources. It does not follow, however, that indigenous rights to lands, territories and resources are always and fully implemented at the national level. On the contrary, there is a considerable gap between indigenous rights to lands, territories and resources as enshrined in international and sometimes national law and the operationalization of those rights at the grass-roots level. Such processes are often slow, haphazard, incomplete or even non-existent.<sup>84</sup>

There is an obvious main suspect for this inertia. Recognizing and implementing indigenous rights to lands, territories and resources are often perceived to conflict with and come at the expense of heavily prioritized State and private sector interests.

<sup>81</sup> Supreme Court of Belize, *Aurelio Cal (on behalf of the Maya Village of Santa Cruz) and others and Manuel Coy (on behalf of the Maya Village of Conejo) and others v. the Attorney General of Belize and Minister of Natural Resources and the Environment*, claim Nos. 171 and 172 of 2007, Judgment of 18 October 2007.

<sup>82</sup> Supreme Court of Canada, *Tsilhqot'in Nation v. British Columbia*, Judgment of June 26, 2014, Cit. 2014 SCC 44.

<sup>83</sup> Supreme Court of Norway, *Erik Andersen and others v. the Norwegian State*, Serial No. 5B/2001, Judgment of October 5, 2001 [Svartskogen case], Rt. 2001 s. 1229.

<sup>84</sup> E/2018/43-E/C.19/2018/11, paras. 7 and 8; E/C.19/2011/5, para. 17.

Substantial quantities of the world's remaining minerals and fossil fuels are situated within indigenous lands.<sup>85</sup> These lands are also rich in other resources craved by the non-indigenous world, including forests and land for large-scale agricultural developments – a rapidly growing industry that continues to probe deeper into indigenous lands.<sup>86,87</sup> The situation is well illustrated by the exemplified jurisprudence emanating from the Inter-American and African human rights systems. It has surfaced essentially as a result of indigenous rights to lands, territories and resources conflicting with substantial industry interests that are often implicitly or even explicitly supported by the State. The described situation is from a certain perspective understandable, given the major interests in play. Still, the failure to respect and implement indigenous rights to lands, territories and resources for the reasons identified or other reasons may be short-sighted and overlook the fact that realizing those rights could be conducive to promoting economic, social and environmental interests at both the national and international levels.

At the national and regional levels, non-respect of rights always carries risks in the form of litigation, penalties, reparations and other remedial action, as reflected in both the domestic and the Inter-American and African system jurisprudence highlighted thus far. It often generates conflict, instability and uncertainty, which does not promote business interests.<sup>88</sup> For their part, States risk international condemnation and bad will. To avoid such scenarios, States and businesses might want to acknowledge that the interests of indigenous peoples and those of businesses need not always be at odds. If a third party wishes to access indigenous lands for business purposes, it could investigate whether the indigenous population(s) affected might be interested in partnering in the enterprise.<sup>89</sup> If indigenous rights to lands, territories and resources are recognized and respected, an indigenous people might feel secure about entering into such a partnership, leading to mutually beneficial initiatives in which businesses avoid the negative consequences associated with the non-acknowledgment of indigenous rights.<sup>90</sup> Recognizing indigenous rights to lands, territories and resources and thereby

<sup>85</sup> International Work Group for Indigenous Affairs, "Indigenous peoples, transnational corporations and other business enterprises", briefing note, January 2012, p. 1.

<sup>86</sup> Carino, *Global Report*, pp. 28-29.

<sup>87</sup> E/C.19/2018/7, paras. 33-34; Cotula, "Land, property and sovereignty in international law", pp. 222-223 and 248.

<sup>88</sup> E/2007/43-E/C.19/2007/12, para. 7; A/HRC/24/41, para. 29; Oxfam, International Land Coalition and Rights and Resources Initiative, *Common Ground: Securing Land Rights and Safeguarding the Earth* (Oxford, 2016), p. 24; compare also E/C.19/2011/5, para. 25.

<sup>89</sup> A/HRC/24/41, paras. 2, 77 and 80.

<sup>90</sup> Rights and Resources Initiative, *Who Owns the World's Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights* (Washington, D.C., 2015), p. 2.



leaving the resources and their disposition in the hands of indigenous peoples could reduce or even eliminate many of the challenges and elements of instability inherent in land-grabbing.<sup>91</sup> If these rights are not recognized and respected, such partnerships are unlikely to materialize. That being said, when indigenous peoples are uninterested in collaborative commercial development, the legal framework outlined above should naturally be respected.

Recognizing indigenous rights to lands, territories and resources can contribute to political stability, economic growth and sustainable development at the broader global level. Acknowledgement of such rights carries environmental benefits. It has been noted that recognizing the rights of indigenous peoples to lands, territories and resources promotes the protection of ecosystems, waterways, biological diversity, and the general maintenance of natural resources.<sup>92</sup> Respect for such rights can actually contribute to the reduction of carbon emissions from deforestation. Studies point to lower deforestation in forests that are inhabited by indigenous peoples and in which their relevant rights are recognized.<sup>93</sup> Evidence of the relationship between indigenous peoples and their lands, territories and resources suggests that acknowledgement of and respect for indigenous rights in this regard would likely be conducive to promoting the Sustainable Development Goals.<sup>94</sup>

The chapters to come will demonstrate more fully how recognizing and respecting the international framework for indigenous rights to lands, territories and resources elaborated above is not only right and sensible but also the lawful thing to do.

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<sup>91</sup> A/HRC/24/41, para. 17.

<sup>92</sup> E/2018/43-E/C.19/2018/11, para. 10; Oxfam, International Land Coalition and Rights and Resources Initiative, *Common Ground*, p. 11.

<sup>93</sup> Rights and Resources Initiative, *Who Owns the World's Land?*, pp. 2 and 22; Oxfam, International Land Coalition, and Rights and Resources Initiative, *Common Ground*, pp. 16 and 20.

<sup>94</sup> E/2018/43-E/C.19/2018/11, para. 10; Rights and Resources Initiative, *Who Owns the World's Land?*, pp. 2 and 21.

## 5. Conclusion and recommendations

As mentioned, the international *corpus juris* for indigenous lands, territories and resources is young and constantly evolving. Still, recent developments, in particular those following from and subsequent to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007, have clarified the basic contours of the rights framework. The core of the rights to lands, territories and resources that indigenous peoples, communities and individuals possess under international law can be identified, and continuing developments will extend their reach and inject nuance. The present chapter has exemplified how progress at the international level has been matched at the national level by domestic legal systems increasingly absorbing the international norms. However, it has also highlighted the still-considerable gap between the content and scope of indigenous rights to lands, territories and resources as articulated by international legal sources and their implementation at the grass-roots level. The chapter thus concludes by identifying what is needed to accelerate the operationalization of indigenous rights to lands, territories and resources at the domestic level and by offering some concrete recommendations following therefrom.

To facilitate and strengthen the actualization of indigenous rights to lands, territories and resources, action must be taken to (a) identify the geographical scope of indigenous territories; (b) further resolve the meaning, reach, content and scope of these rights; (c) ensure the recognition and implementation of such rights; and (d) install dispute mechanisms and remedies for instances of non-recognition and non-implementation. At all stages, particular attention should be given to those traditionally most vulnerable within indigenous populations.

## Recommendations

- ≡ Absent knowledge of the geographical extent of an indigenous people's territory, it is difficult to adequately recognize, respect and implement their rights to lands, territories and resources. States should therefore establish effective, accessible and affordable mechanisms for effectively identifying and demarcating indigenous traditional lands.<sup>95</sup> To achieve the same end, States should support indigenous efforts to map traditional lands.<sup>96</sup>

<sup>95</sup> E/2018/43-E/C.19/2018/11, para. 12; E/2007/43-E/C.19/2007/12, para. 9(e); "Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples" (A/RES/69/2), para. 21

<sup>96</sup> E/2018/43-E/C.19/2018/11, para. 8; E/2007/43-E/C.19/2007/12, para. 23; Carino, *Global Report*, pp. 64 and 72; Oxfam, International Land Coalition and Rights and Resources Initiative, *Common Ground*, p. 41.



- ≡ To adequately recognize, respect and implement indigenous rights to lands, territories and resources, the meaning, reach, content and scope of those rights must be clear to both indigenous peoples and States. To manage instances in which these parties disagree, States should establish effective, accessible and affordable mechanisms for the purposes of settling relevant disputes.<sup>97</sup>
- ≡ States should formally recognize indigenous peoples' rights to lands, territories and resources in accordance with international law and ensure the implementation of such rights, including vis-à-vis the private sector.<sup>98</sup>
- ≡ Where indigenous peoples hold the position that their rights to lands, territories and resources are not being adequately recognized or implemented, States shall establish effective, accessible and affordable enforcement mechanisms for the purposes of ensuring the acknowledgement and realization of said rights.<sup>99</sup>
- ≡ At all stages of recognizing and operationalizing indigenous rights to lands, territories and resources, particular attention should be given to typically vulnerable groups within indigenous populations, including women, children and youth, and persons with disabilities, all of whom might suffer disproportionately from the failure to respect and implement indigenous rights to lands, territories and resources.<sup>100</sup> Indigenous youth, for example, might abandon the community if deprived of rights to its land and what those rights might have represented in terms of future prospects – which could, in turn, cause damage to the cultural identity of such youth.<sup>101</sup>

<sup>97</sup> E/2018/43-E/C.19/2018/11, para. 8; A/RES/69/2, para. 21; Carino, *Global Report*, pp. 32 and 57.

<sup>98</sup> Compare Carino, *Global Report*, pp. 54-55 and 72; Rights and Resources Initiative, *Who Owns the World's Land?*, p. 2.

<sup>99</sup> E/2018/43-E/C.19/2018/11, para. 8; A/RES/69/2, para. 21; Carino, *Global Report*, pp. 32 and 57.

<sup>100</sup> Compare Carino, *Global Report*, p. 73.

<sup>101</sup> Compare Carino, *Global Report*, p. 49. In support of this assertion, the Committee on the Rights of the Child has expressed concern over the displacement of Batwa communities in Rwanda from their traditional forests and the deprivation of their traditional livelihoods. The Committee found this particularly troublesome as it causes serious damage to the Batwa children's distinct lifestyle and culture. See United Nations, Committee on the Rights of the Child, "Concluding observations on the third and fourth periodic reports of Rwanda, adopted by the Committee at its sixty-third session (27 May – 14 June 2013)" (CRC/C/RWA/CO/3-4), para. 56.



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## Chapter II:

# CHALLENGES FOR indigenous peoples' rights to lands, territories and resources

Cathal Doyle

## 1. Lack of implementation of existing protections

### 1.1 Partial progress in the recognition of land rights

In recent decades a number of jurisdictions have adopted constitutional or legislative provisions recognizing indigenous peoples' rights to lands, territories and resources and their related self-governance and participatory decision-making rights. Some notable examples are provisions incorporated in the constitutions of Latin American countries such as the Plurinational State of Bolivia, Brazil, Colombia and Ecuador, and the ratification by most Latin American States of ILO Convention No. 169 (1989).<sup>102</sup> The drafting and ultimate adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 gave increased impetus to this growing recognition of indigenous peoples' rights.

Some of the most significant developments at the national level vis-à-vis indigenous rights to lands, territories and resources have related to consultation and participation

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<sup>102</sup> Officially designated Convention (No. 169) concerning indigenous and tribal peoples in independent countries (United Nations, Treaty Series, vol. 1650, No. I-28383) and cited by ILO as the Indigenous and Tribal Peoples Convention, 1989, this instrument is often referred to as ILO Convention No. 169 (1989).

in decisions pertaining to projects, plans and policies impacting those rights. These include the adoption by Peru of the Law on the Rights of Consultation of Indigenous Peoples in 2011 and the issuance by Costa Rica of a decree establishing an indigenous consultation mechanism in 2018.<sup>103</sup> Landmark legislation such as the 1976 Australian Aboriginal Land Rights (Northern Territory) Act, the Indigenous Peoples Rights Act 1997 in the Philippines, and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006 (hereinafter referred to as the Forest Rights Act 2006) in India stand out as examples of legal recognition of indigenous peoples' right to free, prior and informed consent.

Since 2007, there have also been progressive court rulings in countries such as in Belize, Canada, Colombia, Peru and South Africa<sup>104</sup> that have to varying degrees addressed the requirement for indigenous peoples' consultation and free, prior and informed consent in relation to the authorization of mining, oil and gas, and logging projects and the creation and management of national parks.<sup>105</sup> These rulings reflect decisions at the regional level by the Inter-American Commission on Human Rights and Inter-American Court of Human Rights in relation to countries such as Suriname and Ecuador, and by the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights in relation to Kenya.

Since 2002, recognition of community tenure over forests has also increased significantly, though the pace has slowed in recent years.<sup>106</sup> In vast swaths of Africa and Asia, many States have yet to officially recognize indigenous peoples as legal entities or their ownership and control of land under customary tenure systems. This poses major challenges to indigenous peoples' cultural integrity and their ability to determine their own development trajectories and has facilitated the dispossession of millions of hectares of their lands for extractive industry and agribusiness operations, infrastructure

<sup>103</sup> Constitution of the Plurinational State of Bolivia of 2009, art. 30(II)(15); Constitution of the Federative Republic of Brazil 1988, art. 231, para. 3; Constitution of Colombia 1991 (with amendments through 2005), art. 330; Constitution of the Republic of Ecuador, 2008, art. 57(7); Ley No. 29785 del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el convenio 169 de la Organización Internacional del Trabajo (OIT), 8 August 2011; Decreto núm. 40932-MP-MJP, de 6 de marzo de 2018, que establece el Mecanismo General de Consulta a Pueblos Indígenas.

<sup>104</sup> See chapter I for additional information.

<sup>105</sup> *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; 2019 2 SA 453; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018); Colombia Constitutional Court Ruling T-129 of 3 March 2011; Supreme Court of Belize, A.D. 2014, Claim No. 394 of 2013; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

<sup>106</sup> Oxfam, International Land Coalition and Rights and Resources Initiative, *Common Ground*, p. 30.



development, and the creation and expansion of protected areas.<sup>107</sup> Where progress has been made in the de jure recognition of indigenous peoples and their rights, legislation and regulations to give effect to those rights often constrain their realization in practice. This is particularly the case when it comes to decision-making regarding the exploitation or management of their lands and resources, often leading to the de facto denial of legally recognized rights.

A combination of circumstances gives rise to this wide gap between the formal recognition and actual implementation of land rights.<sup>108</sup> A major constraint is the affirmation of weak ownership rights and restrictions on land use in legislative and administrative instruments.<sup>109</sup> This is compounded by the relative powerlessness of those institutions with responsibility for the enforcement of indigenous peoples' rights in comparison with the institutions responsible for resource exploitation or environmental management. Procedural hurdles to establishing tenure rights, such as complex and time-consuming demarcation and titling processes, impose huge burdens on communities or render their claims open to challenge by actors with competing interests and can delay access to and control over lands for decades.<sup>110</sup> Where laws and regulations governing extractive industry, agribusiness or conservation activities conflict with those governing indigenous land rights, the latter are almost inevitably subordinated to the former. In some instances, the State maintains the power to unilaterally extinguish indigenous peoples' land rights. In other cases, new or modified legislation or regulations are enacted with the specific intent of undermining legal protections for those rights. As a result, as will be briefly outlined below, the benefits of hard-won gains, in terms of legislative protections or judicial decisions, are at times barely visible in the lived experiences of many indigenous peoples.

## **1.2 Snapshot of advances and their limitations**

The Government of the Philippines enacted the Indigenous Peoples Rights Act in 1997 based on the then draft United Nations Declaration on the Rights of Indigenous Peoples. It is the only Asian country whose laws comprehensively recognize indigenous peoples'

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<sup>107</sup> Ward Anseeuw and others, *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project* (Rome, International Land Coalition, 2011); Rights and Resources Initiative, *Who Owns the World's Land?*

<sup>108</sup> E/2018/43-E/C.19/2018/11, para 7.

<sup>109</sup> Rights and Resources Initiative, *Who Owns the World's Land?*, p. 22.

<sup>110</sup> E/2018/43-E/C.19/2018/11, para. 8; "Report of the Special Rapporteur on the rights of indigenous peoples on her mission to Brazil", note by the Secretariat (A/HRC/33/42/Add.1), paras. 21-25.

rights to ancestral lands, territories and resources.<sup>111</sup> However, indigenous peoples point to culturally inappropriate and costly titling processes and the problematic application of the Act's provisions upholding vested property rights to mining concessions that predate the law's enactment.<sup>112</sup> Among the most progressive provisions of the Act are those addressing free, prior and informed consent in relation to authorizing extractive industry activities and to transferring management responsibility for protected areas within ancestral domains. A 2012 revision of the guidelines for implementing free, prior and informed consent replaced previous flawed regulations and sought in good faith to effect those provisions.<sup>113</sup> However, these guidelines have been rendered ineffective due to the current Government's labelling of a growing number of indigenous leaders as terrorists and the creation of a context in which their lives and liberty are at risk and community consent to measures impacting their land, territorial and resource rights can be neither freely granted nor withheld.<sup>114</sup>

The Constitution of the Independent State of Papua New Guinea recognizes customary land, and 97 per cent of the country is subject to customary rights, with the agreement of landowners required for development in their lands.<sup>115</sup> Despite this, consultation with indigenous stakeholders on agreements for extractive and agribusiness projects is not sought in accordance with international human rights law's free, prior and informed consent standards pertaining to timeframes, information provision and representation.<sup>116</sup>

In India, almost 2 million titles have been granted under the 2006 Forest Rights Act. Its consent provisions have helped protect sacred forests such as those of the Dongria Kondh in the state of Odisha from bauxite mining and other extractive industry activity. However, according to the Ministry of Tribal Affairs, state governments have rejected over 46 per cent of community land claims under the Act on invalid grounds.<sup>117</sup> In December 2018, the Ministry of Environment, Forest and Climate Change further undermined the Forest Rights Act by informing the Maharashtra state government that compliance

<sup>111</sup> Carino, *Global Report*, p. 23.

<sup>112</sup> *Ibid.*, p. 25.

<sup>113</sup> Alternative Law Groups Inc. and others, "Philippines indigenous peoples ICERD shadow report" (2009), pp. 36-38; Cielo Magno, "Free prior and informed consent in the Philippines: regulations and realities", Oxfam America Briefing Paper (Washington, D.C., Oxfam, September 2013), pp. 13-18.

<sup>114</sup> Sarah Bestang K. Dekdeken and Jill K. Cariño, "Philippines", in *The Indigenous World 2019*, David Nathaniel Berger, ed. (Copenhagen, International Work Group for Indigenous Affairs, 2019).

<sup>115</sup> Constitution of the Independent State of Papua New Guinea, sect. 54.

<sup>116</sup> Marcus Colchester and Maurizio Farhan Ferrari, *Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples* (Moreton-in-Marsh, United Kingdom, Forest Peoples Programme, 2007), p. 11.

<sup>117</sup> Ishan Kukreti, "Tribal ministry tells states to stop rejecting FRA claims on invalid grounds", *Down To Earth*, 26 July 2018.

with the Act was unnecessary for in-principle approval of projects such as coal mines in forest lands.<sup>118</sup> This essentially bypasses the Forest Rights Act's consent requirement and renders such projects a *fait accompli*. In March 2019, the Ministry of Environment, Forest and Climate Change issued a draft amendment to the Indian Forest Act of 1927<sup>119</sup> that would threaten the indigenous forest rights recognized in the Forest Rights Act<sup>120</sup> by significantly increasing "the power and discretion vested in forest officials to govern areas declared as forest lands and ... [reinforcing] a trend of summary arrests and prosecution and eviction of forest dwellers".<sup>121</sup> In November 2019, the Government stated that it was withdrawing its proposed changes to the Indian Forest Act; however, concerns remain that states will replicate the draft in their own legislation.<sup>122</sup> In 2019, the Supreme Court of India ordered evictions of forest dwellers who were refused titles by state governments under the Forest Rights Act (see chapter III).

The 1991 Federative Constitution of Brazil requires that indigenous lands be demarcated and prohibits mining in them unless the National Congress adopts legislation allowing it. A bill permitting mining was proposed in 1996, but it was never adopted. However, the current Bolsonaro Government has made opening up indigenous lands for mining one of its priorities.<sup>123</sup> Brazil has seen a notable decline in the demarcation of indigenous lands in recent years. There was no demarcation under the Temer Government (between mid-2016 and the end of 2018). In 2017, agriculturalists successfully advocated for the Office of the Attorney General of the Union to issue Opinion No. 001/2017, which rendered further demarcation of indigenous lands infeasible. Bolsonaro supported this move during his presidential campaign, stating that "there will not be another centimetre for demarcation".<sup>124</sup> Deforestation in the Amazon in 2019

<sup>118</sup> Ishan Kukreti, "Environment ministry makes Forest Rights Act irrelevant in initial stage of forest clearance", *Down to Earth*, 4 December 2018.

<sup>119</sup> Ishan Kukreti, "Indian Forest Act amendment: Govt ready with first draft", *Down To Earth*, 19 March 2019.

<sup>120</sup> "Draft NFP anti-tribal, must be opposed", *The Pioneer* (Bhubaneswar), 14 April 2018.

<sup>121</sup> United Nations, "Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human rights of internally displaced persons", internal communication directed to the Government of India, 19 June 2019 (UA IND 13/2019), p. 5.

<sup>122</sup> Ishan Kukreti, "Government withdraws proposed changes to Indian Forest Act", *Down to Earth*, 15 November 2019.

<sup>123</sup> Congresso em Foco, "Governo planeja liberar mineração em terras indígenas, diz ministro" (5 March 2019); see also Biviane Rojas Garzon, "The Juruna (Yudjá) People's Protocol: a response to a hard-learned lesson", in *Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights-Based Engagement*, Cathal Doyle, Andrew Whitmore and Helen Tugendhat, eds. (Köln, Institut für Ökologie und Aktions-Ethnologie, 2019), p. 34.

<sup>124</sup> María de Lourdes Beldi de Alcántara, "Brazil", in *The Indigenous World 2019*, p. 140.

was the highest it had been in 11 years as a result of forest fires.<sup>125</sup> Indigenous peoples suspect this was a deliberate attempt by agriculturalists to open up their lands for agribusiness activities.<sup>126</sup>

In Peru, more than 11 million hectares of land were titled to 1,200 indigenous communities between 1975 and 2008.<sup>127</sup> However, it is estimated that an additional 20 million hectares of land are still due for formal recognition.<sup>128</sup> The titling process is criticized by indigenous peoples for being far slower and more cumbersome than the process for issuing forest concessions to companies. In addition, the titling procedure does not cater to indigenous peoples such as the Wampis who seek collective titles to their territory as peoples rather than as individual communities to ensure coherence with their concept of territory and to prevent its fragmentation.<sup>129</sup> Demands for legal provisions governing territorial organization to protect against the sale of communal lands by individuals and to halt land-grabbing have been ignored by the Government.<sup>130</sup> Meanwhile, the implementation of the 2011 Law on the Rights of Consultation of Indigenous Peoples has been strongly criticized by indigenous peoples and their support organizations for failing to guarantee that indigenous peoples have a meaningful say in decision-making around extractive industry activities impacting their rights.<sup>131</sup>

In 2010, the Central African Republic became the first country on the continent to ratify ILO Convention No. 169 (1989). However, implementation remains stalled in a context of armed conflict, loss of life, violence, insecurity and widespread displacement.<sup>132</sup> The conflict has also led to the depletion of food sources for forest-reliant communities

<sup>125</sup> Brazil, National Institute for Space Research, fire programme (<http://queimadas.dgi.inpe.br/queimadas/portal-static/situacao-atual/>).

<sup>126</sup> Marcelo Teixeira, "Brazil Amazon deforestation soars to 11-year high under Bolsonaro", Reuters, 18 November 2019.

<sup>127</sup> Sistema de Información sobre Comunidades Nativas del Perú, Instituto del Bien Común (SICNA/IBC), *Directorio de Comunidades Nativas del Perú* (Lima, Instituto del Bien Común, 2016).

<sup>128</sup> Rights and Resources Initiative, *Who Owns the World's Land?*, p. 1.

<sup>129</sup> Tami Okamoto and Cathal Doyle, "The Wampis Nation's FPIC protocol – a statute based tool to defend an integral territory", in *Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights-Based Engagement*, Cathal Doyle, Andrew Whitmore and Helen Tugendhat, eds. (Köln, Institut für Ökologie und Aktions-Ethnologie, 2019).

<sup>130</sup> Juan Carlos Ruiz Molleda, ¿Cómo defender el territorio de las comunidades campesinas del despojo?, *Servindi*, 20 March 2018.

<sup>131</sup> Ana Leyva Valera, "Consúltame de verdad: aproximación a un balance sobre consulta previa en el Perú en los sectores minero e hidrocarburífero", *Derechos Colectivos e Industrias Extractivas* (Lima, CooperAccion and Oxfam, 2018).

<sup>132</sup> Abel Koulaning, "Central African Republic", in *The Indigenous World 2019*, pp. 493-499.



Photo: UN-DESA / Broddi Sigurdarson

and restrictions on their freedom to gather, hunt and fish.<sup>133</sup> During ILO discussions in 2014, worker representatives argued that “despite those difficulties, compliance with the Convention must be secured urgently so that indigenous and tribal peoples could enjoy all of the rights guaranteed to them” and emphasized that participation and consultation mechanisms needed to be strengthened.<sup>134</sup>

Despite the significant progress made at the international level and its reflection in some national legal frameworks, challenges for the realization of indigenous rights to lands, territories and resources remain enormous. Nowhere is this more evident than in the regulation of natural resource exploitation and conservation.

<sup>133</sup> Ibid., p. 498.

<sup>134</sup> International Labour Organization (ILO), “Individual case (CAS) – discussion: 2014, publication: 103rd ILC session (2014)”, Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Central African Republic (ratification: 2010), Information System on International Labour Standards (NORMLEX).

## **2. Natural resource exploitation and conservation**

Since the beginning of the colonial era the activities of mining, logging and other extractive industries, together with the widespread deprivation of land for agricultural and settlement purposes, have had a devastating impact on indigenous peoples' cultural and physical survival. Similarly, from the perspective of indigenous peoples, conservation initiatives in the form of protected areas or national parks have been associated with dispossession and displacement as they have been deemed incompatible with the presence of indigenous peoples and respect for their customary land tenure. Today, much of the world's non-commercially exploited land and many of its remaining mineral and forest resources, major rivers, fossil fuels and sources of renewable energy are found in or around the territories of indigenous peoples.<sup>135</sup> These lands constitute the final frontier in the frantic quest for control over comparatively unexploited lands and natural resources by States, extractive and agribusiness corporations, and international conservation organizations.

Regional and international human rights bodies have highlighted the significant challenges current extractive and agribusiness activities, infrastructure development, and conservation models pose to indigenous rights to lands, territories and resources and at times to the physical and cultural survival of indigenous peoples throughout the world.<sup>136</sup> In 2015 and 2017, respectively, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights published reports documenting the impact the extractive sector has on the rights of indigenous and tribal peoples. These accounts are consistent with the findings of international human rights treaty bodies, as reflected in relevant recommendations emanating from the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights.<sup>137</sup> The same challenges

<sup>135</sup> Cathal Doyle and Jérémie Gilbert, "Indigenous peoples and globalization: from 'development aggression' to 'self-determined development'", *European Yearbook of Minority Issues*, vol. 8, No. 1 (2010), p. 221; International Work Group for Indigenous Affairs, "Indigenous peoples, transnational corporations and other business enterprises", p. 1; Abigail Anongos and others, *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries*, Andy Whitmore, ed. (Baguio City, Philippines, Tebtebba Foundation; Copenhagen, International Work Group for Indigenous Affairs; and London, Indigenous Peoples Links, 2012), p. 5.

<sup>136</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities: Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights – East, Central and Southern Africa* (Copenhagen, 2017), p. 8; Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (OEA/Ser.L/V/II.Doc 47/15), paras. 17-24 and 247.

<sup>137</sup> Cathal M. Doyle and Andrew Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement* (Baguio City, Philippines, Tebtebba Foundation; London, Indigenous Peoples Links; London, Middlesex University, 2014), pp. 57-76.

are reflected in the thematic reports of successive United Nations Special Rapporteurs on the rights of indigenous peoples between 2006 and 2016, which focused on the intersection of the rights of indigenous peoples with the priorities and activities of the extractive, infrastructure and conservation sectors.

Relevant international human rights law, reports and recommendations clarify that extractive industry, agribusiness, infrastructure development and conservation activities all give rise to similar challenges for the realization of rights to lands, territories and resources. They also highlight that essentially the same safeguards are necessary to address these challenges irrespective of the sector with which they are associated. Among the major challenges and threats to indigenous rights to lands, territories and resources – and by extension to the subsistence, self-determined development and cultural integrity of indigenous populations – are evictions, violence, oppression, criminalization, community fragmentation, the undermining of traditional authority and authorities, the destruction of or denial of access to sacred sites, the dispossession of lands, and the denial of traditional livelihoods.

## **2.1 Extractive, agribusiness and other commercial operations**

Human rights bodies use the term extractive industries to encompass a range of activities associated with the commercial exploitation of natural resources. This includes traditional extractive activities such as mining for minerals and metals, fossil fuel exploitation (including the more recent process of fracking), and logging, but it also extends to hydroelectric dams and renewable wind and solar energy projects. Sometimes the concept is expanded to include agribusiness activities, though for the purposes of this chapter the narrower definition generally applies.

### **2.1.1 Mining, oil and gas production, and logging**

Extractive industry activities, in particular mining, oil and gas, and logging projects, have long constituted “the most pervasive source of the challenges to the full exercise of [indigenous peoples’] rights”.<sup>138</sup> Between 2007 and 2014, United Nations human rights treaty bodies addressed project activities with adverse effects on indigenous peoples in 34 countries, with almost half of the cases involving major impacts on water resources.<sup>139</sup> In 2018 alone, there were reports of unredressed violations of indigenous

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<sup>138</sup> “Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: extractive industries operating within or near indigenous territories” (A/HRC/18/35), para. 57.

<sup>139</sup> Doyle and Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, pp. 58, 69 and 184 (note 238).

peoples' rights in multiple extractive industry projects in at least 26 countries.<sup>140</sup> The state of affairs in the Philippines and Peru is illustrative of that in many mineral-rich countries, with 72 per cent of all approved large-scale mining applications in the Philippines located in indigenous territories and 75 per cent of the Peruvian Amazon covered by oil and gas concessions. Megaprojects in both countries cover hundreds of thousands of hectares, and as with many other countries that have this nexus of resource extraction and indigenous peoples' territories, the rate at which indigenous rights defenders are being criminalized and/or killed is alarming and growing.

The effects of activities within these sectors are widely documented and include the following: evictions;<sup>141</sup> impacts on health and the destruction of the environment,<sup>142</sup> in particular the depletion and contamination of water resources in the mining sector<sup>143</sup> through, inter alia, the dumping of toxic tailings in rivers,<sup>144</sup> the rupture or outright collapse of tailing dams,<sup>145</sup> and the depletion of groundwater sources; the disruption of traditional livelihoods;<sup>146</sup> the destruction of sacred sites; the generation of social conflict; and the killing of indigenous rights defenders. A major challenge for many indigenous peoples revolves around the rehabilitation and maintenance of damaged areas upon project closure, as former industrial sites often remain perpetual sources of contamination. Notorious examples of such environmental contamination include the devastation

<sup>140</sup> See the following chapters in *The Indigenous World 2019*: Ortiz-T., "Ecuador", pp.163-164 and 167; Negev Coexistence Forum for Civil Equality, "Israel", p. 381; International Work Group for Indigenous Affairs, "Kalaallit Nunaat (Greenland)", p. 31; Murashko and Rohr, "Russian Federation", p. 49; Vars, "Sápmi", pp. 55-57; Braun, "United States of America", p. 78; Elías, "Guatemala", p. 98; de Val, Pérez Martínez and Sánchez García, "Mexico", p. 106; Acosta, "Nicaragua", p. 114; Beldi de Alcántara, "Brazil", p. 135; Observatorio Ciudadano de Chile, "Chile", p. 148; Organización Nacional Indígena de Colombia, "Colombia", p. 156; Kulesza and Merlet, "French Guiana", p. 172; Bulkan, Palmer and Maedel, "Guyana", pp. 181 and 183-184; Diaz Zanelli and Garcia Urbina, "Peru", pp. 198-199 and 203; Ooft, "Suriname", pp. 214-215; Socio-Environmental Working Group of the Amazon "Wataniba", "Venezuela", pp. 220-221; Brennan, "Australia", pp. 237 and 240; Anonymous, "China", p. 264; Dekdeken and Cariño, "Philippines", pp. 296-298; Kulesza, "West Papua", p. 330; Mutambukah, "Uganda", pp. 470-472; Koulaning, "Central African Republic", p. 495; Hitchcock and Frost, "Botswana", p. 529; Jansen, "South Africa", p. 549; Clerc and Preciado Gómez, "The work of the treaty bodies and indigenous peoples' rights", pp. 629 and 633.

<sup>141</sup> Negev Coexistence Forum for Civil Equality, "Israel", in *The Indigenous World 2019*, p. 381.

<sup>142</sup> Olga Murashko and Johannes Rohr, "Russian Federation", in *The Indigenous World 2019*, p. 49.

<sup>143</sup> Negev Coexistence Forum for Civil Equality, "Israel", in *The Indigenous World 2019*, p. 381; International Work Group for Indigenous Affairs, "Kalaallit Nunaat (Greenland)", in *The Indigenous World 2019*, p. 31.

<sup>144</sup> Columbia Law School Human Rights Clinic and Advanced Consortium on Cooperation, Conflict and Complexity, *Red Water: Mining and the Right to Water in Porgera, Papua New Guinea* (New York, Columbia University, 2019).

<sup>145</sup> Zongjie Lyu and others, "A comprehensive review on reasons for tailings dam failures based on case history", *Advances in Civil Engineering*, vol. 2019, art. ID 4159306 (2019).

<sup>146</sup> Laila Susanne Vars, "Sápmi", in *The Indigenous World 2019*, pp. 56; Sebastian Braun, "The United States of America", in *The Indigenous World 2019*, p. 78.



of the Ogoni region in Nigeria as a result of Shell's oil exploitation, and the damage to the territories of the Quechua, Achuar, Kichwa and Urarina peoples on the Pastaza, Tigre and Corrientes rivers in the Peruvian Amazon Basin, which Pluspetrol abandoned without remediating over 1,000 contaminated sites identified by the concerned indigenous peoples and the environmental monitoring organs of the State of Peru.<sup>147</sup>

Many indigenous peoples are profoundly impacted not only by large-scale mining, oil and gas and forestry projects, but also by smaller-scale or illegal mining and logging activities. Among the many Amazonian communities affected by this type of mining are the A'i Cofán community of Sinangoe in Ecuador and the Yanomami in Brazil and the Bolivarian Republic of Venezuela.<sup>148</sup> In these cases, as in many others, mining has brought a large influx of outsiders, including armed groups, leading to major social problems and putting the lives of indigenous representatives at risk. Another common issue is that mercury used in the mining process enters the food chain and causes significant and long-lasting health issues.

### **2.1.2 Hydroelectric projects**

In 2000, the World Commission on Dams highlighted the profound and disastrous extent to which dams have impacted indigenous peoples' lands and lives, giving rise to large-scale evictions and the loss of lands and livelihoods.<sup>149</sup> A renewed focus among Governments on hydroelectric power in the context of a shift away from fossil fuel energy appears set to have a profound effect on indigenous peoples throughout the world.<sup>150</sup> Megadams are planned or have recently been constructed in or near indigenous peoples' territories in numerous countries throughout the world, including Lao People's Democratic Republic, Cambodia, Viet Nam, Malaysia, India, Nepal and the Philippines in Asia; the Plurinational State of Bolivia, Brazil, Peru, Canada, Colombia, Ecuador,

<sup>147</sup> Yaizha Campanario Baqué and Cathal Doyle, *El Daño No Se Olvida: Impactos Socioambientales en los Pueblos Indígenas de la Amazonía Norperuana Afectados por las Operaciones de la Empresa Pluspetrol* (Lima, Centro de Políticas Públicas y Derechos Humanos Perú Equidad, 2017).

<sup>148</sup> Pablo Ortiz-T., "Ecuador", in *The Indigenous World 2019*, p. 163; A/HRC/33/42/Add.1, paras. 15, 70 and 72.

<sup>149</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Washington, D.C., Earthscan, 2001), pp. iv and 110-112.

<sup>150</sup> "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: addendum, consultation on the situation of indigenous peoples in Asia" (A/HRC/24/41/Add.3), para. 17.

Guatemala and Chile in the Americas; and Ethiopia, Kenya and Namibia in Africa.<sup>151</sup> In some cases, such as with the Baram Dam in Malaysia and the Piatúa hydroelectric power plant project in Ecuador, indigenous peoples have managed to halt megadam projects through direct mobilization.<sup>152</sup> In other situations, such as that involving the Tapajós dam and its impact on the Munduruku in Brazil, a combination of direct action, legal challenges and political advocacy, including the development of free, prior and informed consent protocols, have resulted in their suspension.<sup>153</sup> In certain settings, indigenous peoples have faced arrests and killings for opposing dams. In 2018, an independent investigation found that State actors in Honduras had colluded with company executives in the killing of Berta Cáceres, a Lenca indigenous representative who was opposing the Agua Zarca dam.<sup>154</sup> In India, women involved in peaceful protests against the massive evictions associated with the Sardar Sarovar Dam in the Narmada River Valley were arrested.<sup>155</sup> In some cases these dams serve to generate energy for the mining sector or to make rivers navigable by barges carrying agribusiness produce, and in other cases they provide power to growing towns and cities.<sup>156</sup> This undermines the argument that dams are necessary to meet the needs of the majority of the population, including the poor, which would presumably take precedence over the needs of the smaller number of indigenous peoples. In all cases, consultation processes have been non-existent or highly flawed, with some involving intimidation, violence and killings. Transparency has been lacking, and impact assessments have consistently failed to address indigenous peoples' concerns.

<sup>151</sup> International Work Group for Indigenous Affairs, *The Indigenous World 2019*, pp. 68, 98, 149-150, 156, 167, 251, 279, 298, 351, 445 and 455; African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, pp. 98-100, 116-117 and 124; Kanokwan Manorom, *Hydropower Resettlement in the Mekong Region*, Water Knowledge #1 (Vientiane, Lao People's Democratic Republic, CGIAR Research Program on Water, Land and Ecosystems, 2018), pp. 6-7.

<sup>152</sup> Ortiz-T., "Ecuador", in *The Indigenous World 2019*, p. 167; Sarah Bardeen, "Baram Dam stopped! A victory for indigenous rights", [www.internationalrivers.org](http://www.internationalrivers.org), blog (2016).

