

# The Customary Land Rights of Indigenous Peoples in Asia

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Asia is home to 70% of the world's estimated 370 million indigenous peoples.<sup>1</sup> In Southeast Asia, indigenous peoples comprise as much as 30% of the total populations in Lao PDR and Burma, 14% to 17% in the Philippines, to 1.2% in Cambodia. Their numbers range from a high of 30 to 40 million in Indonesia, to a low of 200 thousand in Cambodia.

In South Asia, indigenous peoples comprise an estimated 37% of the population in Nepal, 15% in Pakistan, 8.6% in India, and 1-2% in Bangladesh.<sup>2</sup> India has the largest indigenous and tribal population in Asia (80 million people), comprised of over 500 distinct communities.<sup>3</sup>

Indigenous peoples across Asia are known by different names: ethnic minorities, hill people, uplanders, orang asal, masyarakat adat, tribes, scheduled tribes, adivasis, cultural communities and religious minorities.

While there is no universal legal definition of "indigenous peoples", official documents cite four defining attributes of indigenous peoples: (i) self-ascension or self-identification, (ii) a definable territory, (iii) historical resistance to colonization, and (iv) continuing cultures and traditions that have historically been differentiated from the dominant majority.<sup>4</sup> Other formal definitions

<sup>1</sup> IFAD. <http://www.ifad.org/english/indigenous/index.htm>

<sup>2</sup> As culled from various sources. See the list of references cited in this paper.

<sup>3</sup> ILO. <http://www.ilo.org/indigenous/Activitiesbyregion/Asia/SouthAsia/India/lang--en/index.htm>

<sup>4</sup> Kingsbury, Benedict (2008). "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" in *The Concept of Indigenous Peoples in Asia*, ed by Erni, Christian. Copenhagen and Chiang-mai: International Work Group for Indigenous Affairs and Asian Indigenous Peoples Pact Foundation. pp 126-130, 143-145. <http://iilj.org/aboutus/documents/IndigenousPeoplesinInternationalLawAConstructivistApproachtotheAsianControversy.Kingsbury.pdf>



include the presence of customary institutions, the use of indigenous language, collective attachment to a territory or habitat, and other characteristics.<sup>5</sup>

### State of indigenous communities

Globally, indigenous peoples account for less than 5 percent of the global population, yet they comprise about 15 percent of all the poor people in the world, and some one-third of the world's extremely poor people.<sup>6</sup>

Across Asia, indigenous people rank among the most deprived in terms of incomes, access to

justice, health and education. In Vietnam, despite comprising just over one-eighth of the national population, the minorities accounted for about 40 percent of Vietnam's poor in 2004.<sup>7</sup> They also suffer disproportionately from injustice, dispossession, and discrimination. In India, tribal peoples account for 40 percent of internally displaced people, although they constitute only 8 percent of the population.<sup>8</sup>

### Land as culture and survival

Land plays a central role in the culture and survival of indigenous peoples. As recognized by the UN Permanent Forum on Indigenous Peoples:

*"Land is the foundation of the lives and cultures of indigenous peoples all over the world. This is why the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples' movement ... Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct cultures is threatened."*<sup>9</sup>

For Asia's indigenous peoples, land is more than just an economic asset or commodity. Land is life itself, rooted to a territory and history. It provides the foundation for self-identity, personal security,

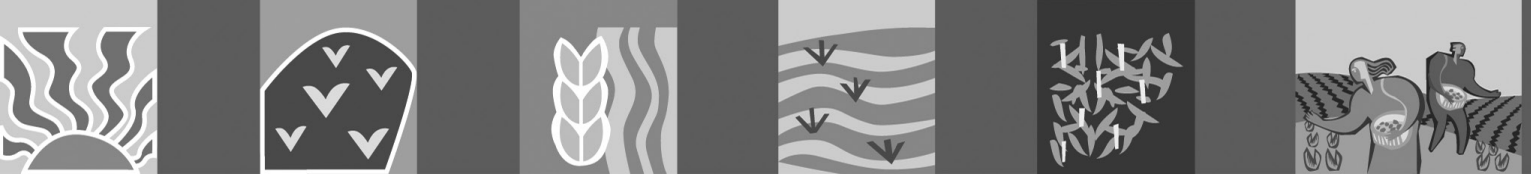
<sup>5</sup> The World Bank describes "indigenous peoples" as a distinct, vulnerable, social and cultural group having these characteristics in varying degrees: (i) self-identification; (ii) collective attachment to a distinct area and to natural resources in these habitats and territories; (iii) customary institutions that are separate from the dominant society and culture; and (iv) indigenous language. (WB Operational Procedure 4.10 of 2005).

