

Beyond Tenure

Rights-based approaches to peoples and forests

Some lessons from the Forest Peoples Programme

Marcus Colchester

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Forest Peoples Programme

1c Fosseyway Business Centre, Stratford Road, Moreton-in-Marsh

GL56 9NQ, UK. *tel:* +44 (0)1608 652893 *fax:* +44 (0)1608 652878

email: marcus@forestpeoples.org *web:* www.forestpeoples.org

Title: *Beyond Tenure: rights-based approaches to peoples and forests*

Author: *Marcus Colchester*¹

Abstract:

In large parts of the world forests remain the domain of the State in which the rights of forest-dependent peoples are denied or insecure. Efforts to restore justice to, and alleviate the poverty of, these marginalised communities have often focused on tenurial reforms. Sometimes these reforms have led to important improvements in livelihoods, mainly by stabilising communities' land use systems and giving them greater security but this has not prevented communities suffer other forms of social exclusion and impoverishment. Based on a review of 17 years of programmatic work with forest peoples in Latin American, Africa and Asia by the Forest Peoples Programme, this paper explores the complexity of rights that need recognition if community-based livelihoods in forests are to be secured and well-being improved. The conclusion from this review is that programmes to reform tenure in forests need to be based on a broader understanding of the basis for asserting rights and take into account a far wider range of human rights than are generally considered in forest policy debates. An effective rights-based approach to forestry reform to ensure justice and poverty alleviation requires attention to a much wider spectrum of rights than just the assertion of the right to property. Tenures must be appropriate to the culture and context of the communities concerned. Systems of representation require effective recognition. Communities need to be able to control their lands and resources. Cultural heritage should be protected. Basic rights to health, life and to civil and political rights and freedoms need to be secured and social, cultural and economic rights respected. Although such rights are often recognised in countries' constitutions, in international customary law and in nationally ratified human rights treaties, they are rarely taken into account in narrow sectoral decision-making about forests. Forest governance systems need to secure this broader spectrum of rights if forest peoples are to benefit from forestry reforms.

Key words: **Tenure, human rights, forests, international law, poverty alleviation**

Cover:

Sanema youth, South Venezuela (Photo: Marcus Colchester); Baka hunter, Cameroon (Photo: John Nelson); Minangkabau woman, West Sumatra, Indonesia (Photo: Marcus Colchester).

¹ Marcus Colchester, Director, Forest Peoples Programme: marcus@forestpeoples.org

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Introduction

Until the last decade, human development and human rights followed separate paths in both concept and action – the one largely dominated by economists, social scientists and policy-makers, the other by political activists, lawyers and philosophers. They promoted divergent strategies of analysis and action – economic and social progress on the one hand, political pressure, law reform and ethical questioning on the other.²

Development practitioners have often been accused of failing to integrate concern for human rights into their development work.³ Although this is now beginning to change, with the need for ‘rights-based approaches’ being increasingly accepted by the development agencies, UN bodies and even conservationists, similar progress in the forestry sector is harder to discern. Indeed it has been a struggle during the past 30 years to get foresters to re-think their policies towards local communities and indigenous peoples at all, let alone to do this from a human rights perspective. Typically forestry agencies have shaped their policies towards forests in order to prioritise strategic national (or colonial) interests to deliver financial revenues, environmental services and sustained yields of timber, while the rights and interests of those living in and directly from forests have too often been secondary considerations or even denied altogether.⁴

The relatively recent upsurge of interest in alternative forms of forest governance and tenure, and new efforts to elaborate forest policies so forests can contribute to poverty alleviation and the achievement of the ‘Millennium Development Goals’, now offers a more hopeful context for a debate about human rights and forestry. Just as development practitioners have begun to accept that long-term development gains are unsustainable without effective recognition and protection of rights, so forest policy-makers now need to ensure that the revised policies they adopt to secure development gains also reinforce rights.

Indeed, there is compelling evidence to suggest that one reason that projects implemented under the slogan ‘forests for people’ have failed to deliver long-term improvements in well-being is that they have not given enough attention to rights. Moreover, even where tenure reforms have been central to new policies, they have too often been imposed from the top without taking into account peoples’ own customs, institutions and forms of land ownership and without the provision of an adequate enabling framework.

² UNDP, 2000, *Human Rights and Human Development: Human Development Report 2000*, UNDP, New York page 2 cited in Philip Alston and Mary Robinson (eds.), 2005, *Human Rights and Development: towards mutual reinforcement*, Oxford University Press, Oxford:27.

³ Peter Uvin, 2004, *Human Rights and Development*, Kumarian Press, Bloomfield:1; Alston and Robinson 2005, op. cit. footnote 1.

⁴ Jack Westoby, 1987, *The Purpose of Forests*, Basil Blackwell, Oxford; Jack Westoby, 1989, *Introduction to World Forestry*, Basil Blackwell, Oxford; Marcus Colchester et alii., 2006, *Forest Peoples, Customary Use and State Forests: the case for reform*. Presentation to the 11th Biennial Congress of the International Association for the Study of Common Property Bali, Indonesia, 19-23 June 2006 available at http://www.forestpeoples.org/documents/conservation/10c_overview_iascp_jun06_eng.pdf

Still, it is easier to say that forest policies should adopt a rights-based approach than to actually implement it. Human rights are conceived as being: ‘inherent’, we acquire such rights through being human not through any act of the State; ‘indivisible’, in that all rights are seamlessly interconnected, and; ‘inalienable’, which does not mean they trump every other consideration but that they cannot be taken away from us. This makes it a hard task for external policy-makers and development officials to decide which rights to prioritise in forest development and conservation and requires that they be guided by the demands of the rights-holders themselves.

Summing up a number of different pieces of international law, we can assert that international human rights standards recognise the right of forest peoples to ‘*own, control, use and peacefully enjoy their lands, territories and other resources, and be secure in their means of subsistence*’. The phrase neatly draws our attention to the way a demand for respect for property rights – implicit in the term ‘own’ – also requires respect for civil and political rights – ‘control’, economic rights – ‘use’ and ‘means of subsistence’, and social and cultural rights – ‘enjoy’. None of these rights can be enjoyed ‘peacefully’ without respect for basic rights and freedoms. Moreover, in line with international human rights law and jurisprudence, forest peoples claim the right to own their lands and forests according to their customary norms in accordance with their right, as peoples, to self-determination.

The rights basis for land tenure is thus not just a claim for respect of property rights but implies a consideration of so-called ‘first generation human rights’ – the civil and political rights of individuals in relation to the State; ‘second generation human rights’ – the economic, social and cultural rights of individuals in relation to the State; and ‘third generation human rights’ – the collective rights of peoples to self-determination and development in relation both to other peoples and to States.

Forest peoples are very diverse, ranging from indigenous peoples and other long-term residents who regulate their affairs according to custom, to newcomers and settlers who have moved into forests voluntarily in colonisation schemes or for lack of alternatives. It is estimated that some 370 million people consider themselves to be indigenous of whom as many as one half depend on forests. According to a widely cited but equally uncertain statistic from the World Bank some 1.2 billion people worldwide depend on forests.⁵

Although all humans and all peoples have the same rights, these rights are expressed, and need to be respected, in diverse ways in conformity with their historical and cultural specificities. This has long been recommended by the UN’s Committee on the Elimination of Racial Discrimination, and recently reaffirmed by the UN General Assembly’s approval in September of the UN Declaration on the Rights of Indigenous Peoples.⁶

⁵ World Bank, 2002, *Revised Forest Strategy for the World Bank Group*. World Bank, Washington DC.

⁶ *General Recommendation XXIII on Indigenous Peoples*, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument) ; A/61/L.67 12 September 2007. United Nations Declaration on the Rights of Indigenous Peoples, available at http://www.forestpeoples.org/documents/law_hr/un_declaration_ip_rights_sept07_eng.pdf

The work of the Forest Peoples Programme has been focused on the most marginalised groups – those with least access to justice, or least awareness of their rights, or with the least support from other civil society actors. This focus is reflected in the summary that follows, which pays particular attention to indigenous peoples and other marginalised groups and those who suffer the most obvious violations of their rights.

Recognition and legal personality

Before forest peoples can be secure in their rights within the framework of national laws the very matter of their recognition as citizens, as communities and as peoples is first required. Unfortunately, many forest peoples lack even the most basic recognition. For example, in Thailand many members of the so-called ‘hill tribes’, who number over 700,000 people and mostly inhabit the upland forests of the North and West of the country, lack citizenship papers. This situation is not only found among those ethnic groups which have migrated into the upland forests over the last hundred years but also among members of the Karen, who have lived within the borders of what is now the Kingdom of Thailand for centuries. The reasons for this denial of citizenship are many and various including: historical prejudices against non-Tai speaking peoples; concerns about drug cultivation and trafficking; national security considerations; bias against migrants; and alleged association with insurgencies.⁷

A similar problem of lack of citizenship prevails among the so-called ‘Pygmy’ peoples of Central Africa – Cameroon, Equatorial Guinea, Gabon, Central African Republic, Republic of Congo, Democratic Republic of Congo, Angola, Rwanda, Burundi and Uganda – who are estimated to number between 500,000 to over 4 million.⁸ The consequence of this bureaucratic marginalisation is that such people not only cannot secure rights in land like other citizens, but are also discriminated against in job markets, are disenfranchised and do not have ready access to state services like health and education. Indeed, not being citizens, they do not even get enumerated in national censuses.

The reluctance of States to recognise the legal personality of forest peoples’ customary institutions is a much more widespread problem. For example, in Cameroon the existence of rural communities is recognised in the local administration through the formal recognition of three levels of chieftaincies, *chefferies*. Most Bantu villages in the forest zone in the south of the country are recognised as *chefferies du troisième degré*, but the settlements of forest peoples, such as the Bagyeli and Baka, are excluded from such consideration altogether. One result is that they are also

⁷ Ken Camp and Don McCasskill (eds.), 1997, *Development or Domestication? Indigenous Peoples of South East Asia*, Silkworm Books, Chiang Mai.

⁸ Marcus Colchester, Dorothy Jackson and Justin Kenrick, 1998, Forest Peoples of the Congo Basin: past exploitation, present threats and future prospects. In: C.S. Bessleink and Peter Sips (eds.) *The Congo Basin: Human and Natural Resources*, IUCN-Netherlands, Amsterdam: 53-63; Tea Braun and Lucy Mulvagh, 2007, Democratic Republic of Congo, In: *Indigenous World 2007*, IWGIA, Copenhagen: 505-512, http://www.forestpeoples.org/documents/africa/drc_iw_2007.pdf

excluded from landscape zoning exercises which are meant to set aside areas for customary use.⁹

In Indonesia, the problem of non-recognition by the State of communities governed by custom (*masyarakat adat*) also fundamentally affects their scope for controlling their lands and forests. As during the colonial era when the Dutch had tended to administer the 'Outer Islands' through policies of indirect rule, so during the early period of independence the Indonesian State recognised customary law and the self-governance of communities. This ceased during the Suharto dictatorship with the passing of the 1979 Local Administration Act, which replaced the great variety of the peoples' own customary institutions with new, uniform, administrative units at the village level (*desa*). Customary institutions lost their powers and recognition.¹⁰ With the fall of Suharto, the *masyarakat adat* rapidly organised themselves and issued a famous challenge to the State: 'we will not recognise the State, unless the State recognises us'.¹¹ Under laws granting regional autonomy, provinces and districts are now able to pass laws recognising again customary institutions, but these have yet to be passed in more than a few areas. Moreover, the qualified recognition afforded indigenous peoples in the Constitution of the Republic of Indonesia, which makes guarded reference to the need to recognise them, 'so long as they still exist', also weakens communities' abilities to assert their rights.¹²

In Central Africa, the Forest Peoples Programme has focused its support on the so-called 'Pygmy' peoples of the Congo Basin and Great Lakes Region. Of these peoples the first to found their own organisation, in the early 1990s, were the Twa of Rwanda, most of whom had by then lost access to forests and even land. The minority Rwandan Twa lost up to 30% of their population in the genocide and ensuing forced migrations unleashed by the Interahamwe in 1994.¹³ Despite this the Twa re-organised and later founded their own umbrella organisation, *Communauté des Autochtones Rwandaises*, which was able to receive substantial funds from aid agencies including the European Commission to redress the Twa's situation. The new government of Rwanda, however, which bans the naming of all ethnic groups and disagrees with the use of the term *autochtone* (indigenous), has sought to close down the organisation, an issue which has been taken up with the UN's Human Rights Committee and discussed at the meetings of the Working Group on Indigenous

⁹ Belmond Tchoumba, John Nelson, George Thierry Handja, Stephen Nounah, Emmanuel Minsolo, 2006, *Protecting and Encouraging Customary Use of Biological Resources by the Baka in the west of the Dja Biosphere Reserve*. Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/conservation/cameroon_10c_jun06_eng.pdf

¹⁰ Marcus Colchester, Martua Sirait and Boedhi Wijardjo, 2003, *Obstacles and Possibilities : the Application of FSC Principles 2 & 3 in Indonesia*, WALHI and AMAN, Jakarta, http://www.forestpeoples.org/documents/asia_pacific/indonesia_obstacles_and_possibilities_03_eng.pdf

¹¹ AMAN, ICRAF and FPP, 2003, *In Search of Recognition*, Bogor, http://www.forestpeoples.org/documents/asia_pacific/in_search_recognition_03_eng.pdf

¹² Marcus Colchester, Norman Jiwan, Andiko, Martua Sirait, Asep Yunan Firdaus, A. Surambo and Herbert Pane, 2006, *Promised Land: Palm Oil and Land Acquisition in Indonesia – Implications for Local Communities and Indigenous Peoples*, Forest Peoples Programme, Sawit Watch, HuMA and ICRAF, Bogor http://www.forestpeoples.org/documents/prv_sector/oil_palm/promised_land_eng.pdf

¹³ Jerome Lewis and Judy Knight, 1995, *The Twa of Rwanda: Assessment of the situation of the Twa and promotion of Twa rights in post-war Rwanda*, IWGIA and Forest Peoples Programme, Copenhagen.