<sup>153</sup> A/HRC/33/42/Add.1, paras. 15 and 47-53; Bruce Douglas, "Brazil Amazon dam project suspended over concerns for indigenous people", *The Guardian*, 22 April 2016.

<sup>154</sup> Roxanna Altholz and others, *Dam Violence: The Plan that Killed Berta Cáceres* (n.p., International Advisory Group of Experts, 2017).

<sup>155</sup> Office of the High Commissioner for Human Rights, internal communication relating to mandates of the Working Group on Arbitrary Detention and of specific Special Rapporteurs (UA IND 8/2017); Office of the High Commissioner for Human Rights, internal communication relating to the mandate of the Special Rapporteur on the rights of indigenous peoples (UA IND 9/2017); "Report of the Special Rapporteur on the rights of indigenous peoples", note by the Secretariat, providing a thematic study on attacks against and the criminalization of indigenous human rights defenders (A/HRC/39/17), para. 63.

<sup>156</sup> Jonathan Watts, "Brazil's mega hydro plan foreshadows China's growing impact on the Amazon", *The Guardian*, 5 October 2017.

### 2.1.3 Agribusiness plantations

Agribusiness plantations occupy extensive areas of indigenous peoples' lands, with countless cases of adverse impacts documented.<sup>157</sup> Among the monocrops with the greatest impact on indigenous peoples are palm oil, soybean, sugarcane and jatropha, all of which are cultivated and used for multiple purposes, including as raw material for biofuels. The impact of palm oil production is particularly profound in South-east Asia, with Indonesia and Malaysia accounting for 85 per cent of palm oil products. Extensive palm oil plantations exist in or are planned for the territories of indigenous peoples in a growing number of countries, including Thailand, Papua New Guinea, Cambodia, the Philippines, Colombia, Guatemala, Cameroon, Liberia, and the Democratic Republic of the Congo.<sup>158</sup> Among the distinguishing features of monocrop plantations are their scale and rate of growth. In Indonesia, palm oil plantations covered 11.9 million hectares in 2016, having expanded threefold since 2000.<sup>159</sup> Based on current expansion rates, an additional 6 million hectares will be required by 2025.<sup>160</sup> According to the International Union for Conservation of Nature, oil palm expansion is devastating for biodiversity and "could affect 54 per cent of all threatened mammals and 64 per cent of all threatened birds globally" while displacing many other species as well as indigenous communities.<sup>161</sup> Carbon emissions from the clearing of forests on peatland and methane released from waste make the palm oil sector one of the major contributors to global warming.<sup>162</sup> Cattle ranching is the primary driver of deforestation in the Brazilian Amazon, and soybean production, most of which is destined for animal

<sup>157</sup> "Human rights and transnational corporations and other business enterprises", note by the Secretary-General (A/71/291), para. 10.

<sup>158</sup> Christopher Fon Achobang and others, *Conflict or Consent? The Oil Palm Sector at a Crossroads*, Marcus Colchester and Sofie Chao, eds. (Moreton-in-Marsh, United Kingdom, Forest Peoples Programme; West Java, Indonesia, Perkumpulan Sawit Watch; Jakarta Sclatan, Indonesia, Transformasi untuk Keadilan Indonesia, 2013); Marcus Colchester and Sofie Chao, eds., with others, *Oil Palm Expansion in South East Asia: Trends and Implications for Local Communities and Indigenous Peoples* (Moreton-in-Marsh, United Kingdom, Forest Peoples Programme; West Java, Indonesia, Perkumpulan Sawit Watch, 2011), pp. 3-7.

<sup>159</sup> Dilip Khatiwada, Carl Palmén and Semida Silveira, "Evaluating the palm oil demand in Indonesia: production trends, yields, and emerging issues", *Biofuels* (2018), pp. 1-13 (DOI: 10.1080/17597269.2018.1461520).

<sup>160</sup> Kathryn Devon Dixon, "Indonesia's palm oil expansion and further contribution to economic fragility", Bard College, Digital Commons, senior projects, Spring 2016, No. 239.

<sup>161</sup> International Union for Conservation of Nature, "Palm oil and biodiversity", issues brief, June 2018.

<sup>162</sup> Alue Dohong, Ammar Abdul Aziz and Paul Dargusch, "Carbon emissions from oil palm development on deep peat soil in Central Kalimantan Indonesia", *Anthropocene*, vol. 22 (June 2018), pp. 31-39; Union of Concerned Scientists, "Palm oil and global warming", fact sheet, 13 December 2013; Frances Claire Manning and others, "Carbon emissions from oil palm plantations on peat soil", *Frontiers in Forests and Global Change*, vol. 2, No. 37 (2019).

feed, is the second major contributor to deforestation.<sup>163</sup> As with mining, oil and gas, and hydroelectric projects, agribusiness is associated with conflict, violence and the killing of indigenous representatives, reportedly becoming the industry most linked to such killings in 2017.<sup>164</sup> Cattle grazing and monoculture plantations have fuelled violent evictions in countries such as Guatemala,<sup>165</sup> while palm oil projects are responsible for widespread conflict in Indonesia.<sup>166</sup> The challenges the agribusiness sector poses for the territories, cultures, livelihoods, lives and subsistence of an ever-growing number of indigenous peoples are consequently enormous and increasingly pervasive.<sup>167</sup>

## **2.2 Development and conservation**

### **2.2.1 Infrastructure development**

Major infrastructure projects such as the construction and expansion of roads, railways, ports, airports, canals, and power transmission systems go hand in hand with the development and operation of extractive industry, hydroelectric, agribusiness and tourism projects. In some cases, they form part of regional development plans such as the Initiative for the Integration of Regional Infrastructure in South America (IIRSA) or Lamu Port South Sudan - Ethiopia Transport in East Africa (LAPSSET). These initiatives regard cross-border infrastructure as an enabler of ambitious development objectives that are often completely at odds with the development agendas of indigenous peoples. Such initiatives also facilitate the proliferation of smaller roads cut into forests by loggers, which can be equally devastating for indigenous cultures. Indigenous peoples in voluntary isolation are particularly vulnerable, as roads open up previously inaccessible territories and increase the risk of forced contact, with disastrous and potentially fatal consequences for their cultural and physical survival. Road construction as part of IIRSA in the Plurinational State of Bolivia is impacting the territories of the Tsimané,

<sup>163</sup> Doug Boucher and others, *The Root of the Problem: What's Driving Tropical Deforestation Today?* (Cambridge, Massachusetts, Tropical Forest and Climate Initiative of the Union of Concerned Scientists, 2011).

<sup>164</sup> Global Witness, "Deadliest year on record for land and environmental defenders, as agribusiness is shown to be the industry most linked to killings", press release, 24 July 2018.

<sup>165</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 311.

<sup>166</sup> Emmanuelle Cheyns and Laurent Thévenot, "Interview with Marcus Colchester, founder of the NGO Forest Peoples Programme, on the 'free, prior and informed consent' of communities", *La Revue des droits de l'homme*, vol. 16 (2019).

<sup>167</sup> Juliana Nnoko-Mewanu, "When we lost the forest, we lost everything: oil palm plantations and rights violations in Indonesia" (New York, Human Rights Watch, 2019).



Mosetén and Tacana peoples, who fear it will facilitate the expansion of the agricultural frontier. Their territories are targeted for oil and dam projects and a sugar mill, all of which necessitate the construction of access roads.<sup>168</sup> The Southern Interoceanic Highway in the Peruvian Amazon, also part of IIRSA, has resulted in deforestation that is set to pave the way for agribusiness and further displacement of indigenous communities. Odebrecht, the Brazilian company constructing many of the IIRSA roads, has been involved in a major corporate corruption scandal. This nexus of corporate and political corruption with large-scale infrastructure, extractive and agribusiness projects severely constrains indigenous peoples' ability to assert their rights and puts them in positions of extreme vulnerability. Another major infrastructure project in Latin America is the transoceanic canal in Nicaragua, which threatens the Rama and Creole peoples with displacement.<sup>169</sup> According to the African Commission on Human and Peoples' Rights and representatives of concerned communities, the cumulative impacts of the various aspects of the LAPSET project in Kenya "will spell the end of Aweer culture" and will have profound effects on many other pastoralist and hunter-gatherer communities in Kenya and Tanzania.<sup>170</sup>

### **2.2.2 Conservation, protected areas, national parks and wildlife reserves**

Over the past century and a half States have pursued the conservation of flora and fauna through a range of initiatives. Traditionally these protected areas have included national parks, national forests, wildlife refuges and marine protected areas. National and international conservation organizations have played a major role in the creation and regulation of these protected areas, and more recently private actors, including non-governmental organizations (NGOs), have become involved in managing protected preserves.<sup>171</sup>

<sup>168</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 263.

<sup>169</sup> *Ibid.*, paras. 302 and 306.

<sup>170</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, p. 115; Elifuraha Laltaika, "Business and human rights in Tanzania: indigenous peoples' experiences with access to justice and remedies", in *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America*, Cathal M. Doyle, ed. (Chiang Mai, Thailand, Asia Indigenous Peoples Pact; Madrid, Almaciga; and Copenhagen, International Work Group for Indigenous Affairs, 2015).

<sup>171</sup> "Rights of indigenous peoples", note by the Secretary-General transmitting the report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples providing a thematic analysis of conservation measures and their impact on indigenous peoples' rights (A/71/229).

Indigenous peoples' governance of their traditional territories is "arguably the oldest form of conservation on earth", and the world's oldest protected areas are found in within these territories.<sup>172</sup> This important long-standing dual role of indigenous peoples' governance structures — as protectors of the ecosystems and grantors of sustainable livelihoods in their territories — was only formally recognized by certain conservation organizations through the concept of "indigenous peoples and protected areas" starting in the 1990s.<sup>173</sup> Until then, the dominant paradigm, described as "fortress conservation", held that indigenous peoples' presence in protected areas and respect for their rights were incompatible with conservation goals. This legitimized the eviction of indigenous peoples and other land-based communities from 50 per cent of the world's protected areas that had formed part of their traditional territories.<sup>174</sup> Ironically, in practice, tourism, extractive, energy and agribusiness initiatives have frequently been authorized on those lands following their designation as protected areas.<sup>175</sup> Today it is estimated that indigenous peoples govern under 5 per cent of the world's officially recognized protected areas.<sup>176</sup>

The fallacy underpinning this rights-denying paradigm has been highlighted by a growing body of research. In 2016, research across the Amazon in Colombia, Brazil and the Plurinational State of Bolivia found that deforestation rates in indigenous lands where tenure security is guaranteed are significantly lower and climate change mitigation contributions significantly higher than those in similar lands where tenure security is lacking.<sup>177</sup> The cost of guaranteeing this tenure security pales into insignificance in comparison with the value of the ecosystem services they provide, which is estimated at up to \$1.5 billion in these three countries alone.

<sup>172</sup> Grazia Borrini-Feyerabend and others, *Governance of Protected Areas: from Understanding to Action — Developing Capacity for a Protected Planet*, IUCN-WCPA Best Practice Protected Area Guidelines Series, No. 20 (Gland, Switzerland, International Union for Conservation of Nature and Natural Resources, 2013), p. 40.

<sup>173</sup> Javier Beltrán, ed., *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*, Best Practice Protected Area Guidelines Series No. 4, Adrian Phillips, series ed. (Gland, Switzerland, and Cambridge, United Kingdom, World Conservation Union; Gland, Switzerland, World Wildlife Foundation, 2000), p. 4.

<sup>174</sup> A/71/229, para. 15; Diego Juffe-Bignoli and others, *Protected Planet Report 2014: Tracking Progress towards Global Targets for Protected Areas* (Cambridge, United Kingdom, United Nations Environment Programme/World Conservation Monitoring Centre, 2014).

<sup>175</sup> A/71/229, para. 17; Aili Pyhälä, Ana Osuna Orozco and Simon Counsell, *Protected Areas in the Congo Basin: Failing Both People and Biodiversity?* (London, Rainforest Foundation UK, 2016).

<sup>176</sup> A/71/229, para. 15; Juffe-Bignoli and others, *Protected Planet Report 2014: Tracking Progress towards Global Targets for Protected Areas*.

<sup>177</sup> Helen Ding and others, *Climate Benefits, Tenure Costs: The Economic Case for Securing Indigenous Land Rights in the Amazon* (Washington, D.C., World Resources Institute, 2016), p. 1



## STATE OF THE WORLD'S INDIGENOUS PEOPLES: Rights to Lands, Territories and Resources



In 2019, this contribution of indigenous peoples was recognized in part by the Intergovernmental Panel on Climate Change when it highlighted the important role of indigenous knowledge in climate change mitigation and biodiversity conservation. The Intergovernmental Panel expressed a moderate level of confidence “that land titling and recognition programmes, particularly those that authorize and respect indigenous and communal tenure, can lead to improved management of forests, including for carbon storage”.<sup>178</sup> Respect for indigenous peoples’ land rights represents a cost-effective and efficient approach to forest and ecosystem conservation and climate change mitigation.

Despite the growing awareness of this fact and its gradual reflection in the policies of conservation organizations and the international commitments of States, fortress-conservation practices remain pervasive on the ground, and little effort is being invested in addressing their ongoing legacy of enduring hardship and conflict and in

<sup>178</sup> Intergovernmental Panel on Climate Change, *Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems*, P.R. Shukla and others, eds. (2019), pp. 70, 677 and 753.



Flickr.com / Peter Prokosch (<https://www.grida.no/resources/4735>)

recognizing these non-consensually acquired indigenous territories and returning the control and management of them to indigenous peoples.<sup>179</sup> This is evident in the continued expropriation of indigenous lands throughout the world and in the widespread denial of any meaningful role for indigenous peoples in the management of protected areas created in their lands, as demonstrated by the evictions of the Karen peoples in Thailand and of the Sengwer and Ogiek peoples in Kenya. In Tanzania, 34 per cent of the country is allocated to 16 national parks created through the eviction of pastoralists and hunter-gatherers.<sup>180</sup> Despite the immense suffering caused, these parks are being expanded without the participation of the affected indigenous peoples. In many countries the development of the tourism sector has gone hand in hand with the creation of such protected areas and poses major challenges for indigenous peoples. In Rwanda much of the territory of the Batwa is now covered by three national parks – Volcanoes, Gishwati and Nyungwe.<sup>181</sup> Each of these parks generates considerable tourism revenues. Meanwhile, having been evicted from the traditional lands upon which their livelihoods depended, the Batwa are now struggling with extreme poverty, poor health and grossly inadequate housing.<sup>182</sup>

Indigenous peoples in other countries have had similar negative experiences with conservation areas. International instruments such as the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, the promise of tourism revenues, and pressure from international conservation NGOs all provide incentives for the establishment of conservation areas, but there are fewer incentives to protect the rights and traditional livelihoods of indigenous peoples within these territories. As pointed out by the United Nations Special Rapporteur on the rights of indigenous peoples, the impacts of protected areas when declared and managed in this way include “the expropriation of land, forced displacement, denial of self-governance, lack of access to livelihoods and loss of culture and spiritual sites, non-recognition of their own authorities and denial of access to justice and reparation, including restitution and compensation”.<sup>183</sup> As previously noted, these and other impacts are also associated with extractive industries, agribusiness plantations and infrastructure development. The following section addresses some of the primary challenges these often interconnected activities generate for indigenous peoples.

<sup>179</sup> A/71/229, paras. 16 and 19.

<sup>180</sup> Edward Porokwa, “Tanzania”, in *The Indigenous World 2019*, p. 465.

<sup>181</sup> Anna Kamanzi, “Rwanda”, in *The Indigenous World 2019*, p. 518.

<sup>182</sup> Ibid.

<sup>183</sup> A/71/229, para. 9.



### **3. Shared challenges across the extractive, hydropower, agribusiness and conservation sectors**

Mining, energy, agribusiness, tourism, large-scale infrastructure and conservation initiatives all have distinct characteristics and are associated with particular impacts. Some of the major concerns emanating from sectoral development activities relate to the enormous tracts of land required for plantations, the extensive flooding and upstream and downstream impacts of dams, the intensive use of water and irreparable damage to ecosystems associated with mining, the influx of outsiders and social impacts facilitated by the development of transportation infrastructure, and the denial of access to traditional lands designated as protected areas or used for tourism purposes. As repeatedly highlighted by international human rights mechanisms, these activities also have many common features and give rise to many of the same challenges for indigenous peoples. As an exhaustive overview of all these challenges is beyond the scope of this chapter, ten of the most common challenges are highlighted below.

#### **3.1 Non-recognition of indigenous peoples and their land rights**

Human rights bodies have outlined the objective characteristics commonly found among the culturally and ethnically distinct groups who self-identify as indigenous peoples. This guidance clarifies that these peoples' collective rights are not contingent on the nomenclature used by States to identify them. It also points to the interdependence of rights to lands, territories and resources with equality, non-discrimination, self-determination, development, cultural and religious rights, and a range of economic, social and cultural rights such as rights to housing, an adequate standard of living, water, food and employment.<sup>184</sup> This gives rise to an obligation among States to promote the provisions of the United Nations Declaration on the Rights of Indigenous Peoples for those groups within their territories who meet the characteristics of indigenous peoples under international human rights law. However, throughout much of Asia and Africa, the failure of States to recognize the existence of indigenous peoples continues to pose a fundamental challenge to the realization of their land rights. It denies these peoples the legal standing necessary to assert their rights vis-à-vis commercial and conservation actors and facilitates non-consensual extractive, hydroelectric, agribusiness, tourism and conservation activities in their territories. While business and conservation organizations have an independent responsibility to respect the rights of these indigenous peoples, complaints

<sup>184</sup> E/C.19/2018/7, para. 17.

taken to the Organization for Economic Cooperation and Development (OECD) and other oversight mechanisms point to the widespread complicity of these actors with States in violating indigenous rights to lands, territories and resources.

### **3.2 Contradictory national legislation and international law**

One of the major challenges facing indigenous peoples in the context of extractive industry, agribusiness and infrastructure operations in their territories and undermining the realization of their rights is the existence and selective enforcement of conflicting laws and regulations. Legislation governing land acquisition, mining and hydrocarbon projects often makes no reference to indigenous peoples' rights<sup>185</sup> and is enacted without any consultation with them.<sup>186</sup> In many cases, legislative reforms serve to further subordinate rather than give effect to indigenous peoples' rights.<sup>187</sup> Where provisions addressing indigenous peoples exist, these are often inadequate or are ignored outright. Examples include the decision of the Mines and Geosciences Bureau in the Philippines to disregard the consent provision in the Philippine Mining Act of 1995 in the case of the Subanon of Mt. Canatuan<sup>188</sup> and the routine overlooking of section 111 of the 1989 Guyana Geology and Mines Commission Act.<sup>189</sup>

This issue also arises in the context of conservation areas.<sup>190</sup> Eleven years after the adoption of the 2003 Durban Accord – which called on States Parties to the Convention on Biological Diversity to ensure that protected areas are established and managed in compliance with indigenous peoples' rights – only 8 of the world's 21 most biodiversity-rich countries had enacted or reformed their protected-area legislation relating to community land and resource rights.<sup>191</sup> Of these, only one, the Bolivarian

<sup>185</sup> Vars, "Sápmi", in *The Indigenous World 2019*, pp. 55-57.

<sup>186</sup> Constitutional Court of Colombia, Sentence T-766 of 2015; A/71/291, para. 17.

<sup>187</sup> Peru, Organic Law of Hydrocarbons, Law No. 26221.

<sup>188</sup> Cathal Doyle, "Business corporations and indigenous rights: the experience of the Subanon in the Philippines", in *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument*, David Keane and Annapurna Waughray, eds. (Manchester, Manchester University Press, 2017), pp. 182-206; Penelope Sanz, "The politics of consent: the State, multinational capital and the Subanon of Mount Canatuan", in *Negotiating Autonomy: Case Studies on Philippines Indigenous Peoples' Land Rights*, Augusto B. Gatmaytan, ed. (Quezon City and Copenhagen, International Work Group for Indigenous Affairs and Legal Rights and Natural Resources Center – Kasama sa Kalikasan/Friends of the Earth – Philippines, 2007), pp. 109-136.

<sup>189</sup> Tom Griffiths and Jean La Rose, "Searching for justice and land security: land rights, indigenous peoples and governance of tenure in Guyana" (Moreton-in-Marsh, Forest Peoples Programme, 2014).

<sup>190</sup> A/71/229, para. 52; Rights and Resources Initiative, *Who Owns the World's Land?*, p. 32.

<sup>191</sup> Jenny Springer and Fernanda Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda* (Washington, D.C., Rights and Resources Initiative, 2015), p. 18.



Republic of Venezuela, had enacted legislation recognizing customary lands in which protected areas had been established.<sup>192</sup> Other countries, such as the Philippines, have enacted legislation requiring indigenous peoples' participation on protected area management boards. However, this has not been sufficiently harmonized with legislation recognizing indigenous peoples' land rights and their governance structures, and the management boards tend to be bureaucratic in nature.<sup>193</sup>

### **3.3 Extent of encroachment on indigenous territories**

It is estimated that over 50 per cent of the world's remaining mineral resources targeted by mining companies are in customary lands claimed by indigenous peoples.<sup>194</sup> For copper and uranium resources these estimates increase to 70 per cent.<sup>195</sup> The demand for lithium, the new "white gold", is expected to increase tenfold in the next decade, and this surge in demand is triggering a new wave of extractive industry encroachment into indigenous territories in Chile, the Plurinational State of Bolivia and Argentina, where 60 per cent of the world's lithium resources are located.<sup>196</sup> Among those affected by lithium mining are the Pai-Ote community of the Colla people in the Cordillera sector of the Atacama Region in northern Chile, who have mobilized to protest against the profound impact of such mining on their water supplies and livelihoods, and whose representatives have been criminalized and threatened for voicing their opposition.<sup>197</sup>

In the oil and gas sector, legacies of unremediated contamination exist in indigenous territories in Peru, Ecuador and Nigeria.<sup>198</sup> New oil and gas technologies are facilitating

<sup>192</sup> Ibid.

<sup>193</sup> Maurizio Farhan Ferrari and Dave de Vera, "The Philippines: indigenous peoples's [sic] rights-based approach to conservation", Bulletin 73 (Montevideo, Uruguay, World Rainforest Movement, 19 August 2003); Springer and Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda*, p. 25.

<sup>194</sup> Doyle and Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, p. 4.

<sup>195</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, pp. 16-17.

<sup>196</sup> Eniko Horvath and Amanda Romero Medina, "Indigenous people's livelihoods at risk in scramble for lithium, the new white gold", Reuters Events: Sustainable Business (9 April 2019); Ronald Stein, "The dark side of Green technology" (Washington, D.C., Committee for a Constructive Tomorrow, 18 February 2019).

<sup>197</sup> Observatorio Ciudadano of Chile, "Chile", in *The Indigenous World 2019*, p. 149.

<sup>198</sup> Campanario Baqué and Doyle, *El Daño No Se Olvida: Impactos Socioambientales en los Pueblos Indígenas de la Amazonía Norperuana Afectados por las Operaciones de la Empresa Pluspetrol*; *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96), ruling issued 27 May 2002; United Nations Environment Programme, *Environmental Assessment of Ogoniland* report (Abuja, 4 August 2011); Sarah Joseph, "Protracted lawfare: the tale of Chevron Texaco in the Amazon", *Journal of Human Rights and the Environment*, vol. 3, No. 1 (2012), pp. 70-91.

high-risk activities that entail further encroachment into indigenous peoples' territories and the destruction of their lands and resources; these include fracking, currently being proposed in the Peruvian Amazon against indigenous peoples' wishes,<sup>199</sup> and tar sand projects in Canada, described as the "world's most destructive oil operation".<sup>200</sup> Renewable energy projects also present challenges. Development activities in the rapidly expanding wind, geothermal and solar energy sectors are disproportionately impacting indigenous peoples from Mexico to Sweden, and in some cases, such as the Lake Turkana Wind Power project in Kenya, are threatening indigenous peoples' entire way of life.<sup>201</sup> The profound and disproportionate impact of hydroelectric dams on indigenous peoples' territories has long been documented.<sup>202</sup> Despite this, there is a heightened focus on hydroelectric power and the construction of new dams in indigenous territories in regions throughout the world.<sup>203</sup>

More than half of the world's protected areas have been established on the customary lands of indigenous peoples throughout the world, and in Central America the proportion is closer to 90 per cent.<sup>204</sup> Research indicates that the expanse of protected areas almost doubled between 1980 and 2000, increasing from 8.7 million to 16.1 million square kilometres, and is now being further propelled by climate change and sustainable development considerations<sup>205</sup> as well as tourism interests.<sup>206</sup>

<sup>199</sup> Peru, Organic Law of Hydrocarbons, Law No. 26221 (draft); Jose Carlos Diaz Zanelli and Lourdes Garcia Urbina, "Peru", in *The Indigenous World 2019*, pp. 203-204.

<sup>200</sup> Stephen Leahy, "This is the world's most destructive oil operation – and it's growing: Can Canada develop its climate leadership and its lucrative oil sands too?", *National Geographic*, 11 April 2019.

<sup>201</sup> "Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico", note by the Secretariat (A/HRC/39/17/Add.2), paras. 31 and 39-42; Andrew Lee, "Naive wind industry could destroy our way of life", *Recharge*, 20 February 2019; Kanyinke Sena, *Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya*, IWGIA Report 21 (Copenhagen, International Work Group for Indigenous Affairs, 2015).

<sup>202</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, pp. iv and 110-112; Marcus Colchester, "Dams, indigenous peoples and ethnic minorities", WCD Thematic Reviews, Social Issues I.2, prepared as a Commission input (Cape Town, World Commission on Dams, 2000), p. 16.

<sup>203</sup> A/HRC/24/41/Add.3, para. 17; A/HRC/33/42/Add.1, paras. 36-53.

<sup>204</sup> Springer and Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda*; A/71/229, paras. 10 and 14.

<sup>205</sup> "Indigenous peoples' collective rights to lands, territories and resources", note by the Secretariat (E/C.19/2018/5), para. 27.

<sup>206</sup> A/71/229, para. 14; Springer and Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda*.

### **3.4 Cumulative effects of extractive industry and conservation initiatives**

The impacts of extractive industry, agribusiness, infrastructure development and conservation initiatives on indigenous peoples are very often interconnected and cumulative. Hydroelectric dams are required to power the refining and smelting operations that follow mining. Activities carried out by the extractive industry sector account for 40 per cent of energy consumption in countries such as Namibia<sup>207</sup> and together with agribusiness projects are driving the construction of megadams in Brazil.<sup>208</sup> Likewise, large-scale infrastructure development in the form of roads, railways, ports, pipelines and airports is necessary for the construction and operation of mines and oil and gas projects, as well as for tourism initiatives. The introduction of roads in previously isolated areas has opened indigenous territories to illegal mining and logging activities. In many cases, indigenous peoples who faced evictions from their lands as a result of conservation initiatives in the 1980s and 1990s have had to deal with the further incursion of extractive, agribusiness or tourism activities into their territories. Among those affected are the Kaliña and Lokono Peoples in Suriname, where bauxite mining commenced in 1997 within a natural reserve created in 1986 in their territories,<sup>209</sup> and the Ngöbe, Naso and Bribri communities of Panama, whose lands were declared protected areas in 1983, only to have a hydroelectric dam constructed in them in 2007.<sup>210</sup>

### **3.5 Rights impacted, safeguards required, and the public interest argument**

Human rights bodies have stressed that extractive industry, agribusiness and infrastructure projects effectively prevent indigenous peoples from enjoying the full spectrum of their rights. These include rights to lands, territories and resources, “to property, culture, [and] religion, and ... to health and physical well-being in relation to a clean and healthy environment; ... [they also include] rights to set and pursue their own priorities for development, including development of natural resources, as part

<sup>207</sup> African Commission on Human and Peoples’ Rights and International Work Group for Indigenous Affairs, *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, pp. 101-102.

<sup>208</sup> Philip M. Fearnside, “Environmental and social impacts of hydroelectric dams in Brazilian Amazonia: implications for the aluminum industry”, *World Development*, vol. 77 (January 2016), pp. 48-65.

<sup>209</sup> Inter-American Court of Human Rights, “Case of the Kaliña and Lokono Peoples v. Suriname”, paras. 81, 88 and 124-127.

<sup>210</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 259.

of their fundamental right to self-determination.”<sup>211</sup> While the scale of these impacts tends to be greatest in extractive and agribusiness sectors, human rights bodies have highlighted the enormous and expanding impact of conservation initiatives on indigenous peoples as a result of evictions and the loss of livelihoods.<sup>212</sup> The Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights and other human rights bodies have highlighted that a strict proportionality requirement must be met in the context of extractive industry activities such as large-scale mining, infrastructure projects, or the declaration or expansion of protected areas. This requires, among other safeguards, participatory impact assessment, free, prior and informed consent, and fair and equitable benefit-sharing.<sup>213,214</sup> As these activities are clearly linked to the limitation or deprivation of indigenous peoples’ rights to their lands and natural resources, they cannot be justified on the basis of public interest or purpose without meeting this proportionality test and adhering to these safeguards.<sup>215</sup> Nevertheless, extractive industry projects, conservation initiatives and military operations in indigenous territories continue to be authorized based on “public need”, “public interest” or “public purpose”<sup>216</sup> without any justification for the associated restrictions on indigenous peoples’ rights in terms of necessity or proportionality vis-à-vis the purported public need, interest or purpose.<sup>217</sup> The public interest argument is particularly suspect in the context of agribusiness activities, as they are not restricted to a specific geographical location,<sup>218</sup> and such an argument can never be used to justify commercial gain (in this or any other sector) at the expense of indigenous rights.<sup>219</sup>

<sup>211</sup> “Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya” (A/HRC/21/47), para. 50.

<sup>212</sup> A/71/229, para. 10; Stephen T. Garnett and others, “A spatial overview of the global importance of indigenous lands for conservation”, *Nature Sustainability*, vol. 1, No. 7 (2018), pp. 369-374.

<sup>213</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, paras. 155-224; Inter-American Court of Human Rights, “Case of the Saramaka People v. Suriname”, paras. 129-140.

<sup>214</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 259; A/71/229, paras. 22-26.

<sup>215</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision); Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 193.

<sup>216</sup> Oxfam, International Land Coalition, and Rights and Resources Initiative, *Common Ground*, p. 31.

<sup>217</sup> African Commission on Human and Peoples’ Rights and International Work Group for Indigenous Affairs, *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, p. 128.

<sup>218</sup> Cheyens and Thévenot, “Interview with Marcus Colchester, founder of the NGO Forest Peoples Programme, on the ‘free, prior and informed consent’ of communities”, pp. 8-9.

<sup>219</sup> A/HRC/24/41, para. 35.

### **3.6 Failure to consult in order to obtain free, prior and informed consent**

A consistent feature of extractive industry and agribusiness concessions and licenses, infrastructure projects, and conservation areas impacting indigenous peoples' territories is that they are issued, authorized or declared in the absence of recognition for indigenous peoples' tenure rights and consultation aimed at obtaining their free, prior and informed consent.<sup>220</sup> This has been repeatedly addressed by treaty monitoring bodies in the context of extractive industries, in particular following the adoption of the Declaration on the Rights of Indigenous Peoples,<sup>221</sup> with over 30 per cent of the Committee on the Elimination of Racial Discrimination's urgent actions addressing free, prior and informed consent in the extractive sector.<sup>222</sup> It is also increasingly the focus of treaty bodies, including this Committee, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee, in the context of protected areas.<sup>223</sup>

The Inter-American Commission on Human Rights and Inter-American Court of Human Rights have engaged with the issue in the context of extractive industries, while the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights have done so in relation to protected areas.<sup>224</sup> Former United Nations Special Rapporteur on the rights of indigenous peoples James Anaya concluded that "indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival".<sup>225</sup> In her report addressing conservation, former Special Rapporteur of the Human Rights Council on the rights of indigenous

<sup>220</sup> A/71/229, paras. 9, 16 and 51-59; A/HRC/18/35, paras. 30-55; A/HRC/24/41/Add.3, paras. 11-20; A/71/291, paras. 10-11 and 67-74.

<sup>221</sup> Doyle and Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, pp. 61-63.

<sup>222</sup> *Ibid.*, p. 61.

<sup>223</sup> "Concluding observations on the initial to third reports of the United Republic of Tanzania, adopted by the Committee at its forty-ninth session (12-30 November 2012) (E/C.12/TZA/CO/1-3), para. 22; "Consideration of reports submitted by States parties under article 40 of the Covenant: concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012 – Kenya (CCPR/C/KEN/CO/3), para. 24; Committee on the Elimination of Racial Discrimination, urgent action letters to Thailand (29 August 2019); Tanzania (3 October 2016); and Kenya (7 March 2014).

<sup>224</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*; African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*.

<sup>225</sup> A/HRC/21/47, para. 65.



Photo: UN-DESA / Broddi Sigurdarson

peoples Vicky Tauli-Corpuz stated that “the right to participate and to free, prior and informed consent are sine qua non elements of effective advancement of indigenous peoples’ rights in practice”.<sup>226</sup> Human rights bodies have clarified that consultation and free, prior and informed consent cannot be divorced from respect for indigenous peoples’ rights to lands, territories, resources, self-determination and autonomy. The integration of genuine consultation to obtain free, prior and informed consent requires radical structural change in how States, companies and organizations work – and not mere tweaks to engagement processes that seek to legitimize decisions that have already been taken.<sup>227</sup> Such distortions of the right to consultation continue to occur despite its growing recognition as an established norm of customary international law.<sup>228</sup> In the light of this, indigenous peoples have repeatedly had to turn to the courts to seek redress for States’ failure to respect this consultation and consent right and, by extension, the spectrum of land, territorial, resource and self-determination rights that underpin it.

<sup>226</sup> A/71/229, para. 23.

<sup>227</sup> A/HRC/39/17, para. 36.

<sup>228</sup> Inter-American Court of Human Rights, “Case of the Yakyé Axa Indigenous Community v. Paraguay”.

### **3.7 Absence of participatory impact assessments**

Participatory impact assessments are another of the core safeguards in the context of projects potentially impacting indigenous peoples' rights and are implicit in the informed component of free, prior and informed consent.<sup>229</sup> Indigenous peoples' knowledge is essential for assessing potential social, environmental, cultural, spiritual and economic impacts and for determining the risks posed to their rights, well-being, livelihoods, beliefs, development and survival. Despite the widespread use of impact assessments, it remains a major challenge for indigenous peoples to ensure that they are conducted in a transparent, participatory and rights-compliant manner. Instead, they are frequently reduced to technical assessments under the control of project proponents that fail to address matters of fundamental importance to indigenous peoples. The concerned peoples tend to have little or no say as to the scope and conduct of these assessments, the options considered, or the appropriate mitigating measures. Independent reviews of impact assessments for projects such as the Tampakan copper-gold mine in the Philippines have found that even severe impacts, such as high seismic activity, are frequently overlooked.<sup>230</sup> Practice around the conduct of impact assessments for protected areas is limited.<sup>231</sup> Given the impact of protected areas on indigenous peoples, the United Nations Special Rapporteur on the rights of indigenous peoples has called on conservation organizations to ensure greater transparency, access to information, and improved monitoring and compliance with indigenous peoples' rights in regular project assessments and reporting as part of their human rights due diligence.<sup>232</sup>

### **3.8 Denial of benefits and compensation**

The stark contrast between the wealth generated for outsiders through the exploitation of lands and resources and the impoverishment of the peoples in whose land those resources are found is another pervasive feature of extractive, hydroelectric and agribusiness activities in indigenous peoples' territories. With few exceptions, indigenous peoples derive negligible benefit from these projects and receive little or no

<sup>229</sup> Cathal Doyle, "Indigenous peoples' rights: Is HRIA an enabler for free, prior and informed consent?", in *Handbook on Human Rights Impact Assessment*, Research Handbooks on Impact Assessment series, Nora Götzmann, ed. (Cheltenham, United Kingdom, Edward Elgar Publishing, Inc., 2019), pp. 135–153.

<sup>230</sup> Robert Goodland and Clive Montgomery Wicks, "Draft response to Xstrata/Indophil/SMI's ESIA of the Tampakan copper-gold mine project in Mindanao, Philippines" (London, Working Group on Mining in the Philippines – United Kingdom, 2012).

<sup>231</sup> Ignacio J. Petit and others, "Protected areas in Chile: Are we managing them?" *Revista Chilena de Historia Natural*, vol. 91, No. 1 (2018).

<sup>232</sup> A/71/229, para. 79.

compensation for the harm caused.<sup>233</sup> In the conservation sector, national parks and wildlife reserves often generate significant tourism revenues while evicted indigenous peoples live in poverty. The designation of UNESCO World Heritage Sites frequently brings increased tourism revenues, but Governments rarely take action to ensure respect for indigenous peoples' rights as an integral part of this process. For example, the Lake Bogoria National Reserve in Kenya was designated as a World Heritage Site in 2011 despite the Government's failure to provide reparations for the eviction of the Endorois and to acknowledge and respect their role as guardians of the area as required by the African Commission on Human and Peoples' Rights in 2009.<sup>234</sup>

### **3.9 Evictions and forced relocation**

Evictions from ancestral territories are among the most profound impacts on indigenous peoples of imposed extractive, agribusiness, infrastructure and conservation projects.<sup>235</sup> Relocation of indigenous peoples in the absence of free, prior and informed consent is a long-standing concern of human rights bodies.<sup>236</sup> Despite their prohibition under international human rights law, such evictions continue at an alarming rate.<sup>237</sup> It is estimated that in India alone approximately 26 million indigenous people have been displaced for dams, mining operations and protected areas since 1947, with evictions continuing to the present day.<sup>238</sup> Figures provided by the Minister of Tribal Affairs indicate that dams have been the primary cause of displacement, followed by mining and protected areas,<sup>239</sup> and that less than 25 per cent of those displaced between 1951 and 1990 have been rehabilitated.<sup>240</sup> This failure to rehabilitate the displaced and to punish those responsible for unlawful evictions is a global phenomenon and has led to calls by the Committee on Economic, Social and Cultural Rights for "investigations of past

<sup>233</sup> Robert Hitchcock and Judith Frost, "Botswana", in *The Indigenous World 2019*, p. 529.

<sup>234</sup> A/71/229, para. 60.

<sup>235</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 306.

<sup>236</sup> Doyle and Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, p. 71.

<sup>237</sup> *Ibid.*, p. 71.

<sup>238</sup> Nicole Girard, "Minority and indigenous women and urbanization", in *State of the World's Minorities and Indigenous Peoples 2015: Events of 2014*, Peter Grant, ed. (London, Minority Rights Group International, 2015), p. 34.

<sup>239</sup> Athili Sapriina and Paritosh Chakma, "India", in *The Indigenous World 2019*, p. 351.