<sup>6</sup> <http://www.un.org/esa/socdev/unpfii/documents/SOWIP/chapter%20highlights/chapter%201/sowip-ch1-en.pdf>

<sup>7</sup> Luong Thu Oanh (2012). *Country Technical Notes on Indigenous Peoples Issues*. IFAD and AIPP. <http://www.ifad.org/english/indigenous/pub/documents/tnotes/vietnam.pdf>

<sup>8</sup> Nathan, Dev, Govind Kelkar & Pierre Walter (2004). *Globalization and Indigenous Peoples in Asia: Changing the Local Global Interface*. Delhi: Sage Books. P. 17.

<sup>9</sup> United Nations Permanent Forum on Indigenous Issues (UNPFII) (2007). Report on the Sixth Session. UN Doc. E/2007/43.



faith, culture, livelihood and self-governance.<sup>10</sup> Land is where one's ancestors are buried and where sacred places are visited and revered.<sup>11</sup> Indigenous communities have evolved their own customary property regimes with multiple resource-use systems and corresponding rights and responsibilities over farming, foraging, mining and grazing.

Yet most Asian states have no legal framework for recognition of customary land rights, nor a mechanism for collective or communal land titling. Neither are indigenous communities recognized as legal entities under statutory law. Thus, the concepts of ancestral lands and customary rights continue to be highly contentious issues between indigenous peoples and State governments, as well as between indigenous and non-indigenous populations.

### Colonialism and disenfranchisement

Asia's history of colonialism and modern state-building was marked by a systematic process of disenfranchisement of indigenous peoples in many Asian countries.

Starting in the 16<sup>th</sup> century, Western powers came to Asia with a primary interest in trade, and gradually developed economic and political interest over land and territory as they imposed a commercial economy over local communities that had previously depended on local agricultural production and trade. The colonialists first introduced land administration and land-based

revenue collection to support the costs of colonial expansion, and later invaded the hinterlands to seize control over native territories. This annexation of lands reached its peak in the last 100 years of colonization (1850s to 1945) with the expansion of plantations and commercial mines in order to feed the growing industrialization of the West. Asia became not only a source of raw materials, but a growing market for manufactured Western goods.

**The creation of public domains.** Western powers brought native lands under "crown lands" or "the public domain" managed by the colonial state. These included lands outside of permanent settlements, including communal lands for grazing, hunting and shifting cultivation, burial and spiritual lands, and remote settlements. Traditional systems of communal ownership were broken up, and native inhabitants stripped of their rights to the land. Formal systems for land registration, titling, surveys and censuses further disenfranchised native peoples who lived far and remote from the centers of colonial power.

In the Philippines, the Spanish conquistadores declared all lands on the fringes of towns, which used to be communal land, as *realangas* or Crown land. Later in 1903, the Americans introduced the Torrens title and land registration system, followed by the 1905 Public Lands Act, which declared all unregistered land without Torrens titles to be "public lands" regardless of prior occupancy. And since the land titling system did not provide for customary rights, this excluded the indigenous peoples who subscribed to traditions of ancestral and communal land ownership.

In Indonesia, the Dutch Agrarian Law of 1870 declared all uncultivated lands to be state property, from which large plantations were carved out by leasing land to private and State

<sup>10</sup> Quizon, Antonio B. (2013). *Land Governance in Asia: Understanding the Debates on Land Tenure Rights and Land Reforms in the Asian Context*. Framing the Debate Series, No. 3. Rome: International Land Coalition. p 4.

<sup>11</sup> United Nations (2009). *State of the World's Indigenous Peoples*. New York: United Nations. p 53. [http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP\\_chapter2.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_chapter2.pdf)



corporations. As the colonizers were interested primarily in production and trade, they allowed *adat* (customary) tenure and smallholder agriculture to co-exist side-by-side with a Dutch plantation sector. This dual system initially enabled the colonisers to exploit native labour without disturbing traditional community systems.

In Cambodia, Laos and parts of Vietnam, the French introduced the concept of private land ownership under the Land Act of 1884. All “unoccupied” lands became open for sale, enabling the French to build their plantations

and rubber estates. French mines were also later opened in Thakhek and Pathan Valley, in Laos.<sup>12</sup>

In Cambodia, the French imposed the Ordinance of 1897 over the Khmer king, which gave the colonial government “the right to alienate and assign all free lands of the kingdom.” The French Civil Code of 1920 later introduced formal land registries; thus, a formal land registration system existed side-by-side with traditional ownership based on customary tenure.

