



Beyond Tenure

Rights-Based Approaches to Peoples and Forests
Some lessons from the Forest Peoples Programme

THE RIGHTS AND RESOURCES INITIATIVE

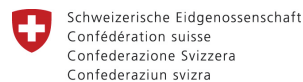
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The mission of the Rights and Resources Initiative is to promote greater global action on forest policy and market reforms to increase household and community ownership, control, and benefits from forests and trees. The initiative is coordinated by the Rights and Resources Group, a nonprofit organization based in Washington, D.C. For more information, visit www.rightsandresources.org.

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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 marginalized communities have often focused on tenurial reforms. Sometimes those reforms have led to important improvements in livelihoods, mainly by stabilizing communities' land use systems and by giving them greater security. However, these improvements have not prevented communities from suffering other forms of social exclusion and impoverishment. On the basis of a review of 17 years of programmatic work with forest peoples in Africa, Asia, and Latin America 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 is to be improved. The conclusion from this review is that programs to reform tenure in forests must be based on a broader understanding of the basis for asserting rights and must 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 broader 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 must be able to control their lands and resources. Cultural heritage should be protected. Basic rights to health and life and to civil and political rights and freedoms need to be secured. Social, cultural, and economic rights need to be respected. Although such rights are often recognized in countries' constitutions, in international customary law, and in nationally ratified human rights treaties, they are rarely taken into account in narrow sectoral decisionmaking about forests. Forest governance systems must secure this broader spectrum of rights if forest peoples are to benefit from forestry reforms.

1

INTRODUCTION

Until the recently, human development and human rights followed separate paths in both concept and action. One path was dominated by economists, social scientists, and policymakers; the other by political activists, lawyers, and philosophers. Those groups promoted divergent strategies of analysis and action: economic and social progress on the one hand, and political pressure, law reform, and ethical questioning on the other.¹

Development practitioners have often been accused of failing to integrate concern for human rights into their development work.² This situation is beginning to change, with development agencies, United Nations (UN) bodies, and even conservationists increasingly accepting the need for rights-based approaches; however, 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 rethink their policies toward local communities and indigenous peoples at all, let alone to do so from a human rights perspective. Typically, forestry agencies have shaped their policies toward forests in a way that sets priorities of 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.³

The relatively recent upsurge of interest in alternative forms of forest governance and tenure—as well as new efforts to elaborate forest policies

so that forests can contribute to poverty alleviation and to 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 policymakers now need to ensure that the revised policies they adopt to secure development gains will also reinforce rights.

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

Still, it is easier to say that forest policies should adopt a rights-based approach than to actually include such an approach in policies. Human rights are conceived (a) as being inherent, in that we acquire such rights through being human, not through any act of the state; (b) as being indivisible, in that all rights are seamlessly interconnected; and (c) as being inalienable, which does not mean that they trump every other consideration but that they cannot be taken away from us. This conception makes it a hard task for external policymakers

and development officials to decide which rights to use as priorities in forest development and conservation and requires that those decisionmakers 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 recognize the right of forest peoples to own, control, use, and peacefully enjoy their lands, territories, and other resources and to be secure in their means of subsistence. This assertion neatly draws our attention to the way a demand for respect for property rights (implicit in the word *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 in accordance with their customary norms and with their right, as peoples, to self-determination.

The rights basis for land tenure, thus, is not just a claim for respect of property rights. It also 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 colonization schemes or for lack of alternatives. It is estimated that some 370 million people consider themselves to be indigenous. Of those people, 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.⁴

Although all humans and all peoples have the same rights, their rights are expressed—and need to be respected—in diverse ways in conformity with historical and cultural specificities. This approach has long been recommended by the UN's Committee on the Elimination of Racial Discrimination and was recently reaffirmed by the UN General Assembly's approval in September 2007 of the UN Declaration on the Rights of Indigenous Peoples.⁵

The work of the Forest Peoples Programme (FPP) has focused on the most marginalized groups: those with the least access to justice, least awareness of their rights, or 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 marginalized groups and to those who suffer the most obvious violations of their rights.

2

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 have more than 700,000 people and mostly inhabit the upland forests of the north and west, lack citizenship papers. This situation is found not only among those ethnic groups that have migrated into the upland forests over the past hundred years but also among members of the Karen, who have lived for centuries within the borders of what is now Thailand. The reasons for this denial of citizenship are many and varied, including historical prejudices against non-Tai-speaking peoples, concerns about illegal drug cultivation and trafficking, national security considerations, bias against migrants, and alleged association with insurgencies.⁶

A similar problem of lack of citizenship prevails among the so-called Pygmy peoples of Central Africa—Angola, Burundi, Cameroon, Central African Republic, Democratic Republic of Congo, Equatorial Guinea, Gabon, Republic of Congo, Rwanda, and Uganda—who are estimated to number between 500,000 and more than 4 million.⁷ The consequence of this bureaucratic marginalization is that such peoples not only are prohibited from securing rights in land like other citizens, but also are discriminated against in job markets, are disenfranchised, and do not have ready access to state

services, such as health and education. Indeed, not being citizens, they are not even counted in national censuses.