<sup>240</sup> *Ibid.*, p. 351, quoting figures from the response by Minister of State for Tribal Affairs Sudarshan Bhagat to Unstarred Question No. 3076 in the Lok Sabha on 31 December 2018 (p. 361, footnote 32).

evictions and prosecutions for those responsible”.<sup>241</sup> Members of the Yakye Axa community in Paraguay were displaced at the end of the nineteenth century when ranches set up on their lands were purchased through the London Stock Exchange and now live in a precarious situation on the side of the road. Despite a ruling of the Inter-American Court of Human Rights in 2005 ordering the recovery of their lands, a follow-up visit by the Court in 2017 found that the community continued to live in the same life-threatening conditions. The State purchased lands for the community in 2012, but delays in titling and road construction denied them access.<sup>242</sup>

A common experience among those communities that were rehabilitated, such as the Wayuu communities in La Guajira, Colombia,<sup>243</sup> the Bru from Mizoram in India,<sup>244</sup> the Karen communities in the Phetchaburi Province in Thailand,<sup>245</sup> and the Batwa in Rwanda,<sup>246</sup> is that the land provided is of inferior quality and does not support their livelihoods. Another common feature of evictions is that they involve the use of force and violence against indigenous peoples.<sup>247</sup> The forced eviction of the Karen people of Kaeng Krachan National Park in 2011 involved the destruction of homes and the burning of rice barns by park officials and the military. In 2018, the Supreme Administrative Court affirmed that this use of force was in violation of the National Park Act.<sup>248</sup> Similar accounts of the inappropriate use of force and violence have been documented in Nepal in the context of a road expansion project in the lands of the Newar people.<sup>249</sup> In Tanzania, the forced occupation of the ancestral lands of Maasai pastoralists by a United Arab Emirates wildlife hunting company, Otterlo Business Corporation, reportedly involved attacks by police on Maasai in 2009, 2013 and 2017 and the burning of

<sup>241</sup> E/C.12/TZA/CO/1-3, para. 22.

<sup>242</sup> Centro por la Justicia y el Derecho Internacional, “The Inter-American Court visits the Yakye Axa people in Paraguay” (Asuncion), 9 July 2018.

<sup>243</sup> Cathal M. Doyle, ed., *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America* (Chiang Mai, Thailand, Asia Indigenous Peoples Pact; Madrid, Almáciga; and Copenhagen, International Work Group for Indigenous Affairs, 2015).

<sup>244</sup> Sangeeta Barooah Pisharoty, “Centre’s ‘historic agreement’ with Mizoram Bru refugees falls through ‘for the moment’”, *The Wire*, 17 July 2018.

<sup>245</sup> Chin Human Rights Organization, “Myanmar”, in *The Indigenous World 2019*, p. 291.

<sup>246</sup> Kamanzi, “Rwanda”, in *The Indigenous World 2019*, p. 518.

<sup>247</sup> See the following chapters in International Work Group for Indigenous Affairs, *The Indigenous World 2019*: Bhattachan, “Nepal”, p. 369; Rattanakrajangsi, “Thailand”, pp. 315-316; Sapriina and Chakma, “India”, p. 351; Porokwa, “Tanzania”, pp. 462-463 and 465; Negev Coexistence Forum for Civil Equality, “Israel”, pp. 378 and 380-381; Elías, “Guatemala”, pp. 582 and 594; Magnet, “Eritrea”, p. 435; Acosta, “Nicaragua”, p. 114.

<sup>248</sup> Kittisak Rattanakrajangsi, “Thailand”, in *The Indigenous World 2019*, pp. 315-316.

<sup>249</sup> Krishna B. Bhattachan, “Nepal”, in *The Indigenous World 2019*, pp. 369.

homes and arrests.<sup>250</sup> The Maasai are also threatened with evictions as a result of the expansion plans for the Serengeti National Park and Ngorongoro Conservation Area.<sup>251</sup> In Kenya, members of the Sengwer have been denied access to their sacred places in the forest as a result of years of brutal forced evictions by the Kenya Forest Service.<sup>252</sup>

### **3.10 Destruction of sacred sites**

In the context of extractive projects and conservation initiatives, the denial of access to sacred and spiritually significant sites and the desecration and destruction of such sites are issues of profound importance to many indigenous peoples.<sup>253</sup> Peoples such as the Western Shoshone in the United States and the Subanon of Mt. Canatuan in the Philippines have had their sacred mountains destroyed by mining operations. Despite repeated calls from the Committee on the Elimination of Racial Discrimination and the Inter-American Commission on Human Rights, they have not received reparations from the State.<sup>254</sup> Uranium mining on Mount Taylor in the state of New Mexico in the United States threatens spiritually significant sites of the Navajo and Laguna pueblos.<sup>255</sup> In the Russian Federation, between 2012 and 2014, mining activities damaged the Shor peoples' sacred mountain of Karagai-Nash and denied them access to their cemetery near the village of Kazas in Kemerovo Oblast in south-western Siberia.<sup>256</sup> In 2018, cancelled oil leases in the Badger-Two Medicine area, sacred to the Blackfeet in Montana, were reinstated by a federal judge.<sup>257</sup> Both the Dakota Access and Keystone XL oil pipelines

<sup>250</sup> Porokwa, "Tanzania", in *The Indigenous World 2019*, p. 462; International Work Group for Indigenous Affairs, "Forced evictions of Maasai people in Loliondo, Tanzania", urgent alert, August 2017.

<sup>251</sup> Porokwa, "Tanzania", in *The Indigenous World 2019*, p. 462.

<sup>252</sup> Peter Grant, ed., *Minority and Indigenous Trends 2019: Focus on Climate Justice* (London, Minority Rights Group International, 2019), pp. 71-72.

<sup>253</sup> A/HRC/24/41/Add.3, para. 33; Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 266.

<sup>254</sup> Committee on the Elimination of Racial Discrimination, early warning and urgent action letter to the Philippines (31 August 2012); "Early warning and urgent action procedure, decision 1 (68): United States of America" (CERD/C/USA/DEC/1).

<sup>255</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 267.

<sup>256</sup> Boris Babin and others, "Europe", in *State of the World's Minorities and Indigenous Peoples 2016: Events of 2015*, Peter Grant, ed. (London, Minority Rights Group International, 2016), pp. 179-180.

<sup>257</sup> Braun, "United States of America", p. 78, citing *Solenex LLC v. Sally Jewell*, U.S. District Court for the District of Columbia, Civil Case No. 13-0993 (RJL), 24 September 2018.



have disturbed sacred sites of indigenous peoples in Canada and the United States.<sup>258</sup> Hydroelectric projects also have major impacts on sacred sites. The Himba in Namibia, the Mapuche in Chile, and Mayan communities in Guatemala have protested hydroelectric dams because of partial or permanent flooding of sacred areas.<sup>259</sup> In 2018, the West Moberly in British Columbia were unsuccessful in seeking a temporary injunction to halt the Site C dam in north-eastern British Columbia, the construction of which will destroy their sacred sites.<sup>260</sup> In Cambodia, the Lower Sesan 2 hydroelectric dam in Stung Treng Province has destroyed sacred forests and grave sites as the protests of the Phnong indigenous people have effectively been ignored.<sup>261</sup> Logging operations in Cameroon have threatened the Baka sacred sites.<sup>262</sup> Conservation projects continue to restrict access to sacred areas. In 2010, the African Commission on Human and Peoples' Rights found that the forced eviction of the Endorois "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".<sup>263</sup>

There have been some positive developments in terms of protection for sacred sites. In 2017, the African Commission on Human and Peoples' Rights adopted a resolution calling on States Parties "to recognise sacred natural sites and territories, and their customary governance systems, as contributing to the protection of human and peoples' rights".<sup>264</sup> After a long legal battle and the involvement of the United Nations Special Rapporteur on the rights of indigenous peoples, the Wixárika (Huichol) in Mexico managed to protect Wirikuta, their sacred territory, from 78 mining concessions issued to the Canadian

<sup>258</sup> Indigenous Peoples Major Group for Sustainable Development, *Inclusion, Equality, and Empowerment to Achieve Sustainable Development: Realities of Indigenous Peoples*, report of the high level political forum, July 9-18, 2019, p. 13.

<sup>259</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, p. 100; Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 266; Janet Oropeza Eng, "Central America", in *State of the World's Minorities and Indigenous Peoples 2016: Events of 2015*, p. 109.

<sup>260</sup> Jennifer Preston and Rachel LaFortune, "Canada", in *The Indigenous World 2019*, p. 68.

<sup>261</sup> Nicole Girard and Hanna Hindstrom, "Southeast Asia", in *State of the World's Minorities and Indigenous Peoples 2016: Events of 2015*, p. 147; Cristina Maza and Phak Seangly, "Sesan dam to bring power, pain" *The Phnom Penh Post*, 28 April 2017; Prak Chan Thul, "Floodwater released by Chinese dam in Cambodia submerges village", Reuters, 2 February 2018.

<sup>262</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, p. 125.

<sup>263</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/3003 (4 February 2010), para. 173.

<sup>264</sup> African Commission on Human and Peoples' Rights, *Resolution on the Protection of Sacred Natural Sites and Territories* (ACHPR/Res.372(LX)2017), para. 1; Samuel Tilahun Tessema, "African Commission on Human and Peoples' Rights", in *The Indigenous World 2019*, p. 572.

companies Revolution Resources and First Majestic Silver.<sup>265</sup> A 2019 landmark ruling of the High Court of Australia awarded the Ngaliwurru and Nungali peoples 2.53 million Australian dollars in compensation for the denial of land rights — including 1.3 million Australian dollars for cultural loss and damage to sacred sites.<sup>266</sup> In India, after years of struggle, the Dongria Kondh succeeded in protecting their sacred Niyamgiri hills in the state of Odisha from Vedanta Resources, a bauxite mining company registered in the United Kingdom. In 2013, a landmark decision of the Supreme Court held that the consent of the 12 tribal village councils (*gram sabhas*) had to be obtained in accordance with the 2006 Forest Rights Act in order to protect and preserve their “religious rights, especially their right to worship their deity” on the hilltop of the Niyamgiri range.<sup>267</sup>

## **4. Lack of access to remedy for rights violations**

### **4.1 Barriers to access to justice**

Article 2.3(a) of the International Covenant on Civil and Political Rights requires that States guarantee access to effective remedy, and article 8 of the Universal Declaration of Human Rights affirms that reparations should be provided to victims and perpetrators should be brought to justice. The United Nations Declaration on the Rights of Indigenous Peoples contextualizes these provisions in relation to indigenous peoples’ needs and realities. While indigenous peoples have had some notable victories in national and international forums in the years since the adoption of the Declaration, realizing remedies and reparations for damage caused by imposed activities in or near their lands remains the exception. Lack of access to courts and mechanisms to protect the rights recognized under international human rights law, including through their own

<sup>265</sup> International Land Coalition, ILC Toolkit 5: Indigenous Peoples’ and Local Communities’ Land Rights Toolkit (Washington, D.C., 2018), p. 51.

<sup>266</sup> Helen Davidson, “High court native title award of \$2.53m may open floodgates”, *The Guardian*, 13 March 2019; William Isdale and Jonathan Fulcher, “How will indigenous people be compensated for lost native title rights? The High Court will soon decide”, *The Conversation*, 4 September 2018; Sean Brennan, “Australia”, in *The Indigenous World 2019*, p. 237.

<sup>267</sup> India, Supreme Court judgement dated 18/04/2013 in W.P.(C) No.180/2011 *Orissa Mining Corpn. vs. MoEF & Ors.*



justice systems,<sup>268</sup> renders indigenous peoples vulnerable to actions that threaten their lands, territories, resources, sacred sites and livelihoods.<sup>269</sup> This is particularly true for the many indigenous peoples who are not recognized as legal subjects with collective rights to their lands.

Discrimination against indigenous peoples in the justice system is widespread, and numerous barriers to accessing and realizing remedies exist. These include language barriers and the absence of interpreters – despite recognition of the need for this in article 40 of the United Nations Declaration on the Rights of Indigenous Peoples – as well as insensitivity to indigenous cultures, the lack of legal assistance, and geographical remoteness. Delays in processing court cases are a common experience, rendering remedies inaccessible. In 2013, 22 years after they were evicted from their lands to clear the area for the establishment of a national park, the Batwa in Uganda filed a case with the Constitutional Court addressing the prolonged and ongoing suffering they had experienced.<sup>270</sup> Seven years later, the case has yet to be resolved. In the meantime, the Batwa must be accompanied by guards if they enter the Mgahinga Gorilla National Park, as otherwise they face arrest and imprisonment for trespassing on what are their ancestral lands.<sup>271</sup> This de facto discrimination in the criminal justice system is also reflected in the disproportionate number of incarcerated indigenous persons.

In the context of land rights, collusion between the State and private sector actors is a significant barrier to access to justice.<sup>272</sup> Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples affirms the responsibility of States to establish and implement processes to recognize and adjudicate indigenous peoples' land rights, but to date only a small number of States have established specific mechanisms to address this.<sup>273</sup> The transnational nature of many extractive and agribusiness companies compounds the challenges faced by indigenous peoples, as jurisdictional issues make it difficult to take legal action at home or abroad. Accessing regional and international human rights mechanisms is also challenging for most indigenous communities due to financial and

<sup>268</sup> United Nations Declaration on the Rights of Indigenous Peoples, arts. 2 and 33; ILO Convention 169 (1989), arts. 8 and 9.

<sup>269</sup> "Rights of indigenous peoples: report of the Special Rapporteur on the rights of indigenous peoples" (A/HRC/42/37), para. 9.

<sup>270</sup> Benjamin Mutambukah, "Uganda", in *The Indigenous World 2019*, p. 472; Survival International, "Uganda: Batwa 'Pygmy' faces prison in the name of conservation", 10 February 2017.

<sup>271</sup> Ibid.

<sup>272</sup> "Access to justice in the promotion and protection of the rights of indigenous peoples: study by the Expert Mechanism on the Rights of Indigenous Peoples" (A/HRC/24/50), para. 36.

<sup>273</sup> Ibid., para. 39.

technical resource limitations, and the lack of enforcement powers among these bodies limits their effectiveness when decisions are made in favour of indigenous peoples.

A lack of understanding of international human rights law as it pertains to indigenous peoples' rights is also common in national judicial systems. In some cases, courts have ordered consultations to be held after projects have been initiated, defeating their purpose as a safeguard for rights to lands, territories and resources. The United Nations special rapporteur on the rights of indigenous peoples has highlighted that this is at odds with the international human rights law requirements for consultations to be held and consent sought prior to potential impacts on rights.<sup>274</sup> In other cases, courts have dismissed free, prior and informed consent as a veto power without addressing the collective rights to lands, territories, resources and self-determination or the necessity and proportionality requirements that underpin the requirement for free, prior and informed consent in the context of extractive, agribusiness or conservation initiatives.<sup>275</sup> Discriminatory colonial doctrines also continue to underpin judicial reasoning around extractive industries in many jurisdictions. The Committee on the Elimination of Racial Discrimination has recommended that these doctrines be re-interpreted in the light of international human rights standards<sup>276</sup> and that culturally appropriate remedies be provided for issues arising from decades of extractive industry activities.<sup>277</sup>

#### **4.2 Failure to implement court rulings**

Since 2007 there have been several recommendations of United Nations bodies and a number of landmark decisions of national and regional courts and commissions reflecting the core provisions of the United Nations Declaration on the Rights of Indigenous Peoples, including those on lands, territories and resources and on consultation and consent, as they relate to the extractive and conservation sectors. These include rulings of the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights in the cases of the Endorois and Ogiek peoples addressing evictions in the context of national parks in Kenya. Decisions of the Inter-American Court of Human Rights have addressed consultation and consent in the context of mining and logging concessions in the territories of the Saramaka in Suriname, reparations for mining within a national park in the territories of the Kaliña and Lokono peoples, also in Suriname, and dispossession of the lands of the Yakye Axa and Sawhoyamoxa

<sup>274</sup> "Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala" (A/HRC/39/17/Add.3), para. 37.

<sup>275</sup> Plurinational State of Bolivia, Sentencia Constitucional 0045/2006, Expediente 2005-12440-25-RDI, Sucre, 2 de junio de 2006.

<sup>276</sup> Doyle and Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement*, p. 66.

<sup>277</sup> *Ibid.*, pp. 64-66.



communities in the context of agribusiness activities in Paraguay. At the national level, groundbreaking decisions of courts in Colombia, Peru, Indonesia, Brazil, Uganda and South Africa have addressed the need for the demarcation of traditional territories, respect for customary tenure rights, and the requirement for free, prior and informed consent, including respect for indigenous peoples' autonomous free, prior and informed consent protocols, in the context of extractive industry projects.

Despite, or perhaps because of, their groundbreaking nature, none of these decisions has been fully implemented. United Nations bodies have repeatedly called on States to demonstrate how they are implementing them,<sup>278</sup> and indigenous peoples have started to seek the enforcement of decisions from regional courts by engaging domestic mechanisms. Faced with the inaction of the Government of Ecuador following the Inter-American Court of Human Rights ruling regarding oil exploitation in their territories, the Sarayaku filed a petition to the Constitutional Court of Ecuador seeking its implementation.<sup>279</sup> The Kaliña and Lokono peoples are considering similar domestic legal action in Suriname to seek enforcement of their Inter-American Court ruling.<sup>280</sup>

### **4.3 The role of indigenous legal systems**

Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples addresses the prompt resolution of conflicts and the need for due consideration to be given to indigenous peoples' own legal systems. This is echoed in the jurisprudence of the Inter-American Court of Human Rights, which requires that indigenous peoples' customary law be taken into consideration in judicial proceedings and affirms that the failure to provide indigenous peoples with an effective and efficient remedy for resolving their land claims constitutes a violation of their right to fair trial and effective judicial protection.<sup>281</sup>

Several countries — particularly in Latin America, where legal plurality is guaranteed under some constitutions — have taken initial steps to recognize the role of indigenous justice systems and to better integrate them with State systems, one example being the development of an intercultural protocol for judges in the Plurinational State of

<sup>278</sup> Ibid., pp. 73-75.

<sup>279</sup> "Regarding the non-compliance with the ruling of the IACtHR in the case of *Kichwa Indigenous People of Sarayaku vs Ecuador*", El Pueblo Originario Kichwa de Sarayaku, press release, 13 November 2019.

<sup>280</sup> Max Ooft, "Suriname", in *The Indigenous World 2019*, p. 213.

<sup>281</sup> Inter-American Court of Human Rights, "Case of the *Yakye Axa Indigenous Community v. Paraguay*"; and A/HRC/24/50, para. 35.

Bolivia in 2017.<sup>282</sup> However, a combination of discrimination, lack of understanding, and the failure to make genuine efforts to engage with indigenous communities has constrained or denied the potential of these indigenous systems to provide access to remedies.<sup>283</sup> In the Philippines, having recognized the authority of the indigenous legal system to regulate activities within the traditional territories, the government body responsible for upholding indigenous peoples' rights ignored the indigenous authorities' ruling penalizing the State and a mining company for violating their rights by mining their sacred mountain without free, prior and informed consent.<sup>284</sup> In Chile the situation is even more extreme, as indigenous authorities have been prosecuted for exercising their jurisdiction under customary law.<sup>285</sup>

#### **4.4 Structural barriers to justice: international investment law**

Another challenge when seeking remedies for violations of land rights in the context of extractive and agribusiness activities is the lack of harmonization between international investment law and international human rights law. The unprecedented demand for natural resources by and on behalf of multinational companies, fuelled by the global growth in consumerism and speculative interests, has led to the proliferation of international investment agreements aimed at facilitating large-scale land acquisition and enabling foreign investment in extractive, energy and agribusiness projects in or near indigenous peoples' territories.<sup>286</sup> These international investment agreements establish legal protections for investors and grant them the right to sue States in investment arbitration without any reference to the pre-existing rights of indigenous peoples and their protection under international human rights law.<sup>287</sup> Where indigenous peoples' opposition prevents projects from proceeding, investors are increasingly resorting to

<sup>282</sup> A/HRC/42/37, paras. 85-94; "Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, James Anaya", observaciones sobre los avances y desafíos en la implementación de las garantías de la Constitución Política del Ecuador sobre los derechos de los pueblos indígenas (A/HRC/15/37/Add.7), para. 15.

<sup>283</sup> A/HRC/42/37, paras. 50-60.

<sup>284</sup> Doyle, "Business corporations and indigenous rights".

<sup>285</sup> "Visit to Ecuador: report of the Special Rapporteur on the rights of indigenous peoples" (A/HRC/42/37/Add.1), para. 52.

<sup>286</sup> "Rights of indigenous peoples", note by the Secretary-General transmitting the report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples (A/70/301); "Report of the Special Rapporteur on the rights of indigenous peoples", note by the Secretariat providing an analysis of the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of indigenous peoples (A/HRC/33/42).

<sup>287</sup> E/C.19/2018/7, para. 37.



international arbitration to sue or threaten to sue States for the loss of potential earnings. This has had a chilling effect on the implementation of judicial and quasi-judicial decisions aimed at protecting indigenous peoples' rights in several countries.<sup>288</sup> In recent years, some States have invoked indigenous rights arguments before investment tribunals to defend their actions while simultaneously pursuing criminal cases against representatives of the same indigenous peoples in their national courts.<sup>289</sup> The indigenous peoples concerned have no standing before investment arbitration tribunals, and their rights are frequently deemed immaterial to the arbitral decisions. This legal architecture precludes indigenous peoples from accessing remedies in disputes pertaining to their rights while also rendering other remedial mechanisms to which they have access less effective in protecting their rights.

<sup>288</sup> A/HRC/33/42, para. 31.

<sup>289</sup> International Centre for Settlement of Investment Disputes, *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21), "Award".



Photo: Ben Powless

## 5. Indigenous human rights defenders and militarization

### 5.1 Indigenous rights defenders

Extractive, agribusiness and infrastructure projects in indigenous peoples' territories have long been associated with conflict and violence often manifested in the harassment, criminalization and killing of indigenous peoples. According to the United Nations Special Rapporteur on the situation of human rights defenders, these sectors have been major drivers of murders of environmental and indigenous rights defenders, with mining and extractive industries accounting for 42 killings, agribusiness for 20 killings, and hydroelectric dam and logging operations for 15 killings each in 2015.<sup>290</sup> Conservation policies which criminalize indigenous peoples' livelihoods and result in forced evictions have also contributed to numerous killings. According to reports by Global Witness and Front Line Defenders, 77 per cent of the 321 human rights defenders killed in 2018 and 40 per cent of the 304 human rights defenders killed in 2019 were involved in defending the environment, land and indigenous peoples' rights.<sup>291</sup> In Colombia, in the two years following the signing of the peace agreement, indigenous organizations documented 87 killings,<sup>292</sup> while in the Philippines, Global Witness documented 47 killings in 2017.<sup>293</sup> These killings have escalated in contexts in which civil society spaces have shrunk, populist regimes have emerged, and environmentally destructive projects have increased.<sup>294</sup> The United Nations Special Rapporteur on the rights of indigenous peoples has referred to this escalation of violence against and killings of indigenous rights defenders as a "global crisis".

Research consistently demonstrates that the root cause of this crisis is the failure to protect indigenous peoples' land rights and secure their customary tenure.<sup>295</sup> The fact that countries such as the Philippines, Colombia, Brazil and Mexico have progressive

<sup>290</sup> "Situation of human rights defenders", note by the Secretary-General transmitting the report of the Special Rapporteur on the situation of human rights defenders, Michel Forst (A/71/281), para. 27.

<sup>291</sup> Front Line Defenders, *Front Line Defenders Global Analysis 2019* (Dublin, Front Line – the International Foundation for the Protection of Human Rights Defenders, 2020); and *Front Line Defenders Global Analysis 2018* (Dublin, Front Line – the International Foundation for the Protection of Human Rights Defenders, 2019).

<sup>292</sup> Organización Nacional Indígena de Colombia, "Colombia", in *The Indigenous World 2019*, p. 155.

<sup>293</sup> Global Witness, "Deadliest year on record for land and environmental defenders", p. 296.

<sup>294</sup> A/71/281, paras. 24-40.

<sup>295</sup> A/HRC/39/17, para. 31; Rights and Resources Initiative, *Who Owns the World's Land?*, p. 1.

constitutional, legislative or judicial affirmations of indigenous peoples' rights but also have the highest levels of reported killings highlights the glaring gap between the legal recognition and practical realization of rights. As a result, even where legal protections theoretically exist, mobilizations and direct action – such as blockading rivers, roads or airports – are often the only avenues available to indigenous peoples when faced with imminent threats of irreversible harm to their well-being and survival arising from the accelerating expansion of imposed extractive and agribusiness projects and protected areas. Rather than seeing this response as an indicator of the urgency of altering their engagement paradigms and pursuing rights-compliant models of development, States, companies and conservation organizations have typically retaliated by using force, generating conflict, or filing legal charges against indigenous representatives.<sup>296</sup>

According to the Inter-American Commission on Human Rights, between August 2011 and May 2015 there were 63 deaths and 1,935 injuries in Peru in the context of social conflicts, mostly in the extractive sector. Activities in the palm oil sector have also generated widespread conflict in indigenous peoples' territories. In Indonesia, the National Land Bureau lists 8,000 conflicts over the land, half of which have involved the palm oil sector.<sup>297</sup> NGOs have compiled extensive information on conflicts arising from displacement from national protected areas.<sup>298</sup> While most conflicts are in the global South, indigenous peoples in northern States are also criminalized. An injunction requested by a pipeline corporation resulted in the dismantling of a protest camp of the Wet'suwet'en in January 2019 in north-west British Columbia and led to 14 arrests. Similarly, in the United States, a military-style response to the protest of the Standing Rock Sioux tribe against the construction of the Dakota Access Pipeline near their reservation resulted in hundreds of arrests.

To justify this divisive approach, a narrative has been constructed that stigmatizes indigenous peoples as anti-development, opposed to the national interest, or “dogs in the manger” who selfishly deny others the benefits of progress.<sup>299</sup> Social conflicts that arise from the failure to consult in good faith and respect land rights are misrepresented as disputes initiated by a small minority of vocal indigenous representatives. This nar-

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<sup>296</sup> A/HRC/24/50, para. 38.

<sup>297</sup> Cheyns and Thévenot, “Interview with Marcus Colchester, founder of the NGO Forest Peoples Programme, on the ‘free, prior and informed consent’ of communities”, para. 49.

<sup>298</sup> Springer and Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda*, pp. 5-9.

<sup>299</sup> Cathal M. Doyle, “Indigenous peoples’ experiences of resistance, participation and autonomy: consultation and free prior and informed consent in Peru”, in *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap*, Claire Wright and Alexandra Tomaselli, eds. (London, Routledge, 2019), pp. 58-73.

rative creates an environment in which the criminalization of indigenous representatives and the use of violence against them is deemed tolerable or even encouraged. A striking example of this is the Philippines Department of Justice petition to a Manila court in 2018 listing more than 600 people – including 30 indigenous rights defenders and the United Nations Special Rapporteur – as terrorists. The Special Rapporteur on the rights of indigenous peoples reported the similar labelling of indigenous representatives in Guatemala, seven of whom were killed shortly after her country mission in 2018.<sup>300</sup> In a growing number of States, national security laws are invoked to classify indigenous peoples as terrorists, and in some, states of emergency are declared in order to suspend legal protections.<sup>301</sup> The militarization of indigenous peoples' territories and violence almost inevitably follow.

An alarming number of indigenous representatives are killed, and many more face harassment and violence. Indigenous peoples that attempt to bring legal cases to defend their land rights are often faced with criminal counter-charges.<sup>302</sup> Following protests, indigenous representatives have had arbitrary criminal charges filed against them for their alleged involvement in acts ranging from public order offences and the destruction of property to extortion and aggravated usurpation.<sup>303</sup> These cases often lead to extended pretrial detention and unjust decisions by misinformed or biased judges, an issue addressed by the Inter-American Court of Human Rights in relation to Chilean court judgments applying anti-terrorism legislation to the Mapuche.<sup>304</sup> They also demand significant time and resources and cause enormous psychological stress, rendering it impossible for indigenous representatives to dedicate themselves to defending their people and territories against harm. Faced with potential death threats, legal harassment and violence, others are slow to take their place. Governments in India and the Russian Federation have also made use of financial regulations to clamp down on the activities of organizations supporting indigenous peoples.<sup>305</sup> Through the silencing of their representatives and supporters, communities' voices are silenced.

The gravity of the situation has been highlighted by numerous human rights bodies at the international and regional levels and has been addressed as part of the Universal

<sup>300</sup> A/HRC/39/17/Add.3, paras. 54 and 58; A/HRC/39/17, para. 54.

<sup>301</sup> A/HRC/39/17, para. 48.

<sup>302</sup> A/HRC/42/37, para. 43, citing communication THA 2/2019 in relation to the Karen peoples in Thailand.

<sup>303</sup> A/HRC/39/17, para. 48.

<sup>304</sup> Inter-American Court of Human Rights, "Case of *Norín Catrimán et al. (leaders, members and activists of the Mapuche Indigenous People) v. Chile*, Judgment of May 29, 2014 (merits, reparations and costs)", para. 228.

<sup>305</sup> Michael Safi, "Greenpeace and Amnesty accuse Indian government of 'smear campaign'", *The Guardian* (Delhi), 25 December 2018.

Periodic Review carried out by several States. Despite this, the number of indigenous rights defenders killed remains alarmingly high. This suggests a lack of will to take action against the armed groups, criminal organizations or security forces that are behind these attacks.<sup>306</sup> In many cases, States do not even acknowledge that a structural problem exists, framing it instead as a series of unrelated localized incidents, with no attempt made to identify and tackle the root cause.<sup>307</sup> This reinforces the view that the aim and effect of this stigmatization, harassment and violence is to deny indigenous peoples the possibility of exercising their decision-making rights over their lands, territories and resources.

## **5.2 Militarization**

One of the major challenges facing many indigenous peoples seeking to assert their land rights is the militarization or paramilitarization of their territories. This played a major role in the violation of indigenous peoples' rights to lands, territories and resources in Latin America under former dictators, and its impacts have yet to be addressed in countries such as Guatemala and Colombia. In Guatemala, military and paramilitary groups were responsible for the forced displacement, extrajudicial killings and enforced disappearances of hundreds of thousands of indigenous people in the 1980s. To date, "virtually no one has been held accountable" for these crimes.<sup>308</sup> Presently, the militarization of indigenous territories is particularly pronounced in many Asian and certain African countries. Decades-long conflicts in the Philippines, India and Indonesia have seen indigenous peoples trapped between rebel groups and the military. In Mindanao, Philippines, indigenous representatives have reported being arbitrarily labelled as members of the Communist Party of the Philippines - New People's Army, with the frequent dispatch of military battalions to their territories resulting in evictions.<sup>309</sup> Extrajudicial killings and military operations were reported to have resulted in 41 incidents of forced evacuation between 2008 and 2012 and led to the closing down of indigenous-run schools.<sup>310</sup> Indigenous peoples in north-east India are labelled as Maoist Naxalites and treated as criminals under national security legislation.<sup>311</sup> The Supreme Court of

<sup>306</sup> Organizacion Nacional Indigena de Colombia, "Colombia", in *The Indigenous World 2019*, p. 155.

<sup>307</sup> Ibid.

<sup>308</sup> A/HRC/39/17/Add.3, para. 98.

<sup>309</sup> Alternative Law Groups Inc. and others, "Philippines indigenous peoples ICERD shadow report", pp. 55-65.

<sup>310</sup> Eliseo F. Huesca, Jr. "Plantation economy, indigenous people, and precariousness in the Philippine uplands: the Mindanao experience", in *Human Insecurities in Southeast Asia*, Paul J. Carnegie, Victor T. King and Zawawi Ibrahim, eds. (Springer Singapore, 2016), p. 185.

<sup>311</sup> Anand Teltumbde, *Republic of Caste: Thinking Equality in the Time of Neoliberal Hindutva* (New Delhi, Navayana Publishing Pvt Ltd, 2018).

India has criticized the use of schools as encampments by the military or police. Similar practices have been reported to the Inter-American Commission on Human Rights in Nicaragua,<sup>312</sup> to the Constitutional Court of Colombia,<sup>313</sup> and by indigenous peoples in the Philippines in the context of infrastructure projects and plantations.<sup>314</sup> In India and the Philippines, anti-insurgency plans cover indigenous peoples' territories and have resulted in indigenous peoples being targeted by military operations.<sup>315</sup> In Myanmar, the denial of self-determination rights is at the root of long-running conflicts between the State and indigenous peoples.<sup>316</sup> In areas where conflict has formally ended, such as in the Chittagong Hill Tracts of Bangladesh, military presence nevertheless continues and is frequently associated with human rights abuses.<sup>317</sup>

The fact that many indigenous territories in conflict and post-conflict areas are rich in minerals makes matters even more complex. Military, police and paramilitary forces are involved in providing security for extractive industry projects that are imposed on, and opposed by, indigenous peoples. The presence of the military in such contexts renders good-faith consultation to obtain free consent impossible. In Colombia, despite the peace agreement signed in 2016, many members of former paramilitary groups remain active in indigenous territories and continue to issue death threats and murder indigenous representatives asserting land rights in the context of extractive industry and agribusiness projects.<sup>318</sup> SMI/Xstrata's Tampakan project in the lands of the B'laan people in South Cotabato in Mindanao, Philippines, is illustrative of this interplay between militarization and extractive industry operations. The project has been targeted by the New People's Army (the armed wing of the Communist Party of the Philippines), some B'laan tribal leaders have declared tribal war against it, and the Philippine Army established a task force to secure its operation. In 2013, a mother and her two children were killed by the military in an attack on the home of a tribal leader. In a congressional inquiry it transpired that the company had been funding paramilitary security through

<sup>312</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 302.

<sup>313</sup> Constitutional Court of Colombia, Auto 004/09 (26 January 2009).

<sup>314</sup> Huesca, "Plantation economy, indigenous people, and precariousness in the Philippine uplands: the Mindanao experience", p. 185.

<sup>315</sup> Alternative Law Groups Inc. and others, "Philippines indigenous peoples ICERD shadow report"; Teltumbde, *Republic of Caste*.

<sup>316</sup> Sourabh Jyoti Sharma, "Ethnicity and insurgency in Myanmar: profiling of non-State insurgent groups", *World Affairs: The Journal of International Issues*, vol. 18, No. 3, Autumn (July-September 2014), pp. 150-168.

<sup>317</sup> International Work Group for Indigenous Affairs, *Militarization in the Chittagong Hill Tracts, Bangladesh: The Slow Demise of The Region's Indigenous Peoples*, Report 14 (Copenhagen, IWGIA, Organising Committee CHT Campaign and Shimin Gaikou Centre, 2012).

<sup>318</sup> Organizacion Nacional Indigena de Colombia, "Colombia", in *The Indigenous World 2019*, p. 155.



the local government.<sup>319</sup> Serious issues associated with the use of private security and paramilitary groups to protect extractive projects have been reported in Papua New Guinea, where security guards and police at Barrick Gold's Porgera Joint Venture mine were involved in sexually assaulting and raping women and committing violence against men. Similar issues have arisen in the conservation sector in Africa, as evidenced by the ongoing investigation initiated by the World Wildlife Fund (WWF) into allegations that guards at Salonga National Park in the Democratic Republic of the Congo were involved in rape, torture and killings, and there have been concerns communicated to WWF by civil society organizations and indigenous peoples that similar practices are common in other countries, including Cameroon, Nepal and India.<sup>320</sup>

In Botswana and Zimbabwe, militarization operations associated with conservation efforts have impacted the San since the beginning of the twentieth century, leading to the dispossession of lands and impoverishment.<sup>321</sup> The deployment of military, paramilitary and security forces in indigenous territories in the absence of indigenous peoples' consent continues despite the clarification by international human rights law bodies that "the public interest does not justify military presence in indigenous territories to guarantee the feasibility of extraction or development plans and projects that have not been consulted with nor been consented to by indigenous peoples".<sup>322</sup>

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<sup>319</sup> Global Witness, "Defending the Philippines: environmental activists at the mercy of business at all costs", report, 24 September 2019, p. 28.

<sup>320</sup> Forest Peoples Programme, "Open letter to WWF on serious human rights abuses associated with conservation activities" news article, 7 May 2019.

<sup>321</sup> Robert K. Hitchcock, "The impacts of conservation and militarization on indigenous peoples: a southern African San perspective", *Human Nature*, vol. 30, No. 2 (2019), pp. 217-241.

<sup>322</sup> Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, para. 193.

## **6. Conclusions and recommendations**

### **Conclusions**

Since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, there have been several ground-breaking recommendations from United Nations bodies and landmark decisions from national and regional courts and commissions. Despite this progress, the challenges constraining indigenous peoples' realization of their land rights remain enormous. Many of the world's indigenous peoples are still not recognized by national Governments. Where land rights are recognized they tend to fall short of the ownership and control rights required under international law. Most Governments are wilfully turning a blind eye to the impacts of their development and conservation plans on indigenous peoples' rights to lands, territories and resources and their survival as self-determining peoples.

Given this reality, indigenous peoples have adopted a range of proactive approaches to assert their rights. They have challenged State actions in domestic and regional courts, establishing important legal precedents, and have made effective use of international complaint mechanisms. In parallel, they have taken local-level actions such as declaring their own autonomous governments, codifying statutes regulating activities in their territories, and developing autonomous free, prior and informed consent protocols regulating consultation with external actors. Some communities have declared moratoriums on mining activities in their territories or have called on States to do so. Others have established indigenous guards to monitor and control the entry of companies attempting to operate in their territories. In cases where companies are operating without adequate oversight by the State, some indigenous communities have established their own independent environmental monitoring mechanisms to oversee potential or actual environmental impacts.<sup>323</sup> These initiatives are often coupled with mobilizations aimed at preventing imminent threats to their territories and, acting together, they have at times forced States and other actors to recognize and respect indigenous rights. However, in the absence of systematic change, such efforts are insufficient to address the nature and scale of the challenges facing indigenous peoples.