In Nepal, indigenous peoples lost their autonomy and self-rule with the territorial unification of Nepal in 1769 under the monarchy. The imposition of land tenure systems such as the *Birta* and *Jagir* (land grants given to favored individuals) allowed the dominant caste, i.e. the Bahun Chhetris, to own and control lands of indigenous peoples, while the *Kipat* (communal/collective land ownership tenure system) was abolished.

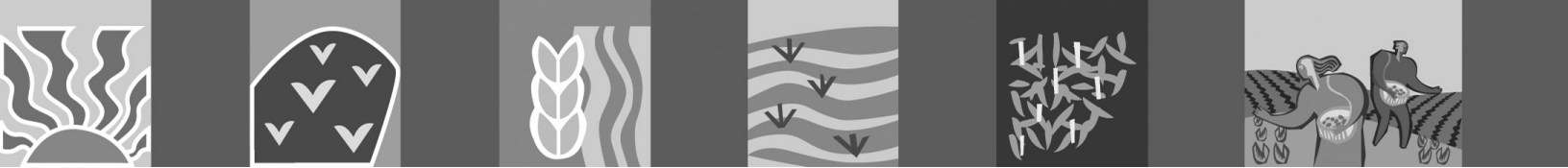
### Colonial inheritance of modern nation-states

Many independent nation-states of South and Southeast Asia emerged after World War II.<sup>13</sup> By then, colonization had delineated the territories of the new nations, and had brought most lands and resources under state ownership. The new nation-states then became the largest landowners, as the “claimant-heirs” of past colonial regimes.

While Governments began to nationalize colonial properties, they were reluctant to restore lands among the disenfranchised “minority” populations. Instead, many governments viewed self-governing peoples as a potential challenge

<sup>12</sup> Evans. Grant *A Short History of Laos: The Land In Between*. 2002. NSW, Australia: Allen and Unwin. pp. 50.

<sup>13</sup> With the exception of Thailand, as well as East Timor which gained independence in 1999.



to national unity and state sovereignty, and thus adopted policies of assimilation and integration for “minority” groups. This meant that indigenous peoples had to adopt the language, customs and ways of life of the majority.

Until today, a major barrier to the recognition of indigenous peoples’ lands is the fact that States are the main counter-claimants to customary lands.

### Assimilation and state-led migrations

After ousting the French from Cambodia in 1953, different regimes tried to assimilate highland minorities into lowland Khmer society. During the Sihanouk Regime in the late 1960s, the Royal Government promoted resettlement projects to bring highland indigenous minorities into sedentary farming.<sup>14</sup>

In Indonesia, the government initiated a massive *transmigrasi* (transmigration) program starting in the late 1950s to resettle millions of landless people from the densely-populated islands of Java and Bali, to less populated areas in Kalimantan, Papua, Sulawesi and Sumatra. During the Soeharto Regime (1967-1998), around 2.2 million hectares were redistributed to 1.1 million families in various transmigration schemes.<sup>15</sup> Indigenous communities were embroiled in territorial and cultural conflicts with the arrival of thousands of new settlements into *adat* territories.<sup>16</sup>

During the 1980s, the Bangladesh government settled almost half a million Bengalis from the crowded plains into the Chittagong Hill Tracts, causing displacement to many indigenous communities.<sup>17</sup>

In Cambodia, the Khmer Rouge (1974-79) caused the wholesale destruction of cadastral maps and historical land records, and wiped out the entire administrative and institutional infrastructure of the land system. This created massive confusion in the recognition and allocation of property rights, which later subjected the whole property system to massive landgrabbing and corruption.

### Customary lands

Today, the remaining land and territories under customary use and claim by indigenous peoples cover up to 20 percent of the land area in some Asian countries.

In Indonesia, *masyarakat adat* or “communities of customary law” consist of over 1,128 ethnic groups. According to the Aliansi Masyarakat Adat Nusantara (AMAN), *adat* territories cover an estimated 40 million hectares of traditional forest lands,<sup>18</sup> or a fifth of the country’s land area.

In the Philippines, indigenous cultural communities are composed of 110 major ethnolinguistic groups. As of 2015, Ancestral Domain Titles have been issued over 4.3 million

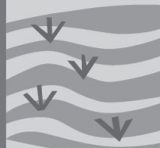
<sup>14</sup> Simbolon, *loc cit*, p 70.

<sup>15</sup> Bachriadi, Dianto and Gunawan Wiradi. “Land Tenure Problems in Indonesia: The Need for Reforms.” 2009. (Manuscript copy), pp 5. The authors further note that the land allocated for transmigration is actually higher, since the figure of 2.2 million hectares does not include land allocated for other public facilities provided in each transmigration site.

<sup>16</sup> *Ibid*, p p6.