Populations/Communities of the African Commission on Human and Peoples' Rights', as a violation of their rights to freedom of association and to collective action.¹⁴

Contrasting with this widely prevalent situation of non-recognition of forest peoples in Africa and Asia, in recent years most Latin American countries have now overhauled their laws and constitutions. Most now recognise that Latin American states are multi-national and pluri-cultural and make provisions in law for the recognition of indigenous organisations and, albeit limited, forms of self-governance.¹⁵

Land Reforms and Security of Tenure

The fundamental importance of land to rural communities has long been recognised by the development community, for example in the endorsement of the FAO's 'Peasants' Charter' by 145 countries in 1979. Recognising that 'the rural poor must be given access to land and water resources', the Charter went on to insist on the need for agrarian reforms to achieve 'broad-based community control and management of land and water rights' ... and programmes 'to ensure the conservation and management of fishery and forestry resources through arrangements involving local communities'.¹⁶ Unfortunately, policies of land reform then went out of fashion during the heyday of neo-liberalism, and the importance of recognising property rights only markedly revived in the late 1990s, most publicly with the popular work of Hernando de Soto, who highlighted the need to secure the property rights of the urban poor in order to provide them with security for investment and collateral for loans.¹⁷

An important paper published in 2002 by Forest Trends has suggested that almost one quarter of the world's forests are now 'owned' by local communities and indigenous peoples. However, as authors White and Martins noted, the generalization disguises the huge variety of different tenures included in this statistic.¹⁸

In fact, these forest tenures vary along a whole series of *continua* ranging from individual titles to collective ownership, from ownership rights to limited rights of use, from saleable properties to inalienable territories, from rights only to lands to rights to the resources thereon, and from rights to surface resources to rights over sub-surface resources. In many cases forestlands allocated to community management

¹⁴ Submission of the Forest Peoples Programme Concerning the Republic of Rwanda and its compliance with the International Covenant on Civil and Political Rights, 5 October 2006, http://www.forestpeoples.org/documents/africa/rwanda_hrc_rep_oct06_eng.pdf

¹⁵ Tom Griffiths, 2004, Indigenous Peoples, Land Tenure and Land Policy in Latin America. *Land Reform Bulletin* 2004(1):46-64.

¹⁶ For a discussion see Marcus Colchester and Larry Lohmann (eds.), 1993, *The Struggle for Land and the Fate of the Forests*, World Rainforest Movement, Penang, and Zed Books, London: 296-300.

¹⁷ Hernando de Soto, 2000, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. One bizarre result of this is that the Millennium Development Goals only refer to the need to recognise the property rights of the urban poor and not of rural communities, <http://www.un.org/millenniumgoals/>

¹⁸ Andy White and Alejandra Martin, 2002, *Who Owns the World's Forests? Forest Tenure and Public Forests in Transition*, Forest Trends, Washington DC.

may be under weak tenures by which State forests are merely leased to communities subject to restrictive management plans and conditional performance reviews. Even where communities are given charge of forests they may be prohibited from marketing the products of their management or only get a small share of the proceeds. Not all these tenures are acceptable to forest peoples and many are not even conducive to legality, as the complex regulations push people into illegality just to survive. Much less are these tenures conducive to positive development outcomes.¹⁹

Many land titling programmes fail to take into account forest peoples' customary forms of land management and ownership. Some agrarian reforms have specifically targeted forests, clearing forests for colonists with scant regard for forest peoples' rights. Some agrarian reform programmes in effect parcel up what were customarily owned lands and reallocate them to individuals. Although intended to provide land security and promote development, all too often such individualisation of land leads to the break up of communal lands and accelerate the dispossession of the original owners who, even if they secure titles, as quickly lose them in the land markets which follow.²⁰

Exactly these problems ensued in the USA with the passing of the General Allotment Act (the notorious 'Dawes Act') in 1887 which led to the loss of some 36 million out of a remaining 56 million hectares of officially recognised indigenous peoples' lands and forests.²¹ Most *adivasi* lands in India have likewise been titled as individual *patta* and, even though laws are meant to prevent the transfer of titles to non-tribals, land markets have led to the loss of much tribal land.²² In Vietnam, efforts to provide rural people with long-term leaseholds on State lands, while broadly welcomed as an improvement over the stifling conditions of 'collectivisation', have created serious problems for ethnic minorities. As objects of discrimination, targets of corruption and lacking the political connections needed to get titles – as well as lacking fluency in Vietnamese and market savvy – many highlanders have lost out to incoming settlers, condemning them, according to one study, 'to a deplorable existence in more remote areas or to work as landless laborers'. Individualised tenure has not allowed for collective forms of tenure and land management and has been used to disqualify customary land-use systems like swidden agriculture which the State has a policy of eradicating.²³

¹⁹ Marcus Colchester with Marco Boscolo, Arnaldo Contreras-Hermosilla, Filippo del Gatto, Jessica Dempsey, Guillaume Lescuyer, Krystof Obidzinski, Denis Pommier, Michael Richards, Sulaiman N. Sembiring, Luca Tacconi, Maria Teresa Vargas Rios and Adrian Wells, 2006, *Justice in the Forest: rural livelihoods and forest law enforcement*. Forest Perspectives 3, CIFOR, Bogor, http://www.cifor.cgiar.org/publications/pdf_files/Books/BColchester0601.pdf

²⁰ Griffiths 2004, op. cit. footnote 12 ; Colchester and Lohmann 1993, op. cit. footnote 13.

²¹ Angie Debo, 1940, *And still the waters run: the Betrayal of the Five Civilized Tribes*. Princeton University Press, Princeton; K. Carter, 1999, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, Ancestry.com, Utah; Charles Wilkinson, 2005, *Blood Struggle: the Rise of Modern Indian Nations*, WW Norton and Company, New York: 43-49.

²² Christoph von Furer-Haimendorf, 1982, *Tribes of India: the struggle for survival*, University of California Press, Berkeley; B.D. Sharma, 1990, *Report of the Commissioner for Scheduled Castes and Scheduled Tribes*, Government of India, Delhi.

²³ Claes Corlin, 2004, Hmong and the Land Question in Vietnam: national policy and local concepts of the environment In: Nicholas Tapp, Jean Michaud, Christian Culas and Gary Yia Lee (eds.), 2004, *Hmong/Miao in Asia*, Silkworm Book, Bangkok, 295-320: 301.

In Venezuela, under the 1960 Agrarian Reform Law, title was initially handed out to indigenous peoples as individual lots and, later, was accorded to indigenous communities as communal titles to small pieces of land. The result was to 'peasantise' indigenous peoples' land ownership, reducing their rights to small parts of their once extensive territories and making them vulnerable to land invasion by settlers.²⁴ In Peru, the law which provides for the titling for so-called 'native communities' likewise has been interpreted as only allowing relatively small land areas to be allotted to indigenous peoples, leading to the break-up of their territories and allowing the government to hand out logging concessions on what are in fact indigenous lands.²⁵ In Guyana, the government likewise accords title to only small parts of the indigenous peoples' lands, the procedure for which has been found to be in violation of the country's obligations under international human rights laws.²⁶

An important conclusion from these experiences is that the wrong kind of law may be worse than no law, creating a legal mechanism for the loss, invasion and takeover of forest peoples' customary lands. Indeed such may be the very intent of such laws. Teddy Roosevelt is said to have hailed the Dawes Act as a 'mighty pulverising engine to break up the tribal mass.'²⁷

Towards territorial recognition

In line with indigenous peoples' own demands for full ownership and control of their customary territories, as inalienable properties held in accordance with their own customs,²⁸ international human rights laws accept that indigenous and tribal peoples have the right to hold and transmit their properties according to their customary systems of tenure and that these tenurial regimes must enjoy equal protection of the law.²⁹

In some countries, tenure systems now come close to this. In Colombia, where some 24 million hectares of the national territory have now been recognised as *resguardos*,

²⁴ Nelly Arvelo-Jimenez, 1980, Programmes among Indigenous Peoples in Venezuela and their Impact: a critique. In: F. Barbira-Scazzocchio (ed.) *Land, People and Planning in Contemporary Amazonia*. Centre for Latin American Studies, Cambridge: 210-221; Marcus Colchester, 1995, *Venezuela: Violations of Indigenous Rights*. World Rainforest Movement, Chadlington; German Freire, 2002, *The Piara: Environment and Society in Transition: a study of land use and social change in the Middle Orinoco, Venezuela*, Ph. D. dissertation, University of Oxford.

²⁵ Chirif, A, García, P and Chase-Smith, R., 1991, *El Indígena y Su Territorio: estrategias para la defensa de los pueblos y territorios indígenas en la cuenca amazónica* Oxfam-America-COICA, Lima; Alexandre Surralles and Pedro Garcia Hierro (eds.), 2004, *Tierra Adentro: Territorio Indígena y Percepción del Entorno*, IWGIA, Copenhagen.

²⁶ CERD/C/GUY/CO/14.

²⁷ Cited in David Hurst Thomas, 2000, *Skull Wars: Kennewick Man, Archaeology and the Battle for Native American Identity*, Basic Books, New York: 67.

²⁸ See, for example, Articles 13-17 of the Charter of the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, http://www.international-alliance.org/charter_eng.htm

²⁹ See for example ILO Convention 169 Articles 14(1) and 17(1); Fergus MacKay, 2003, *A guide to indigenous peoples' rights in the International Labour Organisation*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/law_hr/ilo_guide_ip_rights_jul02_eng.pdf

both for indigenous peoples and Afro-Colombians, communities have secure ownership and self-governance of their lands, which has allowed them to sustain their communities and have greater control over developments on their land. They are not, however, entitled to commercialise the forests on those lands, control of which rests with the State. One of the most progressive legal frameworks in South America is that adopted by the Bolivarian Republic of Venezuela, the Constitution of which explicitly recognises indigenous peoples' existence and guarantees their aboriginal rights to their lands. The December 2000 'Law on the Demarcation and Guarantee of Indigenous Peoples Lands and Habitats', set out the procedure for the titling of indigenous customary territories (*habitats*) but seven years later not a single one has yet been legally titled, despite completed applications having been submitted over five years ago.³⁰

In Asia, the most progressive law that recognises indigenous tenure is the Philippines Indigenous Peoples Rights Act of 1997, which allows for the titling of indigenous peoples' ancestral domains as inalienable communal properties.³¹ To date, just under 1 million of the over 4 million hectares which have interim Certificates of Ancestral Domain Claims, have been titled, while additional areas, which were never issued with the interim certificates, have also yet to be titled.

In Central Africa, measures for the formal recognition of forest peoples' land rights are lacking. While customary tenures may be observed by local administration, they do not protect traditional owners against un-indemnified expropriation for public works or the allocation of overlapping concessions for logging, mining and the establishment of protected areas. Some governments, like the government of the Democratic Republic of Congo, deny the possibility of recognising forest peoples' collective property rights based on custom 'as that was not a viable concept in their legislation and those who used it could only be acknowledged as individual users'.³² Moreover, the customary law regimes of dominant tribes may exclude recognition of the rights of forest-dwellers, hunters and gatherers.³³ In the absence of national-level legal protections, efforts to secure the customary tenures of forest peoples tend to

³⁰ *Ley de Demarcacion y Garantia del Habitat y Tierras de los Pueblos Indigenas*; Marcus Colchester, Nalúa Silva Monterrey and Ramón Tomedes, 2004, *Protecting and Encouraging Customary Use of Biological Resources: the Upper Caura, Venezuela*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/conservation/Ven10c_jan04_full_eng.pdf

³¹ Ingrid Rosalie L. Gorre, Yasmin O. Hatta and Andre Gerard G. Ballesteros (eds.), 1997, *A Compilation of Laws on Natural Resources and Indigenous Peoples Rights: a field handbook. Volume 1 – Indigenous Peoples Rights*, Legal Rights and Resources Centre, Manila.