International and regional human rights bodies have repeatedly signalled the need for a paradigm shift from the historical models of fortress-style conservation and non-consensual extractive and agribusiness activities to a self-determination-based partnership-style model of engagement with indigenous peoples. In its 2015 decision

<sup>323</sup> Ortiz-T., "Ecuador", in *The Indigenous World 2019*, p. 167.

in *Kaliña and Lokono Peoples v. Suriname*,<sup>324</sup> the Inter-American Court of Human Rights acknowledged “the adverse effects on use and enjoyment of the parts of the nature reserves that fall within the alleged traditional territories”<sup>325</sup> and recognized the right of the petitioners to request “restitution of their traditional territories” within the nature reserves. The Court further observed that “indigenous peoples may play an important role in nature conservation”, and as a result their rights and international environmental laws “should be understood as complementary, rather than exclusionary, rights”.<sup>326</sup> The African Commission on Human and Peoples’ Rights, in *Endorois Welfare Council v. Kenya*, also stressed the role of indigenous peoples in managing protected areas, stating that “the Endorois, as the ancestral guardians of that land, are best equipped to maintain its delicate ecosystems”.<sup>327</sup> In its 2017 ruling, the African Court on Human and Peoples’ Rights affirmed that the presence of the Ogiek in the Mau Forest in Kenya was consistent with the objective of conserving and protecting natural resources located in their ancestral lands.<sup>328</sup> Much of this guidance echoes that of the Inter-American Court of Human Rights in its *Saramaka People v. Suriname*, *Kichwa Indigenous People of Sarayaku v. Ecuador*, *Yakye Axa Indigenous Community v. Paraguay* and *Sawhoyamaxa Indigenous Community v. Paraguay* decisions, which affirmed the requirement for consultation to obtain free, prior and informed consent and for the restitution of lands taken without such consent for extractive and agribusiness activities.<sup>329</sup> These decisions resonate with the large body of recommendations of United Nations treaty and charter bodies addressing extractive, agribusiness, infrastructure and conservation activities.

There is also a growing recognition in the policy discourse of several of the major actors involved in funding, operating and overseeing extractive industry and agribusiness activities of this need to shift from imposed projects to projects and partnerships with indigenous peoples that are rights-compliant and based on free, prior and informed

<sup>324</sup> Inter-American Court of Human Rights, “Case of the *Kaliña and Lokono Peoples v. Suriname*”.

<sup>325</sup> *Ibid.*, para. 127.

<sup>326</sup> *Ibid.*, paras. 150 and 173.

<sup>327</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision), para. 235.

<sup>328</sup> *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, ACTHPR, Application No. 006/2012 (2017), para. 145.

<sup>329</sup> Inter-American Court of Human Rights, “Case of the *Saramaka People v. Suriname*”; Inter-American Court of Human Rights, “Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*”.



Photo: Ben Powless

consent.<sup>330</sup> Major international actors in the conservation sector are engaged in a similar policy shift, with recent policies reflecting requirements for the respect of indigenous peoples' land rights and the need for consultation in order to obtain free, prior and informed consent. In the extractive industry sector there are some examples of indigenous peoples becoming involved in partnership-based operations or negotiating more satisfactory benefit agreements.<sup>331</sup> Likewise, there have been a few notable positive experiences relating to the management and co-management of protected areas by indigenous peoples.<sup>332</sup> However, the failure by States and private actors to pursue the structural changes needed to realize these policy goals on a broader scale means

<sup>330</sup> International Council on Mining and Metals, "Indigenous peoples and mining – position statement" (2013); Roundtable on Sustainable Palm Oil, Principles and Criteria for the Production of Sustainable Palm Oil (2018); International Finance Corporation, Performance Standard 7: Indigenous Peoples; Equator Principles (2019).

<sup>331</sup> Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (New York, Routledge, 2015).

<sup>332</sup> A/71/229, para. 52.



practice lags significantly behind discourse in both sectors, and systemic discrimination continues to lead to gross violations of indigenous peoples' rights.

Externally driven activities in or near indigenous peoples' territories therefore continue to be pursued overwhelmingly in a manner that is at odds with indigenous peoples' rights to lands, territories and resources, often with devastating consequences for indigenous peoples.<sup>333</sup> The associated denial of rights to self-determination, territorial control and cultural integrity remains a matter of grave concern for international human rights bodies, regional courts and commissions, and national courts and human rights institutions.<sup>334</sup>

Unsurprisingly, for many indigenous peoples, imposed natural resource extraction and conservation have become synonymous with the displacement of their peoples and animals, the denial of access to or destruction of lands and natural resources, and the elimination of traditional livelihoods and ways of life. The underlying cause for this historical and contemporary reality has been the failure of States, corporations and conservation organizations to guarantee respect for indigenous peoples' rights to lands, territories and resources and their associated self-determination-based decision-making rights, including their right to consultation and to give or withhold free, prior and informed consent.

This approach is ultimately self-defeating. The realization of indigenous peoples' rights is intimately related to addressing major challenges facing not only indigenous peoples but the broader national and global societies of which they form a part. Goals such as tackling climate change and biological conservation,<sup>335</sup> realizing sustainable and inclusive development, ensuring peace and security,<sup>336</sup> and protecting the world's cultural heritage cannot be achieved without a paradigm shift that incorporates respect for indigenous peoples and their rights. Nowhere is this need more evident and urgent than in the interaction of the extractive, agribusiness, infrastructure and conservation sectors with indigenous peoples.

<sup>333</sup> A/HRC/24/41, para. 4; Julian Burger, *Indigenous Peoples, Extractive Industries and Human Rights* (Brussels, European Parliament, Directorate-General for External Policies, 2014) (EXPO/B/DROI/2013/23), p. 5; for some exceptions see O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada*.

<sup>334</sup> A/HRC/24/41, para. 1; Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources*, paras. 247-333; African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Report of the African Commission's Working Group on Indigenous Populations/Communities*, pp. 130-131.

<sup>335</sup> E/2018/43-E/C.19/2018/11, para. 10.

<sup>336</sup> Liz Alden Wily, "Tackling land tenure in the emergency to development transition in post-conflict States: from restitution to reform", in *Uncharted Territory: Land, Conflict and Humanitarian Action*, Sara Pantuliano, ed. (Rugby, United Kingdom, Practical Action Publishing, 2009), pp. 27-50.

## Recommendations

### To States

- ≡ Be guided by international law criteria for the identification of indigenous peoples, including the criterion of self-identification, and recognize their inherent rights, irrespective of the nomenclature used at the national level.
- ≡ Acknowledge that, for indigenous peoples, securing rights over lands, territories and resources is necessary for their survival as distinct peoples and their exercise of the right to self-determination, by virtue of which they can choose their own social, cultural and economic development paths.
- ≡ Acknowledge the contribution of indigenous peoples to conservation and ensure that policies and programmes relating to conservation or the pursuit of extractive industry, agribusiness or other commercial activities are fully consistent with respect for indigenous peoples' rights.
- ≡ Commit to upholding the rights of indigenous peoples under international human rights law by ratifying ILO Convention No. 169 (1989) and give effect to its provisions and those of the United Nations Declaration on the Rights of Indigenous Peoples through the adoption of legislation recognizing customary tenure rights and providing for culturally appropriate and efficient demarcation and titling processes.
- ≡ Create or reform government structures to facilitate the realization of indigenous peoples' rights, ensuring that they are accountable to and representative of indigenous peoples and that their decisions are not subordinated to government organs regulating business or conservation activities.
- ≡ Review existing laws, administrative procedures and policies regulating extractive, agribusiness, infrastructure and conservation activities and harmonize them with international human rights law instruments and jurisprudence pertaining to indigenous peoples' rights.
- ≡ Ensure indigenous peoples' effective participation in strategic land planning and collaborate with them to investigate alternative non-extractive forms of self-determined development.



- ≡ Guarantee restitution and compensation for lands taken without free, prior and informed consent, including those taken as a result of extractive, agribusiness or infrastructure projects or the establishment of protected areas, and provide culturally appropriate redress for historical and ongoing harm caused.
- ≡ Collaborate with indigenous peoples in the drafting or reform of legislative, administrative or policy measures impacting their rights, including legislation or other measures regulating consultation processes, and ensure that these are culturally appropriate and aimed at guaranteeing indigenous peoples' collective rights.
- ≡ Obtain indigenous peoples' free, prior and informed consent for the issuance of concessions for extractive or other projects or the establishment or extension of protected areas in or near their territories. Where indigenous peoples have developed their own consultation and free, prior and informed consent protocols, these should be respected.
- ≡ Ensure that consultations to obtain consent are free of interference from government actors, companies or the military, and facilitate indigenous peoples' internal consensus-building and decision-making practices, respecting their time frames, customary laws and representative structures.
- ≡ For activities impacting indigenous peoples, require participatory and independently verified environmental, social and human rights impact assessments as well as acceptable mitigation measures and fair and equitable benefit-sharing and compensation in accordance with international human rights law guidance.
- ≡ Ensure the full and effective participation of indigenous peoples in the governance of protected areas on the basis of free, prior and informed consent and work in close collaboration with them to eliminate any restrictions that prohibit them from carrying out their traditional subsistence and cultural activities within these areas.
- ≡ Protect indigenous rights defenders, ensuring that they are not subject to the use of force, harassment, acts of violence, killings, enforced disappearances or criminal prosecution when asserting the rights of their peoples, and put an immediate end to the practice of equating indigenous peoples' representatives with terrorists.



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- ≡ Ensure that prompt and transparent investigations are carried out to address the systematic nature and root causes of harassment, acts of violence and killings of indigenous peoples; that all those responsible for such acts are prosecuted; and that culturally appropriate and effective safeguard mechanisms are in place to protect those who have been threatened or harmed.
- ≡ Prohibit non-consensual military presence in indigenous territories in the context of consultations regarding activities impacting indigenous peoples' rights and refrain from using the public interest argument to justify military deployment.
- ≡ Review counter-insurgency programmes to ensure that they are consistent with the protection, respect and fulfilment of indigenous peoples' rights and avoid labelling indigenous peoples who are impacted by conflict as insurgents.
- ≡ Ensure that the judiciary, lawyers, prosecutors, law enforcement officials, and civil servants responsible for natural resource exploitation or environmental management are fully cognizant of indigenous peoples' rights and have a proper appreciation of the importance of respectful intercultural dialogue when engaging with indigenous peoples.
- ≡ Comply with and fully implement the judgments and decisions of national courts and regional and international human rights monitoring mechanisms regarding indigenous peoples' rights and indigenous justice systems.
- ≡ Ensure that the national justice system fully respects the rights of indigenous peoples, recognizes the right of indigenous peoples to maintain and develop their own justice systems, and acknowledges the central role such systems can play in resolving disputes and addressing violations of indigenous rights to lands, territories and resources.
- ≡ Engage in good-faith dialogue with indigenous peoples to assess and agree on how their customary laws and national laws can best be harmonized to ensure effective rights-based regulation of lands and natural resources. The adoption of a flexible approach to judicial boundaries between these systems is recommended.
- ≡ Avoid collusion with private sector actors in activities that deny indigenous peoples access to remedies and work with indigenous peoples to identify and overcome any barriers to accessing remedies.

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- ≡ Implement the recommendations from the thematic studies on extractive industries, conservation, human rights defenders, participation, and access to justice that have been produced by United Nations Special Rapporteurs, the Working Group on Business and Human Rights, the Expert Mechanism on the Rights of Indigenous Peoples, and regional human rights bodies.

#### ***To conservation organizations***

- ≡ Collaborate with indigenous peoples in implementing a long-term rights-based approach to conservation that effectively addresses threats to key biodiversity areas and indigenous peoples' rights and well-being, including threats to the lives of indigenous environmentalists from extractive industry, energy and infrastructure activities.
- ≡ Use the leverage conservation organizations have with Governments to advocate for the legal recognition and effective implementation of indigenous peoples' land tenure rights and the full implementation of the Durban Action Plan.

#### ***To business enterprises***

- ≡ Comply with the United Nations Guiding Principles on Business and Human Rights and respect the rights of indigenous peoples, irrespective of the limitations of national laws and regulations, including by carrying out due diligence to ensure that activities do not infringe or contribute to the infringement of indigenous peoples' rights.



Photo: UN-DESA / Broddi Sigurdarson



## Chapter III:

# IMPLEMENTING indigenous peoples' rights to lands, territories and resources

Jérémie Gilbert

## Introduction

The United Nations Permanent Forum on Indigenous Issues has noted that while a number of States have started to recognize indigenous land rights in legislation, “there remains a wide gap between formal recognition and actual implementation”.<sup>337</sup> Indeed, “in countries in which such rights are recognized, they are not fully implemented, or procedures for the implementation of those rights, such as land or resource mapping, demarcation and titling, have often not been completed, suffer significant delays or are shelved”.<sup>338</sup> However, looking beyond the considerable implementation gap, it appears that implementation is taking place on multiple levels and often via initiatives led by indigenous peoples themselves.

Indigenous peoples and their organizations have been using different strategies and approaches to support the implementation of their rights to lands, territories and resources as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. It is not possible to list and offer a comprehensive review of all the relevant

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<sup>337</sup> E/2018/43-E/C.19/2018/11, para. 7.

<sup>338</sup> *Ibid.*, para. 8.

initiatives.<sup>339</sup> Instead, this chapter highlights selected initiatives to share good practices and explore potential avenues to support implementation.

The situations faced by indigenous peoples vary across countries and regions, but there are some common trends in the implementation of indigenous rights. It is difficult to pin down the exact status or extent of implementation, as this is a progressive and multifaceted process that takes place over time and involves various long-term strategies and advocacy. Implementation can take different paths, including land titling, demarcation, territorial negotiations, autonomous arrangements recognizing land and resource rights, co-management and participatory processes, and decisions governing lands, territories and resources. This chapter focuses on territorial self-governance and autonomy; lobbying, negotiations and litigation; mapping, demarcation and titling programmes; and participatory management, access and benefit-sharing.

## **1. Territorial self-governance and autonomy**

The United Nations bodies supporting indigenous rights have focused their attention on autonomy and self-government as potential arrangements for supporting land rights. Both the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples have conducted several studies looking at self-governance.<sup>340</sup> The 2018 report of the United Nations Special Rapporteur on the rights of indigenous peoples also focuses on autonomy and self-governance, highlighting several examples of indigenous governance systems and some of the positive outcomes achieved in terms of sustainable development.<sup>341</sup> In this report it is noted that “the right to self-government finds concrete expression in how indigenous peoples are able to truly decide on their own priorities with regard to the use and management of their lands, territories and resources”.<sup>342</sup> In 2018, the Indigenous Peoples and Development

<sup>339</sup> The Indigenous Navigator constitutes “a framework and set of tools for and by indigenous peoples to systematically monitor the level of recognition and implementation of their rights”; for a comprehensive and up-to-date review, see [www.indigenousnavigator.org/](http://www.indigenousnavigator.org/).

<sup>340</sup> A/HRC/18/42; A/HRC/15/35; E/C.19/2018/7.

<sup>341</sup> “Rights of indigenous peoples”, note by the Secretary-General transmitting the report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz (A/73/176).

<sup>342</sup> *Ibid.*, para. 91.

Branch of the United Nations Department of Economic and Social Affairs organized an international expert group meeting on the theme “sustainable development in the territories of indigenous peoples”, recommending that “the Permanent Forum on Indigenous Issues should give special consideration to indigenous peoples’ experiences with autonomy and governance systems in their expression of self-determination”.<sup>343</sup>

All of these studies provide multiple examples of indigenous self-governance systems and autonomous arrangements across the world, including territorial self-governance, cultural autonomy, and administrative and political participation. Although autonomy can be exercised through different self-government institutions and political arrangements, not all of these encompass rights to land and natural resources.

The review below focuses on different forms of autonomy to explore how indigenous peoples can ensure the most effective control and implementation of their rights to lands, territories and resources. The successive sections explore the following approaches to self-governance: territorial self-governance, where indigenous peoples exercise full self-determined control over lands and natural resources that are part of their ancestral territories; more “classical” autonomy agreements, where indigenous peoples exercise limited autonomous control over land rights; and political forms of autonomy, where indigenous political organizations can exercise some form of political influence and control over land rights.

## **1.1 Territorial self-governance and land rights**

Territorial self-governance refers to situations in which indigenous territorial entities exercise public policy functions independent of other sources of authority. A number of indigenous communities have entered into territorial self-governance agreements that allow them to take control of lands and natural resources. In Canada, there are several forms of self-governance arrangements, and many of the self-government agreements enable indigenous peoples to create “their own regulations on land, resources, business, culture, housing, health care, education and other elements that previously fell under the responsibility of federal or provincial governments”.<sup>344</sup> One of the most developed forms of territorial self-governance is in Nunavut, which is one of the Inuit autonomies in the Arctic and sub-Arctic regions of Canada. The creation of Nunavut in 1999 was the outcome of the largest aboriginal land claims agreement ever concluded between the Government and the native Inuit. The management of land and natural resources

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<sup>343</sup> E/C.19/2018/7, para. 60.

<sup>344</sup> Tracey Lindeman, “Landmark agreement gives indigenous ‘forgotten people’ power to self-govern”, *The Guardian*, 4 July 2019.



Photo: Visit Greenland / Aningaaq R. Carlsen

constitutes an important element of the Nunavut Land Claims Agreement, which guarantees the Inuit meaningful involvement and participation in decisions relating to the preservation and future development of lands in the Nunavut Settlement Area. Within the framework of the Agreement, the Inuit are provided with land surface ownership of 18 per cent of Nunavut and subsurface rights to 10 per cent of this land.<sup>345</sup> The Inuit have also reached agreement on specified hunting and fishing rights covering the entire Nunavut region, and a number of institutions now recognize and give the Inuit co-management rights. In 2008, the Lands and Resources Devolution Negotiation Protocol was signed, “laying out the jointly agreed upon broad principles for Nunavut devolution” and more control over land and natural resources. In 2019, the Government of Canada, the Government of Nunavut, and Nunavut Tunngavik Incorporated took an important step on the road to devolution in Nunavut with the signing of an agreement in principle – a significant milestone in placing decision-making power over land and

<sup>345</sup> International Work Group for Indigenous Affairs, *Indigenous Peoples’ Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination* (Copenhagen, 2019), p. 32.

resources in the hands of Nunavut residents while also ensuring that the economic and other benefits of resource development in the region are shared with the people of Nunavut.<sup>346</sup> It is expected that this will lead to full devolution in the next five years.

Across Canada, a number of First Nations have entered into agreements with provincial governments and the federal Government to exercise greater self-governance over their territories. The Nisga'a in British Columbia, for example, are party to an agreement that allows the Nisga'a Lisims Government to exercise self-governance in a broad range of areas, including education, lands and resources.<sup>347</sup> Overall, there are 25 self-government agreements in Canada involving 43 indigenous communities, and there are about 50 self-government negotiations in process across the country.<sup>348</sup> However, as highlighted by the Special Rapporteur on the rights of indigenous peoples, "the majority of First Nations have not yet concluded negotiations on treaties or land claim agreements and therefore, in practice, have limited rights to self-governance".<sup>349</sup>

Greenland offers additional examples of territorial self-governance. The indigenous peoples of Greenland are Inuit and make up the majority of the population.<sup>350</sup> In 2009, the Act on Greenland Self-Government came into force, replacing the Greenland Home Rule Act established in 1979. The Self-Government Act represents the constitutional position of Greenland in Denmark; it recognizes the right of the people of Greenland to self-determination under international law and is based on an agreement between the Government of Greenland and the Government of Denmark as equal partners. The governing authorities in Greenland comprise an elected assembly – the *Inatsisartut* (Parliament) – and an administration led by the *Naalakkersuisut* (Government). With the Self-Government Act, the Greenland authorities have assumed responsibility for the administration of the area's mineral resources, whereby the authorities have the right to utilize the mineral resources found in the subsoil and to accrue revenues from activities related to such resources. These revenues will reduce the size of the subsidy Greenland receives from the Government of Denmark.

<sup>346</sup> Canada, "Canada, Nunavut and Nunavut Tunngavik Inc. reach a significant milestone towards devolution in Nunavut with signing of an agreement-in-principle", news release, 15 August 2019.

<sup>347</sup> See the Nisga'a Final Agreement, available from [www.nisgaalisims.ca/nisgaa-final-agreement](http://www.nisgaalisims.ca/nisgaa-final-agreement).

<sup>348</sup> Figures and statistics from the Government of Canada website (<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>).

<sup>349</sup> A/73/176, para. 71.

<sup>350</sup> International Work Group for Indigenous Affairs, "Indigenous peoples in Greenland" (Copenhagen).

## **1.2   Autonomy and land rights**

Autonomy is exercised within the framework of several different types of arrangements typically linked to cultural and political rights within the State structure. Not all autonomy agreements include control over land and natural resources, but indigenous peoples have increasingly pushed for the development of autonomy agreements which specifically include rights to lands, territories and resources. This is particularly the case across Latin America. In Nicaragua, the Government has recognized two main autonomous regions – the North Caribbean Coast Autonomous Region and the South Caribbean Coast Autonomous Region – formally acknowledging that 30 per cent of the country's territory is under the administration of communal/territorial indigenous governments. The implementation of land rights occurred with the adoption of a 2003 law enacting the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers. This law clarified the right to self-governance of the communities and created a procedure for the granting of land. Within the framework of autonomy, it was recognized "that collective land rights were inalienable, imprescriptible and non-seizable, and that indigenous forest concessions required the approval of the communities themselves and the autonomous government".<sup>351</sup> As part of this process, the Government initiated a title-granting process. Between 2005 and 2017, land titles were issued to 23 indigenous territories representing 32 per cent of the national territory and 56 per cent of the Caribbean coast of Nicaragua.<sup>352</sup> However, there is still a need to carry out the regularization (*saneamiento*) process, which consists of establishing whether there are third-party property claims or rights superimposed on the indigenous territories so that appropriate steps can be taken to ensure that indigenous rights are respected and land tenure security strengthened.<sup>353</sup>

In the Plurinational State of Bolivia, "in the light of the Framework Law on Autonomy and Decentralization, No. 031 of 22 July 2010, a number of indigenous peoples are now forming their own self-governments. A total of 36 indigenous autonomies have commenced the process of achieving self-government, 21 by means of municipal conversion and 15 by territorial means or indigenous native peasant territories" (*tierras colectivas de origen*). Three of these autonomies, the Charagua Iyambae in Santa Cruz, the Uru-Chipaya in Oruro, and the Raqaypampa in Cochabamba, "have already achieved self-government, and another five have achieved autonomous status through

<sup>351</sup> E/C.19/2011/5, para. 30.

<sup>352</sup> International Work Group for Indigenous Affairs, *Indigenous Peoples' Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination*, p. 18

<sup>353</sup> *Ibid.*

a declaration of constitutionality”.<sup>354</sup> In 2017, the Guaraní of Charagua Iyambae officially became the first autonomous indigenous and aboriginal farming community in the Plurinational State of Bolivia after years of fighting to regain their self-governance and territory. The Government also agreed to sign a titling agreement as part of the process of autonomy for the Multi-ethnic Indigenous Territory (*Territorio Indígena Multiétnico*) in the south Amazonian department of Beni, “guaranteeing collective title to the area claimed through the agrarian procedure, along with a continuation of the process of autonomy”.<sup>355</sup>

In Panama, the *comarcas* system recognizes indigenous peoples’ “collective rights to their lands, their self-government institutions and their legal systems (with the exception of penal matters)”. The five special territorial units established within this framework “together account for over 20 per cent of the country’s territory”.<sup>356</sup> As an illustration, the Guna Yala *Comarca* exercises administrative autonomy through general, traditional, regional and local councils. The *Comarca* is governed by Guna traditions and customs and makes its own decisions. Indigenous peoples make the majority of decisions on cultural, economic and political matters affecting their populations and monitor the status and implementation of indigenous rights. As noted by the Expert Mechanism on the Rights of Indigenous Peoples, “the establishment of indigenous *comarcas* ... serves as a good example of how recognition of land is tied to self-determination, autonomy and cultural rights”.<sup>357</sup>

The Government of Colombia has recognized 28 per cent of the country’s territory as *resguardos indígenas*,<sup>358</sup> with more than 600,000 hectares legally titled to indigenous communities. For a long time there was not much implementation on the ground, but in 2018 a presidential decree was signed to create a special regime for the implementation of indigenous peoples’ own systems of administration in their territories. The “Congress issued the Organic Law on Territorial Zoning, which ... [defines] relations and coordination between indigenous territorial entities and the municipalities and departments”.<sup>359</sup>

<sup>354</sup> “Update on the promotion and application of the United Nations Declaration on the Rights of Indigenous Peoples”, note by the Secretariat (E/C.19/2019/6), para. 13; International Work Group for Indigenous Affairs, *The Indigenous World 2018* (Copenhagen, 2018), p. 181.

<sup>355</sup> International Work Group for Indigenous Affairs, *The Indigenous World 2019*, p. 131.

<sup>356</sup> “Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation” (A/HRC/EMRIP/2019/3), para. 33.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Resguardos indígenas* are protected reserves for which collective property titles are legally issued to safeguard indigenous territorial rights and cultural and political autonomy. This creates a pathway for indigenous administration of territories within a secure legal framework.

<sup>359</sup> International Work Group for Indigenous Affairs, *The Indigenous World 2019*, p. 154.

This latest development means that indigenous communities in Guainía, Vaupés and Amazonas will now be able to operate as local governments and can, through their Associations of Traditional Indigenous Authorities, administer their lands, territories and resources.<sup>360</sup>

Another significant step forward in the implementation of rights to lands, territories and resources was taken by the Wampis Nation in Peru. In 2015, the Wampis peoples officially declared themselves a self-governing community with their approval of the Statute of the Autonomous Territorial Government of the Wampis Nation. This declaration followed years of internal consultation processes to ensure community cohesion and preparation to support the protection and promotion of their cultural traditions and rights. Self-governance is based on the Statute, which outlines a significant number of priority areas ranging from economic development and territorial and cultural rights to the Wampis vision for the future. "The Statute is built ... on the obligations of the Peruvian State to respect the rights and autonomy of indigenous peoples and nations. Among other principles, the Statute provides that any activity that could affect Wampis territory requires the free, prior and informed consent of the Wampis Nation."<sup>361</sup> The Wampis Nation approached the Government of Peru seeking formal recognition of their autonomy to protect themselves and their land from exploitation. As part of this, they have coordinated intensively with various government institutions, including the Ministry of Energy and Mines, to address illegal mining, which has enabled a more effective response to and ongoing monitoring of illegal mining activities.<sup>362</sup>

### **1.3 Political participatory processes: implementing land rights**

Self-determination over land and natural resources can also be exercised through the establishment of political participatory systems.

In Mexico, several indigenous communities have set up their own political systems at the municipal level. The San Andrés Totoltepec is the first community in Mexico City to have established its own autonomous government. It has set up commissions to deal with the community's different demands relating to priorities such as territorial reorganization, social dialogue, urban services, safety and crime prevention, education, culture, trade, social development, finance and administration, sustainable development and

<sup>360</sup> Martin von Hildebrand, "Indigenous autonomy: new decree recognises autonomy of indigenous communities across Colombian Amazon", *Ciranda*, 17 April 2018 (GAIA Foundation).

<sup>361</sup> E/C.19/2019/6, para. 14; International Work Group for Indigenous Affairs, "Indigenous peoples in Peru", available at [www.iwgia.org/en/peru/3265-wampis-nation-peru](http://www.iwgia.org/en/peru/3265-wampis-nation-peru).

<sup>362</sup> See E/C.19/2018/7, para. 21.



Photo: UN-DESA / Broddi Sigurdarson



environment.<sup>363</sup> The communities of Ayutla de Los Libres in Guerrero and Capulálpam de Méndez in Oaxaca have set up similar systems of municipal autonomy.

It is impossible to mention all of the many examples of territorial self-governance, autonomy and autonomous political participatory processes supporting the implementation of indigenous rights to lands and natural resources.<sup>364</sup> Self-determination is extremely important because it supports the fundamental right of indigenous peoples to exercise full authority over themselves, their lands and their resources, but not all autonomy arrangements concede or facilitate this level of authority. Caution is necessary when examining autonomy agreements, as very often the control, ownership, use and management of land and natural resources remain limited. As noted by the Special Rapporteur on the rights of indigenous peoples, “while several indigenous governance systems have been officially recognized, implementation challenges remain in most cases, owing to a lack of full authority to govern, a lack of resources or the inability to fund governance systems or undertake economic activities that would generate the funds needed”.<sup>365</sup>

<sup>363</sup> International Work Group for Indigenous Affairs, *Indigenous Peoples’ Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination*, pp. 22-23.

<sup>364</sup> See International Work Group for Indigenous Affairs, *Indigenous Peoples’ Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination*.

<sup>365</sup> A/73/176, para. 86.

## **2. Lobbying, negotiations and litigation**

Many indigenous communities engage in lobbying and negotiations to get their rights recognized and implemented. There are many avenues of persuasion, including government and investor engagement strategies and support for the development of mechanisms for inclusive and accountable local land governance.<sup>366</sup> When this fails, some communities use the judiciary to seek remedies for rights violations or to secure recognition of their rights when other branches of government have failed to do so. Litigation on land and natural resource rights has increased tremendously over the last decade, with a growing number of indigenous communities turning to the courts to seek remedies for land rights violations. This rise in litigation is apparent at both the national and international levels; an increasing number of domestic courts – especially high courts, supreme courts and constitutional courts – are addressing land rights cases, and there is a significant body of relevant decisions and jurisprudence emerging from international and regional judicial institutions.

### **2.1 Lobbying and negotiations**

A number of Governments have committed to developing national action plans for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.<sup>367</sup> While some States have developed sector-specific national strategies relating to indigenous peoples, to date only a small number of States appear to be developing action plans expressly related to the implementation of indigenous rights to lands, territories and resources.<sup>368</sup>

There are a number of ongoing lobbying and negotiation processes within and between countries. In 2017, the Governments of Finland, Norway and Sweden and the three Sámi parliaments of those countries prepared a draft Nordic Sámi convention. This is a cross-border initiative aimed at achieving a common standard with respect to certain aspects of Sámi livelihoods, culture, languages and ways of life. The parties are still engaged in discussions and are working towards the adoption of the draft convention.

<sup>366</sup> For an overview and analysis of good practices, see the International Land Coalition database of good practices, as well as ILC Toolkit 5: Indigenous Peoples' and Local Communities' Land Rights Toolkit (Washington, D.C., 2018).

<sup>367</sup> See A/RES/69/2.

<sup>368</sup> "Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017", report of the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/36/56), para. 47.

In New Zealand, there have been several processes of negotiation focused on improving the recognition of indigenous land rights.<sup>369</sup> As part of the Treaty of Waitangi settlement process, New Zealand signed the 2008 Central North Island Forests Land Collective Settlement Act, which returned ownership of central New Zealand forests to Māori tribes; this is one of the largest land claims to be resolved under the treaty settlement process. More recent developments indicate further progress towards the recognition of indigenous rights. In 2016, the *Matiki Mai Aotearoa* report of the Independent Working Group on Constitutional Transformation proposed models for an inclusive constitution based on the Treaty of Waitangi, with a focus on improved relationships reflecting self-determination, partnership and equality.<sup>370</sup>

The modern treaty approach in Canada also offers a potential model for contemporary negotiations on land rights. Since 1993, several First Nations have pursued treaty negotiations with the federal Government and their provincial governments, resulting in a number of treaties which focus on the transfer of government lands to indigenous nations.<sup>371</sup> To date, 26 modern treaties covering over 40 per cent of the country's land mass have been concluded between the Crown and indigenous peoples.<sup>372</sup>

In Guyana, negotiations on the Wapichan people's ancestral land claims started in 2016 with the primary objective of agreeing "on the measures required to fairly and finally resolve the land and territorial rights claims of the indigenous peoples in accordance with applicable law, through a process based on equality and mutual respect that guarantees and respects the indigenous peoples' free, prior and informed consent". This has been seen as "an historic development representing the first time that Guyana has agreed to enter into structured talks with indigenous peoples to resolve outstanding land issues. It also represents a significant change in approach from the largely unilateral decision-making on this issue that took place until very recently."<sup>373</sup>

Negotiations on land and resource rights typically involve Governments and indigenous peoples but are increasingly including private sector stakeholders, including corporations and investors. In the Russian Federation, "the Udege people had an open

<sup>369</sup> For review, see "Report of the Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand" (A/HRC/EMRIP/2016/CRP.4).

<sup>370</sup> Report of *Matiki Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Auckland, Matike Mai Aotearoa, 2016).

<sup>371</sup> For references, see the official portal of the Government of Canada (<https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>).

<sup>372</sup> Land Claims Agreements Coalition, "What is a modern treaty?", overview and timeline available at <https://landclaimscoalition.ca/modern-treaty/>.

<sup>373</sup> Fergus Mackay, "The Wapichan people and the Guyanese Government agree terms of reference for formal land talks", Forest Peoples Programme news article, 26 July 2016.

confrontation with the Terneiles Company, which provoked a crisis in the regional government. Indigenous peoples and the company established a relationship based on international standards regarding indigenous peoples. This included environmental impact studies as well as compensation. The discussions between the indigenous peoples and the company developed into a good relationship, based on the understanding that it was necessary to cooperate and trust in the partnership. This was also a highly positive experience for the community, as there was no clear policy on the part of the Government regarding the relationships between companies and indigenous peoples.”<sup>374</sup>

Another platform for lobbying and negotiation has been created through the increased mobilization of indigenous peoples and their partnerships with supportive organizations. As noted by the Indigenous Peoples Major Group for Sustainable Development, the mobilization of indigenous communities is an important driver of reform and transformation in many countries and regions.<sup>375</sup>

<sup>374</sup> E/C.19/2011/5, para. 34.

<sup>375</sup> The Indigenous Peoples Major Group is a forum for coordination and planning and is one of the nine recognized Major Groups that can officially participate in SDG processes at the global level.

### **Box 3.1**

#### **Productive partnerships between indigenous peoples and civil society organizations**

Recent experience in the Amazon region of Colombia “demonstrates that innovative partnerships between indigenous peoples, government land agencies and civil society organizations can help advance and unblock pathways to legally secure indigenous territories. In the case of the Uitoto (Muina+), more than 0.5 million hectares of old growth rainforest received title in 2017 under two indigenous reserve (*resguardo*) boundary extensions adjacent to a deforestation hotspot. This major achievement has been made due to concerted efforts seeking title extension made by the Resguardo Councils, the regional collective Association of Traditional Indigenous Authorities (CRIMA), using socioeconomic studies, surveys and demarcation work provided by NGOs, and with civil society advocacy support to press the National Lands Agency to fast track the application and remove institutional blockages.”

“With the support of civil society, the indigenous Amazonian Kayapo in Brazil have successfully conserved 105,000 square kilometers of tropical forests in a frontier zone characterized by heavy deforestation, through decades of fighting encroachment by illegal gold miners, mahogany loggers and ranchers. They also led an environmental movement to pressure the World Bank to stop loans for the construction of a mega-dam project on the Rio Xingu, which would have flooded and destroyed parts of their territory. This is an example of how building alliances with indigenous peoples and investing in the capacity building and empowerment of the rightful indigenous owners of the forest can result in large-scale conservation of the world’s richest ecosystems.”

*Source: Excerpted from Joji Carino, Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples, Loreto Tamayo, ed. (n.p., Indigenous Peoples Major Group for Sustainable Development, 2019), p. 63.*

Recently, there have been a number of notable cases in which indigenous peoples have successfully mobilized, lobbied and advocated for change – including recognition of their rights to land and natural resources.<sup>376</sup> In Nepal, the demands and protests of indigenous communities led to the unprecedented outcome of the parties responsible for four large-scale business projects recognizing indigenous peoples' right to free, prior and informed consent and providing adequate compensation, environmental clean-up and infrastructure repair. In one case, a road expansion project carried out by the Government in the ancestral land of the Newar "adversely impacted more than 150,000 people ... and resulted in massive human rights violations, including mass forced eviction, the demolition of symbols of identity such as cultural and religious sites, and intimidation". Following mass mobilization, protests, documentation and litigation, a directive order from the Supreme Court of Nepal was issued prohibiting "any work that adversely affects the security of a home unless there are no alternative solutions"; requiring that "the rights to relocation and rehousing of the displaced [be dealt with] equitably"; providing "benefits and compensation as per the Land Acquisition Act and the Land Acquisition Regulations"; and calling for a "focus on conservation of the environment and archaeological sites while implementing any development project".<sup>377</sup> The Lawyers' Association for Human Rights of Nepalese Indigenous Peoples has been particularly proactive in supporting such initiatives and in engaging with indigenous communities and relevant stakeholders, including government ministries, financial institutions, the national human rights commission, and private companies. The organization's lawyers have filed cases and claims on behalf of the communities and have advised them on appropriate strategies to ensure that their voices are heard.<sup>378</sup>

## 2.2 Domestic courts

Across the globe, indigenous peoples are increasingly resorting to litigation to seek remedies for violations of their fundamental human rights. The last decade has been particularly rich in relevant case law emerging from different parts of the globe, including significant legal decisions concerning indigenous peoples' rights

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<sup>376</sup> See International Work Group for Indigenous Affairs, "Editorial", in *The Indigenous World 2019*, pp. 16-17.

<sup>377</sup> Sunuwar Sewa Samaj and Newa Misa Daboo, "Joint submission on the violations of indigenous peoples' rights in Nepal: 3rd Universal Periodic Review, 37th session, July 2020" (Cambridge, Massachusetts, Cultural Survival), p. 6.

<sup>378</sup> For more details, see International Work Group for Indigenous Affairs, *Annual Report 2018* (Copenhagen, 2019), pp. 15-17.

in Belize,<sup>379</sup> India<sup>380</sup>, Ecuador,<sup>381</sup> Colombia<sup>382</sup> and Indonesia.<sup>383</sup> National courts have been instrumental in the application of indigenous rights, particularly with respect to the ownership of lands, territories and natural resources. In 2019, a court in Ecuador handed down a significant decision preventing the Government from selling land in the Amazon rainforest to oil companies – a ruling linked to implementation of the rights of the Waorani people of the Pastaza province over their lands, territories and resources.<sup>384</sup> The decision by the Pastaza Provincial Court voids the consultation process with the Waorani undertaken by the Government of Ecuador by affirming that it does not respect their right to free, prior and informed consent. The verdict also disrupts the contemplated auctioning of 16 oil blocks that cover over 7 million acres of indigenous territory by providing an invaluable legal precedent for other indigenous nations across the Ecuadorian Amazon.<sup>385</sup>

In 2013, the Constitutional Court of the Republic of Indonesia ruled that the customary forests of indigenous peoples should not be classified as State forest areas, enabling wider recognition of indigenous peoples' collective rights to their territories. The ruling came following an action brought by the Indigenous Peoples' Alliance of the Archipelago. The Constitutional Court judgment is regarded as a landmark decision because it compels the Government to return customary forests to indigenous peoples, opening a window of opportunity for them to potentially secure at least 40 million hectares of customary territory. The Government has begun to enforce the decision, though progress has been modest because regulations have to be formulated and issued at the provincial or district level and are subject to budgetary allocations and, above all, the political will of local governments and leaders.

<sup>379</sup> Supreme Court of Belize, *Sarstoon Temash Institute for Indigenous Management (SATIIM) and others v. Attorney General of Belize and others*, Claim 394 of 2013 (Judgment of 3 April 2014).

<sup>380</sup> Supreme Court of India, *Jagpal Singh & Ors. v. State of Punjab & Ors.*, Civil Appeal No. 1132 @ SLP@ No. 3109/2011 (Judgment of 28 January 2011).

<sup>381</sup> Constitutional Court of Ecuador, *Leonel Ufredo del Pezo Yagual (President of the Montañita Commune) et al.* (2013).