<sup>17</sup> Tripura, S., Shanjida Khan Ripa & Tamina Sumaiya (2013). “Analysis on the Situation of Indigenous Peoples’ Customary Land and Resources Rights in Bangladesh”.

<sup>18</sup> Presentation of Abdon Nabadan, Secretary-General of AMAN, at the *South-East Asia Sub-Regional Meeting on Extractive Industries and Indigenous Peoples’ Rights to Land and Natural Resources*,” 24-25 June 2013, Bangkok, Thailand. AMAN stands for *Aliansi Masyarakat Adat Nusantara* (AMAN), or the Indigenous Peoples Alliance of the Archipelago (Indonesia).



hectares, covering 14 percent of the country’s total land area. With 557 pending applications for ancestral domain titles covering 2.6 million hectares still to be processed;<sup>19</sup> a total of 6.9 million hectares, or 23 percent of the country’s total land area could potentially be under the legal control of indigenous peoples in the Philippines.

In Cambodia, there are 24 different indigenous groups spread across 455 indigenous communities in 15 provinces (according to the 2008 census). Indigenous people serve as traditional managers over an estimated 4 million hectares of Cambodia’s forest lands and ecosystems<sup>20</sup> especially along its mountainous borders in the north and northeast. Substantial areas in Laos and Myanmar remain

<sup>19</sup> The 4.3 million hectares of titled ancestral domain lands is based on reported data of the National Commission on Indigenous Peoples (NCIP). The projected 2 million hectares more that need to be processed is also based on NCIP projections. As cited in Garganera, Jaybee (2013). “Indigenous Peoples and Mining: A Contentious Relationship”. Manuscript copy. Quizon, Antonio B. (2014). “Issues in Protecting Land Rights of Indigenous Peoples in South-East Asia, with a focus on Extractive Industries”. Paper prepared for UNDP-UNIPP.

under customary use and management of “ethnic” and “minority groups” that comprise some 30 percent of the populations in both countries.

In Bangladesh, 45 ethnic groups with an estimated population of three million live mainly in the northern regions and in the Chittagong Hill Tracts (CHT) in the southeast of the country.

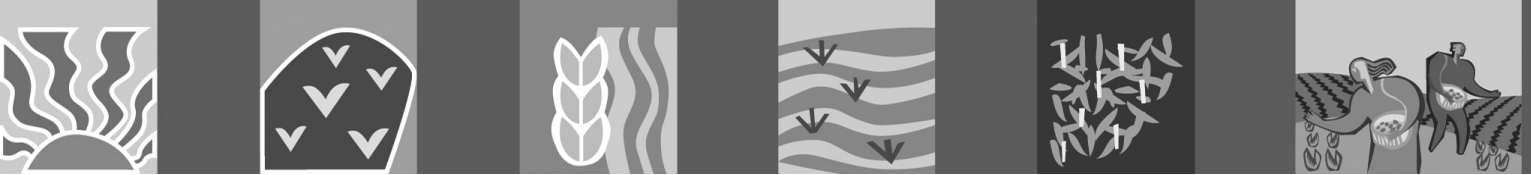
In India, the states of Chattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and Rajasthan account for 70 percent of the scheduled tribes population in the country.

The traditional domains of indigenous peoples include plains, coastal lands, river systems and inland waters, range lands and traditional fishing grounds. And in many Asian countries, indigenous communities live in the remaining frontiers where biodiversity and forest ecosystems have been kept intact over many decades through customary practice, traditional management and sustainable use.

### **The new colonialism of extractive industries & plantations**

Once considered as the “peripheries” of the state, the traditional territories of indigenous peoples have been increasingly targeted over the past two decades for large-scale projects and a rising wave of (domestic and foreign) corporate investments for extractive industries (timber, mining), industrial plantations, tourism and development projects.

Rising global demand for timber, minerals, metals and agricultural products, combined with the liberalization of trade and investment to facilitate



foreign direct investment in resource rich areas, has fueled a new and unprecedented expansion in mining, oil and gas projects, plantations and commercial ventures into indigenous peoples' territories. Where their customary and tenurial rights are not recognized, indigenous peoples face further marginalization by this new intrusion. Long-term land leases and concessions to private corporations over lands of the so-called public domain add a new layer to the old issues that indigenous communities already face, as they are further displaced by new commercial competition. At times, state military and private forces are used to legitimize the entry and takeover of indigenous lands.

In Indonesia, where almost 70 percent of the total land area is classified as State Forest, millions of hectares of land, forests, coastlines and natural resources have been leased out to corporations and state agencies since the New Order in 1967. For mining alone, some 10,677 licenses have been issued as of February 2013, compared to less than 1,000 just 15 years earlier in 1998<sup>21</sup>.