³² United Nations, Press Release 7 August 2007, 'Committee on the Elimination of Racial Discrimination considers report of the Democratic Republic of Congo', <http://www.ohchr.org/english/press/newsFrameset-2.htm>

³³ Albert Kwokwo Barume, *Heading Towards Extinction? Indigenous Rights in Africa: the case of the Twa of the Kahusi-Biega National Park, Democratic Republic of Congo*, IWGIA and Forest Peoples Programme, Copenhagen and Moreton-in-Marsh; John Nelson, 2004, A Survey of Indigenous land tenure in Sub-Saharan Africa. *Land Reform Bulletin* 2004(1):65-80 http://www.forestpeoples.org/documents/law_hr/fao_land_tenure_report_dec01_eng.pdf; Albert Barume, 2005, *Etude sur le cadre legal pour la protection des droits des peuples indigenes et tribaux au Cameroun*, International Labour Organisation, Geneva. The marginalisation of less powerful peoples by dominant ones is not a problem confined to Africa see: Marcus Colchester, 2002, *Indigenous Rights and the Marginal Voice: testimonies of discrimination*. Keynote Paper presented to the 9th International Conference on Hunters and Gatherers, Edinburgh, 9 September 2002.

focus on brokering agreements between ethnic groups and with local government.³⁴ In Indonesia, the lack of progress at the national level in the recognition of indigenous rights has likewise led groups to seek recognition at the district level, where they have the advantage that under the new Autonomy Acts and Decentralization Laws, district-level legislatures have the power to pass laws and recognise rights.³⁵

Securing customary rights

In some countries which enjoy an independent judiciary, indigenous peoples have been able to make significant progress in securing their rights through the national courts, even in the face of government agencies reluctant to recognise rights. In Commonwealth countries, a body of jurisprudence has evolved through a series of cases in Nigeria, Canada, Australia, New Zealand, South Africa, Malaysia and Botswana, which have upheld the rights of indigenous peoples to their lands. The norm has been established that where indigenous peoples can demonstrate continuing connections with their ancestral lands based on custom or customary law and where the State has not legally extinguished such rights, then these 'Aboriginal Rights' endure.³⁶

These legal gains have not only fed into further national claims within Commonwealth jurisdictions³⁷ but have also had important consequences for the way that indigenous rights are interpreted by international human rights tribunals.³⁸ Since the late 1950s, it is increasingly accepted that indigenous peoples' title is grounded in and arises from their own laws and relations with their lands and, in common with other human rights, are considered inherent and do not depend on any act of the State. The State may recognise such rights, they are not granted.

³⁴ John Nelson, 2007, *Securing Indigenous Land Rights in the Cameroon Oil Pipeline Zone*, Forest Peoples Programme, Moreton-in-Marsh.

http://www.forestpeoples.org/documents/africa/cameroon_pipeline_jul07_eng.pdf

³⁵ Ricardo Simarmata, 2002, *Pilihan Hukum Pengurusan Hutan Oleh Masyarakat Adat*, SHK, Jakarta.

³⁶ Dara Culhane, 1998, *The Pleasure of the Crown: Anthropology, Law and First Nations*, Talon Books, Burnaby BC; Fergus MacKay, 2004, Indigenous Peoples' rights to lands, territories and resources: selected international and domestic legal considerations. *Land Reform Bulletin* 2004/1:80-95.

³⁷ Eg Shaunnagh Dorsett and Lee Godden, 1998, *A Guide to Overseas Precedents of Relevance to Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

³⁸ Fergus Fergus MacKay, 2001a, *A Briefing on Indigenous Peoples' Rights and the United Nations Human Rights Committee*. Forest Peoples Programme, Moreton-in-Marsh http://www.forestpeoples.org/documents/law_hr/unhrc_fpp_brief_dec01_eng.shtml; Fergus MacKay, 2001b, *The African Commission on Human and Peoples' Rights*. Forest Peoples Programme, Moreton-in-Marsh http://www.forestpeoples.org/documents/africa/af_com_brf_human_rights_oct01_eng.shtml; Fergus MacKay, 2002, *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System*. Forest Peoples Programme and IWGIA, Moreton-in-Marsh and Copenhagen, http://www.forestpeoples.org/documents/law_hr/iachr_briefing_oct_01_eng.pdf; Fergus MacKay, 2003, *A Guide to Indigenous Peoples' Rights under the International Convention on the Elimination of All Forms of Racial Discrimination*. Forest Peoples Programme, Moreton-in-Marsh http://www.forestpeoples.org/documents/law_hr/cerd_guide_dec02_eng.pdf; FPP, 2005, *Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of Treaty Body Jurisprudence, 1993 – 2004*. Forest Peoples Programme, Moreton-in-Marsh http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf

Unfortunately the struggle to get governments to accept the judgement of the courts has proven a long one. Even where national laws may recognise the principle that indigenous peoples should be able to secure their rights based on custom, governments have commonly hedged such recognition with limitations and restrictive interpretations. In general indigenous peoples' rights are not equally protected by the law and a plethora of discriminatory conditions and limitation are evident even in those states regarded as progressive, such as Scandinavian countries, New Zealand, Canada, Colombia and the Philippines.

For example in Indonesia, while the law accepts customary rights and recognises collective tenures (*hak ulayat*), these are interpreted by the government as weak usufructuary rights on State lands.³⁹ In Malaysia, the Constitution protects custom and laws uphold the exercise of customary law in the adjudication of disputes.⁴⁰ However, when it comes to land, customary rights are only recognised subject to severe limitations. In Peninsular Malaysia, the *Orang Asli* have only been protected through the establishment of tiny reserves which are considered to be State lands set aside for their use which may be annulled at the stroke of a pen.⁴¹ In Sarawak, the Land Code recognises the existence of 'Native Customary Rights' (NCR) but froze their extension without permit in 1958. The executive acknowledges that some 2.4 million hectares of the State are subject to NCRs but took a decision not to extend them by permit after 1974 and adopted the norm that even such NCR as are recognised are limited to cultivated and fallow lands and not hunting and gathering areas.⁴² When the courts ruled in favour of a much broader interpretation of customary rights based on the concept of 'Native Title', taking into account the indigenous plaintiffs' maps of their customary rights areas,⁴³ the government responded not by expanding its recognition of NCRs but by banning community mapping⁴⁴ and tightening the Land Code.

By contrast, in many Pacific nations, rights in land are effectively recognised on the basis of custom⁴⁵ and access to, and development of, these

³⁹ Colchester, Sirait and Wijardjo 2003, op. cit. footnote 7.

⁴⁰ Peter R. Phelan, 2003, *The Traditional Legal System of Sabah*, Centre for Borneo Studies, Kota Kinabalu.

⁴¹ Colin Nicholas, 2000, *The Orang Asli and the Contest for Resources*, IWGIA and Centre for Orang Asli Concerns, Copenhagen and Subang Jaya.

⁴² Marcus Colchester, 1989, *Pirates, Squatters and Poachers: the Political Ecology of Dispossession of the Native Peoples of Sarawak*, Survival International and INSAN, Kuala Lumpur, 2nd edition;

⁴³ *Nor Anak Nyawai et alii vs Borneo Pulp and Paper Sdn. Bhd* (12 May 2001), Suit No. 22-28-99-I, High Court for Sabah and Sarawak at Kuching.

⁴⁴ Press Release, Sahabat Alam Malaysia, 31 October 2001.

⁴⁵ Henry P. Lundsgaarde, (ed.), 1974, *Land Tenure in Oceania*, University Press of Hawaii, Honolulu; Howard van Trease, 1987, *The Politics of Land in Vanuatu: from colony to independence*. Institute of Pacific Studies, University of the South Pacific, Suva; Ron Crocombe (ed.), 1987, *Land Tenure in the Atolls: Cook Island, Kiribati, Marshall Islands, Tokelau and Tuvalu*, Institute of Pacific Studies, University of the South Pacific, Suva; Ron Crocombe (ed.), 1994, *Land Tenure in the Pacific*. University of the South Pacific, Suva.; Ron Crocombe and Malama Meleisea (1994) *Land Issues in the Pacific*. Institute of Pacific Studies, University of the South Pacific, Suva; David Damas, 1994, *Bountiful Island: a study of land tenure on a Micronesian Atoll*. Wilfrid Laurier University Press, Ontario; Colin Filer (ed.), 1997, *The Political Economy of Forest Management in Papua New Guinea*. International Institute for Environment and Development, London; J.S. Fingleton, 1998, *Legal Recognition of Indigenous Groups*. FAO Legal Paper Online, Rome, December 1998.

resources by outsiders is subject to negotiation with land-owners, who may demand benefit-sharing and compensation or mining royalty equivalents. For example, in Papua New Guinea, some 97% of the national territory is accepted as being the property of customary owners. However, lack of clarity in the law about negotiation processes and the legal personality of landowner groups, coupled with the fact that many groups have little experience with the cash economy, have allowed developers to manipulate landowners, by bribery, by the creation of non-representative associations and through making (often unfulfilled) promises of careful land management and the provision of services.⁴⁶

Tenure and the national interest: making way for development and conservation

Under most legal regimes, private properties are subject to expropriation in the national interest ('eminent domain'), usually subject to proper compensation at market rates. Yet, successive reviews show that indigenous peoples tend to suffer disproportionately from such impositions and are often obliged to give up their lands to large-scale development and conservation projects and submit to forced relocations, while their rights to reasonable compensation for the loss of their lands, territories and other properties are often denied or overlooked.

A review of the impact of hydropower projects, carried out for the World Commission on Dams, for example, showed that major dam-building projects have led to the forced removal of hundreds of thousands of indigenous people. Even where these hydropower projects are built by private sector companies, and are mainly justified as providing electricity for mineral smelting by private companies or to provide for export to regional grids, the State asserts its right to expropriate in the national interest.⁴⁷ A detailed examination of the impact of extractive industries carried out as part of the World Bank's 'Extractive Industries Review' has likewise shown that indigenous peoples tend to suffer disproportionately from such schemes.⁴⁸

In Guyana, studies with indigenous peoples of their experiences with mining show that they are often not consulted and their rights have been frequently occluded, denied or abrogated in favour of mining interests.⁴⁹ Even where development agency

⁴⁶ Marcus Colchester, 2004, Indigenous Peoples and Communal Tenures in Asia. *Land Reform Bulletin* 2004(1):29-43.

⁴⁷ Marcus Colchester, 1999, *Sharing Power: Dams, Indigenous Peoples and Ethnic Minorities*, World Commission on Dams, Cape Town, also published in *Indigenous Affairs* 3-4(June/December)99: 4-54. http://www.wca-infonet.org/servlet/BinaryDownloaderServlet?filename=1065194167484_people.pdf&refID=113250

⁴⁸ Marcus Colchester, Ann Loreto Tamayo, Raymundo Rovillos and Emily Caruso (eds.), 2003, *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank*, TebTebba Foundation and Forest Peoples Programme, Baguio and Moreton-in-Marsh.