The reluctance of states to recognize the legal personality of forest peoples' customary institutions is a much more widespread problem. For example, in Cameroon, the existence of rural communities is recognized in the local administration through the formal recognition of three levels of chieftaincies (*chefferies*). Most Bantu villages in the forest zone in the south are recognized as chieftaincies of the third degree (*chefferies du troisième degré*), but the settlements of forest peoples, such as the Bagyeli and Baka, are excluded from such consideration altogether. Those settlements are also excluded from landscape zoning exercises that are meant to set aside areas for customary use.⁸

In Indonesia, the problem of nonrecognition 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 tended to administer the so-called Outer Islands through policies of indirect rule, so Indonesia, in its early period of independence, recognized customary law and the self-governance of communities. This recognition ceased during the Suharto dictatorship with 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.⁹ With the fall of Suharto

in 1998, the *masyarakat adat* rapidly organized themselves and issued a famous challenge to the state: We will not recognize the state, unless the state recognizes us.¹⁰ Under laws granting regional autonomy, provinces and districts can now pass laws again recognizing customary institutions, but those laws 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 recognize such peoples “so long as they still exist,” also weakens communities’ abilities to assert their rights.¹¹

In Central Africa, the FPP has focused its support on the Pygmy peoples of the Congo Basin and Great Lakes Region. In the early 1990s, the Twa of Rwanda were the first such peoples to found their own organization. By then, most of them had lost access to forests and even land. The minority Rwandan Twa lost up to 30 percent of their population in the genocide and ensuing forced migrations unleashed by the Interahamwe organization in 1994.¹² Despite that situation, the Twa reorganized

and later founded their own umbrella organization, *Communauté des Autochtones Rwandaises*, which received substantial funds from aid agencies, including the European Commission, to redress their situation. However, the new government of Rwanda, which bans the naming of all ethnic groups and disagrees with the use of the term *autochtone* (indigenous), has sought to close down the organization. This issue has been taken up with the UN’s Human Rights Committee and discussed at the meetings of the Working Group on Indigenous Populations–Communities of the African Commission on Human and Peoples’ Rights as a violation of the Twa people’s rights to freedom of association and to collective action.¹³

In contrast to this widely prevalent situation of nonrecognition of forest peoples in Africa and Asia, most Latin American countries have now overhauled their laws and constitutions. Most recognize that Latin American states are multinational and pluricultural, and they make provisions in law for the recognition of indigenous organizations and, albeit limited, for forms of self-governance.¹⁴

3

LAND REFORM AND SECURITY OF TENURE

The fundamental importance of land to rural communities has long been recognized by the development community, as in the endorsement of the Peasants' Charter of the UN's Food and Agriculture Organization by 145 countries in 1979. The charter, recognizing that "the rural poor must be given access to land and water resources," went on to insist on the need for agrarian reforms to achieve "broad-based community control and management of land and water rights" and for programs "to ensure the conservation and management of fishery and forestry resources through arrangements involving local communities."¹⁵ Unfortunately, policies of land reform then went out of fashion during the heyday of neo-liberalism. The importance of recognizing property rights was 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 to provide them with security for investment and collateral for loans.¹⁶

An important paper published in 2002 by Forest Trends suggested that almost one-fourth of the world's forests are now owned by local communities and indigenous peoples. However, as Andy White and Alejandra Martin noted, the generalization disguises the huge variety of different tenures included in this statistic.¹⁷

In fact, those 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 only to the resources thereon, and from rights over surface resources to rights over subsurface resources. In many cases, forestlands allocated to community management 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 may receive only a small share of the proceeds. Not all those 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. The tenures are much less conducive to positive development outcomes.¹⁸

Many land titling programs fail to consider forest peoples' customary forms of land management and ownership. Some agrarian reforms have specifically targeted forests, clearing forests for colonists' use with scant regard for forest peoples' rights. Some agrarian reform programs, in effect, parcel what were customarily owned lands and reallocate them to individuals. Although such individualization of land is intended to provide land security and to promote development, it too often leads to the break up of communal lands and accelerates the dispossession of the original owners who, even if they secure titles, quickly lose those titles in the land markets that follow.¹⁹