<sup>382</sup> See Constitutional Court of Colombia, Sentencias T-661/15, T-379/14 and T-129/11.

<sup>383</sup> Constitutional Court of the Republic of Indonesia, Decision 55/PUU-VIII/2010, reviewing Law 18 of 2004 on Plantations, issued 6 September 2011 (Plantation Law case [2011]); Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, issued 16 June 2011 (Coastal and Remote Areas Law case [2011]); and 35/PUU-X/2012 (*The Indigenous Peoples' Alliance of the Archipelago (AMAN) v. Government of Indonesia*).

<sup>384</sup> SBS News, "Indigenous tribe celebrates court decision to protect Amazon rainforest", updated 13 July 2019.

<sup>385</sup> See Rachel Riederer, "An uncommon victory for an indigenous tribe in the Amazon", *New Yorker*, 15 May 2019.



Malaysia is another country that has witnessed increased recourse to litigation involving lands, territories and resources. Most of the cases “involve the acquisition of or entry into customary lands by corporations and government entities without the knowledge or consent of indigenous peoples”; there have been over 200 cases of this nature in Sarawak, a similar number in Sabah, and a substantial number in Peninsular Malaysia.<sup>386</sup> In an unprecedented move, the federal Government has filed a suit to protect the native land rights of the Orang Asli (Original People). This represents one of the first cases in which a federal Government is taking legal action against a constituent state government for failing to respect and protect indigenous land rights.<sup>387</sup>

Courts in Colombia have also ruled on a number of significant land rights cases. “In 2014, following action brought by the Embera Katío people, a local court ordered 11 mining companies to vacate 50,000 hectares in the country’s north-west, annulling titles granted by the Government and reinstating the rights of the traditional owners who had been forced from the land by armed groups”.<sup>388</sup> In 2011, in *Álvaro Balarín et al.*, “the Constitutional Court of Colombia ruled that, for development plans (in this case exploration and extractive activities of mineral resources) that have a major impact on indigenous territories”, the State must not only consult with indigenous peoples but also obtain their free, prior and informed consent.<sup>389</sup>

The Caribbean Court of Justice, acting as the highest court for cases concerning Belize, ruled that the Government had not respected and recognized the customary rights to land and resources of the Maya peoples. In the case of *The Maya Leaders Alliance and others v. The Attorney General of Belize*, the Court “affirmed the rights of the Mayan indigenous communities over their traditional lands”.<sup>390</sup> Notably, the Court recognized that the customary land rights of the Maya were deemed valid under and protected by the Constitution. In addition to requiring the demarcation and titling of their lands, the Court ruled that the Maya were due monetary compensation.

In 2016, “the Constitutional Court of the Republic of Sakha (Yakutia) in the Russian Federation, in the context of clarifying the meaning of article 42 of its Constitution,

<sup>386</sup> Office of the High Commissioner for Human Rights, “Submission to the UN Expert Mechanism on the Rights of Indigenous Peoples in relation to the call for submissions on access to justice in the protection and promotion of the rights of Indigenous peoples, in accordance with Human Rights Council Resolution 21/24 (Ref: A/HRC/21/24) on Human Rights and Indigenous Peoples” (11 February 2013), para. 34.

<sup>387</sup> V. Anbalagan, “Malaysia: Kelantan government applies to strike out Orang Asli case”, Indigenous Peoples Human Rights Defenders, 21 July 2019.

<sup>388</sup> Oxfam, International Land Coalition, Rights and Resources Initiative, Common Ground, p. 31.

<sup>389</sup> A/HRC/EMRIP/2017/CRP.2, para. 42; see Constitutional Court of Colombia, Sentencia T-129 of 3 March 2011, for the judgment on this case.

<sup>390</sup> *Ibid.*, para. 35.

held that it should be understood as ... [recognizing] 'the complete set of natural collective rights of the indigenous people of Yakutia', ... their 'territorial unity, [and their] socio-economic, state, legal, national, cultural and linguistic identity'". The Court affirmed that the intention of article 42 was to "guarantee the preservation and rebirth" of the Republic's indigenous peoples and cited the Declaration on the Rights of Indigenous Peoples as a consensus statement on their inalienable rights.<sup>391</sup>

In New Zealand, a Supreme Court majority decision handed down in 2017 held that the Government had "an enforceable fiduciary duty ... to the collective descendants of the original customary title-holders to land".<sup>392</sup> Specifically, the Supreme Court ruling required the authorities "to reserve 15,100 acres for the benefit of the customary owners" from the land obtained during colonization.<sup>393</sup> Significantly, the judges made several references to the United Nations Declaration on the Rights of Indigenous Peoples to justify particular aspects of their decision.

In 2019, the High Court of Australia issued a landmark decision in which the collateral impact of the loss of land rights was formally recognized in the approach taken to resolve native title compensation claims.<sup>394</sup> In a matter brought forward by the Ngaliwurru and Nungali traditional owners in the town of Timber Creek in the Northern Territory, the Court recognized the right to reparations and compensation for the loss of rights to land and resources, notably highlighting the cultural and spiritual loss occasioned by the loss of native title rights.

Across Canada, there has been significant and extensive litigation over indigenous rights, with many legal decisions having a direct impact on rights to land and natural resources. The courts in Canada have established an obligation to consult and seek accommodation with indigenous peoples on activities that can affect them, including the development of forest areas.<sup>395</sup> In Northern Europe, Sámi rights have been an important focal point in litigation on indigenous issues. "In 2012 the Swedish Supreme Court delivered its ruling in the Nordmaling Case, a landmark case on Sámi land rights. The Supreme Court based its ruling on what constitutes customary practices in reindeer husbandry. Under this approach, the Court found that the communities

<sup>391</sup> Ibid., para. 46.

<sup>392</sup> Supreme Court of New Zealand, *Proprietors of Wakatū v. Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [Wakatū]; David V. Williams, "New Zealand Supreme Court recognizes fiduciary duties to enforce collective indigenous rights", Oxford Human Rights Hub, 22 March 2017.

<sup>393</sup> Williams, "New Zealand Supreme Court recognizes fiduciary duties".

<sup>394</sup> High Court of Australia, *Northern Territory v. Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (13 March 2019).

<sup>395</sup> Supreme Court of Canada, *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] SCC 74.



had established property rights to an extensive area of land.” As noted at an expert group meeting organized by the United Nations Department of Economic and Social Affairs, “the ruling sets a precedent, as it indicates that Sámi reindeer herding communities hold property rights to all the Sámi traditional territory in Sweden”.<sup>396</sup> More recently, on 23 January 2020, the Supreme Court unanimously decided that the Sámi of the Girjas district in Sweden had exclusive hunting and fishing rights: “Our investigation shows that the Swedish crown, when it began to encourage the colonisation of Lapland, was careful to safeguard the Sámis’ opportunities for hunting and fishing. ... [T]he hunting and fishing rights that the Sámi in the area had at the time of the 1886 law and the following reindeer grazing laws have been transferred to members of the Sámi district today.”<sup>397</sup>

Engaging in litigation to support the implementation of indigenous peoples’ rights to lands, territories and resources can be effective but also carries the risk of a negative outcome. In India, for example, a Supreme Court decision in February 2019 ordered the forced eviction of “indigenous communities and other forest dwellers ... whose claims for tenure security on ancestral lands under the Forest Rights Act 2006” had been rejected.<sup>398</sup> This could potentially result in the eviction of 8 million to 10 million tribal and other forest-dwelling people, since the right of many indigenous communities to live in the forests has not been recognized due to “a combination of misinterpretation, coercion and inducement”.<sup>399</sup> Even when courts rule in favour of indigenous peoples’ rights to lands, territories and resources, there is no guarantee that the judicial system will support the enforcement of indigenous rights or that favourable decisions will be implemented in a timely manner – or at all. As noted by the Expert Mechanism on the Rights of Indigenous Peoples, while the actual implementation of these decisions at the national level and associated reparations continue to be a challenge in many cases, the court decisions in themselves already constitute a form of reparation and may pave the way for subsequent reparation and reconciliation processes.<sup>400</sup>

<sup>396</sup> “International expert group meeting on the theme ‘implementation of the United Nations Declaration on the Rights of Indigenous Peoples: the role of the Permanent Forum on Indigenous Issues and other indigenous-specific mechanisms (article 42)’” (E/C.19/2017/10), para. 25.

<sup>397</sup> Court ruling referenced in Kiara Maher, “Historic Court ruling upholds Sámi rights in Sweden”, *Cultural Survival*, 14 February 2020.

<sup>398</sup> Indrani Sigamany, “Forest rights lost: evictions loom over a million Adivasis”, *International Union for Conservation of Nature*, 6 March 2019.

<sup>399</sup> See Adam Withnall, “Millions of indigenous forest-dwelling Indians face ‘world’s biggest eviction’ in name of conservation”, *The Independent*, 23 July 2019; A/71/229, para. 57.

<sup>400</sup> “Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation”, report of the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/EMRIP/2019/3/Rev.1), para. 68.

There are also some practical issues to consider, including the fact that litigation is usually a very lengthy, formal, technical and costly process. Although litigation certainly represents a meaningful tool for supporting the implementation of indigenous peoples' rights, it is important to identify and acknowledge its limitations. As noted in a recent study measuring the impact litigation can have in the pursuit of indigenous land rights, litigation should be used as part of a wider strategy to support implementation. Indigenous communities that have engaged in long-term litigation in Kenya, Paraguay and Malaysia have noted that the process itself contributes to broader legal empowerment and community mobilization.<sup>401</sup>

### **2.3 International and regional adjudication**

International and regional human rights institutions can provide valuable support for the implementation of indigenous rights to lands, territories and resources. Human rights institutions in Africa have been particularly proactive in recognizing indigenous peoples' rights to land and natural resources. The past decade has seen positive legal developments and some important milestones reached within this context. In a decision handed down in 2010, the African Commission on Human and Peoples' Rights found that Kenya had violated the land rights and other human rights of the Endorois people living around Lake Bogoria and recommended redress for these violations.<sup>402</sup> The Commission ordered Kenya to restore the Endorois to their historical land and provide compensation and restitution by returning the lands or by providing alternative lands of equal extent and quality in agreement with the indigenous community. In 2017, the African Court on Human and Peoples' Rights ruled in favour of the Ogiek people of the Mau Forest of Kenya, who were seeking the demarcation and titling of their ancestral lands as well as redress for human rights violations.<sup>403</sup> This ruling by the Court sets a precedent for all indigenous peoples across the continent with respect to their rights to lands, territories and resources. The legal outcomes of the Endorois and Ogiek cases were positive, but the implementation of the respective decisions has been slow. The Government of Kenya has established different task forces to study the implementation of the ruling, but few changes have taken place on the ground. Since the African Court decision, the Ogiek peoples, through their Ogiek Peoples' Development Programme, have exerted strong pressure on the Government for the implementation of the ruling

<sup>401</sup> Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (New York, Open Society Foundations, 2017).

<sup>402</sup> Human Rights Watch, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003 (2010 Decision).

<sup>403</sup> African Union, African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017 [Ogiek case].



via meetings with the National Land Commission and other key authorities at the local and national levels.

The Inter-American Court of Human Rights has dealt with numerous cases on indigenous rights to lands, territories and resources. In *Xákmok Kásek Indigenous Community v. Paraguay* (2010), the Court highlighted the connection between land rights and the survival of a community when the land is used for economic, cultural, social or religious purposes. The Court also recognized that the relationship between the right to life and the right to water, education and food is intrinsically connected to the right to land and natural resources.<sup>404</sup> In the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), the Court held that Ecuador had violated Kichwa rights “to consultation, to indigenous communal property, and to cultural identity” by having granted a permit to a private oil company to carry out oil exploration activities in its territory without previously consulting the Kichwa.<sup>405</sup> In its ruling on the case of the *Kaliña and Lokono Peoples v. Suriname* (2015), the Court declared the State responsible for violating the political rights of the Kaliña and Lokono Peoples and their rights to the recognition of juridical personality, collective property and cultural identity, and called on the State to adopt relevant domestic legal provisions.<sup>406</sup> Significantly, the Court highlighted that respect for the rights of indigenous peoples may have a positive impact on environmental conservation and that the rights of indigenous peoples and international environmental laws should therefore be seen as complementary rather than exclusionary. Reparations included the granting of legal recognition of collective juridical personality and the delimitation, demarcation and granting of lands and territories.

These are only illustrations of a much larger and more comprehensive body of jurisprudence that has emerged from the Inter-American system for the protection of human rights to support the implementation of indigenous peoples’ rights to lands, territories and resources.<sup>407</sup> The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have developed a detailed process to define remedies and reparations for land rights violations, including measures of non-repetition, recognition of customary land rights, demarcation, and the granting of title. However, implementation on the ground has generally been sporadic. The 2006 Court decision

<sup>404</sup> Inter-American Court of Human Rights, “Case of the Xákmok Kásek Indigenous Community v. Paraguay, Judgment of August 24, 2010 (merits, reparations and costs)”.

<sup>405</sup> Inter-American Court of Human Rights, “Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012 (merits and reparations)”, Series C, No. 245, first introductory paragraph.

<sup>406</sup> Inter-American Court of Human Rights, “Case of the Kaliña and Lokono Peoples v. Suriname”.

<sup>407</sup> See Inter-American Commission on Human Rights, “Indigenous and tribal peoples’ rights over their ancestral lands and natural resources: norms and jurisprudence of the Inter-American Human Rights System” (OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009).

on the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*<sup>408</sup> was finally partially implemented after many years when the Government passed a law in 2014 that took 14,404 hectares from a German-owned cattle-raising business and returned the land to the 160 dispossessed families of the Sawhoyamaxa community. In 2019, after much delay, there was a handover of 140 homes and the first tranche of the community development funds provided by the Government of Paraguay as part of its compliance with the Inter-American Court ruling from 2006.<sup>409</sup> The Inter-American Court has increasingly been involved in supporting the implementation of its decisions, with visits to the communities and Governments of the concerned countries, including Suriname and Paraguay.

## **2.4 Non-judicial mechanisms**

A number of non-judicial and quasi-judicial mechanisms exist that can support the efforts of indigenous peoples to secure their rights. Although these mechanisms do not issue binding legal decisions, they can offer a support structure for negotiations and mediation to facilitate the implementation of indigenous rights to lands, territories and resources.

National human rights institutions have become important allies in efforts to secure the implementation of indigenous peoples' rights. Between 2005 and 2010, the Human Rights Commission of Malaysia received more than 1,100 complaints alleging various human rights violations relating to lands claimed or held under native customary rights; Sabah had the highest number (814), followed by Sarawak (229) and Peninsular Malaysia (45). In 2011, the Human Rights Commission launched its first national inquiry on the land rights of the Orang Asal (Original People). The Commission made a number of recommendations based on the United Nations Declaration on the Rights of Indigenous Peoples, underlining the need for free, prior and informed consent to improve the current status of land rights for indigenous peoples in Malaysia. Similarly, the National Commission on Human Rights in Indonesia "conducted its first national enquiry into the violation of indigenous peoples' land rights in 2014". The National Commission "collected around 140 formal complaints from seven regional hearings that highlighted the issue of unauthorized land-grabbing by big timber companies ... [with] major interests in the opening of forests for oil palm plantations. Numerous companies were operating without permits, using the police to brutalize and intimidate the indigenous communities", which were in an extremely vulnerable position because the Government had

<sup>408</sup> Inter-American Court of Human Rights, "Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*".

<sup>409</sup> Agencia de Información Paraguay, "Gobierno entrega viviendas sociales en comunidad indígena Sawhoyamaxa" (Asunción), 27 junio 2019.

never registered the various indigenous peoples living in the forest. The Commission made various recommendations, one of which related to the establishment of a licensing system for natural resource exploitation based on free, prior and informed consent principles. The examples provided here are representative of the growing role national human rights institutions are playing in supporting the recognition and implementation of the rights of indigenous peoples to lands, territories and natural resources.<sup>410</sup>

Oversight mechanisms established by international financial and development institutions constitute another non-judicial source of support.<sup>411</sup> Although these mechanisms are not legally empowered to issue decisions on land and resource rights, they can intervene to support their implementation by ensuring compliance with minimum standards of protection. Their control over implementation is limited, but they can act as mediators and recommend the modification or cancellation of projects that might affect indigenous rights. The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency have established the Office of the Compliance Advisor/Ombudsman (CAO), an oversight mechanism to which several indigenous communities have submitted complaints. As an illustration, in February 2014, a complaint on behalf of 17 indigenous villages in Cambodia was filed with the CAO regarding the IFC financing of “Hoang Anh Gia Lai (HAGL), ... a rubber plantation company based in Viet Nam, which has been responsible for taking tens of thousands of hectares of indigenous lands and forests in Ratanakiri province.<sup>412</sup> ... In September 2015, the CAO facilitated negotiations between HAGL, the indigenous communities and their NGO representatives that resulted in satisfactory agreement. HAGL agreed to facilitate the communal land title processes for 11 of the affected communities and provide other remedies for the disruption caused by its development activities in Ratanakiri province.”<sup>413</sup>

The *OECD Guidelines for Multinational Enterprises* constitute another source of oversight, urging enterprises to respect human rights – including provisions relating to land rights. Countries adhering to the *OECD Guidelines* have established National Contact Points (NCPs) to raise awareness among multinational enterprises about the *Guidelines’* standards and to serve as a grievance mechanism, handling specific

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<sup>410</sup> Shimreichon Luithui-Erni, *Status of Indigenous Peoples’ Lands, Territories and Resources in Asia* (Chiang Mai, Thailand, Asia Indigenous Peoples Pact, n.d.), p. 26; see also Brenda L. Gunn, *Engaging National Human Rights Institutions in Implementing the UN Declaration on the Rights of Indigenous Peoples*, CIGI Papers No. 171 – April 2018 (Waterloo, Ontario, Canada, Centre for International Governance Innovation, 2018).

<sup>411</sup> For analysis and review, see Doyle, *Business and Human Rights: Indigenous Peoples’ Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America*.

<sup>412</sup> Luithui-Erni, *Status of Indigenous Peoples’ Lands, Territories and Resources in Asia*, p. 25.

<sup>413</sup> *Ibid.*; Rina Chandran, “Cambodia returns land taken from indigenous people in ‘unprecedented move’”, Thomson Reuters Foundation (Bangkok), 27 March 2019.

complaints against companies that have allegedly failed to meet said standards. This mechanism has been used by indigenous peoples to address land rights violations. For example, indigenous communities from Sarawak in Malaysia approached NCP Norway concerning the Murum and Baram hydropower projects that are part of the Sarawak Corridor of Renewable Energy programme initiated by the Government of Malaysia. The indigenous peoples most affected are the Penan, Kenyah and Kayan communities, many of which have already been forced to relocate due to the construction of the Murum Dam or will be displaced if construction of the Baram Dam is approved. The company Sarawak Energy Berhad is the primary developer of both hydropower projects but received technical advice and assistance from Norwegian companies. NCP Norway conducted an initial assessment and engaged in successful mediation which resulted in a joint agreement and commitment to respect the right to free, prior and informed consent of the indigenous communities affected by the projects.<sup>414</sup>

### **3. Mapping, demarcation and titling**

The mapping, demarcation and titling of indigenous territories are usually among the crucial first steps in supporting the implementation of indigenous rights to lands and natural resources. As noted by the Permanent Forum on Indigenous Issues, “relying only on legal recognitions of indigenous lands, territories and resources has been shown to be almost meaningless, unless the physical property is clearly demarcated. Failure to do so invites conflicts over land, especially when valuable resources are involved.”<sup>415</sup> Land demarcation is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. The process of demarcation and titling should be undertaken with the full participation of the communities concerned and based on traditional occupation, ownership or use.<sup>416</sup> Many indigenous communities are proactively engaged in community mapping, which has emerged as an increasingly important tool for the self-demarcation of lands to which they lay claim. As noted in a report commissioned by the Inter-American Development Bank, “indigenous peoples have shown a growing capacity to carry out their own land demarcation and titling programs. Indigenous organizations have developed considerable technical expertise in mapping, computerization, geodesic surveys

<sup>414</sup> See OECD Watch, *Fivas vs. Norconsult*, case overview (date filed: 22 August 2014).

<sup>415</sup> E/C.19/2018/5, para. 22.

<sup>416</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art. 171.



and topography to back up their obvious knowledge of local terrain and boundaries. Acting sometimes through agreements with national Governments, at other times with the support of national and international NGOs, they have played a major role in the initial delimitation of their claimed areas.<sup>417</sup>

### **3.1 Land titling and demarcation**

In general, demarcation and land titling have been slow and often controversial, but there have been a few major programmes and policies targeting both objectives. In Nicaragua, 13 indigenous peoples' territories were demarcated and titled in the Caribbean region, accounting for nearly 19 per cent of the national territory. This was part of the Land Administration Project, a government programme financed by the World Bank to improve land tenure security.<sup>418</sup> Although many individuals received land title, there is some debate as to whether this constitutes the appropriate legal mechanism for the recognition of indigenous collective territorial rights.<sup>419</sup> Nicaragua is not alone in dealing with these dynamics, as many countries are implementing individual titling policies that are not necessarily compatible with or respectful of indigenous territorial rights. In Cambodia, for example, a programme for registering and titling 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.<sup>420</sup>

In the Philippines, the Indigenous Peoples' Rights Act 1997 established "the office of the National Commission on Indigenous Peoples (NCIP) as its implementing agency. The primary task of the NCIP is to delineate and issue a Certificate of Ancestral Domain/Land Title (CADT/CALT) to the indigenous clans or communities". This has resulted in the recognition of approximately 14 per cent of the total land area of the Philippines as indigenous territory. Many applications remain pending, however, and "titling

<sup>417</sup> Roger Plant and Soren Hvalkof, "Land titling and indigenous peoples", Sustainable Development Department, Technical Papers Series (Washington, D.C., Inter-American Development Bank, 2001), p. 3.

<sup>418</sup> See M.L. Gonzalez and J. Cherlet, "Indigenous Peoples Secretariat key ally in demarcation and titling of indigenous territories: Nicaragua", case study of the ILC Database of Good Practices (Rome, International Land Coalition, 2015). PRODEP is the acronym used for the Land Administration Project.

<sup>419</sup> See D. Monachon and N. Gonda, "Liberalization of ownership versus indigenous territories in the north of Nicaragua: the case of the Chorotegas" (Washington, D.C., International Land Coalition, 2011); Rikke B. Broegaard, "Land access and titling in Nicaragua", *Development and Change*, vol. 40, No. 1 (2009), pp. 149-169.

<sup>420</sup> Birgitte Feiring, *Indigenous Peoples' Rights to Lands, Territories, and Resources* (Rome, International Land Coalition, 2013), p. 56.

procedures have been criticized for being unnecessarily costly and lengthy and lacking in cultural sensitivity”.<sup>421</sup>

In Indonesia, legislation on the environment implicitly recognizes certain rights of indigenous peoples, referred to as *masyarakat adat* or *masyarakat hukum adat* (customary societies). However, there is no specific law governing the establishment of a national process for land demarcation and titling.<sup>422</sup> In the absence of a national law, the procedures for recognizing indigenous peoples’ rights are onerous. Indigenous peoples must rely on district regents or district legislatures to enact local laws, first to recognize indigenous peoples’ existence within the local jurisdiction and then to recognize their rights to lands and forests; for the latter, endorsement by the regional offices of the Ministry of Environment and Forestry is required. According to mid-2018 figures presented by the Government of Indonesia at the ILC Global Land Forum in Bandung, some 20,000 hectares of customary forest and 2 million hectares of customary territories have been officially recognized (whereas it is conservatively estimated that between 45 million and 75 million hectares of lands and forests in Indonesia are actually subject to customary rights).<sup>423</sup> By contrast, the Government has issued concessions that total some 28 million hectares for agribusiness plantations, more than 10 million hectares of forests for industrial pulpwood plantations, and some 70 million hectares for more than 600 logging projects. There are some 32,000 administrative villages whose lands overlap areas that have been misleadingly classed as State Forest areas, defined by the Forestry Law as forest areas “where there are no rights attached to the lands”.<sup>424</sup>

On a more positive note, a number of collective land titling policies and procedures have been put in place across Latin America in recent years. Colombia has implemented some important programmes to support collective titling in the Amazon. This has resulted in the expansion of indigenous territories (*resguardos indígenas*) in the Amazon region by approximately 600,000 hectares and the designation of these lands as protected areas – which constitutes not only recognition of indigenous peoples’ right to their lands, but also recognition of their traditional knowledge in sustainable land management. For several decades, the indigenous Miskitu peoples have fought for legal title to their lands in the Muskitia region of eastern Honduras. Recently, this has led to the establishment of indigenous territorial jurisdictions or councils (*concejos*

<sup>421</sup> Carino, *Global Report*, p. 25.

<sup>422</sup> See subsection 4.2 in chapter II and subsection 2.2 in the present chapter.

<sup>423</sup> Global Land Forum, Bandung, Indonesia, 22-27 September 2018, public statement by presidential adviser Dr. Noer Fauzi Rachman.

<sup>424</sup> Marcus Colchester, personal communication, August 2019; Arnoldo Contreras-Hermosilla and Chip Fay, *Strengthening Forest Management in Indonesia through Land Tenure Reform: Issues and Framework for Action* (n.p., Forest Trends, 2005), p. 7.

territoriales) with “intercommunity titles that recognize the overlapping land uses and broader functional habitats (subsistence zones) of Miskitu communities”.<sup>425</sup> This intercommunity titling covers 14,000 square kilometres, equivalent to 12.5 per cent of the country’s territory.<sup>426</sup> In Guyana, the Amerindian Peoples Association and its partners, including the Ministry of Indigenous Peoples’ Affairs, the National Tshaos’ Council and the South Rupununi District Council/South Central People’s Development Association, have embarked on a two-year project aimed at promoting the demarcation and tilting of indigenous lands in Guyana as well as the revision of the 2006 Amerindian Act.<sup>427</sup>

These recent initiatives are positive as indigenous peoples are directly involved in the design and development of the land titling programmes. James Anaya, former United Nations Special Rapporteur on the rights of indigenous peoples, explains the process as follows:

*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.*<sup>428</sup>

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<sup>425</sup> Peter H. Herlihy and Taylor A. Tappan, “Recognizing indigenous Miskitu territory in Honduras”, *Geographical Review*, vol. 109, No. 1 (2019), pp. 67-86.

<sup>426</sup> Ibid.; R. Álvarez and others, “Strengthening indigenous peoples land rights in Honduras: the Miskitu people’s experience of collective land titling, lessons learned, and main challenges for the future”, paper presented at the 2017 World Bank Conference on Land and Poverty, Washington, D.C.

<sup>427</sup> INEWS Guyana, “US\$ 1.6B land titling/demarcation project commences”, 16 August 2019; Synieka Thorne, “Amerindian Land Titling project moving ahead”, Guyana Department of Public Information, 18 July 2019.

<sup>428</sup> A/HRC/18/35/Add. 7, para. 36.

### 3.2 Community mapping

Community participatory mapping has become an important tool for securing, safeguarding and strengthening community governance over lands, territories and resources. Across the world, indigenous peoples and local communities have been increasingly deploying a variety of approaches, tools and technologies to generate maps reflecting their customary land use. Participatory and community-led mapping has become an important source of support for land claims, as it allows communities to develop data that can be recorded on geographic information system maps showing their land use and demarcating their lands and territories. A growing number of indigenous peoples are using community-based monitoring and information systems, which include the various processes and mechanisms employed to manage and document lands, territories and resources. Community mapping and monitoring systems are powerful tools for showing how communities often have ancestral non-exclusive land use and shared resource use rights – something that is usually not found in official documents. Maps produced by indigenous communities contain spatial information but also reflect the cultural usage of the area as well as the local names and toponymy.

The myriad community mapping initiatives under way across the globe are too numerous to list here.<sup>429</sup> Those illustrated above are some of the community mapping exercises that have supported land demarcation and eventual titling. In the Philippines, several indigenous communities have been using maps for the delineation of ancestral domains and resources and for policy advocacy; they have found them especially useful in pushing for the implementation of the Ancestral Domain Sustainable Development and Protection Plan.<sup>430</sup> As an illustration, “the indigenous Tagbanua community in Palawan obtained their Certificate of Ancestral Domain Title for 22,284 hectares of land and marine waters, the first ever ancestral waters claim after years of persistent struggle. They produced a map and ancestral land management plan for the recognition and maintenance of a Community Conserved Area in Coron and Dalian islands.”<sup>431</sup> The participatory mapping of customary land and forest use has also proven to be an effective source of empowerment for indigenous peoples in Indonesia; community mapping led by the Dayak people in Sekadau District, West Kalimantan, for example, has influenced local spatial planning.<sup>432</sup> A regional network called the Indigenous Knowledge and Peoples of Asia has been

<sup>429</sup> For review and analysis, see the International Land Coalition database of good practices (<https://www.landcoalition.org/en/good-practices>).

<sup>430</sup> See Asia Indigenous Peoples Pact, “Advancing the respect and recognition of indigenous knowledge and peoples of Asia (IKAPA)”, 10 June 2019.

<sup>431</sup> Carino, *Global Report*, p. 65.

<sup>432</sup> K. Widodo and J. Charlet, “Participatory mapping of customary forest use to influence spatial planning”, case study of the ILC database of good practices (Rome, International Land Coalition, 2014).



## STATE OF THE WORLD'S INDIGENOUS PEOPLES: Rights to Lands, Territories and Resources



Photo: Ben Powless

established with the aim of consolidating diverse initiatives and actions as well as experiences within a community-based monitoring and information system. In the Plurinational State of Bolivia, several indigenous organizations have collaborated to create an atlas of the country that includes more than 200 maps of the 58 indigenous territories in the Bolivian lowlands and extensive information on the concessions granted in the territories for exploration or mining and oil exploitation, the processes of deforestation and forest degradation, and the agrarian rights given to private third parties. The atlas represents the consolidation of key information and can be used to show the Government where indigenous lands and territories are located and what has been occurring in them.<sup>433</sup>

As noted in the *Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples*, “besides being a useful tool for advocacy and to reclaim their lands, the process of inclusive and rights-based approach to community mapping has been empowering to the indigenous communities in many ways: (1) it creates unity among the community behind territorial defense, (2) it enables intergenerational transfer of knowledge about their territory and (3) though territorial demarcation may sometimes lead to conflicts, in most cases it helps to find a lasting solution to existing boundary conflicts.”<sup>434</sup>

<sup>433</sup> See International Work Group for Indigenous Affairs, *Annual Report 2018*, p. 18.

<sup>434</sup> Carino, *Global Report*, p. 66.

## 4. Participatory management, access and benefit-sharing

The past decade has been marked by the increased engagement of indigenous communities in processes involving participatory management, access and benefit-sharing. The crucial role of indigenous peoples in the management, sustainable use and conservation of natural resources is increasingly being recognized by international organizations and Governments. This has allowed the development of progressive participatory mechanisms that can support the implementation of indigenous rights to lands and resources.

### 4.1 Participation and co-management in natural resource conservation

In most countries, there is a considerable overlap between indigenous peoples' territories and areas of high biological diversity. There is thus a broad space for indigenous participation in nature conservation, notably within the contexts of community-based conservation, community-based management, community-based natural resource management, indigenous and community conserved areas, integrated conservation-development projects, and locally managed marine areas.<sup>435</sup> All of these include a significant level of direct indigenous participation in the management of lands and natural resources. Although co-management agreements do not necessarily translate into the legal recognition of indigenous rights to lands and natural resources, they are based on a recognition of indigenous traditional knowledge and the role of indigenous communities in the sustainable management of natural resources.<sup>436</sup>

A recent international expert group meeting on conservation and the rights of indigenous peoples highlighted several examples of indigenous peoples' participation in good conservation practices: "In northern Finland, 15,000 km<sup>2</sup> have been designated as wilderness areas to protect wildlife and the Sámi culture and traditional methods of subsistence and to develop sustainable use. ... In Nicaragua, there are 61 natural reserve areas that are categorized as flexible conservation areas, allowing for the use of natural resources for the benefit of local populations. In Canada, the Indigenous Circle of Experts provides support to Canada's efforts to protect at least 17 per cent of its land by 2020 and 10 per cent of marine waters."<sup>437</sup> In New Zealand, some *iwi* (tribes) have entered

<sup>435</sup> See the Indigenous and Community Conserved Areas (ICCA) website ([www.iccaforum.org](http://www.iccaforum.org)).

<sup>436</sup> For in-depth analysis and review, see the reports published by the ICCA Consortium ([www.iccaconsortium.org](http://www.iccaconsortium.org)) between 2011 and 2012, including 15 national-level legal reviews.

<sup>437</sup> "International expert group meeting on the theme 'conservation and the rights of indigenous peoples'" (E/C.19/2019/7), paras. 24 and 26. The expert group meeting was organized by the Indigenous Peoples Development Branch of the United Nations Department of Economic and Social Affairs and held in Nairobi from 23 to 25 January 2019.



into agreements with the Government to co-manage natural resources. One of these is the Whanganui River Deed of Settlement (*Ruruku Whakatupua*), which recognizes the Whanganui River as a legal person with its own status and establishes a guardianship role shared by the Government and the communities with an interest in the River.

The Expert Mechanism on the Rights of Indigenous Peoples notes the following:

*Examples of indigenous decision-making can be found in indigenous management of resources in indigenous conservation areas and territories. Successful practices include those where indigenous decision-making processes and traditional knowledge are respected by the community and by other authorities. The sasi system used in Haruku, Indonesia, where generations of kewang or indigenous institutions organize the community to remain committed and united in managing fish stocks and other important coastal resources, is exemplary. Another example is the Kaimoana customary fishing regulations in New Zealand, which permit some Māori control of customary fishing in some areas, including by Māori institutions organized in accordance with their own beliefs, albeit significantly and ultimately controlled by the Government.<sup>438</sup>*

There has been an increase in the use of community-based mapping, monitoring and information systems to provide complementary evidence of progress made towards the achievement of goals embodied in the 2030 Agenda for Sustainable Development, the Paris Agreement, and the post-2020 global biodiversity framework, and to guide community governance and self-determined development. The significance of community-based action to protect biodiversity, ecosystems and sustainable livelihoods is captured in the Aichi 2020 targets under the Convention on Biological Diversity, in particular target 11 (protected areas, including “other effective area-based forms of conservation”), target 14 (ecosystem services), and target 18 (traditional knowledge). Community-based monitoring can be conducted by the communities themselves, in partnership with scientists, or jointly with the Government. In Guyana, the South Rupununi District Council monitoring team keeps track of various activities occurring in their territory, including mining operations, border crossings, logging operations, and cattle rustling activities. The monitoring team has alerted government officials to illegal activities. One particular focus of the monitoring programme has been the mining activities on Marutu Taawa (Marudi Mountain). Marutu Taawa, situated in traditional Wapichan territory, is a culturally and spiritually important mountain for the Wapichan people and is located at a

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<sup>438</sup> Final study on indigenous peoples and the right to participate in decision-making”, report of the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/EMRIP/2011/2), para. 19.

critical watershed in Guyana.<sup>439</sup> Significantly, this ongoing process is to be incorporated within the larger ancestral land claim by the Wapichan people, who have been seeking recognition of their rights to their traditional territory since at least 1967.<sup>440</sup>

In Brazil, several indigenous peoples have established their own consultation protocols; among these are the consultation and free, prior and informed consent procedures developed by the Wajãpi in Amapá and the Munduruku in Pará. Others have set up systems for self-protection in their territories, an example being the use of indigenous forest guards by the Ka'apor in Maranhão. These are some of the ways in which indigenous peoples have sought to assert control over their territories, in particular to prevent illegal encroachments.<sup>441</sup>

There are numerous examples of indigenous peoples' positive contributions to conservation in Australia; particularly noteworthy are the activities undertaken within the framework of the Specialised Indigenous Rangers Programme. "On the north-east coast of Arnhem Land, the Dhimurru Indigenous Protected Area (IPA) is on the traditional lands of the Yolngu people. Dhimurru rangers use CyberTracker to quickly and simply collect information on the plants, animals and cultural values of their area, while also monitoring management activities and visitors."<sup>442</sup> The data help the rangers "report back on fee-for-service activities that they undertake for the Australian Government's quarantine system, 'Working on Country' programmes, and 'GhostNets Australia' programme". Several IPAs have been established across the country. IPAs are voluntarily declared protected areas and are managed by indigenous peoples themselves, but the Government supports and funds some of these initiatives to strengthen indigenous engagement in the management of existing government-declared national parks and other protected areas. As noted by the Special Rapporteur on the rights of indigenous peoples, "the creation and joint management of protected areas allow traditional owners to continue to enjoy their customary practices, while simultaneously providing conservation and direct employment opportunities for indigenous peoples".<sup>443</sup>

<sup>439</sup> Guyana, *Wapichan Environmental Monitoring Report: South Rupununi District Council, September 2018*.

<sup>440</sup> Fergus Mackay, "The Wapichan people and the Guyanese Government agree terms of reference for formal land talks".

<sup>441</sup> A/73/176, para. 76; see also A/HRC/36/46/Add.2.

<sup>442</sup> Colleen Corrigan and Terence Hay-Edie, *A Toolkit to Support Conservation by Indigenous Peoples and Local Communities: Building Capacity and Sharing Knowledge for Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs)* (Cambridge, United Kingdom, United Nations Environment Programme World Conservation Monitoring Centre, 2013), case study 12.

<sup>443</sup> A/73/176, para. 73.

## 4.2 Climate change mitigation and land rights

The importance of protecting and expanding indigenous and community ownership of land was recognized in the negotiations leading up to the adoption of the 2030 Agenda for Sustainable Development, in part because indigenous communities are traditionally protectors of the environment, and compliance with the provisions of the Paris Agreement (limiting the rise in the global temperature to address climate change) is central to the successful implementation of the Sustainable Development Goals. As highlighted by Mariam Wallet Aboubakrine, former Chair of the Permanent Forum on Indigenous Issues, protecting the land and resource rights of indigenous peoples will not only provide security for historically exploited groups but also contribute to the global fight against climate change and biodiversity loss.<sup>444</sup> Indigenous peoples are some of the most vulnerable and direct victims of climate change and biodiversity loss; however, the global urgency around mitigating the effects of climate change can constitute a source of potential opportunities for supporting the implementation of indigenous peoples' rights to lands, territories and natural resources.

Since its inception in 2008, the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (the UN-REDD Programme) has supported inclusive policy formulation and decision-making for national and subnational REDD+ processes. Although how this is implemented in various contexts may be far from perfect, the overarching objective of the Programme supports the recognition of indigenous peoples' rights with respect to decision-making and participation in the development of climate and forest policies and measures. As noted by Birgitte Feiring, "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".<sup>445</sup> Forest tenure security for indigenous and local communities – and the role this plays in sustainable forest management and reducing deforestation – has received increasing attention in recent decades. As Feiring notes, "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, ... [including] through REDD+".<sup>446</sup>

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<sup>444</sup> United Nations, Department of Economic and Social Affairs, "Protect indigenous people's land rights and the whole world will benefit, UN forum declares", news, 17 April 2018 (New York).