In Cambodia, despite protective laws, Economic Land Concessions (ELCs) continue to be granted in protected areas, on the lands of indigenous peoples and in primary forests. The OHCHR report of 2012 noted that the government granted land concessions to at least 109 companies in 16 out of the 23 protected areas established by Royal Decree. The same report noted that 98 concessions have been granted in areas inhabited and traditionally used by indigenous communities. Nearly 2 million hectares have

been transferred to the extractive industries, primarily mining, since 2000.<sup>22</sup> Much of the lands that are taken away from indigenous peoples are those used in rotational farming (i.e., fields that are allowed to lie fallow in order to allow the soil to regenerate and preserve their fertility), while other lands are in sacred forests, sacred land used for cultural purposes.<sup>23</sup> In 2012, over 70 percent of Economic Land Concessions given out by government were situated inside national parks, wildlife sanctuaries and protected forests.<sup>24</sup> This included an area of 17,856 hectares of ancestral land of the indigenous Kui community in Prame Commune, District of Tbaeng Mean Chey, the capital of Preah Vihear Province, where private concessionaires cleared 74 families off their lands, destroying their paddy fields, gardens, and resin trees, and cleared the remnants of an ancient Kui temple and an ancient Kui village.<sup>25</sup>

In Laos, the government has been engaged in large-scale mining operations through a state corporation, while small-scale mining has attracted investors from other countries (including China, Vietnam, Russia and South Korea). Artisanal mining for gold, tin and precious stones is also widespread in rural villages, and employs between 15,000-50,000 people, of which some 75 percent are women.<sup>26</sup>

<sup>21</sup> Presentation of Siti Maimunah, Indonesian Mining Advocacy Network (JATAM), at the South-East Asia Sub-Regional Meeting on Extractive Industries and Indigenous Peoples, 24-25 June 2013, Bangkok, Thailand.

<sup>22</sup> Data is from the *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia: Addendum*, 24 September 2012.

<sup>23</sup> STAR Kampuchea (2013). *Scoping Study on Access to and Control of Land by Indigenous Peoples in Cambodia*. Land Watch Asia Campaign. [Unpublished].

<sup>24</sup> Rith, S. (2009). Land deals take toll on minority groups. In *The Phnom Penh Post*. Retrieved from <http://www.phnompenhpost.com/national/land-deals-take-toll-minority-groups-study>.

<sup>25</sup> LICADHO map as cited in STAR Kampuchea. (2013). *Scoping Study on Access to and Control of Land by Indigenous Peoples in Cambodia*. Land Watch Asia Campaign. [Unpublished].

<sup>26</sup> Energy and Mines, National Economic Research Institute (NERI) and International Council on Mining and Metals (ICMM), *op cit.* pp 17.



In the Philippines, there has been a resurgence of large-scale mining operations since the enactment of the 1995 Mining Act. As of January 2013, there are 424 existing mining leases covering about 1.02 million hectares;<sup>27</sup> mining applications impact on an estimated 67% of ancestral domains.<sup>28</sup> The Commission on Human Rights has investigated mining-related atrocities committed by company security personnel, the military and the police against indigenous communities.

In Myanmar, since 1988, the military government encouraged foreign investments and joint ventures especially in mining. This has contributed to militarization, land confiscation by armies and destruction of traditional livelihoods in ethnic areas, with little benefit to local people. This has likewise exacerbated ethnic conflicts.

In Bangladesh, the issuance of land leases in the Chittagong Hill Tracts for private commercial plantations began on a large-scale in 1979. The government started to award leaseholds on large consolidated tracts to private entrepreneurs for setting up rubber, timber, fruit and other commercial plantations and enterprises. Most of these leased areas were common lands of indigenous peoples that had been used for *jhum* (swidden) cultivation, grazing and other purposes,<sup>29</sup> and awarded to the Bengali elite

consisting of political leaders, professionals, civil and military officials.

The incursion of plantations and large-scale extractive industries into “public domain” lands have led to local conflicts and rights violations of indigenous peoples. There is a serious lack of regulatory frameworks and institutional capacities to promote accountable land and resource governance in line with international human rights standards and social and environmental safeguards. In many instances, commercial ventures and development projects enter into IP traditional domains without their free, prior and informed consent (FPIC). Social and environmental impact assessments and public consultations are not undertaken as preconditions for issuing licenses and concessions. Yet even in those countries where legal safeguards exist, FPIC is treated lightly as a mere procedure, or else community “consent” is obtained through force, manipulation or deceit.<sup>30</sup> Companies and state authorities often exploit internal divisions within communities thereby exacerbating existing conflict and disrupting community life.