Those exact problems ensued in the United States with the passing of the General Allotment Act (also known as the Dawes Act) in 1887, which led to the loss of some 36 million hectares (88.9 million acres) from a remaining 56 million hectares (138.3 million acres) of officially recognized indigenous peoples' lands and forests.²⁰ Most *adivasi* lands (belonging to original inhabitants) in India have likewise been titled as individual *patta* (individual title for famlands). Even though laws are meant to prevent the transfer of titles to nontribal peoples, land markets have led to the loss of much tribal land.²¹ In Vietnam, efforts to provide rural people with long-term leaseholds on state lands, although broadly welcomed as an improvement over the stifling conditions of collectivization, have created serious problems for ethnic minorities. Many highlanders of Vietnam are objects of discrimination and targets of corruption, and they lack the political connections needed to get land titles, as well as market savvy and fluency in Vietnamese. Many of them have lost out to incoming settlers, thereby condemning them, according to one study, "to a deplorable existence in more remote areas or to work as landless laborers."²² Individualized tenure has not allowed for collective forms of tenure and land management and has been used to disqualify customary land-use systems, such as swidden (slash and burn) agriculture that the state has a policy of eradicating.²³

In Venezuela, under the 1960 Agrarian Reform Law, title to land 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 *peasantize* indigenous peoples' land ownership by reducing their rights to small parts of their once extensive territories and by making them vulnerable to land invasion by settlers.²⁴ In Peru, the law that provides for titling for so-called native communities has likewise been interpreted as allowing only 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 those experiences is that the wrong type of law may be worse than no law by creating a legal mechanism for the loss, invasion, and takeover of forest peoples' customary lands. Indeed, such may be the very intent of those laws. Teddy Roosevelt is said to have hailed the Dawes Act as a "mighty pulverising engine to break up the tribal mass."²⁷

4

TOWARD 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 the tenurial regimes must enjoy equal protection of the law.²⁹

In some countries, tenure systems now come close to according such rights. In Colombia—where some 24 million hectares (59.3 million acres) of the national territory have been recognized as *resguardos* (indigenous reserves) - for both indigenous peoples and Afro-Colombians, communities have secure ownership and self-governance of their lands, allowing them to sustain their communities and have greater control over developments on their land. They are not, however, entitled to commercialize 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. Its constitution explicitly recognizes indigenous peoples' existence and guarantees their aboriginal rights to their lands. Although 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*), not a single territory has yet been legally titled,

despite completed applications having been submitted more than five years ago.³⁰

In Asia, the most progressive law that recognizes 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 hectares (2.5 million acres) of the more than 4 million hectares (9.9 million acres) that have interim Certificates of Ancestral Domain Claims have been titled, while additional areas, which were never issued the interim certificates, have also yet to be titled.

In Central Africa, measures for the formal recognition of forest peoples' land rights are lacking. Although customary tenures may be observed by local administration, they do not protect traditional owners against the nonindemnified expropriation of land for public works or the allocation of overlapping concessions for logging, mining, and establishing protected areas. Some governments, such as the government of the Democratic Republic of Congo, deny the possibility of recognizing 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 focus on brokering

agreements among 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 recognize rights.³⁵

5

SECURING OF CUSTOMARY RIGHTS

In some countries that enjoy an independent judiciary, indigenous peoples have made significant progress in securing their rights through the national courts, even in the face of government agencies reluctant to recognize such rights. In British Commonwealth countries, a body of jurisprudence has evolved through a series of cases in Australia, Botswana, Canada, Malaysia, New Zealand, Nigeria, and South Africa that 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, these “Aboriginal Rights” endure.³⁶

These legal gains have not only fed into further national claims within British Commonwealth jurisdictions,³⁷ but have also had important consequences for the way that international human rights tribunals interpret indigenous rights.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, such laws and relations are considered inherent and do not depend on any act of the state. The state may recognize such rights, but they are not granted.

Unfortunately, the struggle to convince governments to accept the judgment of the courts has proven to be a long one. Even when national laws recognize 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 limitations are evident even in those states regarded as progressive, such as Canada, Colombia, New Zealand, the Philippines, Denmark, Sweden, Norway and Finland.

For example, in Indonesia, although the law accepts customary rights and recognizes 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, regarding land, customary rights are recognized subject to severe limitations. In Peninsular Malaysia, the Orang Asli have been protected only through the establishment of tiny reserves that are considered to be state lands set aside for that people’s use but that may be annulled at the stroke of a pen.⁴¹ In Sarawak, the Land Code recognizes the existence of native customary rights (NCRs), but in 1958, the state froze the extension without permit. The state acknowledges that some 2.4 million hectares (5.9 million acres) of state land are subject to NCRs, but, using a decision not to extend NCRs by permit after 1974, it adopted the norm that even such recognized NCRs are limited to cultivated and fallow lands and not hunting and gathering areas.⁴² When the courts ruled in favor 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 by tightening the Land Code.

By contrast, in many Pacific nations, rights in land are effectively recognized on the basis of custom.⁴⁵ Access to, and development of, resources by outsiders is subject to negotiation with landowners, who may demand benefit sharing and compen-

sation or mining royalty equivalents. For example, in Papua New Guinea, some 97 percent 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 creating non-representative associations, and by making (often unfulfilled) promises of careful land management and provision of services.⁴⁶

6

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 to 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.