⁴⁹ Upper Mazaruni Amerindian District Council, Amerindian Peoples Association and Forest Peoples Programme, 2000, *Indigenous Peoples, Land Rights and Mining in the Upper Mazaruni*, Moreton-in-Marsh; Marcus Colchester, Jean La Rose and Kid James, 2001, *Mining and Amerindians in Guyana. Final Report of the APA/NSI project on Exploring Indigenous Perspectives on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean*, North-South Institute, Ottawa, http://www.nsi-ins.ca/english/pdf/guyana/guyana_final_report.pdf

policies are meant to ensure that indigenous peoples' rights are protected and that they participate in project development, indigenous peoples may be excluded from consideration, as happened to the Bagyeli people, who found themselves in the way of the World Bank-funded Chad-Cameroon Oil Pipeline. In this case the communities suffered a 'double-whammy', not only losing land to the pipeline but also to the protected area set up as an offset to mitigate the environmental loss caused by the pipeline being laid through natural forest.⁵⁰

Indeed, the establishment of conservation schemes has all too often been accompanied by a denial of indigenous peoples' rights. Ever since they were first conceived, plans to set up 'National Parks' have been allowed to override the rights of indigenous peoples to own, control and manage the lands and natural resources they depend on. Successive reviews and studies carried out by the Forest Peoples Programme and academics show that this is a world-wide problem,⁵¹ which conservationists have only recently sought to address.⁵²

In Indonesia, the rights of indigenous peoples are not only poorly secured by law but are, to an unusual degree, subject to being overridden by the national interest. The Constitution gives the State a 'Controlling Power' to allocate land and natural resources in the national interest, while the Basic Agrarian Law upholds customary law only insofar as it does not 'contradict national and State interests, based on national unity and Indonesian socialism...'.⁵³ The government interprets the 'national interest' as including all projects mentioned in national 5-year plans and all areas zoned for development or conservation in Provincial Spatial Planning exercises. Indigenous peoples' rights in Indonesia are thus expected to give way to logging, timber plantations, oil palm plantations, dams, mines and conservation schemes.⁵⁴

Control and Consent

These kinds of limitations on property rights do much to undermine communities' sense of security in their tenures, security which is crucial to long-term development

⁵⁰ John Nelson, Justin Kenrick and Dorothy Jackson, 2001, *Report on a consultation with Bagyeli communities impacted by the Chad Cameroon Pipeline Project*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/ccp_bagyeli_consult_may01_eng.shtml

⁵¹ Andrew Gray, Alejandro Parellada and Helen Newing (eds.), 1997, *From Principles to Practice: Indigenous Peoples and Biodiversity Conservation in Latin America*, Forest Peoples Programme and International Work Group for Indigenous Affairs, Copenhagen; Colchester Marcus and Christian Erni (eds.), 2000, *Indigenous Peoples and Protected Areas in South and Southeast Asia: from Principles to Practice*. Forest Peoples Programme and International Work Group for Indigenous Affairs, Copenhagen; Marcus Colchester, 2003, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*. World Rainforest Movement and Forest Peoples Programme, Montevideo and Moreton-in-Marsh; Dawn Chatty and Marcus Colchester (eds.), 2003, *Conservation and Mobile Indigenous Peoples: displacement, forced settlement and sustainable development*. Berghahn Books, Oxford; John Nelson and Lindsay Hossack (eds.), 2003, *From Principles to Practice: Indigenous Peoples and Protected Areas in Africa*, Forest Peoples Programme, Moreton-in-Marsh.

⁵² Jessica Campese and Grazia Borrini-Feyerabend (eds.), 2007, *Conservation and Human Rights*. Special Issue Number 15 of *Policy Matters*.

⁵³ Basic Agrarian Law, 1960, Article 5.

⁵⁴ Colchester et alii. 2006, op. cit. footnote 9; J.T. Roberts and N.D. Thomas, 2003, *Trouble in Paradise: globalization and environmental crises in Latin America*, Routledge, London.

and sustainable management. Forest policy reformers and researchers have rightly placed an emphasis on the need for governments and forestry departments to decentralize the administration, and devolve the management, of forests to regional, local and community institutions.

While the gains from decentralization to forest communities are disputed – success depending largely on the extent to which local government is accountable and the rule of law prevails – devolved management is only likely to be effective where communities’ institutions are recognised (see above) and where they have a genuine measure of autonomy in managing resources and have the right to reject the imposition of development and inappropriate plans. Forest peoples have thus been asserting their right to give or withhold their Free, Prior and Informed Consent to activities proposed for their lands (‘the right to FPIC’). This right is part and parcel of the right to self-determination, in particular the constituent rights to ‘freely’ pursue economic, social and cultural development and to ‘freely’ dispose of natural wealth and resources.

With respect to indigenous peoples, at least, there is now a general recognition that the ‘right to FPIC’ is indeed recognised by existing international human rights law and it has been repeatedly affirmed in the jurisprudence of the international treaty bodies.⁵⁵ An independent review for the World Bank looking at the Extractive Industries sector concluded that, given the severe discrimination suffered by indigenous peoples, their rights under international law and the extent to which mining, oil and gas development was causing harm, the World Bank should recognise indigenous peoples’ right to FPIC in its own policies. The Eminent Person in his report noted:

Free, prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a “social license” to operate. Clearly, such consent processes ought to take different forms in different cultural settings. However, they should always be undertaken in a way that incorporates and requires the FPIC of affected indigenous peoples and local communities.⁵⁶

The same right has been accepted for palm oil, logging and plantations certification (see below); making this effective, however, remains a major challenge. Communities

⁵⁵ Fergus MacKay, 2004, Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review, *Sustainable Development Law and Policy*, Volume IV (2): 43-65; http://www.forestpeoples.org/documents/prv_sector/eir/eir_ips_fpic_jun04_eng.pdf

⁵⁶ *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, <http://www.eireview.org/eir/eirhome.nsf/be65a087e9e6b48085256acd005508f7/75971F6A8E5111385256DE80028BEE2?Opendocument> . International law is clear that, in accordance with their right to self-determination, indigenous peoples enjoy ‘the right to FPIC’ but there is less clarity about how other local communities which are constituents of broader peoples enjoy or exercise this right.

can and do insist on this right in their dealings with governments and companies, whether the right is recognised under national law or not. Effective deployment of this right is greatly strengthened where land rights are recognised and titled, where communities' own representative institutions are recognised and have legal personality, where decisions can be made according to customary law or local norms, and where communities are well coordinated and prepared to assert their rights.⁵⁷

In some countries, like the Philippines, FPIC is indeed explicitly required by national law and communities have been able to exercise this right effectively to reject some unacceptable projects and modify others. Unfortunately, however, some government agencies and companies have abused this right to push through nationally prioritised developments, like large-scale mining, using the age-old tactics of divide and rule, corruption, bribery and intimidation.⁵⁸

Sustainable development and customary use

According to a Pacific proverb: *'To know where you are going, you have to know where you are. And to know where you are, you have to know where you have come from.'* The same wisdom informs the development perspectives of many forest peoples. For example the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests affirms:

Our policy of development is based, first, on guaranteeing our self-sufficiency and material welfare, as well as that of our neighbours; a full social and cultural development based on the values of equity, justice, solidarity and reciprocity, and a balance with nature. Thereafter, the generation of a surplus for the market must come from a rational and creative use of natural resources developing our own traditional technologies and selecting appropriate new ones.⁵⁹

Customary norms of environmental use and management are thus seen by forest peoples as a basis on which to base both conservation and development initiatives. The framers of the Convention of Biological Diversity have likewise recognised the value of customary systems of resource use. Article 10(c) of the Convention thus requires States that are party to the Convention 'as far as possible and as appropriate' to:

Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

⁵⁷ Marcus Colchester and Fergus MacKay, 2004, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent*. Forest Peoples Programme, Moreton in Marsh.

http://www.forestpeoples.org/documents/law_hr/fpic_ips_aug04_eng.pdf

⁵⁸ Marcus Colchester and Maurizio Ferrari, 2007, *Making FPIC Work: Challenges and Prospects for Indigenous Peoples*, Forest Peoples Programme, Moreton-in-Marsh,

http://www.forestpeoples.org/documents/law_hr/fpic_synthesis_jun07_eng.pdf

⁵⁹ Charter of the Indigenous and Tribal Peoples of the Tropical Forests, Article 34, http://www.international-alliance.org/charter_eng.htm

The CBD Secretariat has thus recommended that in order to comply with their obligations under this article States must ensure that national legislation and national policies account for and recognise, among others, indigenous legal systems, corresponding systems of governance and administration, land and water rights and control over sacred and cultural sites.⁶⁰

Participatory reviews with forest peoples in Venezuela,⁶¹ Guyana,⁶² Suriname,⁶³ Cameroon,⁶⁴ Thailand⁶⁵ and Bangladesh⁶⁶ have revealed not only the wealth of customary law and environmental knowledge which communities use in managing and using their resources but also the extent to which national laws and policies need to be reformed to protect and encourage these practices. In effect, many countries are not yet meeting their obligations under the Convention. To do so, they either need to enforce existing laws more assiduously or they need to revise their laws so they can.⁶⁷

Use or Sale?

Forestry reforms aimed at realising the Millennium Development Goals emphasise the importance of increasing the incomes of forest-dependent peoples. Yet whereas international human rights law recognises the right of all peoples to freely dispose of their natural wealth and resources and not be deprived of their means of subsistence,⁶⁸ forest peoples' rights to use forest resources are often hedged about with restrictions that may prevent sales of timbers and other forest products.

Where forest peoples' rights have been recognised on the basis of customary rights and ancestral domains, governments may argue that these rights do not include commercial sales as these are 'modern' uses which were not practised in the past. The national courts in USA, New Zealand and Canada have overturned such limitations in the case of riverine and coastal fisheries, freeing indigenous peoples of a legal

⁶⁰ Secretariat of the CBD, 1997, *Traditional Knowledge and Biological Diversity*. UNEP/CBD/TKBD/1/2; 11- 12, <http://www.biodiv.org/doc/meetings/tk/wstkb-d-1/official/wstkb-d-01-02-en.pdf>

⁶¹ Colchester, Monterrey and Tomedes 2004, op. cit. footnote 27.

⁶² Beryl David, Percival Isaacs, Angelbert Johnny, Larry Johnson, Maxi Pugsley, Claudine Ramacindo, Gavin Winter and Yolanda Winter, 2006, *Wa Wiizi, Wa Kaduzu: Our Territory, Our Custom*. Forest Peoples Programme, Moreton-in-Marsh.

⁶³ Henry Zaalman, Georgette Kumanajare, Louis Biswana, Grace Watalmaleo, Michel Barend, Sylvia Oeloekanamoe, Steven Majarawai, Harold Galgren, Ellen-Rose Kambel, Caroline de Jong, 2006, *Marauny Na'Na Emandobo Lokono Shikwabana. 'Marowijne: Our Territory'*. Forest Peoples Programme, Moreton-in-Marsh. http://www.forestpeoples.org/documents/conservation/suriname_10c_feb06_eng.pdf

⁶⁴ Tchoumba et alii. 2006, op. cit. footnote 6.

⁶⁵ Highland Mapping Development and Biodiversity Management Project, Inter-Mountain Peoples' Education and Cultures in Thailand Association with Forest Peoples Programme, 2006, *Indigenous Knowledge, Customary Use of Natural Resources and Sustainable Biodiversity Management: Case Study of Hmong and Karen Communities in Thailand*, IMPECT, Chiang Mai.

⁶⁶ FPP forthcoming.

⁶⁷ Colchester et alii. 2006, op. cit. footnote 4.

⁶⁸ International Covenant on Civil and Political Rights Article 1(2).

straitjacket which would only recognise subsistence not commercial use.⁶⁹ Yet progress to assert similar rights to forest resources has been longer drawn out. In Canada, for example, indigenous peoples' timber rights, even where protected by treaty on Crown lands, are still judged to be limited to personal use.⁷⁰

Using the argument that regulation of all forest use is required to ensure sustained yield and the continuation of the crucial environmental services of forests, foresters have developed complex planning requirements for communities to fulfil before they can be allowed to manage forest resources. A perverse result of these onerous requirements is that they have too often pushed forest peoples into illegality⁷¹ while, by and large, the main tenures offered to communities seeking to carry out community forestry are relatively short-term leaseholds on State lands.⁷² Many of these management regimes actually result in the marginalisation of indigenous peoples and lower caste people and reinforce the power of forestry departments and village elites. They also prevent communities from developing the potential of, and marketing, their natural resources.⁷³

Recent years have seen a growing enthusiasm in the private sector for involving communities as out-growers and smallholders producing for paper-pulp and palm oil mills. Ostensibly designed to allow for wider benefit-sharing between companies and communities, such schemes have also been criticised as really being measures for companies to shed risk, while they place communities in unequal relations with companies to which they are often tied by debt and lack of alternatives. In the worst cases, as among many Dayak groups on oil palm estates in Borneo,⁷⁴ smallholder

⁶⁹ Wilkinson op. cit.; Ken Coates, 2000, *The Marshall Decision and Native Rights*, McGill-Queen's University Press, Montreal; Svein Jentoft, Henry Minde and Ragnar Nilsen (eds.), 2003, *Indigenous Peoples: Resource Management and Global Rights*, Eburon, Delft.

⁷⁰ The Canadian Press, 'Top court upholds aboriginal logging rights on Crown land', Thursday, December 7, 2006, <http://www.cbc.ca/canada/story/2006/12/07/native-court.html>.

⁷¹ Colchester et alii. 2006, op. cit footnote 16.