## State policies

With few exceptions, such as in the Philippines and India (Constitutions and legislations) and in Cambodia (land law), the existing laws in most countries do not give special recognition to indigenous peoples’ land rights. Instead, indigenous peoples tend to be treated as part of the general “landscape” (covered under forestry laws, land laws and agriculture policies), or as “subjects of welfare programs” that further

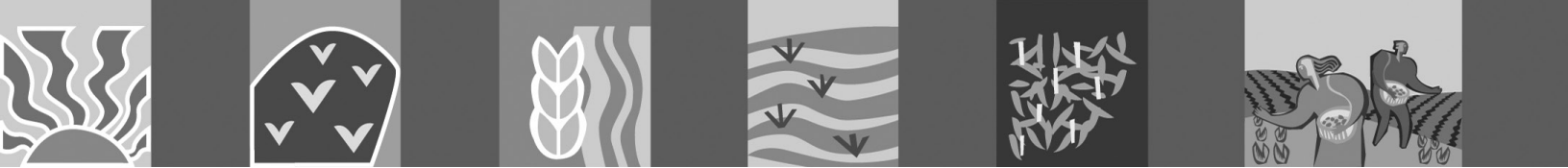
<sup>27</sup> Based on summary data from the website of the Philippines’ Mines and Geosciences Bureau (MGB), Available from: <http://www.mgb.gov.ph> Last accessed 29 July 2013.

<sup>28</sup> This finding is based on mapping activities done by mining-affected communities and their support groups (including AnthroWatch, ESSC, HARIBON and PAFID) in order to visualize land conflicts between mining, forests, and ancestral domains in the Philippines. As cited in Garganera. *op cit*,

<sup>29</sup> Adnam, Shapan and Ranajit Dastidar (2011). *Alienation of the Lands of Indigenous Peoples in the Chittagong Hill Tracts of Bangladesh*. Published by Chittagong Hill Tracts Commission, Dhaka and International Work Group for Indigenous Affairs, Copenhagen. First edition. p. 77.

<sup>30</sup> Garganera. *Loc cit*. Also refer to Encarnacion, Andre. “The Endless Loop: Mining, the State and the indigenous peoples of the Philippines”. 2012. Available from: <http://www1.up.edu.ph/index.php/the-endless-loop-mining-the-state-and-the-indigenous-peoples-of-the-philippines/> Accessed on 15 September 2013.





marginalize them. Indigenous peoples often have to apply for access or user rights to their own traditional lands and forests.

Statutory land registration systems may recognize individual and corporate property, but may not recognize communal lands. Moreover, unlike corporations, indigenous communities are often not recognized by law as legal entities or property holders.

There is low appreciation and understanding of traditional practices. Swidden or jhum farming is considered by most states as “backward” and “destructive” of forests, and thus is prohibited and even criminalized. Traditional lands under swidden cultivation are often treated as “unused”, “barren” or “marginal lands”, which are leased to corporations, including those lands that indigenous communities cultivate and then allow to regenerate during the fallow period. Indigenous farming practices are seen as “low technology” and “unproductive”, with too much “idle time” among rural laborers. The common perception among state authorities and decision-makers is that indigenous peoples “waste” precious land that could be used to further the country’s economic development. In many countries (Vietnam, Sarawak in Malaysia) there are state programs to move indigenous peoples

into new settlements, in order to appropriate their lands for other purposes.

The role of indigenous communities in protecting biodiversity and forest ecosystems is still not fully recognized. Many are evicted, denied entry, or denied grazing and harvesting rights in forests designated as national parks, protected areas and buffer zones. Protected areas are often created and delineated without the consent or knowledge of local communities.

Meanwhile, the loss of land and forced displacement has resulted in the dissolution of many indigenous communities. In Nepal, many indigenous peoples lack citizenship certificates, making it difficult for them to access basic government services such as education and health. According to the UNHCR in Nepal, some 800,000 individuals still lack citizenship registration and considered de facto stateless.<sup>31</sup>

### **Emergence and rise of indigenous peoples movements**

Starting in the 1970s, the struggle of indigenous peoples in Asia to regain control over their traditional domains and cultural spaces grew from localized, community-specific struggles into issues of wide public awareness and global debate.<sup>32</sup> This was brought about by two parallel developments.

First was the massive incursion of global capital and development investments into indigenous territories, with highly-publicized cases that disturbed the public consciousness. Perhaps the most publicized case was the Sardar Sarovar Dam in the Narmada Valley in Gujarat, India which

<sup>31</sup> NGO Federation of Nepal (2013). *Loc cit.* p 49.