For example, a review of the effect of hydropower projects, carried out for the World Commission on Dams, showed that major dam-building projects have led to the forced removal of hundreds of thousands of indigenous people. Even where the hydropower projects are built by private-sector companies, and are mainly justified as providing electricity for mineral smelting by private companies or for export to regional grids, the state asserts its right to expropriate in the national interest.⁴⁷ A detailed examination of the effect 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 that their rights have been frequently occluded, denied, or abrogated in favor of mining interests.⁴⁹ Even where develop-

ment agency 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, who found themselves in the way of the World Bank-funded Chad-Cameroon Oil Pipeline. In this case, the communities suffered a double setback. They lost land not only 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. 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 on which they depend. Successive reviews and studies carried out by the FPP and academics show that this is a worldwide problem,⁵¹ which conservationists have only recently sought to address.⁵²

In Indonesia, the rights of indigenous peoples not only are poorly secured by law but are also, to an unusual degree, subject to being overridden by the national interest. The constitution gives the state a "Controlling Power"⁵³ 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....”⁵⁴ The government interprets the national interest to include all projects mentioned in national five-year plans and all areas zoned for development or conservation in Provincial Spatial

Planning exercises. Thus, indigenous peoples’ rights in Indonesia are expected to give way to logging, timber plantations, oil palm plantations, dams, mines, and conservation schemes.⁵⁵

7

CONTROL AND CONSENT

These types of limitations on property rights do much to undermine communities' sense of security in their tenures—security that is crucial to long-term development 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.

Although the gains to forest communities from decentralization are disputed—success depends largely on the extent to which local government is held accountable and the rule of law prevails—devolved management is likely to be effective only where communities' institutions are recognized (see the earlier discussion) and where they have both a genuine measure of autonomy in managing resources and 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 (right to FPIC) to activities proposed for their lands. This right is basic and essential to 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 acknowledgment that the right to FPIC is indeed recognized by existing international human rights law and has been repeatedly

affirmed in the jurisprudence of the international treaty bodies.⁵⁶ Looking at the extractive industries sector, an independent review for the World Bank 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 bank should recognize indigenous peoples' right to FPIC in its own policies. The final 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.⁵⁷

The same right has been accepted for palm oil, logging, and plantations certification (see the following discussion). Making this right effective, however, remains a major challenge. Communities can and do insist on the right to FPIC in their dealings with governments and companies, whether the right is recognized under national law or not. Effective deployment of this right is greatly strengthened where land rights are recognized and titled, where communities' own representative institutions are recognized 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.⁵⁸

In some countries, such as the Philippines, FPIC is indeed explicitly required by national law, and communities have exercised this right effectively to reject some unacceptable projects and to modify others. Unfortunately, however, some government agencies and companies have abused this right to push through nationally prioritized developments, such as large-scale mining, by using the age-old tactics of divide and rule, corruption, bribery, and intimidation.⁵⁹

8

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 its view:

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.⁶⁰

Thus, customary norms of environmental use and management are seen by forest peoples as a foundation on which to base both conservation initiatives and development initiatives. The framers of the Convention on Biological Diversity have likewise recognized the value of customary systems of re-

source use. Article 10(c) of the convention, therefore, requires states that are party to the convention “as far as possible and as appropriate” to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”

Hence, the convention’s Secretariat has recommended that to comply with its obligations under that article, states must ensure that national legislation and national policies account for and recognize, among others, indigenous legal systems, corresponding systems of governance and administration, land and water rights, and control over sacred and cultural sites.⁶¹

Participatory reviews with forest peoples in Bangladesh,⁶² Cameroon,⁶³ Guyana,⁶⁴ Suriname,⁶⁵ Thailand,⁶⁶ and Venezuela⁶⁷ have revealed not only the wealth of customary law and environmental knowledge that communities apply in managing and using their resources but also the extent to which national laws and policies need to be reformed to protect and encourage those practices. In effect, many countries are not yet meeting their obligations under the convention. To do so, they must either enforce existing laws more assiduously or revise their laws to aid in enforcement.⁶⁸

9

USE OR SALE

Forestry reforms aimed at realizing the Millennium Development Goals emphasize the importance of increasing the incomes of forest-dependent peoples. Yet, whereas international human rights law recognizes the rights of all peoples to freely dispose of their natural wealth and resources and to not be deprived of their means of subsistence,⁶⁹ forest peoples' rights to use forest resources are often hedged with restrictions that may prevent sales of timbers and other forest products.