⁷² Marcus Colchester, Tejaswini Apte, Michel Laforge, Alois Mandondo and Neema Pathak, 2003, *Bridging the Gap: Communities, Forests and International Networks. Synthesis Report of the Project 'Learning Lessons from International Community Forestry Networks'*, CIFOR Occasional Paper No. 41, Bogor; Marcus Colchester, Andrew Ekadinata, Chip Fay, Gamal Pasya, Indriani E., Lisken Situmorang, Martua Sirait, Meine van Noordwijk, Nurka Cahyaningsih, Suseno Budidarsono, S. Suyanto, Koen Kusters, Philip Manalu and David Gaveau, 2005, *Facilitating Agroforestry Development through Land and Tree Tenure Reforms in Indonesia*. ICRAF South East Asia Working Paper No. 2005/2, World Agroforestry Centre, Bogor. <http://www.worldagroforestrycentre.org/SEA/Publications/files/workingpaper/WP0067-05.PDF>

⁷³ Forest Peoples Programme and Samata, 2005, *Andhra Pradesh Community Forestry Management Project: a preliminary evaluation of a World Bank forestry project*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_andhra_pradesh_cfm_proj_may_05_eng.pdf; Tom Griffiths, 2006, *Going from Bad to Worse: World Bank forestry project in Andhra Pradesh fails Adivasi communities*, http://www.forestpeoples.org/documents/ifi_igo/wb_andhra_pradesh_dec06_eng.pdf; cf Liz Alden Wily and Sue Mbaya, 2001, *Land, People and Forests in Eastern and Southern Africa at the Beginning of the 21st Century*, IUCN, Nairobi.

⁷⁴ Marcus Colchester and Norman Jiwan, 2006, *Ghosts on our own land: oil palm smallholders in Indonesia and the Roundtable on Sustainable Palm Oil*, Forest Peoples Programme and Sawit Watch, Bogor. http://www.forestpeoples.org/documents/asia_pacific/bases/indonesia.shtml#ghosts

schemes come close to establishing ‘slavery-like practices’ which are contrary to well established human rights laws.⁷⁵

In such ‘contemporary forms of slavery’, debtors are unable to keep or verify records of the loan payments they have made, and in most cases no written contract exists in the first place. Violence and threats of violence can be used to enforce the bond, or more subtle strategies such as exclusion from future employment. Of the 12 million people worldwide estimated by the International Labour Office (ILO) to be still living in slavery-like conditions, some 9.5 million are in Asia, the majority working as bonded labourers.⁷⁶ These include a disproportionate number of indigenous peoples – notably many forest-dwelling *adivasi* in Central India⁷⁷ – who have been a particular concern to the ILO.⁷⁸

Cultural Rights

Forest Peoples, indeed all peoples, interact with their environment and make their livelihoods within their own framework of norms and values, beliefs, social relations, institutions and unique practices. The right of all people to their own culture and ways of life is strongly affirmed in the UN’s International Bill of Human Rights, specifically in the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.⁷⁹

This right is under serious challenge in some countries. The customary beliefs and practices of forest peoples are often treated in a derogatory way by members of national majorities and government officials. Indonesia, for example, still requires all citizens to be adherents of one of the major world religions – Islam, Christianity, Buddhism or Hinduism – thus disqualifying the traditional religions and systems of belief of the majority of the country’s estimated 500 ethnic groups. In the recent past, the government even used to carry out aggressive programmes to prevent customary ceremonies and burn traditional religious paraphernalia and even burn down Dayak longhouses, which were considered dens of backwardness and promiscuousness.⁸⁰

Forest peoples have sought to defend their right to freedom of religion and to control their cultural heritage in diverse ways. One approach is offered by the Convention on Biological Diversity, Article 8(j) of which requires States Party to the Convention to:

⁷⁵ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926; Protocol amending the Slavery Convention of 1953, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1957; ILO Convention No. 29 on Forced Labour, 1930; ILO Convention 105 Abolition of Forced Labour, 1957. <http://www1.umn.edu/humanrts/instree/flsc.htm> and www.ilo.org

⁷⁶ http://www.ilo.org/public/english/bureau/inf/features/05/debt_asia.htm

⁷⁷ <http://www.antislavery.org/homepage/campaign/bondedinfo.htm>

⁷⁸ http://www.ilo.org/global/Themes/Forced_Labour/lang--en/index.htm

⁷⁹ FPP, 2004, A summary of some key existing political commitments and international standards on the social and cultural aspects of forests, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/forest_issues/summary_stds_forests_dec04_eng.shtml.

⁸⁰ FPP, 2005, *Dayak Leaders’ Memories and Dreams*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/prv_sector/oil_palm/dayak_surv_oil_palm_jul05_eng.pdf

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;⁸¹

Discussions about how governments should best meet their obligations under this article have since been the subject of an intense debate at the meetings of the Conference of the Parties and its working groups,⁸² but the importance of securing indigenous peoples' rights to their lands and resources, to recognition of their own representative institutions and to the exercise of their customary law is widely attested.⁸³

Discussions have also focused specifically on forests, given the evident overlap between the requirements of the Convention on Biological Diversity (CBD) and the UN's various fora on forests (IPF, IFF and UNFF – see below) which have agreed on the importance of protecting 'traditional forest-related knowledge' (TFRK). A detailed review carried out as part of an 'inter-sessional meeting' of both the CBD and UNFF on this theme showed that governments and indigenous peoples had widely divergent views of how this should be achieved. From one point of view, TFRK is seen as an extractable commodity related to practical and potentially lucrative uses of forest products, which should be protected through appropriate regulations defining intellectual property rights, benefit-sharing and community consent. A second approach is to see TFRK as a technical component of 'sustainable forest management', an adjunct to the forester's tool box to be deployed through participatory management regimes. However, from a third point of view, TFRK is seen as something that is embedded in traditional systems of land use, ownership and control, customary systems of decision-making, and ancestral rights to lands, territories and natural resources. These differences of point of view reflect very different understandings of why TFRK needs to be protected.⁸⁴ The review also showed the wide gap that exists between the affirmation of the need to protect TFRK and actual practice.⁸⁵

⁸¹ <http://www.cbd.int/convention/articles.shtml?a=cbd-08>

⁸² FPP, 2004, *Indigenous Peoples' Rights, State Sovereignty and the Convention on Biological Diversity*, Forest Peoples Programme and FERN, Moreton-in-Marsh, http://www.forestpeoples.org/documents/conservation/cbd_ips_sovereignty_feb04_eng.shtml

⁸³ Tony Simpson, 1997, *Indigenous Heritage and Self-Determination*, Forest Peoples Programme and IWGIA, Moreton-in-Marsh and Copenhagen.

⁸⁴ Helen Newing (ed.), 2005, *Our Knowledge for Our Survival: Traditional Forest Related Knowledge and the Implementation of Related International Commitments, Volume 1: Regional Case Studies and Volume 2: National Case Studies*, International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and CIFOR, Chiang Mai: 11-63. <http://www.international-alliance.org/publications.htm>

⁸⁵ Newing 2005, op. cit. footnote 81; Dorothy Jackson, 2004, *Implementation of International Commitments on traditional forest-related knowledge: indigenous peoples' experiences in Central Africa*, Forest Peoples Programme, Moreton-in-Marsh. http://www.forestpeoples.org/documents/africa/tfrk_expert_mtg_oct04_eng.pdf

Women's rights

Development in forest regions has often had especially hard impacts on women, notwithstanding the fact that their rights are often upheld in national laws and are protected by international law,⁸⁶ but who are especially vulnerable to violence and abuse. For example, a study carried out by the Forest Peoples Programme and the Amerindian Peoples Association in Guyana, found that mining is having a very severe impact on the indigenous peoples' environments, livelihoods and health, and is contributing to the denial of land rights. The mining is also having especially severe impacts on Amerindian women and not only because of male absenteeism in the mines and thus the breakdown of shared labour in village production. Prostitution of Amerindian women is rife in mining camps and nearby settlements, and rapes are widely reported. The police are accused of negligence and accepting bribes in dealing with these abuses. Racist prejudices aggravate these problems.⁸⁷

'Pygmy' women in Central Africa also suffer particular problems. The lack of land security, or even access to land at all, often obliges men to move about in search of work, meaning many women shoulder the heavy burden of child care unsupported. Women are also exposed to the prejudice in the dominant culture that sex with a Twa woman cures backache and other ailments. In the war zones of the Democratic Republic of Congo, 'Pygmy' women have suffered very severe abuse. Forest peoples' communities have been targeted by rebels and soldiers leading to forced labour, killings and even cannibalism. Multiple rapes have been widely reported⁸⁸ and confirmed by the UN, which notes that this has led to the spread of HIV/AIDS.⁸⁹

It is also a reality that even under customary law women may suffer discrimination and lack rights over land or a voice in community decision-making. Women in forest communities thus suffer a triple discrimination, being considered of lower worth for being indigenous, for inhabiting 'undeveloped' areas like forests, and for being women. As one reviewer has noted:

...women's lack of property is a fact about the world, and in many places women lack rights to property as a matter of cultural or juridical norms...⁹⁰

⁸⁶ Ellen-Rose Kambel, 2004, *A Guide to Indigenous Women's Rights under the Convention on the Elimination of All Forms of Discrimination against Women*, Forest Peoples Programme, Moreton-in-Marsh. http://www.forestpeoples.org/documents/africa/tfrk_expert_mtg_oct04_eng.pdf

⁸⁷ Marcus Colchester, Jean La Rose and Kid James, 2001, *Mining and Amerindians in Guyana*. Final Report of the APA/NSI project on Exploring Indigenous Perspectives on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean. North-South Institute, Ottawa, http://www.nsi-ins.ca/english/pdf/guyana/guyana_final_report.pdf

⁸⁸ Dorothy Jackson, 2003, *Twa Women, Twa Rights in the Great Lakes Region of Africa*, Minority Rights Group International, London. <http://www.minorityrights.org/>

⁸⁹ http://www.forestpeoples.org/documents/africa/drc_interahamwe_attack_twa_jan04.shtml; UN Integrated Regional Information Networks (IRIN): *DRC: Sexual violence, lack of healthcare spreads HIV/AIDS among pygmies*, <http://www.plusnews.org/aidsreport.asp?reportid=6371>

⁹⁰ Kerry Rittich, 2005, *The Properties of Gender Equality in: Philip Alston and Mary Robinson (eds.), 2005, Human Rights and Development: towards mutual reinforcement*, Oxford University Press, Oxford: 87.

The simplistic solution of empowering women through land titling has, however, been challenged. Many indigenous people, both men and women, such as the Kaliña and Lokono of Suriname, have rejected the idea of individual titling of land as a way of equalising relations between the sexes.⁹¹ And with good reason, for too often land titling programmes have been skewed by prevailing power relations meaning that men get favoured at the expense of women, even though women's rights to be property owners is asserted.⁹² As one reviewer has noted:

Paradoxically, efforts to promote security of tenure through formalization of title may both improve the status of women and go hand in glove with dispossessing women of property.⁹³

This does not mean that women's rights do not need to be asserted in forest reform. Prodded by indigenous women, indigenous organisations have acknowledged the need to reform discriminatory practice in line with international human rights norms. For example, in their 'Manila Declaration' of December 2000, indigenous peoples' representatives accepted that the concept of justice is universal and that in:

revalidating the traditions and institutions of our ancestors it is also necessary that we ourselves honestly deal with those ancient practices, which may have led to the oppression of indigenous women and children. However, the conference also stresses that the transformation of indigenous systems must be defined and controlled by indigenous peoples...[as] part of the right to self-determination.⁹⁴

What this does mean is that indigenous peoples should review and where necessary reform their customary institutions and norms to secure women's rights, particularly to ensure that they participate in decision making about the allocation and use of common properties.

Eliminating discrimination

The persistent lack of respect for and protection of the rights of forest peoples has recently become a matter of urgent consideration by the United Nations' Committee on the Elimination of Racial Discrimination, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination. During the past three years, the Committee has received a series of complaints from indigenous peoples and support organisations drawing attention to discriminatory laws and policies in, inter alia, Brazil,⁹⁵ the Democratic Republic of Congo,⁹⁶ Guyana,⁹⁷ Suriname,⁹⁸ North-East India,⁹⁹ Indonesia¹⁰⁰ and the Philippines.¹⁰¹

⁹¹ Ellen-Rose Kambel, 2002, *Resource Conflicts, Gender and Indigenous Rights in Suriname: Local, National and Global Perspectives*, Ph.D. dissertation, University of Leiden;

⁹² Marcus Colchester, 1994, *Slave and Enclave: the political ecology of Equatorial Africa*, World Rainforest Movement, Penang; 46-47.

⁹³ Rittich 2005, op. cit. footnote 87: 89.

⁹⁴ Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, Metro Manila, Philippines, 6-8 December 2000.