<sup>32</sup> Perrera, Jayantha. *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia.* 2009. Manila: Asian Development Bank. p 2.



was opposed by the Narmada Bachao Andolan and a transnational network of supporters in the 1980s.<sup>33</sup> In the Philippines, the Bontok and Kalinga peoples opposed government efforts to build the Chico River Hydroelectric Dam in the 1970s that threatened to displace over 100,000 people and to submerge their villages, rice fields and sacred sites.

The second development was the parallel growth of self-organized indigenous movements that began to transcend local and national boundaries, moving from local issues and protests towards proactive demands for indigenous people's rights. IP movements were forced to bring their cause into the international arena – one, in response to globalized market forces and two, to seek recognition within nation-state structures that had discriminated against them.<sup>34</sup>

### International recognition

The customary land rights of indigenous peoples have come to be recognized in several international declarations and agreements.

**ILO Convention 169** (Indigenous and Tribal Peoples Convention, 1989) is a legally binding instrument that recognized the distinctive cultural traditions of indigenous peoples and their different ways of seeing the world. It states that indigenous peoples have the right to enjoy the full measure of human rights and fundamental freedoms, and the general rights of citizenship, without hindrance or discrimination. It calls for special measures to safeguard the persons, institutions, property, labor, cultures and environment of these peoples.



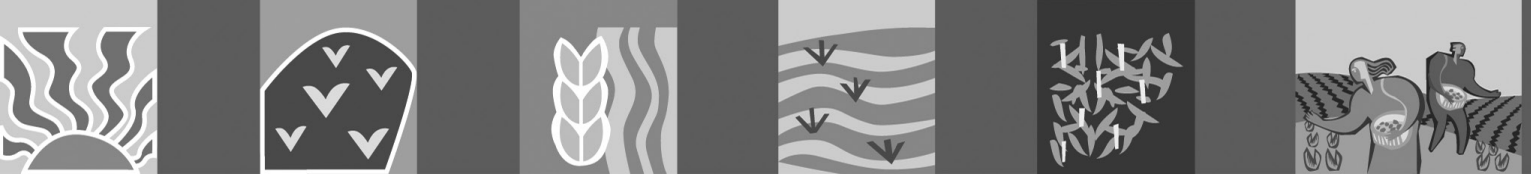
Convention 169 requires that indigenous and tribal peoples are consulted on issues that affect them. It also requires that these peoples are able to engage in free, prior and informed participation in policy and development processes that affect them, and defines how consultations should be undertaken – i.e., through appropriate procedures, in good faith, and through the representative institutions of indigenous peoples.

**UNDRIP** (United Nations Declaration on the Rights of Indigenous Peoples, 2007) recognizes a wide range of basic human rights and fundamental freedoms of indigenous peoples, including the right to unrestricted self-determination, and their rights to maintain and develop their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property. Article 26 states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and directs states to give legal recognition to these territories.

The Declaration establishes “the requirement for prior and informed consultation, participation

<sup>33</sup> Kingsbury. *op cit.* p 133.

<sup>34</sup> Quizon (2013), *loc cit.* p 44.



and consent in activities of any kind that impact on indigenous peoples, their property or territories. It also establishes the requirement for fair and adequate compensation for violation of the rights recognized in the Declaration and establishes guarantees against ethnocide and genocide. The Declaration also provides for fair and mutually acceptable procedures to resolve conflicts between indigenous peoples and States, including procedures such as negotiations, mediation, arbitration, national courts and international and regional mechanisms for denouncing and examining human rights violations.”<sup>35</sup>

**The Convention on Biological Diversity (CBD, 1993)** is an international treaty that aims to preserve biological diversity around the world. Article 8 recognizes the role of indigenous peoples in the conservation and management of biodiversity through the application of indigenous knowledge. Thus, in 1996, the International Indigenous Forum on Biodiversity (IIFB) was established during the third Conference of Parties to the Convention (COP3), as the indigenous caucus in the CBD negotiations.

Several UN Human Rights instruments provide the foundation for recognition of customary land rights of indigenous peoples, i.e.:

- ICESCR (International Covenant on Economic, Social and Cultural Rights) was adopted by the UN General Assembly in 1966. It commits states parties to promote and protect a wide range of economic, social and cultural rights, including rights relating to work in just and favorable conditions, to social protection, to an adequate standard of living, to education and to enjoyment of the benefits of cultural freedom and scientific progress.

<sup>35</sup> IWGIA. <http://www.iwgia.org/human-rights/international-human-rights-instruments/undeclaration-on-the-rights-of-indigenous-peoples>

- ICCPR (International Covenant on Civil and Political Rights) is based on the Universal Declaration of Human Rights, and was adopted by the UN General Assembly in 1966.
- ICERD (International Convention on the Elimination of all Forms of Racial Discrimination) was adopted in 1963 by the UN General Assembly.