Although forest peoples' rights have been recognized on the basis of customary rights and ancestral domains, governments may argue that those rights do not include commercial sales because those sales are modern uses that were not practiced in the past. The national courts in Canada, New Zealand, and the United States have overturned such limitations in the case of riverine and coastal fisheries, freeing indigenous peoples of a legal straitjacket that would recognize only subsistence use, not commercial use.⁷⁰ Yet progress to assert similar rights to forest resources has been drawn out longer. 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.⁷¹

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 fulfill 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 illegality⁷² while, by and large, the main tenures offered to communities seeking to carry out community forestry are relatively short-term leaseholds on state lands.⁷³ Many of the management regimes actually marginalize indigenous peoples and lower caste people and reinforce the power of forestry departments and village elites. They also prevent communities from developing the potential, and marketing, of their natural resources.⁷⁴

Recent years have seen a growing enthusiasm in the private sector for involving communities as out-growers and smallholders that produce materials for paper-pulp and palm oil mills. Ostensibly designed to allow for wider benefit-sharing between companies and communities, such schemes have also been criticized as really being measures for companies to shed risk. The schemes place communities in unequal relations with companies to which the communities are often tied by debt and lack of alternatives. In the worst cases, as among many Dayak groups on oil palm estates in Borneo,⁷⁵ smallholder schemes come close to establishing slavery-like practices, which are contrary to well-established human rights laws.⁷⁶

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, as well as more subtle strategies, such as exclusion from future employment. According to the International Labour Organization, of the 12 million people around the world still living in slavery-like conditions, some 9.5 million are in Asia,

with the majority working as bonded laborers.⁷⁷ These workers include a disproportionate number of indigenous peoples—notably many forest-dwelling *adivasi* in Central India⁷⁸—who have been a particular concern to the International Labour Organization.⁷⁹

10

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 Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights.⁸⁰

This right is under serious challenge in some countries. Members of national majorities and government officials often treat the customary beliefs and practices of forest peoples in a derogatory way. Indonesia, for example, still requires all citizens to be adherents of one of the major world religions—Buddhism, Christianity, Hinduism, or Islam—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 carried out aggressive programs to prevent customary ceremonies and to burn traditional religious paraphernalia—even burning Dayak longhouses, which were considered dens of backwardness and promiscuousness.⁸¹

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), which requires states that are parties to the convention to do the following:

*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.*⁸²

Discussions about how governments should best meet their obligations under this article have been the subject of intense debate at the meetings of the conference of the parties and its working groups.⁸³ However, the importance of securing indigenous peoples' rights to their lands and resources, recognizing their own representative institutions, and exercising their customary law is widely attested.⁸⁴

Discussions have also focused specifically on forests, given the evident overlap between the requirements of the Convention on Biological Diversity and the UN's various forums on forests—Intergovernmental Panel on Forests, Intergovernmental Forum on Forests, and UN Forum on Forests (see section on forest policy forums)—which have agreed on the importance of protecting traditional forest-related knowledge (TFRK). A detailed review carried out as part of an inter-sessional meet-

ing of both the Convention on Biological Diversity and the UN Forum on Forests showed that governments and indigenous peoples had widely divergent views of how such protection 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. In a second approach, TFRK is seen as a technical component of sustainable forest management, an adjunct

to the forester's toolbox to be deployed through participatory management regimes. However, from a third point of view, TFRK is seen as something embedded in traditional systems of land use: ownership and control; customary systems of decisionmaking; and ancestral rights to lands, territories, and natural resources. These differences of viewpoint reflect very different understandings of why TFRK must be protected.⁸⁵ The review also showed the wide gap that exists between the affirmation of the need to protect TFRK and actual practice.⁸⁶

11

WOMEN'S RIGHTS

Development in forest regions has often had especially hard effects on women, notwithstanding that although their rights are often upheld in national laws and are protected by international law,⁸⁷ women are especially vulnerable to violence and abuse. For example, a study carried out by the FPP and the Amerindian Peoples Association in Guyana found that mining is having a very severe effect on the indigenous peoples' environments, livelihoods, and health and is contributing to the denial of land rights. However, the mining is also having especially severe effects on Amerindian women, not only because of male absenteeism in the mines and thus the breakdown of shared labor in village production, but also because prostitution of Amerindian women is rife in mining camps and nearby settlements and rapes are widely reported. The police are accused of negligence and of accepting bribes in dealing with these abuses. Racial prejudices aggravate these problems.⁸⁸

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, which means that many women shoulder the heavy burden of child care unsupported. Women are also exposed to prejudices from the dominant culture that sex with a Twa woman cures a backache and other ailments. In the war zones of the Democratic Republic of Congo, Pygmy women suffer very severe abuse. Forest peoples' communities are targeted by rebels and soldiers, leading to forced labor,

killings, and even cannibalism. Multiple rapes are widely reported⁸⁹ and confirmed by the UN, which notes that this situation has led to the spread of HIV/AIDS.⁹⁰

Also, even under customary law, women may suffer discrimination and lack rights over land or a voice in community decisionmaking. Thus, women in forest communities suffer a triple discrimination: they are considered of lower worth for being indigenous, for inhabiting undeveloped areas such as 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."⁹¹

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 equalizing relations between the sexes.⁹² And they have done so with good reason. Too often, land titling programs have been skewed by prevailing power relations: men are favored at the expense of women, even though women's rights to be property owners are asserted.⁹³ 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."⁹⁴

This situation does not mean that women's rights should not be asserted in forest reform.