<sup>445</sup> Feiring, *Indigenous Peoples' Rights to Lands, Territories, and Resources*, p. 76.

<sup>446</sup> *Ibid.*, p. 77.

Some of the nationally led REDD+ efforts supported by UN-REDD have shown promising results. In Colombia, the full and active participation of indigenous and Afro-Colombian peoples in national policy processes produced a milestone in 2018 with the release of the national strategy on forests (*Bosques: Territorios de Vida*) and the advancement of the national development plan.<sup>447</sup> The first REDD+ project in Cambodia relates to the Oddar Meanchey Community Forest, which comprises “70,000 hectares of evergreen rainforest and affects 10,000 households. Both the governance regime [and] ... the rights to the forest’s carbon [resources] have been secured through legal recognition under the national Community Forestry Agreement. To achieve this, forest communities elected community representatives to speak on their behalf during the REDD+ consultation process before any measures could be taken. Eventually, the community representatives agreed that half of the income generated from the REDD+ project would go directly to the local communities. The disbursement mechanisms under which the community will benefit from this money are currently under negotiation, but the communities’ involvement in the decision-making of the REDD+ project has been secured.”<sup>448</sup> Many indigenous communities have engaged in similar processes. However, as noted by FAO, “there remains a significant gap between the goals and aspirations of national stakeholder participation platforms and institutional instruments to support indigenous peoples’ rights and the reality faced by many indigenous communities in REDD+ partner countries.”<sup>449</sup>

### **4.3 Access and benefit-sharing agreements**

The concepts of access and benefit-sharing stem from the Convention on Biological Diversity, which recognizes indigenous peoples’ traditional knowledge and that people or communities who hold such knowledge are entitled to an equitable share of the benefits accruing from its commercial utilization.<sup>450</sup> The Inter-American Court of Human Rights integrated this concept in the case relating to the Kaliña and Lokono communities in Suriname when it noted that the possibility of receiving benefits from

<sup>447</sup> Elspeth Halverson, “Reflecting on the linkages between REDD+, forest tenure and indigenous peoples’ rights: encouraging progress and challenging gaps”, FAO news, 7 June 2009.

<sup>448</sup> Corrigan and Hay-Edie, *A Toolkit to Support Conservation by Indigenous Peoples and Local Communities*, case study 16.

<sup>449</sup> Halverson, “Reflecting on the linkages between REDD+, forest tenure and indigenous peoples’ rights”, see also the Global Alliance against REDD website ([no-redd.com/](http://no-redd.com/)).

<sup>450</sup> Cf. Convention on Biological Diversity, art. 8(j); United Nations, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted on 29 October 2010.

conservation is connected to the fundamental rights to lands and natural resources of the concerned communities.<sup>451</sup>

Benefit-sharing agreements have largely focused on genetic resources, but that is beginning to change with the gradual emergence of an important body of practice surrounding benefit-sharing arrangements linked to other natural resources. In Canada, several impact and benefit agreements have been established between the federal or provincial governments, indigenous communities, and extractive industries.<sup>452</sup> Increasingly, benefit-sharing agreements are negotiated directly between indigenous peoples and corporations. As part of the Nunavut Land Claims Agreement, for instance, resource developers are obliged to develop impact and benefit agreements with the regional Inuit associations. Benefit-sharing agreements typically provide indigenous peoples with a share of the project revenues and preferential access to employment and business development opportunities. The benefits specified in the agreements can take many different forms, including job creation, the ownership of companies and stock, royalty payments, community development programmes, revenue sharing and equity shares, education and training, land access, and community participation in planning. These are distinct from compensation or remedies for the loss of access and rights to land and resources.

Other types of benefit-sharing arrangements have emerged under the banner of community development agreements, which have been increasingly used by resource companies and investors to establish mechanisms for ensuring that local communities benefit from large-scale investment activities such as mining or forestry projects. Community development agreements formalize arrangements between investors and project-affected communities, establishing how the benefits will be shared. There are many forms these benefit agreements can take depending on the industry involved, but most are based on the guarantee of a percentage of the profits from extractive operations. Although these agreements can contribute to the implementation of indigenous rights to lands, territories and resources, one of the dangers is the lack of a proper legal framework to protect indigenous peoples and local communities, who – due to the asymmetry of the power relationships – could easily find themselves in situations in which their interests are not properly integrated and respected.

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<sup>451</sup> Inter-American Court of Human Rights, “Case of the *Kaliña and Lokono Peoples v. Suriname*”, para. 181.

<sup>452</sup> Norah Kielland, “Supporting aboriginal participation in resource development: the role of impact and benefit agreements” (Ottawa, Canada, Library of Parliament 2015).

## Conclusion and recommendations

There are wide-ranging implementation strategies employed by indigenous peoples to secure their rights to lands, territories and resources. While there is an expanding number of good practices and some promising trends, there is no best way to secure these rights since every situation is unique. The right to self-governance and autonomy are clear objectives for indigenous peoples; however, case studies demonstrate that different types of indigenous autonomy and agreements on lands, territories and resources may work better in some situations than in others.

Over the years, indigenous peoples have mobilized to achieve recognition of their land rights and have pursued litigation at the national, regional and international levels – often with some success. The United Nations Declaration on the Rights of Indigenous Peoples has served as the foundation for legal arguments in several cases. Strategic partnerships with national human rights institutions and other rights-based organizations, along with the use of institutional guidelines from development and funding agencies, have also shown positive results.

The use of community mapping and demarcation to identify indigenous lands and territories has become more prevalent and has contributed to some positive outcomes. Convincing Governments of the need for collective titling has proven more difficult.



## Recommendations

- ≡ Member States should implement legal decisions on indigenous rights to lands, territories and resources and provide the necessary resources for their operationalization.
  
- ≡ Development agencies and other partners should support indigenous peoples and their organizations in their efforts to secure full and effective participation as equal partners in national processes to develop plans and strategies for land, territorial and resource rights and use, including benefit-sharing agreements.
  
- ≡ Development agencies and other relevant partners should provide training and assistance that will allow indigenous peoples and their organizations to carry out the mapping and demarcation of their ancestral lands and territories.
  
- ≡ National human rights institutions should continue to support the rights of indigenous peoples to their lands, territories and resources.
  
- ≡ Member States, development agencies and other partners should support indigenous peoples' initiatives for sustainable development and formally acknowledge the vital importance of indigenous stewardship of lands and resources in the achievement of the Sustainable Development Goals and associated targets.



Photo: UN-DESA / Broddi Sigurdarson



## Chapter IV:

# INDIGENOUS WOMEN and rights to lands, territories and resources

Naomi Lanoi Leleto

## 1. Overview

Indigenous women play a crucial role in transforming land as a resource into life-sustaining food for their communities while also ensuring access to clean water and other land-based resources. They are the backbone of indigenous communities and guardians of the land and natural resources. Traditional lands, territories and resources constitute a source of wealth, power and collective identity for many indigenous women and offer them a sense of belonging.

According to ILO, there are an estimated 476.6 million indigenous peoples in the world.<sup>453</sup> More than half are indigenous women – a fact that cannot be ignored in the relevant social, economic and political discourse. Although “women all over the world encounter gender-based discrimination in relation to the control and ownership of land, indigenous women face triple discrimination on the basis of their gender (as women), their ethnicity (as indigenous peoples), and their economic class”.<sup>454</sup> It is important to note that women with disabilities, older women, and other vulnerable or marginalized groups within indigenous populations face multilayered challenges. Human Rights Watch

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<sup>453</sup> International Labour Organization, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future* (Geneva, 2019).

<sup>454</sup> Esther Effundem Njeassam, “Gender inequality and land rights: the situation of indigenous women in Cameroon”, *Potchefstroom Electronic Law Journal*, vol. 22 (2019).

reports that indigenous women are 35 times more likely than non-indigenous women to be hospitalized due to domestic violence.<sup>455</sup>

The United Nations Permanent Forum on Indigenous Issues acknowledges that indigenous women face multiple forms of discrimination and several related challenges, including limited access to economic empowerment, vocational training, and capacity-building programmes and processes. Their situation makes them particularly vulnerable to food insecurity, conflict, gender-based domestic and other forms of violence, the denial of or limitation of access to property rights, and the violation of their right to inherit land.<sup>456</sup> The Permanent Forum on Indigenous Issues is committed to addressing these issues. The Permanent Forum devoted a special session to indigenous women in 2004, and indigenous women and gender is a standing agenda item discussed at the Forum's annual sessions. An expert group meeting on combating violence against indigenous women and girls was held in January 2012, and its report was presented to the Forum several months later.<sup>457</sup> The recommendations of the Permanent Forum regarding indigenous women and girls continue to highlight relevant issues that fall within its mandate and are posted on the Forum website after each of its sessions.

The United Nations Declaration on the Rights of Indigenous Peoples represents globally endorsed minimum standards and an important normative framework for the rights of indigenous peoples founded on international human rights law. The 2007 adoption of the Declaration and advocacy on the basis of this framework have led to indigenous women's issues being featured more prominently in the dialogue between the Committee on the Elimination of Discrimination against Women (CEDAW) and Member States. CEDAW general recommendation No. 24 calls on States Parties to pay special attention to the health status of indigenous women and the specific concerns of older indigenous women. Additionally, the Committee has pointed out that women may be affected by intersecting forms of discrimination based on race, ethnicity, religion and beliefs and has recommended that States legally recognize these intersecting forms of

<sup>455</sup> See Kriti Sharma, "Indigenous, disabled and imprisoned: the forgotten women of International Women's Day", Human Rights Watch, 8 March 2017, and SBS News, 9 March 2017.

<sup>456</sup> "Permanent Forum on Indigenous Issues: report on the twelfth session (20-31 May 2013)" (E/2013/43-E/C.19/2013/25), para. 35.

<sup>457</sup> "Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples", report of the international expert group meeting (E/C.19/2012/6).



discrimination and address the negative effects they have on women.<sup>458</sup> Of particular importance is CEDAW general recommendation No. 34 on the rights of rural women, which calls on States Parties to “ensure that indigenous women in rural areas have equal access with indigenous men to ownership and possession of and control over land, water, forests, fisheries, aquaculture and other resources that they have traditionally owned, occupied or otherwise used or acquired”.<sup>459</sup> In the outcome document of the World Conference on Indigenous Peoples, States affirm the United Nations Declaration on the Rights of Indigenous Peoples and commit to intensifying efforts, “in cooperation with indigenous peoples, to prevent and eliminate all forms of violence and discrimination against indigenous peoples and individuals, in particular women, children, youth, older persons and persons with disabilities, by strengthening legal, policy and institutional frameworks”.<sup>460</sup>

Indigenous women with disabilities face intersecting forms of discrimination because of their gender, disability and ethnicity that leave them particularly vulnerable to exploitation, violence and abuse, which can effectively undermine the recognition and implementation of their rights to lands, territories and resources. The Convention on the Rights of Persons with Disabilities (2007), the first legally binding United Nations instrument specifically aimed at protecting the rights of individuals with disabilities, acknowledges the added vulnerability of women in this context. Article 6(1) of the Convention calls on States Parties to recognize “that women and girls with disabilities are subject to multiple discrimination and ... [to] take measures to ensure [their] full and equal enjoyment ... of all human rights and fundamental freedoms”. In article 6(2), the Convention calls on States Parties to “take all appropriate measures to ensure the full development, advancement and empowerment of women for the purpose of guaranteeing them the exercise and enjoyment of ... human rights and fundamental freedoms”.

The progress reflected in various international frameworks has yet to translate into significant advancement on the ground as indigenous women continue to battle against discrimination. When indigenous communities have traditional or customary

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<sup>458</sup> United Nations Committee on the Elimination of Discrimination against Women, general recommendation No. 24: article 12 of the Convention (women and health), elaborated at the twentieth session of the Committee in February/March 1999 (A/54/38/Rev.1), chap. I; general recommendation No. 27 on older women and protection of their human rights, December 2010 (CEDAW/C/GC/27); and general recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, December 2010 (CEDAW/C/GC/28).

<sup>459</sup> United Nations Committee on the Elimination of Discrimination against Women, general recommendation No. 34 on the rights of rural women, March 2016 (CEDAW/C/GC/34), para. 59.

<sup>460</sup> “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples”, resolution adopted by the General Assembly on 22 September 2014 (A/RES/69/2), para. 18.

land tenure, indigenous women's rights are often less secure than those of men,<sup>461</sup> and "when communities are dispossessed of their land, women are often disproportionately affected because of their traditional role in procuring water, fuel or trading goods for their families".<sup>462</sup> Recent trends in commercial and infrastructure development in indigenous territories have affected indigenous peoples as a whole but have had a particularly serious impact on the land rights of women.<sup>463</sup> Land and property rights increase indigenous women's bargaining power within the household and empower them "to participate more effectively in their immediate communities and in the larger civil and political aspects of society", so the absence or loss of such rights can leave indigenous women marginalized at multiple levels.<sup>464</sup>

A number of studies offer evidence that women's decision-making power in matters relating to lands, territories and natural resources is constrained by the limitations placed on their participation in community assemblies, local leadership bodies, and community resource management institutions. Research further indicates that the substance, duration, and security of rural and indigenous women's tenure rights are often defined by and dependent upon their marital status and/or their relationships with men.<sup>465</sup> However, with the migration of indigenous men increasing due to outside opportunities for wage labour, a growing number of indigenous women are assuming greater responsibility for the management and governance of community lands.<sup>466</sup> It is thus more important than ever to ensure the inclusion and meaningful participation of indigenous women in land governance at all levels.

The importance of lands, territories and resources for women and their communities and the need to protect, promote and strengthen their rights in this regard are acknowledged in a number of international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 (1989), the Convention on the Elimination of all Forms of Discrimination against Women, the 2030 Agenda for Sustainable Development, and the Voluntary Guidelines on the Responsible

<sup>461</sup> Elisa Scalise, "Indigenous women's land rights: case studies from Africa", in *State of the World's Minorities and Indigenous Peoples 2012: Events of 2011*, Beth Walker, ed. (London, Minority Rights Group International, 2012).

<sup>462</sup> Benson Owuor Ochieng, "Implementing Principle 10 and The Bali Guidelines in Africa", *PERSPECTIVES*, No. 10 (United Nations Environment Programme, October 2015), pp. 3-4.

<sup>463</sup> Samuel Nguiffo and others, "Indigenous peoples' land rights in Cameroon: progress to date and possible futures", *IIED Briefing Papers* (December 2017).

<sup>464</sup> Scalise, "Indigenous women's land rights: case studies from Africa", p. 3.

<sup>465</sup> Food and Agriculture Organization of the United Nations, *Gender and Land Rights: Understanding Complexities; Adjusting Policies*, Economic and Social Perspectives, Policy Brief 8, March 2010.

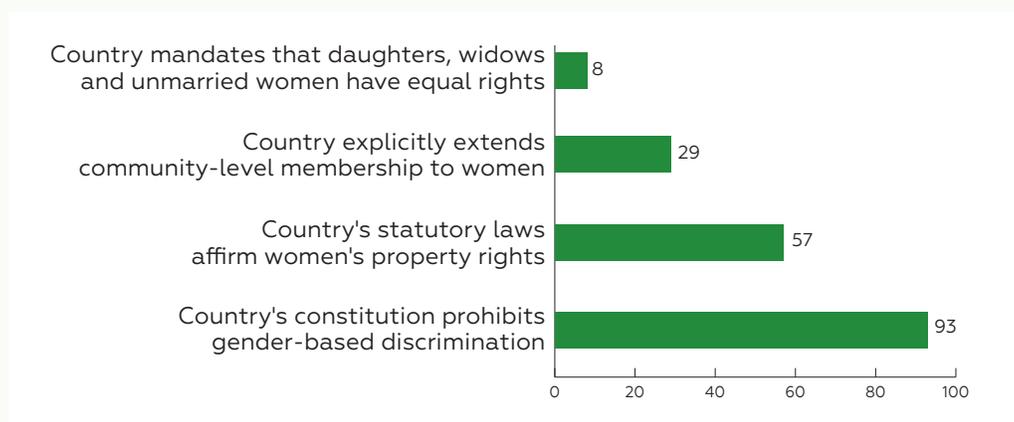
<sup>466</sup> Rights and Resources Initiative, *Power and Potential: A Comparative Analysis of National Laws and Regulations concerning Women's Rights to Community Forests* (Washington, D.C., 2017).

Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. However, this has not translated into the recognition and protection of indigenous women's rights by States and Governments in most parts of the world. In many cases, States have ratified the international instruments but have not established the national laws, safeguards and protection mechanisms that serve to operationalize the agreements.

It is important to appreciate that, in some cases, efforts to strengthen the property rights of indigenous peoples may increase women's vulnerability to disenfranchisement unless the differing needs, rights, norms and expectations of women and men with regard to lands, territories and resources are taken into consideration. For example, documenting or registering communities' rights to land and resources without ensuring the inclusion of both indigenous women and indigenous men in the registration process could further entrench existing inequalities. This points to the need to ensure that women's rights to lands, territories and resources are secured alongside those of the community as a whole.

In research undertaken in 2017, the Rights and Resources Initiative found that while more than 90 per cent of national constitutions prohibit gender-based discrimination and guarantee women's equal protection, less than 15 per cent have adequate gender-sensitive provisions relating to women's voting rights, leadership and property inheritance (see the figure below).

**Figure 4.1**  
**Elimination of gender discrimination in law (percentage of countries)**



Source: Author's analysis, based on data from Rights and Resources Initiative, Power and Potential: A Comparative Analysis of National Laws and Regulations concerning Women's Rights to Community Forests (Washington, D.C., 2017).

The figure indicates that while the vast majority of countries prohibit gender discrimination in their constitutions, only 57 per cent explicitly extend community-level membership to women. This means that while most constitutions clearly espouse the principle of non-discrimination, the lack of specificity can effectively preclude women's membership in communities and their inclusion in important decision-making processes. Full membership in communities is a critical factor enabling indigenous women to participate in key land governance processes.

According to a recent FAO estimate, less than 15 per cent of all landholders are women, with regional distributions ranging from 5 per cent in the Middle East and North Africa to 18 per cent in Latin America and the Caribbean. Part of the problem is that, "despite the increasing adoption of legal frameworks to provide women with equal access to land, non-land assets and financial services, customary laws still impede their access to basic economic resources: in 123 countries, traditional, religious and customary laws and practices limit women's freedom to claim and protect their land assets".<sup>467</sup>

Rights to lands, territories and resources allow indigenous peoples, and particularly indigenous women, to preserve and protect their way of life and manage their own development. Indigenous women have been at the forefront of the struggle to secure land and territorial rights and equitable representation in all aspects of society for themselves and ultimately for their entire communities. They have collectively and successfully defended their lands, territories and natural resources from private and government interests at the risk of social ostracism, exclusion and sometimes violence. Indigenous women face challenges on multiple fronts, but many are chipping away at these obstacles through concerted action and advocacy; the boxes in this chapter highlight a number of cases in which indigenous women have stepped forward to fight for their rights to lands and territories and improve their overall welfare.

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<sup>467</sup> Organization for Economic Cooperation and Development, *SIGI 2019 Global Report: Transforming Challenges into Opportunities*, Social Institutions and Gender Index (Paris, OECD Publishing, 2019).

**Box 4.1**

**The Maasai women of Tanzania take the lead in strengthening their land rights: a case from East Africa**

Through organization and negotiation, one group of Maasai women were able to gain secure rights to community land held under customary tenure. The women recognized that by acting as a group, they were more likely to gain support than by acting alone, taking advantage of positive provisions in the Village Land Act 1999, which grants women and men equal rights to village land.

The Act also recognizes equal rights for men and women to access, own, control and dispose of land under the same terms and conditions.<sup>468</sup> ... The process for being granted a customary right of occupancy is largely administrative and must be granted by the village council and approved by the village assembly, who issues the certification. ...

Maasai cultural practices tend to marginalize women in terms of decision-making, and in terms of rights to access and control over land. Women are largely unrepresented in land-related decision-making bodies. ... As a result, the interests and needs of the Maasai women have largely been absent in the village, ward and/or district development land planning, and women rarely benefit from land-related programmes in the area.

The Maasai Women's Development Organization (MWEDO) supported women in forming committees. These committees of Maasai women then engaged in dialogue and negotiation with village officials and leaders, eventually gaining certificates for customary rights of occupancy of village land for women in their communities. MWEDO supported the women by providing training on legal rights, as well as the administrative steps needed to help secure land rights through official land certification. At the beginning, the women's committees faced significant opposition from their communities, but through perseverance, openness and making use of diverse negotiation tactics, over time the women gained community support. Importantly, because the process was defined and led by the Maasai women's committees and was focused on dialogue and negotiation with men as leaders, the whole community supported the results.

*Source: Excerpted from State of the World's Minorities and Indigenous Peoples 2012: Events of 2011, Beth Walker, ed. (London, Minority Rights Group International, 2012), pp. 57-58.*

Note: MWEDO is an indigenous organization dedicated to helping women access their rights to education, health and economic resources.

<sup>468</sup> The Maasai is an indigenous community inhabiting northern, central and southern Kenya and northern Tanzania.

## **2. Indigenous women's rights to lands, territories and resources: legal, policy and intergovernmental frameworks**

### **2.1 Legal frameworks addressing the recognition and protection of indigenous women's rights to lands, territories and resources**

A number of international frameworks make specific mention of indigenous women, but even those that do not can sometimes offer leverage for strengthening indigenous women's rights to lands, territories and resources. Article 2 of the Universal Declaration of Human Rights establishes the principle of non-discrimination, affirming that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". All basic human rights – including those relating to property, food, housing and education – are addressed in the Declaration. Articles 3 and 4 of the International Covenant on Civil and Political Rights guarantee equality between women and men, prohibiting discrimination based on sex, among other grounds. The Covenant also recognizes rights to life; self-determination; privacy; information; protection of the family as an institution; liberty and security of person; equality before courts and tribunals; freedom of movement, association, assembly and expression; freedom from torture and cruel, inhuman or degrading treatment; equal protection under the law; participation in public affairs; and access to remedies. Of particular relevance in the present context is the affirmation that indigenous men and indigenous women have equal rights when seeking justice through courts and tribunals.

The United Nations Committee on Economic, Social and Cultural Rights, in article 26 of its general comment 12 on the right to adequate food (article 11 of the International Covenant on Economic, Social and Cultural Rights), calls upon States to embrace strategies that "give particular attention to the need to prevent discrimination in access to food or resources for food. This should include guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property." The Convention on the Elimination of All Forms of Discrimination against Women calls on States Parties to end discrimination against women in laws, policies and practices, including through the adoption of temporary special measures.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples to self-determination (articles 3 and 4), their collective



Photo: Ben Powlless

rights to own and control their lands and resources (articles 25-27), their right to free, prior and informed consent in relation to legislation, measures and projects that may have an impact on their rights (articles 10, 11, 19, 28, 29 and 32) and their right to participate in decision-making processes (articles 5, 18 and 27). With regard to indigenous women, the Declaration calls on States to “take effective measures ... to ensure continuing improvement of ... economic and social conditions” while paying particular attention “to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities” (article 21.2); reiterates the need to attend to “the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of the Declaration” (article 22.1); and calls on States, “in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination” (article 22.2). Article 44 further emphasizes that the Declaration applies equally to “male and female indigenous individuals”. The Declaration on the Rights of Indigenous Peoples is underpinned by international human rights law, including the Convention on the Elimination of All Forms of Discrimination against Women.

ILO Convention No. 169 (1989) states that its provisions are applicable “without discrimination to male and female members” of indigenous and tribal peoples (article 3.1). It calls on Governments to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”; it affirms that “the use of the term ‘lands’ [in the Convention] ... shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use” (article 13). Once ratified, ILO Convention No. 169 is legally binding; of the 23 countries that have ratified the Convention to date, the majority are in Latin America. This instrument is noteworthy in that it specifically addresses “equal opportunities and equal treatment in employment for men and women and protection from sexual harassment” (article 21.3[d]).

Resolutions adopted by the United Nations Commission on the Status of Women urge 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, transportation and information”.<sup>469</sup> In March 2020, the Commission on the Status of Women adopted a political declaration on the occasion of the twenty-fifth anniversary of the Fourth World Conference on Women. The declaration expresses concern that “25 years after the Fourth World Conference on Women, no country has fully achieved gender equality and the empowerment of women and girls, that significant levels of inequality persist globally, that many women and girls experience multiple and intersecting forms of discrimination, vulnerability and marginalization throughout their life course, and that they have made the least progress, which may include, inter alia, women of African descent, women with HIV and AIDS, rural women, indigenous women, women with disabilities, migrant women and older women”.<sup>470</sup>

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<sup>469</sup> United Nations, Commission on the Status of Women, “Report on the fifty-sixth session (14 March 2011, 27 February – 9 March and 15 March 2012)”, resolution on indigenous women: key actors in poverty and hunger eradication (E/2012/27-E/CN.6/2012/16), para. 1(b).

<sup>470</sup> E/CN.6/2020/L.1, para. 6.



A number of mechanisms — including the United Nations Permanent Forum on Indigenous Issues,<sup>471</sup> the Expert Mechanism on the Rights of Indigenous Peoples,<sup>472</sup> and the United Nations Special Rapporteur on the rights of indigenous peoples<sup>473</sup> — have been put in place to support indigenous peoples' rights and can be leveraged by indigenous women demanding better accountability in the governance and management of their lands and territories.

In addition to the above-mentioned frameworks and mechanisms, there are tools such as consultation and free, prior and informed consent that can help indigenous peoples — including indigenous women — advocate for their rights.<sup>474</sup> Other international frameworks, such as the 2030 Agenda for Sustainable Development and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, also call on States and corporations to protect and uphold women's land rights in a non-discriminatory manner. The SDG framework recognizes women's secure access to land as a key pillar of women's economic empowerment and has committed to securing, enforcing and monitoring progress on women's land rights in the context of realizing the vision of the 2030 Agenda by establishing land-specific SDG indicators (1.4.2, 2.3.1, 2.3.2, 5.a.1 and 5.a.2). Although non-binding, the components of the 2030 Agenda and associated indicators provide a solid framework from which Member States can draw in legislating for the security of women's rights to lands, territories and resources.

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<sup>471</sup> The United Nations Permanent Forum on Indigenous Issues “is a high-level advisory body to the Economic and Social Council ... established on 28 July 2000 ... with the mandate to deal with indigenous issues related to economic and social development, culture, the environment, education, health and human rights” (United Nations, United Nations Permanent Forum on Indigenous Issues, 18th session, events, 22 April 2019).

<sup>472</sup> The Expert Mechanism provides “the Human Rights Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, and assist[s] Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples” (A/HRC/RES/33/25, para. 1).

<sup>473</sup> The United Nations Special Rapporteur on the rights of indigenous peoples is equally mandated to pay special attention to discrimination against indigenous women and take into account a gender perspective.

<sup>474</sup> See article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

**Box 4.2**

**Resisting to exist: indigenous women in Brazil fighting for their rights and their lives as they demand compliance with the provisions of national and international instruments**

There are around 900,000 indigenous persons in Brazil distributed among 305 ethnic groups. In a country where women account for almost half of the population, indigenous women leaders have “stepped boldly into the political spotlight”. They are protesting against new policies that threaten indigenous peoples’ rights guaranteed by the 1988 Constitution of the Federative Republic of Brazil and recognized by international treaties. On the day President Jair Bolsonaro came to power in January 2019, he issued a provisional measure (Medida Provisória 870) that shifted decision-making power for indigenous reserve demarcations from Fundação Nacional do Índio, the government body established to carry out policies relating to indigenous peoples (in particular the demarcation of indigenous lands), to the Ministry of Agriculture, which is well known to defend the interests of agricultural elites and to favour the exploitation of indigenous lands and territories. Maria Eva Canoé — a 51-year old teacher, leader of the Canoé indigenous peoples from Northern Rondônia, and a member of the council of the Coordination of the Indigenous Organizations of the Brazilian Amazon — said in an interview with Mongabay (a non-profit conservation and environmental science provider) during the Free Land Encampment held in Brasilia in April 2019 that “the policies adopted by the current government ... violate all our rights and aim to destroy us ... but we are strong, we are resistant. And we are here ... to show to the government, and to all society, that we are alive, that we are resisting to exist.”

Indigenous peoples’ rights are recognized within the international human rights system. The United Nations Declaration on the Rights of Indigenous Peoples affirms that indigenous communities “have the right not to be subjected to forced assimilation or destruction of their culture” (article 8.1) or be imperiled by “any action which has the aim or effect of dispossessing them of their lands, territories or resources” (article 8.2[b]). ILO Convention No. 169 (1989), to which Brazil is a signatory, states that prior consultation is required “before undertaking or permitting any programmes for the exploration or exploitation of such resources” in indigenous peoples’ lands and territories, and article 32.2 of the Declaration on the Rights of Indigenous Peoples essentially includes the same provisions.

“Indigenous women are rising fast into leadership positions in Brazil. Among the most prominently known nationally and internationally are Joênia Wapichana, the first indigenous woman ever elected to the Brazilian Congress, and Sônia Guajajara, the leader of the Articulação dos Povos Indígenas do Brasil. ... Other indigenous women are on the frontlines defending their homelands.” Canoé and Gavião are good examples of this; both are land defenders in their Amazonian ancestral territories. The first-ever march by indigenous women in Brasilia took place in August 2019, bringing together about 2,500 women representing 130 different indigenous peoples from every region of Brazil.

*Sources: Karla Mendes, “Resisting to exist: indigenous women unite against Brazil’s far-right president”, Mongabay Series: Amazon Agribusiness, Amazon Illegal Deforestation, Global Forests, 20 May 2019; International Work Group for Indigenous Affairs, “Indigenous peoples in Brazil” (<https://www.iwgia.org/en/brazil.html>). Some of the demographic data are from Economic Commission for Latin America and the Caribbean, *Guaranteeing Indigenous People’s Rights in Latin America: Progress in the Past Decade and Remaining Challenges – Summary (LC/L.3893) (2014)*, p. 37.*

At the regional level, the African Charter on Human and Peoples' Rights affirms and protects the basic freedoms and human rights of individuals and peoples across the African continent. The African Commission on Human and Peoples' Rights, the body established by the African Charter to promote, protect and monitor human rights in the region, issued a resolution in 2011 on the protection of the rights of indigenous women in Africa.<sup>475</sup> The resolution affirms 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 are having a particularly serious impact on the lives of indigenous women. The Commission urges States Parties to pay special attention to the status of women in their countries and to adopt laws, policies and specific programmes to promote and protect their human rights.

In the Declaration on Land Issues and Challenges in Africa, adopted in July 2009, the heads of State and Government of the African Union "resolve to strengthen the security of land tenure for women ... [who] require special attention".<sup>476</sup> In November 2000, the African Commission established the Working Group of Experts on the Rights of Indigenous or Ethnic Communities in Africa, mandated to promote the rights of indigenous peoples through activities such as country visits, research and sensitization seminars. African countries such as Kenya, Zambia, Malawi and Uganda have enacted legislation to recognize, protect and register indigenous and/or community land rights, with particular attention given to indigenous women's land rights, in line with the framework and guidelines on land policy in Africa.

The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States (OAS). It receives, examines and investigates allegations of human rights violations against indigenous women in the Americas. In 2016, OAS member States adopted the American Declaration on the Rights of Indigenous Peoples, prepared by the Commission. Among the provisions of the Declaration is that "indigenous women have the right to the recognition, protection, and enjoyment of all human rights and fundamental freedoms provided for in international law, free of all forms of discrimination".<sup>477</sup> In Latin America, recognition of indigenous territorial rights has grown significantly in recent decades, though the timing and extent of this recognition have varied depending on the characteristics and specific circumstances of each country.<sup>478</sup> Almost all the countries in Latin America have ratified ILO Convention No. 169 (1989) and have taken steps to ensure the legal recognition of indigenous rights.

<sup>475</sup> CHPR/Res.183[XLIX]2011.

<sup>476</sup> Assembly/AU/Decl.I(XIII)Rev.1, p. 3.

<sup>477</sup> AG/RES.2888[XLVI-O/16], art. VII.1.

<sup>478</sup> Economic Commission for Latin America and the Caribbean, *Guaranteeing Indigenous People's Rights in Latin America* (LC/L.3893).

In Asia, the Association of Southeast Asian Nations adopted the ASEAN Human Rights Declaration in 2012.<sup>479</sup> Unfortunately, the Declaration does not explicitly recognize or protect indigenous peoples' rights. The regional human rights regime in Asia is still rather weak, though the establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009 demonstrates the commitment of the member States to pursue forward-looking strategies to strengthen regional cooperation on human rights. The United Nations Development Programme (UNDP) commissioned a study to assess the extent to which governance institutions in the Asia-Pacific region provide space to address the systematic exclusion of disadvantaged groups seeking to participate in decisions affecting them. An important finding was that "women and indigenous peoples suffer most from exclusion and discrimination in governance processes across the region".<sup>480</sup> Some Asian countries, such as the Philippines, recognize indigenous peoples' rights in their national legislation.<sup>481</sup>

## **2.2 Gaps in legal frameworks and practice affecting the recognition and protection of indigenous women's rights to lands, territories and resources**

Although some gains have been achieved, most State efforts geared towards the recognition of indigenous territorial rights have not been aligned with international standards.<sup>482</sup> The implementation of international frameworks, including the United Nations Declaration on the Rights of Indigenous Peoples, has been slow.<sup>483</sup> Indigenous women's rights remain a contentious and often neglected issue at the local, national and international levels. The inadequate statutory recognition of indigenous women's tenure rights undermines the rights guaranteed to women by international laws and standards, as well as those originating from the customary systems of some indigenous peoples. Highlighted below are some of the major gaps in national legal frameworks and practice affecting the recognition and protection of indigenous women's rights.

<sup>479</sup> Association of Southeast Asian Nations, *ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD)* (Jakarta, 2013).

<sup>480</sup> United Nations Development Programme, *Towards Inclusive Governance: Promoting the Participation of Disadvantaged Groups in Asia-Pacific* (Sales No. E.07.III.B.12) (Bangkok, UNDP Regional Center in Bangkok, 2007, p. 3).

<sup>481</sup> Republic Act No. 8371 of 1997 (Indigenous Peoples' Rights Act).

<sup>482</sup> Economic Commission for Latin America and the Caribbean, *Guaranteeing Indigenous People's Rights in Latin America* (LC/L.3893).

<sup>483</sup> *Ibid.*, p. 47.

***Poor enforcement of laws governing the recognition and protection of indigenous women's rights to lands, territories and resources***

The ideals articulated in the United Nations Declaration on the Rights of Indigenous Peoples can only be realized through the enactment and enforcement of national laws that recognize and protect the rights of indigenous women to lands and territories.<sup>484</sup> Globally, where national laws exist to protect indigenous women's land and territorial rights, gaps in enforcing such laws further entrench inequalities. The situation is dire in countries that have no legal framework for recognizing the equal rights of indigenous women or for explicitly eliminating gender discrimination in matters relating to lands, territories and resources. In a comparative analysis undertaken in 2017, the Rights and Resources Initiative noted that "existing legal frameworks in the 30 [countries] assessed are riddled with weak legal protections, crippling legal omissions, and discriminatory inheritance provisions that fail to protect the rights of indigenous and rural women".<sup>485</sup> Overlapping and conflicting laws cause further confusion, undermining efforts to secure indigenous women's rights to lands and territories.

***Inadequate information about existing policies and legal frameworks governing indigenous women's land and territorial rights***

In a number of areas around the world, high levels of illiteracy limit indigenous women's awareness of their rights as set out in different laws and policies, so many fail to exercise those rights. They tend to have limited knowledge of their statutory rights and of customary laws that often define land tenure as a male privilege. Many indigenous women do not know their constitutional rights, much less their rights under international law and under national laws and policies that relate to their lands, territories and resources. Government authorities may also be unaware of the broader international framework governing indigenous rights — and of their obligations within this context. Numerous cases exist of State officials being unsure which international instruments their countries are a party to and have committed to implementing.

***Gender-neutral laws and policies***

Although progress has been made in strengthening the legal and policy frameworks governing indigenous peoples' rights to lands and territories, most of the frameworks

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<sup>484</sup> Provisions adopted to support indigenous women's gains in the United Nations Declaration on the Rights of Indigenous Peoples are in articles 21.2 and 22.1, and article 44 states that the Declaration applies equally to "male and female indigenous individuals".

<sup>485</sup> Rights and Resources Initiative, *Power and Potential: A Comparative Analysis of National Laws and Regulations concerning Women's Rights to Community Forests* (Washington, D.C., 2017).



Photo: UN-DESA / Broddi Sigurdarson

fail the gender-specificity test. They assume that indigenous peoples constitute a homogeneous group, which is not the case. Gender-neutral policies and legal frameworks may have a discriminatory impact on women because they assume a level playing field for women and men and fail to challenge existing inequalities.

### ***Gender biases in the justice systems***

Access to national justice systems and indigenous legal systems remains a challenge for indigenous women, who continue to face persistent poverty, inequality, racism and discrimination. In both State and indigenous judicial systems and processes, there are explicit and implicit ethnic and gender biases that effectively rob indigenous women of justice as they pursue their rights through State courts and community dispute resolution mechanisms. For States to provide effective protection for indigenous women, a gender-sensitive and gender-responsive approach to judicial justice is needed; further, as noted by the Expert Mechanism on the Rights of Indigenous Peoples, “the situation of indigenous women ... with regards to access to justice must ... be viewed from a holistic perspective, as access to justice is inextricably linked to other human rights

challenges that indigenous peoples face, including poverty, lack of access to health and education and lack of recognition of their rights related to lands, territories and resources”.<sup>486</sup>

Indigenous women face additional challenges that can further undermine their pursuit of legal remedies, including low literacy, the long distance between their homes and the courts, and the high cost of moving a case through the justice system. When indigenous women arrive in the cities in which judicial institutions are located, they may feel intimidated and uncomfortable, particularly if they are unable to express themselves using the appropriate language. There are generally no interpreters to help them understand the proceedings (in terms of both language and substance), and they may also be confronted with the cultural insensitivity of justice officials. Frequently, justice officials are unfamiliar with the international human rights instruments that address collective and individual rights applicable to indigenous peoples in general and to indigenous women specifically.