⁹⁵ 'Formal Request to Initiate Early Warning and Urgent Action Procedures To Avoid Immediate and Irreparable Harm To the Indigenous Peoples of Raposa Serra Do Sol, Brazil, And Follow-Up on Brazil's State Party Report (CERD/C/431/Add.8)', submitted to the Committee on the Elimination of

The complaints have documented government discrimination against forest peoples in terms of:

- relative poverty
- limited access to education
- poor health and limited provision of health care

Racial Discrimination in its 69th Session, Geneva, 31 July – 18 August 2006, by Conselho Indígena de Roraima, Indigenous Peoples Law and Policy Program – University of Arizona, Rainforest Foundation and Forest Peoples Programme,

http://www.forestpeoples.org/documents/s_c_america/brazil_cerd_ua_request_jun06_eng.pdf

http://www.forestpeoples.org/documents/s_c_america/brazil_cerd_letter_aug06_eng.pdf

⁹⁶ ‘Persistent and Pervasive Racial Discrimination against Indigenous Peoples in the Democratic Republic of Congo’, Submission to the Committee on the Convention on the Elimination of All Forms of Racial Discrimination, June 2006, submitted by Centre d’Accompagnement des Autochtones Pygmées et Minoritaires Vulnérables, Association Pour le Regroupement et l’Autopromotion des Pygmées, Collectif pour les Peuples Autochtones au Kivu, Action Pour la Promotion des Droits des Minorités Autochtones en Afrique Centrale, Solidarité pour les Initiatives des Peuples Autochtones, Union Pour l’Emancipation de la Femme Autochtones, Forest Peoples Programme, http://www.forestpeoples.org/documents/africa/bases/drc_base.shtml

⁹⁷ ‘Request for Adoption of a Decision under the Urgent Action/Early Warning Procedure in Connection with the Imminent Adoption of Racially Discriminatory Legislation by the Republic of Guyana and Comments on Guyana’s State Party Report (CERD/C/446/Add.1)’. 68th session of the Committee on the Elimination of Racial Discrimination, Geneva, 20 February – 10 March 2006, submitted by Amerindian Peoples Association and Forest Peoples Programme, http://www.forestpeoples.org/documents/s_c_america/guyana_cerd_ua_jan06_eng.pdf

⁹⁸ ‘Request for Follow-Up and Urgent Action Concerning the Situation of Indigenous and Tribal Peoples in Suriname’, 8 July 2005, submitted to the Committee on the Elimination of Racial Discrimination by Association of Indigenous Village Leaders of Suriname, Stichting Sanomaro Esa, Association of Saramaka Authorities and Forest Peoples Programme, http://www.forestpeoples.org/documents/s_c_america/suriname_cerd_submission_jul05_eng.pdf

⁹⁹ ‘Request for adoption of a Decision under the Urgent Action/ Early Warning Procedure in Connection with violation of Indigenous Peoples’ Rights in Northeast India’. 69th Session of the Committee on the Elimination of Racial Discrimination submitted by United NGOs Mission Manipur and Forest Peoples Programme, 31 October 2006, http://www.forestpeoples.org/documents/law_hr/india_cerd_submiss_oct06_eng.shtml

¹⁰⁰ Request for Consideration of the Situation of Indigenous Peoples in Kalimantan, Indonesia, under the United Nations Committee on the Elimination of Racial Discrimination’s Urgent Action and Early Warning Procedures, Committee on the Elimination of Racial Discrimination Seventy-First Session, 30 July – 18 August 2007, Submitted by Perkumpulan Sawit Watch, Aliansi Masyarakat Adat Nusantara/AMAN (Indigenous People Alliance of the Archipelago), Aliansi Masyarakat Adat Kalimantan Barat (Indigenous People Alliance of West Kalimantan), Lembaga Studi dan Advokasi Masyarakat/ELSAM (Center for Community Study and Advocacy), Wahana Lingkungan Hidup Indonesia/WALHI (Friends of the Earth Indonesia) Perkumpulan Untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis/HuMA (Association for Community- and Ecologically-based Legal Reform), Yayasan Padi Indonesia, Lembaga Bela Banua Talino, Lembaga Gemawan (Lembaga Pengembangan Masyarakat Swandiri/The Institution of Swandiri Society Empowerment), Institut Dayakologi, Forest Peoples Programme, 6 July 2007, http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_july07_eng.pdf

¹⁰¹ ‘Discrimination against the Subanon of Mt Canatuan, Siocon, Zambonga del Norte, Philippines in the context of large-scale gold mining on their ancestral domain’, Committee on the Elimination of all forms of Racial Discrimination, 71st Session, 30th July – 18th August 2007, Submitted by Apu Manglang Glupa’ Pusaka, Gukom Sog Pito Kobogolalan Sog Pito Kodulongan, Pigsalabukan Bangsa Subanon, Legal Rights and Natural Resources Center, Tebtebba Foundation, Indigenous Peoples Links, Irish Centre for Human Rights, http://www.forestpeoples.org/documents/asia_pacific/philippines_cerd_jul07_eng.pdf

- unjust and indiscriminate targeting by the Armed Forces
- discriminatory legal frameworks which prejudice forest peoples' rights to land, especially relative to other sectors
- impositions of dams, mining, logging and oil palm plantations without peoples' free, prior and informed consent
- unjust delays in land titling
- fomenting racial hatred
- lack of enforcement of legal protections
- a lack of or denial of equal access to effective judicial and other remedies
- failure to implement the Committee's previous recommendations.

While the Committee has not taken up all these concerns, or has yet to consider them, it has found a number of the most serious charges to be well founded. For example, with respect to Guyana, at its 68th session held in March 2006, the Committee expressed 'deep concern' about the way the new Amerindian Act does not vest Amerindian Village Councils 'with the powers necessary for the self-administration and the control of the use, management and conservation of traditional lands and resources.' It urged the government to develop a mechanism for the 'recognition of the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy' and urged the Government to 'recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources....' It further urged the Government 'to demarcate or otherwise identify the lands which they traditionally occupy or use, ... [and] to define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system, while taking due account of relevant indigenous customary laws.'¹⁰²

In the case of Suriname, the Committee found that Suriname had violated the rights guaranteed in the Convention. The Committee recommended 'legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources.' It also recommended 'urgent action by [Suriname], in cooperation with the indigenous and tribal peoples concerned to identify the lands which those peoples have traditionally occupied and used.' Observing that indigenous peoples and Maroons' rights have been violated by logging and mining activities in the interior, the Committee stated 'that development objectives are no justification for encroachments on human rights' and article 41 of the Constitution, which vests ownership of natural resources in the nation, 'must be exercised consistently with the rights of indigenous and tribal peoples.'¹⁰³

With respect to the Democratic Republic of Congo, the Committee has noted with concern that the rights of the Pygmies (Bambuti, Batwa and Bacwa) to own, exploit, control and use their lands, their resources and their communal territories are not guaranteed and that concessions to the lands and territories of indigenous peoples are granted without prior consultation. The Committee recommended that the

¹⁰² CERD/C/GUY/CO/14.

¹⁰³ CERD/C/64/CO/9/Rev.2, 12 March 2004.

government: take urgent and adequate measures to protect the rights of the Pygmies to land; make provision for the forest rights of indigenous peoples in domestic legislation; register the ancestral lands of the Pygmies in the land registry; proclaim a new moratorium on handing out concessions in forest lands; take the interests of the Pygmies and environmental conservation needs into account in matters of land use and; provide domestic remedies in the event that the rights of indigenous peoples are violated. The Committee also urged that the Government not mis-use its law prohibiting racism and tribalism to ban associations engaged in defending the rights of indigenous peoples.¹⁰⁴

The implications of discriminatory practice by States towards forest peoples are severe. For example, a survey of the health of indigenous peoples in Central Africa uncovered a very serious situation which was found to be a consequence of marginalisation and discrimination and lack of protection of land rights.¹⁰⁵ A similar situation of high mortalities and morbidities has also been found among newly contacted forest peoples in Amazonia, where communities are not protected from illegal invasions, for example by miners, but are provided deficient health care.¹⁰⁶

Right of Redress and Rule of Law

A vital component of any rights-based regime is the provision of the means of redress to victims of abuses. Effective enjoyment of this right implies *inter alia*: an awareness of rights among potential plaintiffs; access to legal counsel; active, unbiased policing; the formal establishment of judicial, administrative and other remedies; access to courts; an independent judiciary; just enforcement of penalties and, not least; protection of plaintiffs, witnesses, court officials, judges and other state officials from intimidation and violence. In other words, justice requires the rule of law.

An FPP study of the possibilities of ensuring exercise of the right of 'Free, Prior and Consent' in Indonesia in the context of timber certification¹⁰⁷ notes that the lack of effective rule of law in Indonesia poses a major challenge to the reform of the forest sector, as the very small number of prosecutions of forestry businesses violating forestry regulations testifies.¹⁰⁸ The long years of dictatorship and one-party rule have left a serious problem. By the end of the Suharto period, as political analyst Kevin O'Rourke notes:

¹⁰⁴ CERD/C/COD/CO/15/CRP.1

¹⁰⁵ Nyang'ori Ohenjo, Ruth Willis, Dorothy Jackson, Clive Nettleton, Kenneth Good, Benon Mugarura, 2006, 'Health of Indigenous people in Africa', *Lancet* 367:1937-1946; Dorothy Jackson, 2006, The Health Situation of Women and Children in Central African Pygmy Peoples, *IWGIA Bulletin* http://www.forestpeoples.org/documents/africa/c_af_pygmy_health_may06_eng.shtml

¹⁰⁶ Marcus Colchester (ed.), 1985, *The Health and Survival of the Venezuelan Yanoama*. Survival International, Anthropology Resource Center and the International Work Group on Indigenous Affairs, Document 53, Copenhagen.

¹⁰⁷ Colchester, Sirait and Wijardjo 2003, op. cit. footnote 7.

¹⁰⁸ DTE, 2002, *Forests, Peoples and Rights*, Down to Earth, London, <http://dte.gn.apc.org/srfin.htm>

Indonesia was governed by what legal experts termed ‘Ruler’s Law’, as opposed to rule-of-law. Over four decades of authoritarian rule, every component of the legal system had been crafted to defend the supremacy of the ruler, rather than the supremacy of the law.... By necessity, Indonesia’s legal system was rife with corruption. Legal system actors – such as judges, prosecutors, police and lawyers – were not motivated by professionalism, principles or ideals of public service, as the system placed little value on these qualities. Instead, the regime recruited and promoted legal system actors on the basis of their loyalty – loyalty that was induced by financial incentives. Over time, the practice of rewarding loyalty with money conditioned legal system actors, who became highly susceptible to bribery while conducting routine tasks. Thus, with the exception of decisions that directly affected the regime, the legal system actors routinely sold their service to the highest bidders. Eventually, the legal system became a mechanism through which the wealthy and powerful were able to consistently exploit the poor and weak. The implications of Ruler’s Law were profound: the government continued to be unaccountable to the people and ordinary Indonesians faced considerable difficulty in their daily lives.¹⁰⁹

Similar conclusions have been reached by many other analysts. For example, an exhaustive review carried out for the World Bank during the closing months of the Suharto era, revealed the very serious problems besetting the whole legal system, a legacy of patrimonial politics and the absence of democracy and civil and political rights and freedoms. Among the problems noted in the five-volume report were: a lack of competence in the legal profession; low professional standards and ethics; lack of disciplining of professionals for misconduct by their legal associations; and a conspicuous absence of good conduct by senior members of the professional legal associations. Moreover, ‘court management... is inefficient and lacks transparency’, leading to a backlog of cases and long court delays. ‘At the present time, the business community and the public are very disappointed with court services’, the report concluded after detailed surveys. The judiciary was likewise found to lack capacity and independence. A serious lack of a separation of powers has led to judges being chosen by the Ministry of Justice. ‘The dominant role of the executive branch enables an unhealthy restraining influence over the judiciary’, the report notes.¹¹⁰ A United Nations mission to gauge the country’s judiciary in 2002 again found pervasive corruption in the courts.¹¹¹

Such a situation is far from unique to Indonesia. A belated realisation of the extent of illegality in the forest sector, the impunity of violators and the lack of enforcement capacity in state agencies has led to the current vogue for ‘Forest Law Enforcement, Governance and Trade’ reforms. The same situation poses a major challenge to effective reforms of forest and land tenures.

On the other hand, the longer governments persist in denying rights and justice to forest peoples, the more complex and costly eventual legal solutions are likely to be. As FPP’s senior human rights lawyer, Fergus MacKay, has noted:

¹⁰⁹ Kevin O’Rourke, 2002, *Reformasi: the Struggle for Power in Post-Suharto Indonesia*, Allen and Unwin, Crow’s Nest:150.