Prodded by indigenous women, indigenous organizations have acknowledged the need to reform discriminatory practices in line with international human rights norms. For example, in the December 2000 Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, 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.⁹⁵

What this situation 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 women participate in decisionmaking about the allocation and use of common properties.

12

ELIMINATION OF 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 UN's Committee on the Elimination of Racial Discrimination, which oversees the implementation of the Convention on the Elimination of All Forms of Racial Discrimination. During the past three years, the committee has received a series of complaints from indigenous peoples and support organizations that draw attention to discriminatory laws and policies in Brazil,⁹⁶ the Democratic Republic of Congo,⁹⁷ Guyana,⁹⁸ Indonesia,⁹⁹ North-East India,¹⁰⁰ the Philippines,¹⁰¹ Suriname,¹⁰² and others.

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

- relative poverty
- limited access to education
- poor health and limited provision of health care
- unjust and indiscriminate targeting by the armed forces
- discriminatory legal frameworks that prejudice forest peoples' rights to land, especially relative to other sectors
- impositions of dams, mining, logging, and oil palm plantations without forest peoples' free, prior, and informed consent
- unjust delays in land titling
- fomenting of racial hatred
- lack of enforcement of legal protections
- lack of or denial of equal access to effective judicial and other remedies

- failure to implement the committee's previous recommendations

Although the committee has not taken up all those 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 the committee's 68th session held in March 2006, it expressed "deep concern" about how 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 Guyana 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 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."¹⁰³

In the case of Suriname, the committee found that the country had violated the rights guaranteed in the Convention on the Elimination of All Forms of Racial Discrimination. 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.” The committee, observing that indigenous peoples and Maroons’ rights have been violated by logging and mining activities in the interior, stated “that development objectives are no justification for encroachments on human rights” and that article 41 of Suriname’s constitution, which vests ownership of natural resources in the nation, “must be exercised consistently with the rights of indigenous and tribal peoples.”¹⁰⁴

With respect to the Democratic Republic of Congo, the committee has noted with concern that the rights of the Pygmies (Bacwa, Bambuti, and Batwa) to own, exploit, control, and use their lands, resources, and 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 government (a) take urgent and

adequate measures to protect the rights of the Pygmies to land, (b) make provision for the forest rights of indigenous peoples in domestic legislation, (c) register the ancestral lands of the Pygmies in the land registry, (d) proclaim a new moratorium on handing out concessions in forest lands, (e) take the interests of the Pygmies and environmental conservation needs into account in matters of land use, and (f) provide domestic remedies in the event that the rights of indigenous peoples are violated. The committee also urged that the government not misuse its law prohibiting racism and tribalism to ban associations engaged in defending the rights of indigenous peoples.¹⁰⁵

The implications of discriminatory practice by states toward forest peoples are severe. For example, a survey of the health of indigenous peoples in Central Africa uncovered a very serious situation that was a consequence of marginalization and discrimination and a result from lack of protection of land rights.¹⁰⁶ 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.¹⁰⁷

13

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, among others, an awareness of rights by potential plaintiffs; access to legal counsel; active, unbiased policing; formal establishment of judicial, administrative, and other remedies; access to courts; an independent judiciary; just enforcement of penalties; and, not least, protection of plaintiffs and witnesses and of court officials, judges, and other state officials from intimidation and violence. In other words, justice requires the rule of law.

An FPP study about the possibilities of ensuring the exercise of the right of free, prior, and informed consent in Indonesia regarding timber certification¹⁰⁸ notes that the lack of effective rule of law in Indonesia poses a major challenge to the reform of the forest sector, as indicated by the very small number of prosecutions of forestry businesses violating forestry regulations.¹⁰⁹ 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:

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.¹¹⁰

Many other analysts have reached similar conclusions. For example, an exhaustive review carried out for the World Bank during the closing months of the Suharto era revealed (a) the very serious problems besetting the whole legal system, (b) a legacy of patrimonial politics, and (c) the absence of democracy and civil and political rights and freedoms. Some of the problems noted in the

five-volume report were a lack of competence in the legal profession, low professional standards and ethics, a lack of disciplining 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 had 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 noted.¹¹¹ In 2002, a UN mission to gauge the country’s judiciary again found pervasive corruption in the courts.¹¹²

Such a situation is far from unique to Indonesia. A belated realization 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.