In spite of these challenges, there are cases in which indigenous women have successfully navigated the complexities and biases of domestic judicial systems and have emerged victorious. The Sepur Zarco trial in Guatemala was not a land-rights case, but it does offer a positive example of how indigenous women are using national courts to pursue justice. In February 2016, the High-Risk Court of Guatemala convicted two former military officers of crimes against humanity and approved reparations for 11 indigenous Q’eqchi’ women who were subjected to sexual violence during the country’s 30-year conflict. Sepur Zarco was the first case of conflict-related sexual violence challenged under the Guatemala penal code. It was also the first time that a national court anywhere in the world considered charges of sexual slavery during an armed conflict – a crime under international law. In its landmark decision, the Court noted that the offences were part of a deliberate strategy by the Guatemalan military to destroy the local indigenous Maya Q’eqchi’ community.<sup>487</sup>

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<sup>486</sup> “Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities”, study by the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/EMRIP/2014/3/Rev.1), para. 35.

<sup>487</sup> See UN-Women, “Indigenous women & the women, peace and security agenda”, research brief (New York, 2016).

### **3. The role of indigenous women in the promotion and protection of indigenous peoples' rights to lands, territories and resources**

#### **3.1 Indigenous women as leaders of grass-roots movements**

Indigenous women have been and continue to be at the front line of the grass-roots movement for land and territorial rights globally. However, they face many challenges, including language barriers, patriarchy, gender discrimination and violence.

There are numerous examples of indigenous women advocating for their rights. A review of the efforts of the Zapatista women and the creation of the National Coordinating Committee of Indigenous Women in Mexico in 1997 offers a look at how the work of these women has evolved over time. The Coordinating Committee and early advocacy efforts emerged from the desire of indigenous women to create spaces to come together and express their demands; establishing a collective platform allowed these women to participate more actively in their own communities and in the national indigenous movement, to develop a voice of their own, and to engage in a higher level of leadership.<sup>488</sup> The agenda of the Coordinating Committee has gradually been transformed — the product of a process of reflection on the reality of indigenous women in the local, national and Latin American spheres and their primary needs and demands; their increasing involvement and influence in the political life of their communities and organizations; and their dialogue with the feminist movement. One of the most important changes is the priority now placed upon political participation, which is not limited to their communities and organizations but extends to the presence and leadership of indigenous women in political parties, municipal government, and local legislative bodies.

The growing activism among indigenous women has exacerbated the violence against them. Indigenous peoples' organizations must monitor and raise awareness of the high levels of global violence and threats directed at indigenous women human rights defenders.

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<sup>488</sup> Marusia López Cruz, *Women within the Indigenous Peoples' Movement of Mexico: New Routes for Transforming Power* (Toronto, Ontario, Association for Women's Rights in Development, 2008), p. 5.



### **3.2 Indigenous women as champions of climate change adaptation and mitigation**

Indigenous women have always played a central role in safeguarding more than half of the world's land, including much of its forests. According to International Funders for Indigenous Peoples, indigenous communities contribute significantly to cultural and environmental diversity, with more than 80 per cent of the world's remaining biodiversity found within their lands.<sup>489</sup> Climate change has adversely affected indigenous women's livelihoods, challenging them to develop coping strategies and mechanisms to minimize its impact. The increasing degradation of many indigenous peoples' lands,

<sup>489</sup> See [internationalfunders.org](http://internationalfunders.org) for more information.

#### **Box 4.3**

#### **Indigenous women as protectors of indigenous and community land: a case from Indonesia**

Yulia Awayakuane, widely known as the Ina Latu of Tananahu village, is a 55-year-old indigenous woman who has been engaged in leading her community to fight for their land. From 2013 to 2019 she served a second term as the Ina Latu, having been "re-elected by consensus by the community after finishing her first term, which started in 2007". The Ina Latu confirmed that "it was not at all easy when she took the leadership, as the village was facing many issues, including land scarcity caused by a 30-year concession given by the government to National Plantation Company XIV (formerly known as National Plantation Company XXVIII), which started its operation in 1983 and was contracted up until 31 December 2012. With the belief that when a community unites, problems can be changed into hopes, she decided to dedicate herself to work with and for the community. Under her leadership, the community started its resistance against the company long before the end of its contract, as the people saw no positive impacts from the existence of the company and its plantation project. Instead, scarcity of land became a major issue since the company started eroding the territory of the Tananahu community." ...

In 2013, "the Tananahu people finally reclaimed their land by cutting down cocoa and coconut trees, just three days after the end of the company's contract. However, despite the fact that the contract had already expired, the Tananahu women who entered the plantation area were beaten by police officers and company security personnel. The women were accused of being thieves and trespassers. ... Ina Latu said: 'We will continue fighting for our land. [The] contract of the plantation company ... ended in 2012 and we don't want to extend the contract. We are suffering greatly; we haven't felt any positive impacts from the plantation activities. We will never stop fighting!'"

Source: Largely excerpted from Luchie Maranan and Tanya Lutvey, eds., "HerStory 3: championing community land rights and indigenous women's leadership in Asia" (Chiangmai, Thailand, Asia Indigenous Peoples Pact, 2016), available at <https://docplayer.net/amp/75326373-Herstory-championing-community-land-rights-and-indigenous-women-s-leadership-in-asia.html>.

compounded by outsider encroachment, has negatively affected many women and children, one example being the extra time and effort spent searching for water and gathering firewood further from home, which compromises their security. In spite of such challenges, indigenous women are critical allies in climate change adaptation and mitigation. They are guardians of traditional knowledge relating to health, herbal medicine and the customary use of natural resources and of the language and transmission of indigenous knowledge in all spheres.

In its 2019 report on climate change and land, the Intergovernmental Panel on Climate Change affirms the importance of securing community land for climate change mitigation and adaptation. The report maintains that “insecure land tenure affects the ability of people, communities and organisations to make changes to land that can advance adaptation and mitigation. ... Limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity.”<sup>490</sup> The report notes that “land policies (including recognition of customary tenure, community mapping, redistribution, decentralisation, co-management, regulation of rental markets) can provide both security and flexibility response to climate change”.<sup>491</sup> While indigenous women are sustainably leading the conservation and management of forests, resources and rotational farms, their roles and contributions continue to be widely ignored or even outlawed by some Governments.<sup>492</sup>

<sup>490</sup> Intergovernmental Panel on Climate Change, “Summary for policymakers”, in *Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems*, P.R. Shukla and others, eds. (in press; approved draft, 7 August 2019), C.1.2, p. 29.

<sup>491</sup> Ibid.

<sup>492</sup> Asia Indigenous Peoples Pact and International Work Group for Indigenous Affairs, *Shifting Cultivation, Livelihood and Food Security: New and Old Challenges for Indigenous Peoples in Asia* (Chiang Mai, Thailand, AIPP Printing Press, 2014).

**Box 4. 4**

**Indigenous women as climate adaptation leaders in Bangladesh**

The Chittagong Hill Tracts, located in an area of south-eastern Bangladesh bordering India and Myanmar, are home to 11 indigenous groups with different cultures and livelihoods — known collectively as Jummas — who are “economically marginalized despite the rich natural resources found in the area”. In the past, the indigenous communities in the Hill Tracts lived in a resource-rich environment and “were able to survive by being fully dependent on nature. But in the past decades, the people observed that nature had begun to ‘behave’ unfavourably.”

Indigenous women bear the main responsibility for fulfilling their families’ food needs and have been able to meet this obligation in “innovative ways despite the adverse situations that they face. Such adaptations have been enabled by reliance on traditional knowledge passed on through the generations and have allowed them to survive by adapting to the environment and engaging in sustainable practices to preserve the forest.”

“The indigenous peoples in Chittagong Hill Tracts mainly depend on shifting cultivation (locally known as Jum cultivation) and forest product collection. In general, it is more commonly the women, rather than the men, who engage in these livelihood activities, in addition to their domestic roles. The women traditionally employ local knowledge ... to meet the family’s needs for food, despite the food crisis which these communities are currently experiencing. ... Women are involved in all stages of Jum, from site selection to sowing seeds, harvesting and selling these products in the market ... [making] the indigenous women consider the forest as an extensive resource. The forest provides for many, if not most, of their needs. ... It is one of the main sources of their income.”

“The women are aware of the value of preserving the wellness of the forest. They are aware that the forest does not only exist for their use; it also enables the existence of wild animals such as birds, tigers, monkeys, deer, snakes, and others. They understand that the survival of all the animals and plants are very vital to safeguard biodiversity and environmental balance. As such, the community strives to maintain the balance for the benefit of everyone. For instance, they never collect the top green leaves of plants because this practice is detrimental to the well-being of and cause[s] grave damage to the plants. When the plants die, their lives are affected. Because of their great reliance on the forest and forest resources for livelihood, the women are conscious of the need to conserve and save the forest. For generations, caring for the forest and looking after the continued well-being of the resources that may be found there has traditionally been among the roles ascribed to women. These practices ensure future productivity and food security” — and a climate-resilient community.

*Source: Largely excerpted from Senjuti Khisa Maleya and Women’s Resources Network, “The women of the Chittagong Hill Tracts and their experiences on climate change”, in Indigenous Women, Climate Change and Forests, Wilfredo V. Anamgui, Grace Subido and Ruth Tinda-am, eds. (Baguio City, Philippines, Tebtebba Foundation, 2011), pp. 128-129 and 133-134.*

## 4. What is the price indigenous women pay for protecting their lands, territories and resources?

Indigenous women who defend their lands, territories and resources face dual challenges; they are targets of violence both because they are activists and because they are women. The seriousness of the situation is illustrated by recent statistics for Colombia, where Oxfam documented the killing of 55 indigenous women defenders from 2016 to 2019 and confirmed a 97 per cent increase in attacks on women defenders in the first quarter of 2019.<sup>493</sup>

Indigenous women human rights defenders are far more likely than their male counterparts to face threats such as rape, abuse and criticism, and they sometimes encounter hostility from their own families, partners, friends, communities and movements because they are challenging and breaking out of the traditional roles they are assigned as women in their respective cultural contexts.<sup>494</sup> Many indigenous women defenders are targets of defamation aimed at tarnishing their reputations, which affects their professional and personal lives.<sup>495</sup>

In questioning and jeopardizing internal and external power structures based on class privilege and gender discrimination, women defenders are perceived as a threat to the status quo. Gender-based and sexual violence and brutal murders are tools used to silence indigenous women and keep them from challenging existing inequalities and protecting their lands and livelihoods.

<sup>493</sup> Oxfam International, *Women Defenders of Agricultural, Territorial, and Environmental Rights in Colombia: Risking their Lives for Peace*, Oxfam Briefing Paper – October 2019 (Nairobi, 2019).

<sup>494</sup> Ibid.

<sup>495</sup> Land Rights Now, *Criminalised for Defending our Planet*, brochure (2019).

**Box 4.5**

**The human cost of defending indigenous land and territorial rights for women in Colombia**

Members of the Fuerza de Mujeres Wayúu (Wayúu Women's Force), a group of 230 indigenous women and 50 indigenous men, have received death threats and have been defamed and stigmatized for opposing the damaging effects of a mining project in La Guajira, Colombia. The Fuerza belongs to a group of four organizations that filed a claim for the annulment of "the environmental license granted to the multinational company Carbones de El Cerrejón, which owns one of the largest open-pit coal ... mines in the world". The mine's presence in the region has seriously affected water and environmental resources, impacting the quality of life of the La Guajira communities.

"Following the lawsuit, the national media disseminated false information, arguing that the claim would lead to the definitive closure of the mine, affecting more than 12,000 jobs. The legal claim, however, only seeks to suspend the ... [expansion of extractive activity] until the protection of the environment and rights of local communities, including the right to prior and informed consent, have been complied with. ... Colombia is the second most dangerous place in the world to be a land rights defender. If you are a woman, indigenous or Afro-Colombian defending rights, threats and violence, including sexual violence, are the norm." In 2019, a female land defender was killed every two weeks.

For more than 14 years, the organization has been dedicated to improving living conditions and guaranteeing the rights of the Wayúu indigenous peoples. "When we began to complain, to ask, we found that there [was] discomfort amongst ... local political sectors. ... From there came threats in pamphlets, phone calls, text messages and any way that could diminish our work", according to Jakeline Romero Epiayú, a Wayúu Women's Force member and active defender of human rights. The members of the Women's Force "continue to fight for the respect of their land rights, as well as the protection of their leaders, since official protection measures have been slow, insufficient and inadequate".

*Source: Excerpted and paraphrased from Land Rights Now, "Members of the organization Fuerza de Mujeres Wayúu (Force of Wayúu Women) have received death threats and been subject to defamation and stigmatization for opposing the harmful effects of a mining project in La Guajira, Colombia" (2020 case profile, available from <https://www.landrightsnow.org/wayuu/>).*

## **5. Conclusion and recommendations: recognition and protection of indigenous women's rights to lands, territories and resources**

The recognition and protection of indigenous women's rights to lands, territories and resources are critical for advancing human rights, realizing the 2030 Agenda, and achieving sustainable development. The slow recognition and implementation of existing provisions on indigenous women's land rights has exacerbated inequalities between women and men and between indigenous and non-indigenous peoples. International instruments may be progressive, but at the heart of securing indigenous women's rights to lands, territories and resources are national laws and regulations. States and Governments, financial institutions and the private sector, indigenous and civil society organizations, and United Nations agencies all have a role to play in promoting and securing the recognition and protection of indigenous women's rights to lands, territories and resources. The recommendations below should be implemented in close consultation with indigenous women themselves, allowing them to be part of key decision-making platforms.

### **States and Governments**

Governments should review and acknowledge the gaps in national and regional laws and policies on indigenous women's rights to lands, territories and resources and should undertake all necessary revisions to ensure that the tenure rights of indigenous women are explicitly protected. As part of this process, Governments should ensure that national laws and policies on indigenous women's rights to lands and territories are aligned with the relevant provisions of international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, ILO Convention No. 169 (1989), and the United Nations Declaration on the Rights of Indigenous Peoples. The result should be consistently enforced national laws and policies that categorically recognize, secure, protect and uphold indigenous women's rights to lands, territories and resources. Particular areas of need are addressed in the following recommendations:

- ≡ Laws, policies and institutions should be established to protect indigenous women engaged in defending their land and the environment. Law enforcement authorities should receive training aimed at ensuring compliance with international human rights standards so that indigenous women defending their rights to lands, territories and natural resources have the freedom to protest without fearing retaliation or prosecution.



Photo: Ben Powless

- ≡ For indigenous women land and environmental defenders who are subjected to violent attacks, timely and independent investigations should be carried out and measures adopted to provide for effective redress and reparation.
- ≡ States should ensure that fair and effective grievance mechanisms are available and accessible to indigenous women so that they have a way to report violations of their rights to lands, territories and resources and pursue justice.
- ≡ Where legal frameworks for the recognition and protection of indigenous women's land and resource rights do not exist, States and Governments should adopt legislative and other formal measures to secure those rights, with explicit provisions addressing their individual and collective rights, the needs of indigenous women with disabilities, the roles and contributions of indigenous women in natural resource management, the equitable distribution of benefits and entitlements, and other cross-cutting issues with specific relevance to indigenous women.

- ≡ Legal frameworks should be established or modified to require private companies to respect human rights, indigenous peoples' rights, and the rights of indigenous women.

Governments should implement all international human rights instruments to which they are a party and should work to ensure the alignment of national initiatives with the principles embodied in these instruments and with good practice in general, as outlined in the following recommendations:

- ≡ The rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples must be advanced concurrently with initiatives designed specifically for indigenous women in order to address the structural problems affecting indigenous peoples that exacerbate or magnify the specific challenges faced by indigenous women.
- ≡ States and Governments should fully implement the Convention on the Elimination of All Forms of Discrimination against Women and take all possible measures to improve the economic and social conditions of indigenous women. Developing these measures in close consultation with indigenous women will allow them to be part of key decision-making platforms.
- ≡ To address the underrepresentation of indigenous women in land and territorial governance and management, States should secure their full and effective participation and equitable representation in decision-making bodies and processes that affect their rights as indigenous peoples and as women.
- ≡ States should include actions to secure indigenous women's land and territorial rights as part of their nationally determined contributions to reduce carbon emissions under the Paris Agreement on climate change and build communities resilient to climate change.
- ≡ National statistics offices should gather data on indigenous rights to lands, territories and resources. Disaggregating relevant data by ethnicity/indigenous affiliation and sex will provide a clearer picture of the situation of indigenous women and allow Governments to develop data-driven solutions aimed at securing and strengthening indigenous women's land and resource rights. A starting point could be formally recognizing the data and maps produced by indigenous communities themselves and even facilitating data collection and map creation within this context. Community data and maps best represent the interests and needs of indigenous women and their communities.



### **Financial institutions and the private sector**

Financial institutions fund many of the investment projects that violate the land and resource rights of indigenous women. Private sector entities finance or engage in commercial activities that undermine those rights and may even lead to violence against indigenous women and their communities. Both lenders and corporate entities must recognize and respect the rights of indigenous peoples to lands, territories and resources that are targeted or approved for commercial exploitation. Relevant recommendations are as follows:

- ≡ All financial institutions should have social safeguards in place to ensure that they are aware of the potential or actual impact of their investments on indigenous women and men.
- ≡ Financial institutions should adhere to the highest international standards of conduct and due diligence in all interactions with indigenous peoples, recognizing that national laws often do not adequately safeguard indigenous women's rights to land and land-based resources.
- ≡ Financial institutions should adopt business models and operational approaches that support the recognition, protection and strengthening of indigenous women's land rights. Project funding decisions should be contingent on the operationalization of free, prior and informed consent and associated consultation processes, through which indigenous women and indigenous men have the right to grant or withhold approval for commercial investment activities that affect them. The private sector must also demonstrate respect for indigenous peoples' rights through the consistent application of consultation and free, prior and informed consent principles and processes.
- ≡ The private sector and financial institutions should demonstrate zero tolerance for land-grabbing and should embrace inclusive, transparent and accountable procedures and practices, including the full disclosure of pertinent information to indigenous women and men. The private sector must be proactive in ensuring that the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and its principles on non-discrimination, equity, justice, gender equality, and participation are implemented to the letter.<sup>496</sup>

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<sup>496</sup> Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Governance of Tenure: At a Glance* (Rome, 2012).

### **Donor agencies**

- ≡ Donors, along with Governments, international organizations and other development partners, should scale up direct and targeted support to indigenous women's organizations at all levels. As part of such support, development partners should commit to not directly or indirectly harming the indigenous women's cause.
- ≡ Where possible, donor agencies should leverage their power and influence to hold to account corporate entities and financial institutions that violate the rights of indigenous women to lands, territories and resources.
- ≡ Foundations and philanthropic organizations should direct more resources towards ensuring the safety and security of indigenous women land rights defenders and supporting strategic public litigation on indigenous women's land and territorial rights. Where dialogue and other avenues have failed, strategic litigation provides indigenous women with the opportunity to secure their rights through the judicial system. When successful, public litigation sets a precedent for other cases on indigenous women's rights to lands, territories and resources. It is essential that adequate resources be made available for the pursuit of strategic litigation, as the process is quite costly.

### **Indigenous women's rights organizations and civil society organizations**

- ≡ Indigenous women's rights organizations and civil society organizations should monitor and report what Governments, donors, international institutions, the private sector, and national and international financial institutions are doing to protect or jeopardize indigenous women's rights to lands, territories and resources. Monitoring reports are critical for holding government and other agencies accountable and for promoting the legal recognition of indigenous women's rights to lands and land-based resources. It would also be useful to monitor what individual citizens are doing to support the recognition of indigenous and community land rights.
- ≡ Although indigenous women's organizations take many different forms, all have a common goal: to support the welfare and rights of indigenous women. Alliances should be strengthened so that indigenous women can work together to protect their rights to lands, territories and resources. Indigenous women's organizations should also strengthen their coordination and collaboration with other organizations working to secure land rights for indigenous



peoples so that the message they convey to the world is strong, coherent and consistent.

- ≡ Indigenous women are custodians of traditional knowledge that has long guided their land stewardship and natural resource management. Organizations supporting indigenous women should facilitate the protection and preservation of traditional knowledge and, where possible, ensure that it is documented for future generations.
- ≡ Information, communication and education materials on indigenous women's rights to land and other resources should be developed to help bridge the knowledge gap with respect to these rights. These materials could be used in large-scale campaigns to raise awareness of the rights of indigenous women and the responsibilities of the State in securing and protecting these rights.

### **The United Nations system**

- ≡ The scarcity of data on indigenous peoples (and on indigenous women specifically) makes it difficult to carry out evidence-based advocacy. United Nations agencies have an opportunity to leverage the SDG indicators that relate to land ownership rights for women to encourage stakeholders to collect and disaggregate data on indigenous women's land rights.
- ≡ United Nations agencies and relevant programmes should continue to advocate for the full implementation of the Declaration on the Rights of Indigenous Peoples, with particular attention given to the provisions governing indigenous women's rights to lands, territories and resources. The creation of a system for tracking progress on the implementation of indigenous women's rights to lands, territories and resources could be considered.
- ≡ United Nations Resident Coordinators and Country Teams should encourage and ensure the full and effective participation of indigenous women in the preparation of Common Country Analyses and within the United Nations Sustainable Development Cooperation Framework.



Photo: Ben Powless



## Chapter V:

# Indigenous peoples' rights to lands, territories and resources and the 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT

Prabindra Shakya

## 1. Overview: indigenous peoples, the Millennium Development Goals and the Sustainable Development Goals

Over the past 30 years, the United Nations has developed a series of global frameworks incorporating social, economic and environmental goals and targets for sustainable development. The concept of “sustainable development” first entered the global discourse in 1987 in the “Report of the World Commission on Environment and Development: our common future”.<sup>497</sup> In this report, sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>498</sup> The concept of formally integrating economic development, environmental management and protection, and social equity and inclusion to achieve global development objectives was introduced in the report and, five years later, helped frame the discussions at the 1992 United Nations Conference on Environment and Development (the Earth Summit) in Rio de Janeiro, Brazil, and its outcome document, Agenda 21.<sup>499</sup>

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<sup>497</sup> Also known as the Brundtland Commission in recognition of the role of the Chair, former Prime Minister of Norway Gro Harlem Brundtland.

<sup>498</sup> A/42/427.

<sup>499</sup> See <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

In September 2000, building on these foundations and on the outcomes, achievements and gaps of other international conferences and events that took place during the 1990s, world leaders agreed on a set of eight overarching goals urging collective action to address some of the world's most urgent development needs. Following the Millennium Summit and Millennium Declaration of 2000, the Millennium Development Goals (MDGs) were unanimously adopted by the United Nations Member States, committing Governments to achieving by the year 2015 substantial reductions in poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women, guided by specific goals, targets and indicators. The Millennium Declaration reaffirmed the universal values of human rights, equality, mutual respect and shared responsibility for the well-being of all peoples and sought to address the enormous inequalities deriving from or exacerbated by the process of globalization.<sup>500</sup>

The MDGs were developed and implemented at a time when indigenous peoples were beginning to see progress from their advocacy efforts at the international level. Desk reviews of MDG reports produced between 2006 and 2010 show that the level of attention given to indigenous peoples in the reports of many Latin American countries was encouraging. Some Asian States also referred to indigenous peoples, their issues and specific interventions, often in the context of ethnic diversity. In spite of these gains, there was a general lack of participation of indigenous peoples in the development and implementation of the MDGs and little explicit attention given to their situation in MDG reporting in countries across all regions.<sup>501</sup>

For indigenous peoples, significant challenges and gaps surrounded the MDG process. The MDGs were defined and developed without indigenous representation, consultation or engagement. As a result, there was no mention made of indigenous peoples in any of the Goals, targets or indicators, and as mentioned above, indigenous peoples were absent in both implementation and reporting. The MDGs emphasized economic growth; little attention was given to environmental sustainability and social equity, and the Goals did not address development trends and structural causes of poverty affecting indigenous peoples, such as issues relating to land rights. The MDGs also

<sup>500</sup> Secretariat of the United Nations Permanent Forum on Indigenous Issues, "Indigenous peoples and the MDGs: we must find inclusive and culturally sensitive solutions", *UN Chronicle*, No. 4 (2007).

<sup>501</sup> Kelley Laird, "MDG reports and indigenous peoples: a desk review", prepared for the Secretariat of the United Nations Permanent Forum on Indigenous Issues (2006); Secretariat of the United Nations Permanent Forum on Indigenous Issues, "MDG reports and indigenous peoples: a desk review", No. 2 (March 2007); Bonney Hartley, "MDG reports and indigenous peoples: a desk review — No. 3, February 2008", prepared for the Secretariat of the United Nations Permanent Forum on Indigenous Issues; Christopher Foley, "MDG reports, CCAs, UNDAFs and indigenous peoples: a desk review 2010", study prepared for the Secretariat of the United Nations Permanent Forum on Indigenous Issues (2010).

had limited scope, as they focused on developing countries, even though indigenous peoples living in developed countries were facing similar challenges.

Another problem was that indigenous peoples in most countries were somewhat invisible within the MDG poverty reduction framework owing to a lack of data disaggregation, disappearing into national or regional average poverty rates in a way that made it impossible to identify indigenous groups in need and include them in targeted poverty reduction efforts. The situation in Viet Nam during this period illustrates the importance of data disaggregation: between 1993 and 2012, the national poverty rate decreased from 58.1 to 17.2 per cent, and the poverty rate for the majority Kinh ethnic group declined from 53.9 to 9.9 per cent, but the poverty rate for non-Kinh ethnic minority groups was still as high as 59.2 per cent in 2012 (down from 86.4 per cent in 1993 but nonetheless deserving of attention).<sup>502</sup> Statistics for 2016 indicate that indigenous/ethnic minority groups made up only 14 per cent of the national population but accounted for 73 per cent of the country's poor.<sup>503</sup>

In spite of their relative marginalization, indigenous peoples continued to advocate for a human-rights-based and culturally sensitive approach to development that incorporated respect for and consideration of indigenous peoples' world views, perspectives and experiences. The United Nations Permanent Forum on Indigenous Issues expressed support for this idea in 2003 when it recommended that "agencies and bodies of the United Nations ... [and other intergovernmental organizations] rethink the concept of development, with the full participation of indigenous peoples in development processes, taking into account the rights of indigenous peoples and the practices of their traditional knowledge".<sup>504</sup>

Not only did the MDGs fail to account for the underlying and structural issues affecting indigenous peoples, but MDG-related activities sometimes directly harmed them. An ILO report on indigenous communities' perspectives on the MDGs in five countries found that, in connection with MDG 7 (ensuring environmental sustainability), most communities were negatively affected or even dislocated by the establishment of protected areas or the implementation of other legal provisions designed to protect forest resources. Indigenous communities were not consulted for their input on any of these activities.

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<sup>502</sup> Viet Nam, Ministry of Planning and Investment, "Country report: 15 years achieving the Viet Nam Millennium Development Goals" (September 2015).

<sup>503</sup> World Bank, "Vietnam: ethnic minority children are disproportionately undernourished", press release, 10 December 2019 (Washington, D.C.).

<sup>504</sup> "Permanent Forum on Indigenous Issues: report on the second session (12-23 May 2003)" (E/2003/43-E/C.19/2003/22), para. 26.

## **2. Indigenous peoples in the 2030 Agenda for Sustainable Development**

On 25 September 2015, the United Nations General Assembly adopted the universal, integrated and transformative 2030 Agenda for Sustainable Development. The 2030 Agenda is an ambitious “plan of action for people, planet and prosperity” that is to be implemented by all countries and stakeholders in collaborative partnership. At its heart are 17 Sustainable Development Goals (SDGs) and 169 associated targets to be achieved over a period of 15 years, with the promise that no one will be left behind. The SDGs build on the MDGs in that they contribute to the pursuit of human rights for all, including gender equality and the empowerment of all women and girls. “They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental”. They recognize that ending poverty and other deprivations goes hand in hand with improving health and education, reducing inequality, and spurring economic growth — all while tackling climate change and working to preserve oceans and forests.<sup>505</sup>

In the broad and inclusive development process leading up to the adoption of the 2030 Agenda, indigenous peoples participated as one of the nine Major Groups consulted.<sup>506</sup> The 2030 Agenda for Sustainable Development, including the SDGs, represents a step forward for indigenous peoples in terms of ensuring their visibility, as they had largely been left behind in the creation of the MDGs. Although not all of their concerns were included, their advocacy and participation in intergovernmental processes contributed to the design of a framework that incorporates explicit references to indigenous peoples and that is based on their core priorities, including the principles of universality, human rights, equality and environmental sustainability.

In the 2030 Agenda, States pledge to leave no one behind and to “endeavour to reach the furthest behind first”.<sup>507</sup> The Agenda is explicitly grounded in the Universal Declaration of Human Rights and international human rights treaties. Its overarching framework contains numerous elements of relevance to indigenous peoples and their concerns, and there are six direct references to indigenous peoples in the Agenda.<sup>508</sup>

<sup>505</sup> A/RES/70/1, preamble.

<sup>506</sup> Birgitte Feiring and others, *Leaving No One Behind: Practical Guide for Indigenous Peoples* (Chiang Mai, Thailand, Asia Indigenous Peoples Pact, 2017).

<sup>507</sup> A/RES/70/1, para. 4.

<sup>508</sup> Secretariat of the United Nations Permanent Forum on Indigenous Issues, indigenous peoples and the 2030 Agenda infographics, link available from <https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda/the-sustainable-development-goals-sdgs-and-indigenous.html>.



Photo: UN-DESA / Broddi Sigurdarson



Specific mention is made of indigenous peoples in two SDGs – Goal 2 (to end hunger, achieve food security and improved nutrition and promote sustainable agriculture) and Goal 4 (to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all). Under those Goals, States have two key objectives relating to indigenous communities: to double the agricultural productivity and incomes of small-scale food producers, in particular indigenous peoples, including through secure and equal access to land (target 2.3); and to eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including indigenous peoples, by 2030 (target 4.5). In monitoring and following up on efforts undertaken within the 2030 Agenda framework, States are encouraged to draw on contributions from indigenous peoples as they conduct regular and inclusive reviews of progress at the national and subnational levels.

The concepts of leaving no one behind, human rights, equality, participation and accountability in the 2030 Agenda are particularly relevant for indigenous peoples because they address many of their key priorities, including securing land rights and ending poverty and hunger (SDGs 1 and 2), ensuring social security, health and

education (SDGs 1, 3 and 4), strengthening environmental sustainability (SDGs 12, 13 and 14), promoting inclusive and peaceful societies and reducing inequalities (SDGs 10 and 16), and overcoming discrimination and inequality through special measures (SDGs 5 and 10), as well as calling for disaggregation of data by ethnicity.<sup>509</sup> An analysis by the Indigenous Navigator consortium shows that 73 of the 169 SDG targets have strong links to provisions of the United Nations Declaration on the Rights of Indigenous Peoples and that 92 per cent of the targets are related to provisions of international human rights instruments more broadly.<sup>510</sup> For example, SDG target 1.4, which calls on countries to ensure “that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, [and] natural resources”, relates to the rights of indigenous peoples “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (article 26.1 of the United Nations Declaration on the Rights of Indigenous Peoples).

Although the SDGs represent progress in terms of addressing indigenous concerns, they nonetheless contain many gaps and may involve potential risks for indigenous peoples. The 2030 Agenda does not fully recognize collective rights in relation to not only lands and resources but also health, education, culture and ways of living. The Agenda also lacks cultural sensitivity in certain contexts, including within Goals and targets relating to health and education, as evidenced by the absence of any reference to, for example, the provision of indigenous-mother-tongue-based multilingual education or traditional health-care systems. The principle of free, prior and informed consent and the concept of self-determination for indigenous peoples are neither referred to nor reflected in the Agenda. Although poverty is recognized as a multidimensional phenomenon, there is an emphasis on gross domestic product growth, industrialization and increased production that risks undermining indigenous peoples’ holistic development approaches. The implementation of the SDGs requires a human-rights-based approach through adherence to the principles of indigenous peoples’ empowerment, inclusion and participation as equal partners, whereby not only Governments but also the private sector are held accountable for respecting indigenous rights.<sup>511</sup>

<sup>509</sup> United Nations, Office of the High Commissioner for Human Rights and Secretariat of the Permanent Forum on Indigenous Issues, *Briefing Note: Indigenous Peoples’ Rights and the 2030 Agenda* (September 2017).

<sup>510</sup> Indigenous Navigator, “Where are indigenous peoples’ rights in the Sustainable Development Goals?”, Indigenous Peoples Sustainable Development Matrix; and Danish Institute for Human Rights, *The Human Rights Guide to the Sustainable Development Goals* (Copenhagen).

<sup>511</sup> Office of the High Commissioner for Human Rights and Secretariat of the Permanent Forum on Indigenous Issues, *Briefing Note: Indigenous Peoples’ Rights and the 2030 Agenda*.

### **3. Indigenous peoples' rights to lands, territories and resources and the Sustainable Development Goals**

Rights to lands, territories and resources are at the heart of indigenous peoples' struggles around the world. Indigenous peoples make up around 5 per cent of the global population but account for 15 per cent of the world's poorest inhabitants. According to an ILO report, indigenous peoples are nearly three times as likely as their non-indigenous counterparts to be living in extreme poverty and presently account for almost 19 per cent of the extreme poor living on less than \$1.90 per day.<sup>512</sup> Clearly, in order to achieve the SDGs, including ending poverty in all its forms everywhere (SDG 1), the specific needs and challenges of indigenous peoples must be addressed. Of prime concern is the lack of secure land rights, which results in encroachment by Governments, businesses and others and the forced eviction of many communities from their ancestral lands.<sup>513</sup>

Securing indigenous peoples' land rights not only contributes to decreasing poverty (SDG 1) and supporting food security (SDG 2), but also encourages long-term environmental benefits that are critical to meeting the SDGs, in particular SDG 13 (combating climate change and its impacts). In Mongolia, greater access to and community control over pastures has not only increased incomes for pastoralists but also rehabilitated rangelands and improved biodiversity and ecosystem services.<sup>514</sup> The Permanent Forum on Indigenous Issues has stressed that "ensuring the collective rights of indigenous peoples to lands, territories and resources is not only for their well-being, but also for addressing some of the most pressing global challenges, such as climate change and environmental degradation. Advancing those rights is an effective way to protect critical ecosystems, waterways and biological diversity."<sup>515</sup>

Recently, there has been increasing recognition, including from the world's leading climate scientists, that indigenous peoples are some of the best environmental stewards and play a central role in safeguarding more than half of the world's land,

<sup>512</sup> Rishabh Kumar Dhir and others, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future* (Geneva, International Labour Office, 2020).

<sup>513</sup> Victoria Tauli-Corpuz, "Opinion: don't leave indigenous peoples behind in SDGs", Inter Press Service News Agency, 11 May 2015.

<sup>514</sup> Land Rights Now, *Tested, Cost-Effective and Practical: Securing the Land Rights of Indigenous Peoples and Local Communities Is a Key Solution to Climate Change*, policy brief (n.p., 2018).

<sup>515</sup> "Permanent Forum on Indigenous Issues: report on the seventeenth session (16-27 April 2018)" (E/2018/43-E/C.19/2018/11), para. 10.

including much of its forests. In its 2019 special report on climate change and land, the Intergovernmental Panel on Climate Change highlights the importance of securing community land for climate change adaptation and mitigation (SDG 13).<sup>516</sup> The report states the following:

*Insecure land tenure affects the ability of people, communities and organisations to make changes to land that can advance adaptation and mitigation (medium confidence). Limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity (medium confidence). Land policies (including recognition of customary tenure, community mapping, redistribution, decentralisation, co-management, regulation of rental markets) can provide both security and flexibility response to climate change (medium confidence).*<sup>517</sup>

Secure land and resource rights for indigenous peoples constitute a tested, cost-effective and practical solution to climate change.<sup>518</sup> The legal recognition and protection of indigenous and community forests are associated with lower rates of deforestation and more carbon storage than is the management of forests by government, private sector or other non-indigenous entities.<sup>519</sup> There is also potential for more carbon storage in degraded indigenous lands if they are secured, protected and restored.<sup>520</sup> In the Peruvian Amazon, 11 million hectares have been titled for more than 1,200 indigenous communities since the mid-1970s. Titling has been found to reduce clearing by more than three quarters, forest disturbance by roughly two thirds, and overall deforestation by up to 81 per cent within two years of the title being awarded.<sup>521</sup> Indigenous peoples'

<sup>516</sup> Intergovernmental Panel on Climate Change, "Summary for policymakers", in *Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems*, section C.1.2, p. 29.

<sup>517</sup> Ibid., p. 29. IPCC is the internationally accepted authority on climate change, issuing reports that generally represent the consensus between leading climate scientists and participating Governments. The level of confidence in key findings is indicated based on an evaluation of underlying evidence and agreement using the IPCC-calibrated language and is expressed using five qualifiers: very low, low, medium, high, and very high.

<sup>518</sup> Land Rights Now, "Tested, cost-effective and practical: securing the land rights of indigenous peoples and local communities is a key solution to climate change", policy brief (2017).

<sup>519</sup> Caleb Stevens and others, *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change* (Washington, D.C., World Resources Institute, 2014).

<sup>520</sup> Hannah Mowat and Peter Veit, "The IPCC calls for securing community land rights to fight climate change", World Resources Institute blog post, 8 August 2019.

<sup>521</sup> Alan Blackman and others, "Titling indigenous communities protects forests in the Peruvian Amazon". *Proceedings of the National Academy of Sciences of the United States of America*, vol. 114, No. 16 (2017), pp. 4,123-4,124 and 4,128.



Photo: Ben Powless

sustainable stewardship of the world's lands and resources, including forests, is key to reducing global emissions and limiting the global temperature rise to no more than 1.5 °C by 2030.