¹¹⁰ Ali Budiardjo, Nugroho and Reksodiputro, 1998, *Law Reform in Indonesia: Diagnostic Assessment of Legal Development in Indonesia. Results of a research study undertaken for the World Bank*, 5 Volumes, Cyberconsult, Jakarta: Volume 1:157-9.

¹¹¹ *Jakarta Post*, 30 July 2002.

Violations of human rights trigger remedies designed to provide redress for the victims. In international human rights law, access to effective remedies is itself a right. As a general proposition, violation of indigenous peoples' land and resource rights gives rise to both a general remedy and a specific remedy expressed as a stand alone right. The former requires legal recognition, demarcation and titling of indigenous lands and territories, as defined by indigenous law and customs, and/or compensatory measures if damages have been sustained. In the absence of a mutually acceptable agreement to the contrary, the latter involves the right to restitution of lands, territories and resources taken or used without indigenous peoples' free and informed consent and compensation for any damages sustained as a consequence of the deprivation.¹¹²

In a like vein the UN Committee on the Elimination of Racial Discrimination, has called on states-parties to:

recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.¹¹³

Processes of restitution are now gaining ground and have entailed considerable costs to governments.

Protests, Repression and International Tribunals

Denial of recourse to the courts or access to justice only aggravates relations between forest peoples and incomers seeking access to the lands and resources within their territories. Conflicts between forest peoples and governments and companies are widespread. Underlying these disputes are denial of the rights to land, self-determination and basic civil and political rights, but the lack of proper means of conflict resolution is the most obvious reasons these disputes escalate into conflicts. These disputes are aggravated by the close relations that may obtain between the private sector and state security forces. Often in exchange for favours, security forces may chose to repress, arrest and criminalise forest peoples, rather than enforce laws protecting indigenous rights. A study by Professor Afrizal, of the University of Andalas, of the roots of agrarian conflicts in West Sumatra, illustrates what is a very widespread problem, not only in Indonesia but in many parts of the world.¹¹⁴

One of the most severe cases that FPP has dealt with is Suriname. Suriname is now the only country in the Americas with indigenous and tribal peoples, which makes no

¹¹² Fergus MacKay, 2002, *Addressing Past Wrongs: Indigenous Peoples and Protected Areas – the right to restitution of lands and resources*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/law_hr/ips_restitution_protected_areas_oct02a_eng.pdf

¹¹³ *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997*. UN Doc. CERD/C/51/Misc.13/Rev.4.

¹¹⁴ Afrizal, 2007, *The Nagari Community, Business and the State: the origin and the process on contemporary agrarian protests in West Sumatra*, Indonesia, University of Andalas, Forest Peoples Programme and SawitWatch, Bogor

specific provisions at all to recognise their land rights.¹¹⁵ Among those thus deprived of legal rights to land and security are the Maroons, descendants of escaped African slaves who established forest-based societies and ways of life in the interior, and who during the 17th and 18th centuries signed treaties with the Dutch colonial State recognising their lands. In the 1960s, the Saramaka Maroons lost very large areas of their lands, with minimal compensation, to the Afobaka dam, the reservoir of which forced the displacement of a number of communities. In the 1980s, the Maroons, along with other interior communities, were caught up in the vicious civil war, in the course of which, in 1986, Surinamese soldiers made an unprovoked attack on the N'djuka Maroon village of Moiwana, massacring more than 40 men, women and children. After the peace treaty ending the civil war, which had promised new measures to secure the lands of interior communities, the government defaulted on its commitments and began handing out logging and mining concessions on the Maroons' lands without consulting them or respecting their rights.¹¹⁶ Little effort was made to investigate the Moiwana massacre or provide the survivors with redress. A police officer investigating the massacre was himself murdered. Denied possibilities of justice in the Surinamese courts or under Surinamese laws, the Maroons thus pursued their claims through the international courts, successfully bringing two cases to the Inter-American Court of Human Rights.¹¹⁷

In 2005, in a landmark decision both for Suriname and for forest peoples more widely, the court gave its final judgement on the Moiwana case. Finding the government in breach of its obligations under international human rights laws, the court ordered Suriname to pay nearly US\$ 3 million in compensation to survivors of the 1986 massacre.¹¹⁸ The government was also required to establish a US\$ 1.2 million development fund for health, housing and educational programs for Moiwana residents and investigate and prosecute those responsible for the deaths. The judgement also established the principle that there is an ongoing right to restitution of customary lands and that States have a positive obligation to protect indigenous and tribal peoples against forced displacement. A final judgement on the second case – in which the Saramaka have called on the government to rescind the hand out of forestry and mining concessions on their lands, compensate them for past losses and legally secure their rights in land – is expected shortly.

Responsibilities of the business community

Detailed case studies by FPP and partner organisations have exposed the complicity of transnational logging¹¹⁹ and mining¹²⁰ companies from Malaysia, Europe and

¹¹⁵ Ellen-Rose Kambel and Fergus MacKay, 1999, *The Rights of Indigenous Peoples and Maroons in Suriname*, Forest Peoples Programme and IWGIA, Copenhagen.

¹¹⁶ Marcus Colchester, 1995, *Forest Politics in Suriname*, International Books, Utrecht.

¹¹⁷ http://www.forestpeoples.org/documents/law_hr/suriname_iachr_moiwana_base_aug05_eng.shtml

¹¹⁸ 'Rights court orders Suriname massacre compensation', 16 Aug 2005, Reuters. For full details of the judgement see

http://www.forestpeoples.org/documents/law_hr/suriname_iachr_moiwana_summ_aug05_eng.shtml

¹¹⁹ World Rainforest Movement and Forests Monitor, 1998, *High Stakes: the need to control transnational logging companies – a Malaysian case study*, Ely and Montevideo; Forests Monitor with FPP, 2001, *Sold Down the River: the need to control transnational forestry practices – a European case study*, Ely.

Canada in the destruction of tropical forests and the abuse of the forest peoples' rights. These studies have also substantiated the failure of companies' own voluntary codes of conduct and self-regulatory mechanisms to prevent violations, and have called for strengthened regulatory frameworks to control their operations. Recent cases have also exposed the worthlessness of self-policed forestry policies of banks like HSBC, which are bankrolling companies that are logging primary forests and areas of High Conservation Value and violating indigenous rights, all in clear contradiction with their professed policies.¹²¹ On the other hand, analyses of the political economies of target countries reveal the extent to which mining and timber interests have 'captured' the legislatures and executives of these places, making strengthened regulatory frameworks hard to achieve.¹²²

This places human rights organisations in something of a quandary. Both State- based, regulatory and company-based, self-regulatory approaches are problematic means of protecting the rights of forest peoples, implying that broader approaches using multiple means of rights recognition, protection and redress are required. FPP has responded on a number of fronts. We have pressed for international financial institutions and development agencies to adopt rights-based approaches and improve their safeguard standards.¹²³ We have sought to build up the capacity of community groups and indigenous peoples to use these standards.¹²⁴ We have also argued that

¹²⁰ FPP, PIP Links and WRM, 2000, *Undermining the Forests: the need to control transnational mining companies – a Canadian case study*, Moreton-in-Marsh.

¹²¹ http://www.forestpeoples.org/documents/prv_sector/bases/priv_banks.shtml#hsbc

¹²² Marcus Colchester, 1989, *Pirates, Squatters and Poachers: the Political Ecology of Dispossession of the Native Peoples of Sarawak*, Survival International and INSAN, Kuala Lumpur, 2nd edition; Colchester 1995, op. cit. footnote 112; Marcus Colchester, 1997, *Fragile Frontier – Guyana: Loggers, Miners and Forest Peoples*, Latin America Bureau and World Rainforest Movement, London and Montevideo.

¹²³ Thomas Griffiths and Marcus Colchester, 2000, *Indigenous Peoples, Forests and the World Bank: Policies and Practice*, Bank Information Centre and Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_ips_wshop_rep_aug_00_eng.pdf; Fergus MacKay, 2002, *Universal Rights or a universe unto itself? Indigenous peoples' human rights and the Draft World Bank Operational Policy 4.10 on indigenous peoples*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_universal_rights_nov01_eng.shtml; Tom Griffiths, 2003, *A failure of accountability: indigenous peoples, human rights and development agency standards – a reference tool and comparative review*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/law_hr/ip_devl_stds_failure_accountability_dec03_eng.pdf; Tom Griffiths, 2005, *Indigenous Peoples and the World Bank: experiences with participation*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_ips_and_particip_jul05_eng.pdf; FPP and other NGOs, 2005, *Broken Promises: How World Bank group policies fail to protect forests and forest peoples*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_forests_joint_pub_apr05_eng.pdf; Letter from FPP and 17 other NGOs to the International Finance Corporations Compliance Advisory Ombudsman, 18 July 2007, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/ifc_wilmar_fpp_let_jul07_eng.pdf

¹²⁴ FPP, 2003, *The World Bank's New 'Forests Policy: an NGO Guide*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_forest_policy_ngo_guide_apr03_eng.shtml; FPP, 2006, *Briefing on Indigenous Peoples and Private Sector Project Financing – the International Finance Corporation, the Equator Principles and Export Credit Agencies*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/private_sector_project_financing_aug06_eng.pdf;

institutions like transnational corporations should be required to observe relevant international human rights standards.¹²⁵ In the meantime, we have also pressed companies to go beyond professions of Corporate Social Responsibility,¹²⁶ and make themselves accountable to more-autonomous standard-setting processes.

This has led FPP to involve itself in efforts to define rights-based, ‘best practice’ standards for various sectors such as Extractive Industries,¹²⁷ Large Dams,¹²⁸ timber and plantations,¹²⁹ palm oil development,¹³⁰ legality verification,¹³¹ and to explore other means of getting key transnationals to make themselves accountable.¹³² Most of these ‘multi-stakeholder processes’ have accepted the principle that indigenous peoples and other customary law communities have the right to give or withhold their free, prior and informed consent for activities planned on their lands, a right recently reaffirmed in the UN’s Declaration on the Rights of Indigenous Peoples. These processes create important political space for forest peoples to engage with the private sector, providing them with safer and more transparent fora than the often manipulated and intimidatory situations available back home. Nonetheless, there have been serious problems with ensuring that third-party certification bodies genuinely uphold rights.¹³³

FPP, 2006, *A brief operational guide to the Inter-American Development Bank’s New Operational Policy on Indigenous Peoples*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/idb_policy_guide_jun06_eng.pdf ; FPP, 2007, *Indigenous Peoples and World Bank projects: a community guide to the World Bank’s Indigenous Peoples’ Policy*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/wb_4_10_guide_may07_eng.pdf ; Devasish Roy and Helen Leake, 2007, Indigenous Peoples and the ADB, *Bankwatch Magazine* (April) http://www.forestpeoples.org/documents/ifi_igo/adb_bankwatch_apr07_eng.pdf

¹²⁵ ‘Indigenous Peoples’ Rights, Extractive Industries and Transnational and Other Business Enterprises’ a Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, 29 December 2006, Forest Peoples Programme and Tebtebba Foundation, http://www.forestpeoples.org/documents/prv_sector/eir/un_extractives_ruggie_submission_dec06_eng.pdf ‘Indigenous Peoples’ Rights and Transnational and Other Business Enterprises: A Review of International Law and Jurisprudence’, Submission to the African Commission on Human and Peoples’ Rights, May 2007, by Forest Peoples Programme, http://www.forestpeoples.org/documents/law_hr/af_com_ip_rights_submission_may07.pdf

¹²⁶ see http://www.forestpeoples.org/documents/conservation/ecologist_debate_jul-aug04_eng.shtml

¹²⁷ Op. cit. footnotes 46 and 52.

¹²⁸ Op. cit. footnote 44.

¹²⁹ Op. cit. footnote: 7.

¹³⁰ Op. cit. footnotes 9 and 71: Marcus Colchester and Rudy Lumuru, 2005, *The Roundtable on Sustainable Palm Oil: analysis, prospects and progress*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/prv_sector/oil_palm/rspo_feb05_briefing_eng.shtml

¹³¹ Marcus Colchester, 2006, *Reflections on the Social Dimension of Verification in FLEGT processes*, Verifor, http://www.forestpeoples.org/documents/prv_sector/illegal_log/verifor_flegt_apr06_eng.pdf

¹³² For example, FPP has also participated in The Forests Dialogue www.tfd.org, the High Conservation Value Resource Network www.hcvrn.org, as well as IUCN-ICMM dialogue on Indigenous Peoples and Mining.