However, 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:

*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 standalone 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.*¹¹³

In a similar vein, the UN Committee on the Elimination of Racial Discrimination has called on each state-party 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.”¹¹⁴ Processes of restitution are now gaining ground and have entailed considerable costs to governments.

14

PROTESTS, REPRESSION, AND INTERNATIONAL TRIBUNES

Denial of recourse to the courts or of access to justice only aggravates relations between forest peoples and incomers seeking access to the lands and resources within their territories. Conflicts among forest peoples, governments, and companies are widespread. Underlying those disputes are denial of the rights to land and self-determination and the basic civil and political rights. But the lack of proper means of conflict resolution is the most obvious reason that the disputes escalate into conflicts. The close relations that may exist between the private sector and state security forces aggravate the disputes. Often in exchange for favors, security forces may choose to repress, arrest, and criminalize forest peoples rather than enforce laws protecting indigenous rights. A study, by Dr. M. A. Afrizal from the University of Andalas, about the roots of agrarian conflicts in West Sumatra illustrates what is a very widespread problem, not only in Indonesia but also in many parts of the world.¹¹⁵

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, and it makes no specific provisions at all to recognize their land rights.¹¹⁶ Among those 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 recognizing their lands. In the 1960s, the Saramaka Maroons lost very large areas of their lands, with

minimal compensation, to the Afobaka dam. And the construction of the dam's reservoir displaced a number of communities. In the 1980s, the Maroons, and other interior communities, were caught up in Suriname's vicious civil war. During the war in 1986, Surinamese soldiers made an unprovoked attack on the N'djuka Maroon village of Moiwana, massacring more than 40 men, women, and children. Although the peace treaty ending the civil war 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.¹¹⁷ Little effort was made to investigate the Moiwana massacre or to 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 therefore pursued their claims through the international courts, successfully bringing two cases to the Inter-American Court of Human Rights.¹¹⁸

In 2005, in a landmark decision both for Suriname's Maroons and for forest peoples more widely, the court gave its final judgment on the Moiwana case. The court, finding the government to be in breach of its obligations under international human rights laws, ordered Suriname to pay nearly US\$3 million in compensation to survivors of the 1986 massacre.¹¹⁹ The government was also required to establish a US\$1.2 million development fund for health, housing, and educational

programs for Moinana residents and to investigate and prosecute those responsible for the deaths.

The judgment also established the principles 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 judgment on the second case—the Saramaka have called on the government to rescind the handing out of forestry and mining concessions on their lands, to compensate them for past losses, and to legally secure their rights in land—is expected shortly.

15

RESPONSIBILITIES OF THE BUSINESS COMMUNITY

Detailed case studies by FPP and partner organizations have exposed the complicity of transnational logging¹²⁰ and mining¹²¹ companies from Canada, Europe, and Malaysia in the destruction of tropical forests and the abuse of the forest peoples' rights. The 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 the companies' operations. Recent cases have also exposed the worthlessness of self-policed forestry policies of banks, such as HSBC Bank, 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.¹²² Furthermore, analyses of the political economies of target countries reveal the extent to which mining and timber interests have captured the legislatures and executives of the countries, making strengthened regulatory frameworks difficult to achieve.¹²³

This situation places human rights organizations in something of a quandary. Both state-based, regulatory approaches 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. It has pressed for international financial institutions and development agencies to adopt rights-based approaches and to improve their safeguard stan-

dards.¹²⁴ It has sought to build up the capacity of community groups and indigenous peoples to use those standards.¹²⁵ It has also argued that institutions, such as transnational corporations, should be required to observe relevant international human rights standards.¹²⁶ In the meantime, FPP has also pressed companies to go beyond declarations of corporate social responsibility¹²⁷ and to make themselves accountable to more autonomous standard-setting processes.

The circumstances have led FPP to involve itself in efforts to define rights-based, best practice standards for various sectors, such as extractive industries,¹²⁸ large dams,¹²⁹ timber and plantations,¹³⁰ oil palm development,¹³¹ and legality verification,¹³² and to explore other means of getting key transnational companies to make themselves accountable.¹³³ 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 in which forest peoples can engage with the private sector, providing them with safer and more transparent forums than the often manipulated and intimidatory situations available in their home countries. Nonetheless, there have been serious problems with ensuring that third-party certification bodies genuinely uphold rights.¹³⁴

16

THE RESPONSE OF FOREST POLICY FORUMS

Since the 1980s, indigenous peoples and non-governmental organizations, including FPP, have been calling on creators of forest policy to include consideration for forest peoples' rights in their deliberations. The initiative commenced with the International Tropical Timber Organization,¹³⁵ and it was then pursued at the UN Conference on Environment and Development, the UN Commission on Sustainable Development, the Intergovernmental Panel on Forests, the Intergovernmental Forum on Forests, and the UN Forum on Forests.¹³⁶ The same issues have been repeatedly raised through the various international forums 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 that has explicitly recognized, or is consonant with, the human rights of forest peoples and procedures that have allowed forest peoples to participate in policy debates. Yet in practice, application of these

commitments has been deficient.¹³⁷ Moreover, recent sessions of the UN Forum on 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.¹³⁸