### **In search of a common agenda**

**Recognize the rights of indigenous peoples in line with international human rights norms and state obligations.** Article 3 of UNDRIP affirms the right to self-determination under the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR), which most Asian countries have ratified as a legally binding agreement.

**Provide legal recognition and protection for the land rights of indigenous peoples.** States should provide legal recognition and protection for the land and territorial rights of indigenous peoples.

**Strengthen the principle and practice of FPIC.** States should ensure the implementation of FPIC before the entry of development activities in the domains of indigenous peoples. Safeguards should include, i.e., prior impact assessments, mitigation measures to avoid/minimize impacts on the exercise of those rights, benefit-sharing, and adequate compensation for impacts in accordance with relevant international standards. FPIC processes should be conducted in accordance with customary law and local practices of decision-making.

**Recognize and promote ICCAs.** As traditional indigenous lands and territories contain some 80 percent of the planet’s biodiversity, the role



played by indigenous peoples in managing natural resources should be recognized.<sup>36</sup> The concept and practice of Indigenous and Community Conserved Areas (ICCAs) that has gained international recognition as a legitimate conservation and protection system, should be adopted by national governments as an alternative to the current practice of state-led protected areas systems.<sup>37</sup>

**Strengthen disaggregated data on indigenous peoples.** States and indigenous peoples' organizations should jointly collect, analyze and disaggregate data on indigenous peoples, including women. This would aim to protect the rights of indigenous peoples, including their indigenous knowledge and customary lands and domains.

**Establish impartial commissions of inquiry and systems of redress for human rights violations.** Together with indigenous peoples, governments should establish independent commissions to look into the human rights concerns of indigenous peoples, and to put an end to violations of indigenous peoples' rights. Perpetrators of atrocities should be brought to justice in order to end the culture of impunity.

**Institute restitution and recovery of customary lands to address injustices against indigenous peoples.** Governments should cease the removal of indigenous peoples from their ancestral lands and territories. In cases where IPs are being, or have been removed, displaced or dispossessed, they should initiate independent inquiries and provide appropriate restitution.

<sup>36</sup> IFAD. [http://www.ifad.org/english/indigenous/index\\_full.htm](http://www.ifad.org/english/indigenous/index_full.htm)

<sup>37</sup> ICCAs are defined as "natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural values, voluntarily conserved by indigenous peoples and local communities."

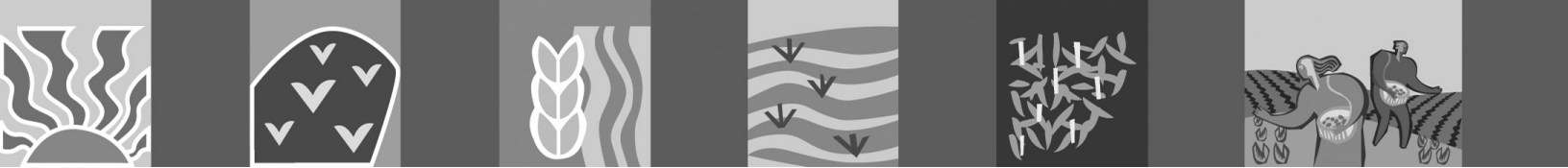
**Establish the accountability of private corporations in upholding human rights.** In line with the UN Guiding Principle on Business and Human Rights, the private sector should respect human rights of indigenous peoples regardless of the state legal framework or government actions in the countries where they operate.<sup>38</sup>

**ASEAN and SAARC programs on indigenous people's rights.** Regional associations such as ASEAN and SAARC should institute a common agenda and action program that protects indigenous people's rights, and that promotes and fulfils at the regional level the UN Declaration on the Rights of Indigenous Peoples.

**Recognize indigenous peoples as key to our collective future.** Finally, in the face of environmental destruction and climate change, we need to recognize the important roles that indigenous peoples play for our collective future:

- Conserving forests and ecosystems that are crucial, especially for the absorption of greenhouse gases, and for regulating hydrological flows;
- Providing environmental services that protect the global commons, resulting in clean and safe water, healthy soils, improved air quality, and protection from extreme weather conditions;
- Maintaining biodiversity and indigenous knowledge systems;
- Maintaining peace and social harmony;
- Providing a range of products and eco-services, and;

<sup>38</sup> The UN Guiding Principles on Business and Human Rights was adopted by the UN Human Rights Council in 2011. It affirms the duty of states and the responsibility of corporations to respect human rights, and the need to ensure access to remedies where business-related human rights abuses do occur. [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)



- Promoting cultural diversity and enlarging human options in an increasingly homogenized world. ■

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