¹³³ WRM, 2003, *Certifying the uncertifiable: FSC Certification of Tree Plantations in Thailand and Brazil*, World Rainforest Movement, Montevideo. <http://www.wrm.org.uy/actors/FSC/uncertifiable.html>; FPP, 2006, *Protecting Indigenous Rights in the Republic of Congo through the Application of FSC Standards in Forest Plans*, Forest Peoples

The Response of Forest Policy Fora

Since the 1980s, Indigenous Peoples and NGOs, including the Forest Peoples Programme, have been calling on forest 'policy makers' to include consideration for forest peoples' rights in their deliberations. The initiative commenced with the International Tropical Timber Organisation,¹³⁴ and was then pursued at the UN Conference on Environment and Development, the Commission on Sustainable Development, the Intergovernmental Panel on Forests, the Intergovernmental Forum on Forests and the United Nations Forum on Forests.¹³⁵ The same issues have been repeatedly raised through the various international fora promoting Forest Law Enforcement, Governance and Trade, as well as at the Convention on Biological Diversity and with the Global Environment Facility.

Detailed reviews of the outcomes of these processes show that considerable gains have been made in terms of adoption of language explicitly recognising, or consonant with, the human rights of forest peoples and procedures have been accepted allowing forest peoples to participate in policy debates. Yet in practice, application of these commitments has been deficient.¹³⁶ Moreover, recent sessions of the UN Forum on

Programme, Moreton-in-Marsh,

http://www.forestpeoples.org/documents/africa/congo_cib_prog_rev_jan06_eng.pdf

¹³⁴ Marcus Colchester, 1993, *The International Tropical Timber Organisation: kill or cure for the rainforests?* In: Simon Reitbergen (ed.) *The Earthscan Reader in Tropical Forestry*. Earthscan, London:185-207

¹³⁵ David Humphreys, 1996, *Forest Politics: the Evolution of International Cooperation*, Earthscan, London; David Humphreys, 2007, *Logjam: Deforestation and the Crisis of Global Governance*, Earthscan, London.

¹³⁶ Friends of the Earth and World Rainforest Movement, 1992, *The International Tropical Timber Agreement: Conserving the Forests or Chainsaw Charter? A critical review of the first five years' operations of the International Tropical Timber Organization*, London; International Alliance of Indigenous-Tribal Peoples of the Tropical Forests and European Alliance with Indigenous Peoples, 1997, *Indigenous Peoples Participation in Global Environmental Negotiations: an evaluation of Indigenous Peoples' participation in and impact on the UN Conference on Environment and Development and its follow-up mechanisms*, London. Available from the International Alliance Secretariat: contact info@internationalalliance.org; Tom Griffiths, 2001, *Consolidating the Gains: Indigenous Peoples' Rights and Forest Policy Making at the United Nations*. Forest Peoples Programme, Moreton-in-Marsh; FPP, 2004, *A Summary of Some Key Existing Political Commitments and international standards on the Social and Cultural Aspects of Forests*. Forest Peoples Programme, Moreton-in-Marsh; Dorothy Jackson, 2004, *Implementation of International Commitments on traditional forest-related knowledge: indigenous peoples' experiences in Central Africa*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/africa/tfrk_expert_mtg_oct04_eng.pdf; Newing 2005, op. cit. footnote 81; Emily Caruso, 2005, *The Global Environment Facility in Central Africa*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/gef/gef_caf_rev_mar05_eng.pdf; Tom Griffiths, 2005, *Indigenous Peoples and the Global Environment Facility: Indigenous Peoples' experiences of GEF-funded Biodiversity Conservation – A critical study*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/gef/gef_study_jan05_eng.pdf; Tom Griffiths, 2006, *The Global Environment Facility and its Local Benefits Study: a critique*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/ifi_igo/gef/fpp_gef_briefing_aug06_eng.pdf; Forest Peoples Programme, 2007, *Indigenous Peoples' Participation in the Decisions and Policy-making of the GEF*, Moreton-in-Marsh,

Forests show a weakening commitment by governments to address issues of rights and a reluctance to allow indigenous peoples and other ‘Major Groups’ to address the plenary.¹³⁷

This is especially worrying in the context of renewed calls for new massive injections of funds into forestry – both as grants and as ‘carbon trading’ – for carbon offsets and rewards for reduced deforestation. FPP studies highlight the risks of new ‘carbon-funded’ forestry schemes being pushed through without the rights and interests of forest peoples being at the forefront of developers’ considerations.¹³⁸ At the same time new markets in biofuels are increasing pressures on forests through clearance for palm oil, soya, sugar and other crops. Already these speculative new markets have driven up the prices of food staples and edible oils, and encouraged local planners to allocate additional lands of forest peoples to estates causing escalating human rights abuses.¹³⁹

Next steps for activists and policy makers

A human rights-based approach to development is a radical affair... demanding profound changes in choices of partners, the range of activities undertaken and the rationale for them, internal management systems and funding procedures, and the type of relationship established with partners in public and non-governmental sectors.¹⁴⁰

This paper has sought to illustrate why programmes to reform tenure in forests need to be based on a broader understanding of the basis for asserting rights and take into account a far wider range of human rights than are generally considered in forest policy debates. Effective recognition of the rights of forest peoples needs to go ‘beyond tenure’, in the sense of just allocating community forestry leases or land titles to forest users. This is not just to repeat the ‘bundle of rights’ argument about land

http://www.forestpeoples.org/documents/ifi_igo/gef/gef_and_ip_participation_jun07_eng.pdf ; Liam Taylor and Tom Griffiths, 2007, *A desk-based review of the treatment of indigenous peoples and social issues in large and medium-sized GEF biodiversity projects (2005-2006)*, Forest Peoples Programme, Moreton-in-Marsh,

http://www.forestpeoples.org/documents/ifi_igo/gef/gef_biodiv_proj_review_feb07_eng.pdf

¹³⁷ Forest Peoples Programme, ‘UNFF Fails Indigenous Peoples Again’, Press Release, 17 May 2007.

¹³⁸ Emily Caruso and Vijaya Bhaskara Reddy, 2005, *The Clean Development Mechanism: issues for Adivasi peoples in India*, Forest Peoples Programme, Moreton-in-Marsh,

http://www.forestpeoples.org/documents/asia_pacific/cdm_&_adivasi_peoples_india_apr05_eng.pdf;

Tom Griffiths, 2007, *Seeing RED? ‘Avoided Deforestation’ and the rights of indigenous peoples and local communities*, Forest Peoples Programme, Moreton-in-Marsh,

http://www.forestpeoples.org/documents/ifi_igo/avoided_deforestation_red_jun07_eng.pdf

¹³⁹ For example see: Global Forest Coalition and Global Justice Ecology Project, 2007, *From Meals to Wheels: the social and ecological catastrophe of agrofuels*. Where?; Fidel Mingorance, 2006, *The Flow of palm oil Colombia-Belgium/Europe: a study from a human rights perspective*, Human Rights Everywhere and Coordination Belge pour la Colombie, Brussels; Biofuelwatch et alii, 2007, *Agrofuels: towards a reality check in nine key areas*, available at <http://www.tni.org/reports/ctw/agrofuels.pdf>? ; Richard Dornbosch and Ronald Steenblik, 2007, *Biofuels: is the cure worse than the disease?* OECD, Paris, available at

http://www.foeeurope.org/publications/2007/OECD_Biofuels_Cure_Worse_Than_Disease_Sept07.pdf

¹⁴⁰ Uvin 2004.

ownership but to assert that for tenurial rights to be effectively exercised, they need to be secured within a wider framework of rights recognition.

The cases researched and documented over the last 17 years of the Forest Peoples Programme, which have been summarised in this paper, illustrate the need for recognition of forest peoples' rights to:

- be recognised, individually and collectively, as citizens, communities and peoples and as having legal personality and the right to collective action as communities, peoples or organisations;
- hold and manage their lands according to their own forms of tenure – which must be equally protected by the law and with full respect for the right to cultural integrity that is inextricably connected to maintain relations with traditional lands, territories and resources – and not be obliged to parcel up their lands into individual or family holdings against their will;
- the ownership of their territories and ancestral domains
- respect for their customary lands and customary laws
- represent themselves through their own institutions
- control their lands and forests as self-governing communities
- give or withhold their free, prior and informed consent to activities or actions that may affect their lands
- customary use of biological resources
- to freely pursue economic, social and cultural development including the right to choose to market and/or commercialise forest products from their domains
- get fair prices for their produce
- be protected from slavery, debt-bondage and other slavery-like practices
- control the use of their cultural heritage
- health
- the elimination of all forms of discrimination, not least against women
- access to justice
- redress and the restitution of illegally expropriated properties, including land and other natural resources, and most obviously but crucially
- protection of their basic rights and freedoms.

The bases for these rights are well attested in international human rights law and jurisprudence. Here we have sought to demonstrate the importance of respecting these rights through reference to the actual experiences of the peoples themselves. Foresters continue to develop new laws to regulate and manage forest resources but, as in the recent case of Liberia, still tend to overlook the importance of securing customary rights and wider protections.¹⁴¹

Mary Robinson, ex-UN High Commissioner for Human Rights, has argued that adopting a human rights-based approach to development does not just imply integrating human rights norms into development plans but, more importantly, prioritising measures that enhance safeguards, accountability and transparency,

¹⁴¹ FPP, 2006, *Liberia's Forestry Law in an international context: reasons for concern*, Forest Peoples Programme, Moreton-in-Marsh, http://www.forestpeoples.org/documents/africa/liberia_brf_nov06_eng.pdf

promote citizens' empowerment, ownership and free meaningful and active participation.¹⁴² This is no less true for those seeking to promote development in forests.

As we have seen, although global forest-policy making has listed some of these rights in non-binding statements of principles and declarations, the extent to which they have been incorporated into international development agencies' policies and programmes remains limited, especially in forest-related aid. Only in a few countries have these rights been made operational in the agenda of forestry departments.

This means that forestry departments and development agencies need to seriously overhaul their policies and programmes if they are not to be party to continued human rights abuse and ensuing social exclusion and poverty creation. Forestry departments and national legislatures need to:

- adopt a human rights-based approach to forests and development
- invest sufficient time and resources into recognising land claims and resolving land conflicts, including processes for supporting community-led mapping and recognition of claims through land reform departments (or other relevant government department)
- ensure full transparency and public access to information in land and forest designation, tenure, permitting, licensing and concession systems
- ensure that national legislation exists that explicitly respects and protects forest peoples' rights, including the rights of indigenous peoples as set out in the UN Declaration on the Rights of Indigenous Peoples
- ensure that national laws and appropriate administrative and judicial mechanisms effectively protect forest peoples' lands from imposed projects and investments, concession systems and forest zoning
- reform and change forest management policies to enable recognition of community management strategies and techniques
- retrain officials and forest rangers, alongside those from environment ministries / land reform departments to put into effect existing national commitments under the Convention on Biological Diversity and other international treaties which require respect for forest peoples' rights

For their part, development agencies need to:

- accept their own human rights obligations, and make the necessary adjustments to their strategies / policies or safeguards for the forest sector, for poverty reduction, for indigenous peoples to ensure compliance with international law, including *inter alia* the UN Declaration on the Rights of Indigenous Peoples
- support inclusive national forest sector reviews using a rights-based approach, with the aim of identifying practical steps to secure peoples' rights including options such as eliminating discrimination through retraining and education, programmes to secure citizenship, reviews of excess use of the principle of eminent domain, exposing and preventing slavery-like practices, review options for tenure reforms

¹⁴² Mary Robinson, 2005, 'What Rights Can Add to Good Development Practice' in Alston and Robinson 2005, op. cit. footnote 1:25-41.

- support community level trainings in their rights, including the UN Declaration on the Rights of Indigenous Peoples
- invest in human rights awareness raising among forest departments and forestry officials
- give targeted direct support to community initiatives on forest management
- support multi-stakeholder legal reviews and reform processes
- ensure human rights impact and poverty risk assessments are conducted at local, national and regional level
- support initiatives for effective implementation of the right to Free, Prior and Informed Consent through locally developed guides, third party verification etc.
- support independent reviews of claims of dispossession, assist tenure reform and land restitution programmes

Civil society organisations and researchers need to work much more consistently to advocate and then monitor such rights-based forest policies. In fact, for civil society groups the agenda is even broader. Helping forest peoples to secure effective reforms requires long-term engagement and support to build up communities' awareness of rights and the capacity to press for their recognition. As Stephen Golub cogently argues,¹⁴³ what NGOs need to do is focus on counselling, litigation, human rights and legal training, establishing paralegal capacity and advocacy so reforms are based on informed mobilisation and civil society participation and not just on legal changes.

¹⁴³ Stephen Golub, 2005, 'Less Law and Reform, More Politics and Enforcement: a Civil Society Approach to Integrating Rights and Development' in: Alston and Robinson 2005, op. cit. footnote 1: 297-324.