This general weakening of commitment is especially worrisome in the context of renewed calls for massive injections of funds into forestry—both as grants and as carbon trading—for carbon offsets and rewards for reduced deforestation. Studies by FPP 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.¹³⁹ At the same time, new markets in biofuels are increasing pressures on forests through clearance for the use of oil palm, soya, sugar, and other crops. Already these speculative new markets have driven up the prices of food staples and edible oils and have encouraged local planners to allocate additional lands of forest peoples to estates, thereby causing escalating human rights abuses.¹⁴⁰

17

NEXT STEPS FOR ACTIVISTS AND POLICYMAKERS

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 nongovernmental sectors.¹⁴¹

This paper illustrates why programs to reform tenure in forests must be based on a broader understanding of the basis for asserting rights and must 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 allocating community forestry leases or land titles to forest users. This is not just to repeat the bundle-of-rights argument about land ownership, but to assert that for tenurial rights to be effectively exercised, they must be secured within a wider framework of rights recognition.

The cases researched and documented over the past 17 years by FPP, which have been summarized in this paper, illustrate the need for recognition of the following rights of forest peoples:

- Be recognized, individually and collectively, as citizens, communities, and peoples and as having a legal personality and the right to collective action as communities, peoples, or organizations.
- 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 con-

nected 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.

- Own their territories and ancestral domains.
- Be given 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.
- Have customary use of biological resources.
- Have free pursuit of economic, social, and cultural development, including the right to choose to market and/or commercialize forest products from their domains.
- Receive fair prices for their produce.
- Be protected from slavery, debt-bondage, and other slavery-like practices.
- Control the use of their cultural heritage.
- Be given health care.
- Eliminate all forms of discrimination, not least against women.
- Have access to justice.
- Be given redress for and the restitution of illegally expropriated properties, including land and other natural resources.
- Be given protection of their basic rights and freedoms.

The bases for those rights are well affirmed in international human rights law and jurisprudence. Here, FPP has sought to demonstrate the importance of respecting those 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.¹⁴²

Mary Robinson, the former UN high commissioner for human rights, has argued that adopting a human rights-based approach to development not only implies integrating human rights norms into development plans but also, more important, involves prioritizing measures that enhance safeguards, accountability, and transparency and that promote citizens' empowerment, ownership, and free meaningful and active participation.¹⁴³ 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 those rights in nonbinding statements of principles and declarations, the extent to which they have been incorporated into international development agencies' policies and programs remains limited, especially in forest-related aid. Only in a few countries have the rights been made operational in the agenda of forestry departments.

This situation means that forestry departments and development agencies must seriously overhaul their policies and programs 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 do the following:

- Adopt a human rights-based approach to forests and development.
- Invest sufficient time and resources into recognizing 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 departments).

- Ensure full transparency and public access to information in land and forest designation, tenure, permitting, licensing, and concession systems. Ensure the existence of national legislation 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 and land reform departments, to put into effect existing national commitments under the Convention on Biological Diversity and other international treaties that require respect for forest peoples' rights.

For their part, development agencies need to do the following:

- Accept their own human rights obligations, and make the necessary adjustments to their strategies, policies, or safeguards for the forest sector, to ensure compliance with international law, including agreements such as the UN Declaration on the Rights of Indigenous Peoples, in the reduction of poverty of indigenous peoples.

- Support inclusive reviews of the national forest sector using a rights-based approach, with the aim of identifying practical steps to secure peoples' rights that include options such as elimination of discrimination through retraining and education, programs to secure citizenship, reviews of excess use of the principle of eminent domain, and exposure and prevention of slavery-like practices.

- Review options for tenure reforms.

- Support community-level trainings in peoples' rights, including the UN Declaration on the Rights of Indigenous Peoples.

- Invest in raising human rights awareness among forest departments and forestry officials.

- Give targeted direct support to community initiatives on forest management.
- Support multistakeholder legal reviews and reform processes.
- Ensure human rights effects and poverty risk assessments are conducted at local, national, and regional levels.
- Support initiatives for effective implementation of the right to free, prior, and informed consent through locally developed guides, third-party verification, and so on.
- Support independent reviews of claims of dispossession and assist tenure reform and land restitution programs.

Civil society organizations and researchers need to work much more consistently to advocate and then to monitor such rights-based forest policies. In fact, the agenda is even broader for civil society groups. 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,¹⁴⁴ nongovernmental organizations need to focus on counseling, litigation, human rights, and legal training by establishing paralegal capacity and advocacy so that reforms are based on informed mobilization and civil society participation and not just on legal changes.

ENDNOTES

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