As emphasized by the Intergovernmental Panel on Climate Change, “agricultural practices that include indigenous and local knowledge can contribute to overcoming the combined challenges of climate change, food security, biodiversity conservation, and combating desertification and land degradation (*high confidence*)”.<sup>522</sup> This highlights the importance of indigenous peoples’ traditional knowledge — which is closely linked to their lands, territories and resources — for achieving food security (SDG 2), combating climate change and its impacts (SDG 13), and combating desertification and halting and reversing land degradation and the loss of biodiversity (SDG 15). In this context, the contributions of indigenous women are widely acknowledged and should be further promoted, as women play a key role in protecting and transmitting indigenous

<sup>522</sup> Intergovernmental Panel on Climate Change, *Climate Change and Land: An IPCC Special Report*, para. C.4.3, p. 31.

traditional knowledge and using this knowledge for sustainable natural resource management and the conservation of biodiversity both to sustain their families and communities and to ensure the well-being of the environment.<sup>523</sup>

According to a World Bank report, “traditional indigenous territories encompass up to 22 per cent of the world’s land surface and ... coincide with areas that hold 80 per cent of the planet’s biodiversity, ... and 11 per cent of world forest lands are legally owned by indigenous peoples and communities”.<sup>524</sup> Globally, indigenous peoples’ lands intersect with around 40 per cent of all terrestrial protected areas, account for 37 per cent of all remaining ecologically intact landscapes, and encompass more than 65 per cent of the remotest and least inhabited lands on Earth. Hence, “recognizing indigenous peoples’ rights to lands, benefit-sharing and institutions is essential to meeting local and global conservation goals”.<sup>525</sup> The Permanent Forum on Indigenous Issues recommended in the report on the Forum’s seventeenth session “that the secretariat of the Convention on Biological Diversity and the International Union for Conservation of Nature actively engage with indigenous organizations, relevant United Nations entities, non-governmental organizations and other actors to develop a set of actions and commitments in relation to conservation and human rights in the context of the post-2020 biodiversity framework and the next World Conservation Congress”.<sup>526</sup>

Millions of indigenous peoples depend on the oceans, seabeds, coastal areas and associated environments and resources for their food, health, economic activities and cultural practices; the South Pacific alone is home to an estimated 9.5 million indigenous people.<sup>527</sup> Globally, there are 27 million people living in more than 1,900 coastal indigenous communities across 87 countries, and they consume seafood at a per capita rate that is 15 times higher on average than that of non-indigenous populations.<sup>528</sup> Protecting the

<sup>523</sup> United Nations, Secretariat of the Permanent Forum on Indigenous Issues, in collaboration with the Office of the Special Advisor on Gender Issues and the Advancement of Women and the Division for the Advancement of Women, “Gender and indigenous peoples”, briefing notes (New York, 2010); Asia Indigenous Peoples Pact, *Research on the Roles and Contributions of Indigenous Women in Sustainable Forest Management in Mekong Countries/Asia* (Chiang Mai, Thailand, AIPP Printing Press, Ltd., 2013).

<sup>524</sup> Claudia Sobrevilla, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (Washington, D.C., World Bank, 2008), p. xii.

<sup>525</sup> Garnett and others, “A spatial overview of the global importance of indigenous lands for conservation”, p. 369.

<sup>526</sup> E/2018/43-E/C.19/2018/11, para. 26; see also United Nations Permanent Forum on Indigenous Issues, “Indigenous peoples’ collective rights to lands, territories and resources”, backgrounder (New York, United Nations Department of Public Information, 2018).

<sup>527</sup> Valmaine Toki, “Study on the relationship between indigenous peoples and the Pacific Ocean” (E/C.19/2016/3), para. 19.

<sup>528</sup> Andrés M. Cisneros-Montemayor and others, “A global estimate of seafood consumption by coastal indigenous peoples”, *PLoS ONE*, vol. 11, No. 12 (2016).



marine environment is critical, as “over 3 billion people depend on marine and coastal biodiversity for their livelihoods”, and “oceans absorb about 30 per cent of the carbon dioxide produced by humans, thereby buffering the impacts of global warming”.<sup>529</sup>

Not enough is being done to conserve and protect marine areas and resources; presently, “as much as 40 per cent of the world’s oceans are heavily affected by human activities”.<sup>530</sup> For indigenous peoples and other communities living in these areas, pollution and climate change threaten food and other resources, coastal habitats and cultures, and marine life and ecosystems. The release of wastes and other harmful substances, including through the dumping of toxic industrial chemicals and oil and gas spills, along with uncontrolled tourism, have contributed significantly to marine pollution, and climate change has led to ocean acidification, coral bleaching and oceanwide fish migration;<sup>531</sup> “overfishing and the destruction and exploitation of natural resources through deep sea mining further exacerbate those threats”.<sup>532</sup>

Coastal indigenous communities rely on the ocean for sustenance and thus have a unique relationship with the ocean. This relationship is closely tied to their cultures, on the basis of which they have traditionally managed their environment, including the oceans, seabeds and other marine resources, in a sustainable manner to benefit all peoples and future generations. The indigenous Māori of New Zealand, for example, have the concept of *tikanga*, aimed at achieving balance between the environment and the community; this approach has been integrated in various pieces of national legislation, including the Fisheries Regulation, which provides for a temporary ban on resource exploitation or restricted access to an area or a resource such as fish to allow regeneration. Within the framework of the 2030 Agenda, the rights of indigenous peoples to their lands and resources are important for the conservation and sustainable use of oceans, seas and marine resources for sustainable development (SDG 14).

The participation of indigenous peoples, particularly indigenous women, in the sustainable management of terrestrial and marine resources is vital for climate change mitigation and adaptation. However, many indigenous communities are unable to employ their traditional conservation strategies because they lack guaranteed land and resource rights; this not only prevents them from combating climate change but also makes them more susceptible to its negative effects. Populations with insecure land and resource rights have a higher level of vulnerability to the impacts of climate

<sup>529</sup> E/C.19/2016/3, para. 1.

<sup>530</sup> Ibid.

<sup>531</sup> Joshua Cooper, “Our oceans, our future: the United Nations discusses oceans”, *Cultural Survival Quarterly*, vol. 41, No. 4 (December 2017).

<sup>532</sup> E/C.19/2016/3, para. 20.

change, and the Intergovernmental Panel on Climate Change has identified indigenous peoples, women and others dependent on natural resources as particularly vulnerable.<sup>533</sup> Typical of what is happening more frequently with the increase in major weather events linked to climate change, the indigenous Badjao people in the southern Philippines were displaced by Typhoon Haiyan in late 2013 and were unable to return and rebuild their homes owing to the lack of secure land tenure. After being displaced earlier in 1987 from their original village due to decades of armed conflict, they had moved to Isabel town and were living there when disaster struck. Following the typhoon, they were prevented from returning to their homes after the landowner said they could not come back, citing the Government's new rule on "no-build zones".<sup>534</sup>

The continued dispossession of indigenous lands and resources is among the root causes of political conflicts between indigenous peoples and majority non-indigenous populations. This dynamic interferes with the socioeconomic and political inclusion of indigenous peoples in the broader society as well as their access to responsive, participatory and representative decision-making. Indigenous groups are increasingly experiencing harassment, killings and disappearances due to their engagement in defending their rights to lands and resources and the environment. In such situations, indigenous women face multiple layers of discrimination and violence, including sexual violence.

In some countries, efforts are being made to resolve conflicts and address issues that affect the security of indigenous peoples and their rights to lands, territories and resources. The 2016 peace agreement in Colombia, for example, calls for advancement of the comprehensive agrarian reform process, including the recognition of the collective land rights of indigenous and Afro-descendent communities. A report released by the Kroc Institute for International Peace Studies confirms that progress is being made in the implementation of the agreement.<sup>535</sup> In other settings, agreements supporting indigenous land rights have been concluded, but implementation has stalled. In Bangladesh, there are reports of violence allegedly being used as part of an organized strategy to suppress indigenous peoples and grab their lands and resources in the context of unresolved conflicts more than 20 years after the 1997 Chittagong Hill Tracts

<sup>533</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Fourth Assessment Report of the IPCC (Cambridge, United Kingdom, Cambridge University Press, 2007).

<sup>534</sup> Johanna Morden, "Typhoon Haiyan: indigenous people seek to break cycle of displacement", UNHCR news (Isabel, the Philippines), 4 February 2014.

<sup>535</sup> Kroc Institute for International Peace Studies, "State of implementation of the Colombian Final Accord: December 2016 – April 2019 – executive summary" (Notre Dame, Indiana, University of Notre Dame, Keough School of Global Affairs, 2019); updates on progress in the implementation of the agreement are available at [kroc.nd.edu/Colombia](http://kroc.nd.edu/Colombia).



Peace Accord was signed.<sup>536</sup> Successful implementation of the Accord requires formal recognition of those community lands, but some communities have been waiting for more than two decades for collective land titles.<sup>537</sup> Recognizing and protecting the rights of indigenous peoples to lands, territories and resources are not only important in and of themselves, but are also key to promoting peaceful and inclusive societies and providing access to justice (SDG 16), as well as ensuring equality and non-discrimination (SDG 10), including through the achievement of gender equality (SDG 5).

### **3.1 Sustainable Development Goal indicators addressing indigenous peoples' rights to lands, territories and resources**

In 2017, the United Nations General Assembly adopted the global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development. The list of global indicators, updated and refined annually, functions as a source of guidance for the development of national indicator frameworks to assess progress towards achieving sustainable development at the country level.

The global indicator framework includes several indicators that address indigenous peoples' priorities and concerns. Specific indicators are designed to track the average income of small-scale food producers, by sex and indigenous status (indicator 2.3.2) and the development of a parity index for indigenous peoples for all educational indicators to monitor their access to education in comparison with other groups (indicator 4.5.1.). Particularly relevant to indigenous peoples are the indicators for measuring the proportion of the total adult population with secure tenure rights to land, with legally recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure (indicator 1.4.2), the proportion of total agricultural population with ownership or secure rights over agricultural land, by sex (indicator 5.a.1[a]), the share of women among owners or rights-bearers of agricultural land, by type of tenure (indicator 5.a.1[b]), and the proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control (indicator 5.a.2). Data for these and other relevant indicators need to be disaggregated by ethnicity to contribute to the recognition of indigenous peoples' rights to their lands, territories and resources, particularly within collective/community tenure systems.

The lack of data disaggregation is also relevant to the indicator on the proportion of the population reporting personal feelings of discrimination or harassment based on

<sup>536</sup> International Work Group for Indigenous Affairs, "Indigenous women target of rape in land-related conflicts in Bangladesh", press release, 8 March 2018.

<sup>537</sup> Rights and Resources Initiative, *At a Crossroads: Consequential Trends in Recognition of Community-Based Forest Tenure from 2002-2017* (Washington, D.C., 2018).

prohibited grounds of discrimination in international human rights treaties, as this makes it impossible to assess progress towards addressing indigenous peoples' experience of marginalization and discrimination (indicators 10.3.1 and 16.b.1.).

The Permanent Forum on Indigenous Issues has affirmed the importance of data disaggregation, as emphasized in target 17.18 of the SDGs. It has called upon "Governments to establish permanent, open and inclusive mechanisms for consultation, participation and representation of indigenous peoples in local, regional, national and international processes and bodies relating to the Sustainable Development Goals, ... to allocate adequate resources towards the implementation of plans that include indigenous peoples ... [and] to ensure data disaggregation on the basis of indigenous identifiers".<sup>538</sup> The Forum has also recommended that the Economic Commission for Latin America and the Caribbean, in cooperation with the United Nations Population Fund and others, "redouble efforts to ensure data disaggregation for indigenous peoples and promote the

<sup>538</sup> "Permanent Forum on Indigenous Issues: report on the sixteenth session (24 April – 5 May 2017)" (E/2017/43–E/C.19/2017/11), para. 92.



Photo: UN-DESA / Broddi Sigurdarson



inclusion of complementary indicators on indigenous peoples' rights in Governments' national reports for the Sustainable Development Goals".<sup>539</sup>

### **3.2 Indigenous peoples' rights to lands, territories and resources in relation to the achievement of the Sustainable Development Goals**

The exact proportion of the world's land held by indigenous peoples is unknown. According to a World Bank report, traditional indigenous territories constitute up to 22 per cent of the world's land surface.<sup>540</sup> A recent report maintains that indigenous peoples and local communities customarily claim and manage more than 50 per cent of the world's land but legally own just 10 per cent, which means that at least 40 per cent of the world's land – around 5 billion hectares – remains unprotected and vulnerable to commercial pressures, including land-grabbing by powerful entities such as Governments and corporations, as well as environmental destruction.

Secure land rights are a prerequisite for development, allowing communities to benefit from increased incomes, resilience and food security. As noted in a 2013 World Bank report, economic growth in Africa is held back by poor land governance, with 90 per cent of Africa's rural land untitled and thus highly vulnerable to land-grabbing and expropriation. The report asserts that there is a direct link between poor land governance and high poverty rates in the region, concluding that "African countries and their communities could effectively end land grabs, grow significantly more food across the region, and transform their development prospects if they can modernize the complex governance procedures that govern land ownership and management".<sup>541</sup> Modernization requires "not the removal of rights from communities but the 'documentation of communal lands, [...] recognizing customary land rights [and] regularizing tenure rights on public land'".<sup>542</sup>

Food security is dependent on securing the land rights of indigenous peoples because these are the farmers, pastoralists, fisherfolks and forest keepers that make up a large part of the world's small-scale food producers, providing 70 per cent of the world's food

<sup>539</sup> Ibid., para. 90; see also United Nations Permanent Forum on Indigenous Issues, "Indigenous peoples' collective rights to lands, territories and resources".

<sup>540</sup> Sobrevilla, *The Role of Indigenous Peoples in Biodiversity Conservation*.

<sup>541</sup> World Bank, "How Africa can transform land tenure, revolutionize agriculture, and end poverty", press release, 22 July 2013, referencing Frank F. K. Byamugisha, *Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments*, Africa Development Forum series (Washington, D.C., World Bank, 2013).

<sup>542</sup> Oxfam, International Land Coalition, Rights and Resources Initiative, *Common Ground: Securing Land Rights and Safeguarding the Earth*, p. 16, citing the World Bank Group, "How Africa can transform land tenure, revolutionize agriculture, and end poverty", press release, 22 July 2013.

despite difficult challenges.<sup>543</sup> As noted in the 2012 Global Hunger Index, land rights are positively correlated with the absence of hunger – an assertion substantiated in an analysis of the most recent land grabs in countries such as Cambodia, Lao People's Democratic Republic and Liberia, all of which have a hunger ranking of “alarming” or “serious”.<sup>544</sup> Indigenous communities also play a vital role in sustaining food diversity, as they use more than 200 wild food species on average, and “traditional food species contribute 30 to 93 per cent of total dietary energy in indigenous communities”; conversely, “the global food system has come to depend on a handful of widely cultivated species”, which makes it vulnerable to shocks.<sup>545</sup>

Evidence shows that the benefits of securing indigenous peoples' rights to lands, territories and resources extend to protecting the wider environment and combating climate change. In many areas in Latin America and around the world, annual deforestation rates are an average of 50 per cent lower for tenure-secure indigenous lands than for similar lands without tenure security.<sup>546</sup> A report published by the World Resources Institute in 2016 found the following:<sup>547</sup>

- ☰ In the Plurinational State of Bolivia, deforestation rates are 2.8 times lower in indigenous lands that are legally recognized and protected from external threats and competing claims.
- ☰ In Brazil, the deforestation rate in tenure-secure indigenous lands is 0.06 per cent, compared with 0.15 per cent outside such lands.
- ☰ In Colombia, the deforestation rate in indigenous lands (0.04 per cent) is half that outside such lands (0.08 per cent).
- ☰ The cost of securing tenure in indigenous lands in the Amazonian countries is equivalent to less than 1 per cent of the total environmental benefits from the lands.

<sup>543</sup> Land Rights Now, *A Recipe for Global Food Security: The Fruits of Securing Indigenous and Community Land Rights* (n.p., 2018).

<sup>544</sup> Oxfam, International Land Coalition, Rights and Resources Initiative, *Common Ground: Securing Land Rights and Safeguarding the Earth*.

<sup>545</sup> Harriet V. Kuhnlein, Bill Erasmus and Dina Spigelski, *Indigenous Peoples' Food Systems: The Many Dimensions of Culture, Diversity and Environment for Nutrition and Health* (Rome, Food and Agriculture Organization of the United Nations, 2009); Land Rights Now, *A Recipe for Global Food Security: The Fruits of Securing Indigenous and Community Land Rights* (n.p., 2018).

<sup>546</sup> Peter Veit and Katie Reytar, “By the numbers: indigenous and community land rights”, World Resources Institute blog, 20 March 2017 (Washington, D.C.).

<sup>547</sup> Ding and others, *Climate Benefits, Tenure Costs*.



- By securing indigenous peoples' rights to their land, the Plurinational State of Bolivia could reduce greenhouse gas emissions by 8-12 megatons each year, which is equivalent to taking 1.7 million vehicles off the road.

Investing in the security of indigenous forest lands reduces deforestation and represents a low-cost, high-benefit approach to climate change mitigation with huge environmental and economic benefits.<sup>548</sup>

### **3.3 Good practices in securing and implementing the rights of indigenous peoples to their lands, territories and resources in Sustainable Development Goal processes**

#### **3.3.1 At the United Nations intergovernmental level**

Within the framework of global efforts to achieve the objectives set out in the 2030 Agenda, a number of United Nations entities, including the three mechanisms specifically dealing with indigenous peoples – the Permanent Forum on Indigenous Issues, the Special Rapporteur on the rights of indigenous peoples, and the Expert Mechanism on the Rights of Indigenous Peoples – have been actively engaged in awareness-raising and advocacy to address the priority issues and concerns of indigenous peoples, including their rights to lands, territories and resources. The Secretary-General of the United Nations has highlighted that certain groups, “including pastoralists and indigenous peoples, manage a significant share of [natural] resources, while being among those most vulnerable to the effects of climate change, land degradation and biodiversity loss ... [and that] critically, these groups are often repositories of rich, varied and locally rooted knowledge systems. An enabling institutional and policy environment is needed for these actors to contribute to enhancing the broader sustainability of societies.”<sup>549</sup>

In the annual updates on the implementation of the 2030 Agenda from the perspective of indigenous peoples, the Permanent Forum on Indigenous Issues emphasizes that indigenous peoples are in a vulnerable position and are disproportionately affected by development challenges because they lack rights to their lands and resources and are often excluded from meaningful consultations surrounding the issues that affect them – including those associated with SDG implementation. The 2020 update from the Forum incorporates an observation from the President of the Economic and Social Council that indigenous peoples are “at risk of being left behind if barriers to their

<sup>548</sup> Ibid.

<sup>549</sup> “From global to local: supporting sustainable and resilient societies in urban and rural communities”, report of the Secretary-General (E/2018/61), para. 62.

full and equal participation in society [are] not removed". The Permanent Forum has emphasized the need for Governments and communities to consult and engage with indigenous peoples as custodians of ecosystems in the sustainable management of resources, including through the empowerment of indigenous women and the involvement of young people and other marginalized groups.<sup>550</sup>

The ministerial declaration of the 2017 high-level political forum on sustainable development noted the vulnerability of small-scale food producers, including indigenous peoples, to extreme weather events as a result of climate change and land degradation and called for efforts to raise awareness of the 2030 Agenda among all stakeholders, including indigenous peoples, in order to ensure accountability. The declaration further noted the importance of coherent policies and accountable institutions that respect tenure rights and stressed the need for data disaggregated by ethnicity and other relevant characteristics.<sup>551</sup>

The regional forums on sustainable development organized by United Nations regional commissions prior to the annual high-level political forum have given some, though not adequate, attention to indigenous peoples and their rights to lands, territories and resources. The report of the 2018 Africa Regional Forum on Sustainable Development emphasizes the need to "strengthen rights and access to land resources and participative approaches to the management of land, freshwater, forests and biodiversity" and notes the importance of enhancing "access and participation by indigenous peoples, local communities and various groups, including women and young people, ... [as] central to ensuring equitable benefit-sharing" and leaving no one behind. The report urges countries "to strengthen their land governance, including resource tenure systems. Doing so should contribute to efforts to combat land-grabbing."<sup>552</sup> The Economic Commission for Latin America and the Caribbean notes in its submission to the 2020 high-level political forum that while "the region has made great strides in improving health, inequalities persist among and within countries. People living in poverty, those living in rural areas, indigenous peoples and Afrodescendants are more likely to suffer

<sup>550</sup> "Update on indigenous peoples and the 2030 Agenda for Sustainable Development", note by the Secretariat, for the years 2018-2020 (E/C.19/2018/2; E/C.19/2019/2; E/C.19/2020/2, para. 17).

<sup>551</sup> "Ministerial declaration of the 2017 high-level political forum on sustainable development, convened under the auspices of the Economic and Social Council, on the theme 'Eradicating poverty and promoting prosperity in a changing world'" (E/HLS/2017/1).

<sup>552</sup> "Input from the fourth session of the Africa Regional Forum on Sustainable Development" (E/HLPF/2018/2/Add.4), para. 66.

poor health and less likely to use basic health services, including preventive services to prevent and detect diseases in a timely manner.”<sup>553</sup>

### **3.3.2 By United Nations Member States**

In their respective voluntary national reviews (VNRs) of progress achieved in SDG implementation, several States reported good practices in the promotion of indigenous peoples’ rights to lands, territories and resources. Relevant summaries are provided by region in the subsections below.

#### **Australia and the Pacific**

Australia affirms in its 2018 VNR that all 17 SDGs are of significance to Aboriginal and Torres Strait Islander peoples and that the “concept of ‘caring for country’ incorporates not just environmental and landscape management, but also the sociopolitical, cultural, economic, physical and emotional well-being” of the resident indigenous communities.<sup>554</sup> As part of its efforts to combat climate change (SDG 13), Australia has promoted partnerships between indigenous peoples and Emissions Reduction Fund projects that have resulted in reducing emissions by more than 1.5 million tons and have supported more than 300 indigenous jobs per year over a period of 10 years. In terms of strengthening the sustainable use of ecosystems (SDG 15), Australia reports that by mid-2017 indigenous land rights and interests had been fully recognized across more than 40 per cent of the country’s land area, with native title determinations covering 34 per cent of the country and another 26 per cent subject to application for recognition of native title rights.<sup>555</sup>

According to the 2019 VNR for New Zealand, the State has integrated the concerns of the indigenous Māori peoples in the implementation of almost all SDGs, acknowledging “that the special status of Māori, as the *tangata whenua* or indigenous people of New Zealand, is fundamental” to the country’s national identity.<sup>556</sup> Specific laws, policies, strategies and programmes that exist or are in development are reported to address Māori challenges under a number of SDGs. For example, about 5 per cent

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<sup>553</sup> Economic Commission for Latin America and the Caribbean, *The 2030 Agenda for Sustainable Development in the New Global and Regional Context: Scenarios and Projections in the Current Crisis* (LC/PUB.2020/5) (Santiago, 2020), p. 38.

<sup>554</sup> Australia, Report on the *Implementation of the Sustainable Development Goals, 2018*, voluntary national review prepared for the United Nations high-level political forum on sustainable development 2018, pp. 7 and 87.

<sup>555</sup> *Ibid.*, p. 97.

<sup>556</sup> New Zealand, *He Waka Eke Noa: Towards a Better Future, Together – New Zealand’s Progress Towards the SDGs, 2019*, voluntary national review (July 2019), p. 4.

(1.3 million hectares) of the total land in New Zealand is collectively owned by Māori, but problems associated with the legislative system for Māori-owned land mean that the productivity for such land is reportedly 60 to 70 per cent of the national average, so the Government is providing the Māori with agribusiness support to strengthen their ability to make informed decisions that will increase sustainable productivity.<sup>557</sup>

The Government of New Zealand aims to see its indigenous ecosystems and species thrive with the Māori as active partners in managing biodiversity, supporting the *kaitiaki* (caretaker) role of the Māori and embracing their concept of *kaitiakitanga* (guardianship) of the natural environment at both the *iwi* (tribe) and *hapū* (subtribe) levels. As a reflection of these shared priorities, the Government is “developing a national policy statement on indigenous biodiversity, which will set out objectives and policies to improve how regional councils and territorial authorities manage and protect indigenous biodiversity on both public and private land”.<sup>558</sup>

Several States have reported on targeted efforts to address indigenous peoples’ issues under specific SDGs. For example, Ecuador, under SDG 2, has highlighted its initiatives to end hunger through food sovereignty, including the provision of incentives to indigenous farmers who voluntarily commit themselves to food production, conservation and the protection of their native forests. Uruguay has reported on the implementation of a UNDP Global Environment Facility project on access to genetic resources and benefit-sharing in the context of the Convention on Biological Diversity and on its efforts to strengthen the capacity of indigenous communities to participate in the project.<sup>559</sup>

### Asia

In the 2017 VNR for Malaysia, under Goal 15, the Government highlights the strengthening of partnerships with indigenous and local communities as a continuing priority and affirms the need to leverage the specialized knowledge and skills of indigenous and local communities in the management of natural resources and to empower those communities to give or withhold consent for proposed projects that might affect their lands.<sup>560</sup>

<sup>557</sup> Ibid.

<sup>558</sup> Ibid., pp. 103-104.

<sup>559</sup> All VNRs for 2018 may be downloaded from <https://sustainabledevelopment.un.org/hlpf/2018#vnrs>.

<sup>560</sup> The voluntary national review for Malaysia and all other VNR-related documentation may be downloaded from the Voluntary National Reviews Database at <https://sustainabledevelopment.un.org/vnrs/>.

Indonesia reported in its 2017 VNR that it was developing a national marine spatial plan as well as a coastal zoning plan in some provinces to support the integrated and sustainable use and management of marine and coastal resources, including through the “preservation of maritime socio-culture, indigenous communities and artisanal fisheries”.<sup>561</sup> In the section on lessons learned, the report acknowledges the alignment between local wisdom (community rules and traditions passed down through generations) and the sustainable use of natural resources, noting that such wisdom is “effective in conserving marine ecosystems and encouraging [the] sustainable use of fisheries resources”.<sup>562</sup>

### **Africa**

Congo reports in its 2019 VNR that the implementation of the principle of leaving no one behind is reflected in the strategic axes of its National Development Plan 2018-2022. The Plan promotes the defence of the cultural identity of indigenous peoples and their access to land and natural resources to ensure their participation in sustainable forest management and the protection of their usufructuary rights.<sup>563</sup>

In its 2017 VNR, Ethiopia reported that pastoralist community representatives had participated in a government process aimed at creating awareness of the integration of SDGs in the country’s Second Growth and Transformation Plan as well as in the national consultations for drafting the VNR. The report acknowledged the challenges linked to the continued negative impact of climate change in the water-stressed regions belonging to pastoralist communities and emphasized the need to give more attention to increasing the productivity of smallholder farmers and pastoralists to eliminate hunger (SDG 2). The country has had some success with this strategy, reporting that small-scale irrigated agriculture development in 2014/15 benefited 6.8 million farmers and semi-pastoralists.<sup>564</sup>

The 2019 VNR for South Africa acknowledges the role of indigenous communities in biodiversity conservation under SDG 15 (the sustainable use of ecosystems). The report also includes a case study highlighting the country’s first free, prior and informed consent benefit-sharing agreement, made by a company with an indigenous community

<sup>561</sup> Indonesia, *Voluntary National Review (VNR): Eradicating Poverty and Promoting Prosperity in a Changing World 2017* (Jakarta), p. 73.

<sup>562</sup> *Ibid.*, p. 76.

<sup>563</sup> The voluntary national review for Congo and all other VNR-related documentation may be downloaded from the Voluntary National Reviews Database at <https://sustainabledevelopment.un.org/vnrs/>.

<sup>564</sup> Ethiopia, *The 2017 Voluntary National Reviews on SDGs of Ethiopia: Government Commitments, National Ownership and Performance Trends* (Addis Ababa, National Plan Commission, June 2017).

through the San Council of South Africa for the commercialization of an indigenous medicinal plant.<sup>565</sup>

### **3.3.3 By indigenous peoples**

As one of the major groups of stakeholders, indigenous peoples have consistently engaged in processes associated with the 2030 Agenda since its development and adoption. The Indigenous Peoples Major Group for Sustainable Development has been actively involved in SDG implementation processes, including the activities undertaken by the high-level political forum on sustainable development and its regional forums. The Major Group has also facilitated the participation of indigenous representatives in meetings and the preparation and submission of reports, position papers, statements, proposals and recommendations on behalf of indigenous peoples.<sup>566</sup>

The Indigenous Peoples Major Group has called attention to issues relating to indigenous peoples' lands, territories and resources in its statements and reports submitted to the high-level political forum on sustainable development. In its report for the 2017 forum, the Major Group notes that poverty has been a factor in the food insecurity of indigenous peoples due to historical colonization, subjugation and assimilation, prevailing discriminatory structures, and the systematic violation of their rights. The state of impoverishment of indigenous peoples has resulted from the widespread loss of their ownership and control over their lands, territories and resources and their lack of food security. The report offers the following six key recommendations:<sup>567</sup>

- ≡ Recognize indigenous peoples as distinct groups with specific rights and conditions when designing poverty reduction and food security strategies and programmes, with their effective participation.
- ≡ Ensure data disaggregation based on indigenous identity.

<sup>565</sup> South Africa, *2019 South Africa Voluntary National Review: Empowering People and Ensuring Inclusiveness and Equality*, voluntary national review of progress made towards the achievement of the Sustainable Development Goals.

<sup>566</sup> International Institute for Sustainable Development, "IAEG-SDGs approves Tier II status for land indicator 1.4.2", SDG Knowledge Hub, news, 16 November 2017. The indicators were reclassified from Tier III to Tier II status in 2017, which means that internationally established methodology and standards are now available for the indicators but that data are not regularly produced by countries. At least 50 per cent of all countries must collect data and report regularly on an indicator for it to be recognized as Tier I.

<sup>567</sup> Joan Carling, co-convenor of the Indigenous Peoples Major Group on behalf of the Tebtebba Foundation, "Eradicating poverty and promoting prosperity in a changing world", available at <https://sustainabledevelopment.un.org/content/documents/14942SDG-IPMG.pdf>. The recommendations are reproduced verbatim.



- ≡ Institutionalize mechanisms for the effective participation and representation of indigenous peoples in processes relating to SDGs.
- ≡ Legally recognize the customary collective land rights of indigenous peoples and adopt indicators to monitor progress.
- ≡ Ensure that free, prior and informed consent of indigenous peoples is required on development projects that affect them; establish effective grievance mechanisms and ensure equitable benefit-sharing mechanisms.
- ≡ Ensure adequate finance and resources for targeted programmes in plans that address poverty, food security, health and self-determined development of indigenous peoples.

In 2019, the Indigenous Peoples Major Group published the *Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples*, which includes regional-level studies, relevant data and case studies of challenges and good practices to inform the implementation of global commitments for sustainable development and to highlight the importance of securing indigenous peoples' collective land rights to achieve sustainable development for all.<sup>568</sup>

In its thematic report prepared for the high-level political forum in 2020, the Indigenous Peoples Major Group addresses the rising criminalization, persecution and extrajudicial killings of indigenous peoples defending their rights to the lands, territories and resources that are at the heart of their survival. The Major Group notes in the report that COVID-19-related lockdowns have contributed to increased land-related violence and land-grabbing. It is pointed out that circumstances such as these illustrate the huge gap in the protection and realization of the rights of indigenous peoples in relation to the implementation of the SDGs.<sup>569</sup>

During the 2020 high-level political forum, the Major Group convened an online discussion focusing on lands and rights threatened due to the criminalization of indigenous peoples during the COVID-19 pandemic, providing an opportunity to explore these issues further. The Group reported that the strict lockdowns imposed due to the pandemic contributed not only to the loss of livelihoods, but also to extrajudicial killings of indigenous land and environment defenders.

<sup>568</sup> Carino, *Global Report*.

<sup>569</sup> Indigenous Peoples Major Group for Sustainable Development, *Thematic Report for the High-Level Political Forum of Agenda 2030 for Sustainable Development 2020*, executive summary available at <https://www.indigenouspeoples-sdg.org/index.php/english/all-resources/ipmg-position-papers-and-publications/ipmg-reports/global-reports/162-ipmg-thematic-report-for-hlpf-2020/file>.

## **4. Challenges and opportunities for indigenous peoples in achieving the Sustainable Development Goals**

The lack of secure land and resource rights is a primary concern for indigenous peoples in the context of the SDGs. Although some countries have made significant strides in recognizing indigenous rights to lands, territories and resources, far too many others have done little or nothing to ensure the legal protection of those rights. Where relevant laws and provisions are in place, implementation and enforcement are often lacking.

Former United Nations Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz reported in 2015 that indigenous and local communities – comprising an estimated 1.5 billion people worldwide – govern 6.8 billion hectares of land through customary tenure arrangements,<sup>570</sup> this constitutes over 50 per cent of the global land area.<sup>571</sup> It was also noted that Governments only recognize the legal right of indigenous peoples and local communities to about 513 million hectares of forests (around one eighth of the world total).<sup>572</sup> A study by the Rights and Resources Initiative has warned that worrying legislative rollbacks and stalled reform processes threaten to undermine progress achieved at the global level; legislative setbacks that have occurred since 2013 have in some cases resulted in large-scale forest grabs. Action must be taken to address these negative trends, as progress towards the recognition of community-based forest tenure remains inadequate to meet international commitments to tackle climate change and achieve sustainable development.<sup>573</sup>

Indigenous peoples are not being given the chance to participate meaningfully and equitably in the SDG processes in most States. The meaningful participation of indigenous peoples should be characterized by equality in opportunity, non-discrimination, special measures for inclusion, and effective representation in decision-making at all levels. The results of a survey among indigenous peoples' organizations in Bangladesh, Cambodia, India, Lao People's Democratic Republic, Malaysia, Nepal, the Philippines and

<sup>570</sup> Victoria Tauli-Corpuz, "Opinion: don't leave indigenous peoples behind in SDGs", Inter Press Service News Agency, 11 May 2015.

<sup>571</sup> Liz Alden Wily, *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure* (Rome, International Land Coalition, 2011); Rights and Resources Initiative, *What Future for Reform? Progress and Slowdown in Forest Tenure Reform since 2002* (Washington, D.C., 2014).

<sup>572</sup> Victoria Tauli-Corpuz, "Opinion: don't leave indigenous peoples behind in SDGs"; Caleb Stevens and others, *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change* (Washington, D.C., World Resources Institute, 2014).

<sup>573</sup> Rights and Resources Initiative, *At a Crossroads: Consequential Trends in Recognition of Community-Based Forest Tenure from 2002-2017* (Washington, D.C., 2018).



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Viet Nam indicate that indigenous peoples have limited knowledge and understanding of the SDGs; the implementation of the SDGs has largely been centralized or top-down, and because indigenous peoples have had little or no say in the SDG processes, associated “development” policies have failed to address their needs and aspirations on the ground.<sup>574</sup> The survey concludes that the localization of the 2030 Agenda vision is key, and that indigenous peoples and other marginalized communities must be kept at the centre of relevant programming and implementation processes if the SDGs are to “leave no one behind” and “reach the furthest behind first”. Governments, development agencies and other stakeholders must dedicate adequate financial and other resources to support the collective right of indigenous peoples to self-determined development and must partner with indigenous peoples to ensure that they can fully participate in and benefit from development more broadly.<sup>575</sup>

<sup>574</sup> Asia Indigenous Peoples Pact, *Participation for Empowerment: How Are Indigenous Peoples Faring in the SDGs?* (Chiang Mai, Thailand, AIPP Printing Press, Ltd., 2019).

<sup>575</sup> Ibid.



Photo: UN-DESA / Broddi Sigurdarson

## **5. Conclusions and recommendations**

The 2030 Agenda and its integrated SDGs constitute progress for indigenous peoples over the earlier MDGs, in which they were largely invisible. Notwithstanding the many gaps and potential risks that still surround sustainable development objectives and efforts, the pledge of States to leave no one behind and to reach the furthest behind first in meeting the SDGs holds great potential for indigenous peoples. The centrality of human rights in the 2030 Agenda is equally important; within this framework, the SDGs address many of the key priority areas for indigenous peoples, including land rights, reducing poverty and hunger, social protection, health and education, environmental sustainability, the promotion of inclusive and peaceful societies and reducing inequalities, and the disaggregation of data by ethnicity.

The recognition and protection of indigenous peoples' rights to lands, territories and resources are essential for the pursuit of a holistic approach to achieving the SDGs. Secure land and resource rights for indigenous peoples and local communities represent a tested, cost-effective and practical solution to climate change. Indigenous peoples' traditional knowledge is invaluable for ensuring the sustainable management of terrestrial and marine ecosystems and resources. Respect for the inviolability of indigenous peoples' land and resource rights is vital for the creation and preservation of peaceful and inclusive societies.

Data disaggregation can help reduce the invisibility of indigenous peoples in SDG monitoring and implementation. There are several SDG indicators that might lend themselves to the generation of data relating to indigenous peoples and their land and resource rights. At present, the global indicator framework includes indicators to measure the proportion of the population with secure land tenure by type and the share of women owning and holding rights of agricultural land by type of tenure,<sup>576</sup> but data could be further disaggregated to identify and address the specific development needs of indigenous peoples, including those linked to secure land tenure. The former United Nations Special Rapporteur on the rights of indigenous peoples has stressed that the SDGs should include an indicator to measure the recognition of collective land rights along with the land rights of individuals (men and women).<sup>577</sup> Governments, United

<sup>576</sup> International Institute for Sustainable Development, "IAEG-SDGs approves Tier II status for land indicator 1.4.2", SDG Knowledge Hub, news, 16 November 2017. The indicators were reclassified from Tier III to Tier II status in 2017, which means that internationally established methodology and standards are now available for the indicators but that data are not regularly produced by countries. At least 50 per cent of all countries must collect data and report regularly on an indicator for it to be recognized as Tier I.

<sup>577</sup> Victoria Tauli-Corpuz, "Opinion: don't leave indigenous peoples behind in SDGs", Inter Press Service News Agency, 11 May 2015.



Nations entities and other stakeholders need to collaborate with indigenous peoples to address the enormous gaps in official data relevant to indigenous populations.

Serious challenges remain, as there are still many areas of the world in which indigenous peoples' rights to lands, territories and resources are limited or not recognized, and even where there is legal support for such rights, implementation is frequently stalled or inconsistent. Progress in securing such rights is often undermined by the detrimental effects of "development" that threaten the lands and resources of many indigenous peoples. In addition, indigenous communities and their defenders face increasing risks and reprisals for defending their lands – including criminalization, harassment, assault and killings. Given all this, the absence of provisions within the SDG framework governing the right to free, prior and informed consent for indigenous peoples in decisions affecting their lands is particularly concerning. The continuing poverty and vulnerability of indigenous peoples – rooted in the dispossession of their lands and resources and consequent land and resource insecurity, as well as in the exclusion and discrimination they have historically faced – remain daunting challenges.

### **Recommendations**

- ≡ States should include the recognition of customary rights or tenure of indigenous peoples to their lands and resources in their data on secure land tenure rights in SDG reporting.
- ≡ The titling of the land of indigenous communities must protect their right to free, prior and informed consent in order to give the communities a powerful voice in all decisions affecting their lands and resources; this is essential for preventing the widespread destruction of critical ecosystems and is therefore critical for achieving the SDGs.
- ≡ Governments should collect more data disaggregated by ethnicity and indigenous identity through census and household surveys so that the challenges faced by specific indigenous communities can be better addressed in SDG implementation and more accurately reflected in SDG reporting.
- ≡ Governments must "establish permanent, open and inclusive mechanisms for consultation, participation and representation of indigenous peoples in local, regional, national and international processes" relating to the SDGs to ensure

that they have the opportunity to both contribute to and benefit from these processes.<sup>578</sup>

- ≡ United Nations Country Teams and Resident Coordinators should include indigenous peoples and their organizations in the preparation of Common Country Analyses and the development of sustainable development frameworks, establishing appropriate consultation mechanisms where necessary.

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<sup>578</sup> E/2017/43-E/C.19/2017/11), para. 92.



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