

HUMAN RIGHTS AND AGRIBUSINESS



Plural Legal Approaches to Conflict
Resolution, Institutional
Strengthening and Legal Reform



HUMAN RIGHTS AND AGRIBUSINESS

Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform

Proceedings of the Workshop at Bali, Indonesia

28th November – 1st December 2011

Komnas HAM, SawitWatch and Forest Peoples Programme,
with Rights and Resources Initiative and partners Samdhana
Institute and RECOFTC - The Center for People and Forests

Edited by
Sophie Chao and Marcus Colchester



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**HUMAN RIGHTS AND AGRIBUSINESS
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This publication documents the proceedings of a four day conference on 'Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform' (Bali, 28th November – 1st December 2011), convened by the Indonesian Government's National Human Rights Commission (Komnas HAM). This high level meeting brought together the heads of human rights commissions of the region, notable academics, NGOs and indigenous peoples' organisations with the purpose of developing a regional standard on human rights and agribusiness. The *Bali Declaration on Human Rights and Agribusiness* which resulted from this meeting, reminds companies of their legal obligation to fulfil their responsibilities to respect human rights and calls on States to protect the rights of their citizens, including indigenous peoples, in the face of unprecedented pressures from agribusiness.

Editors: Sophie Chao and Marcus Colchester

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Forest Peoples Programme
1c Fosseway Business Centre
Stratford Road
Moreton-in-Marsh
GL56 9NQ England
Tel: + 44 1608 652893
Fax: + 44 1608 652878
Web: www.forestpeoples.org

Perkumpulan SawitWatch
Perumahan Bogor Baru
Blok C1, No.10
16127 Bogor
West Java, Indonesia
Tel: + 62 251 352171
Fax: + 62 251 352047
Web: www.sawitwatch.or.id

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Sophie Chao and Marcus Colchester, editors

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PROLOGUE

It is an honour for Sawit Watch to have collaborated with its partner Forest Peoples Programme and the Indonesian National Human Rights Commission in organising the Bali Conference on Human Rights and Agribusiness in Southeast Asia. This landmark event has led to a very significant outcome, the *Bali Declaration on Human Rights and Agribusiness in Southeast Asia*, which outlines the fundamental requirements and safeguards for the protection of human rights of indigenous peoples, local communities, smallholder farmers, labourers and vulnerable women and children.

The acclamation of the *Bali Declaration* comes at a crucial point in time, when grave concerns are increasingly being voiced over the rapid and widespread expansion of agribusiness, including the expansion of oil palm plantations for the production of biodiesel feedstock and edible oils to supply an ever growing population and market demand. This expansion has triggered a massive land rush in which weak or absent safeguards are leading to the expropriation of land rights of indigenous peoples and other local communities. Case studies carried out in oil palm plantations in Southeast Asian countries point to the urgent need for plural legal approaches and the development and implementation of stronger regional human rights standards with regards to agribusiness expansion.

Sawit Watch sees in the *Bali Declaration on Human Rights and Agribusiness in South East Asia* great potential to encourage States, companies and civil society to take further steps towards recognising and respecting the rights of those communities whose customary lands are targeted for development and investment. It is hoped that the proceedings of the workshop can act as an eye-opener on the realities and challenges faced by local communities on a daily basis, and can stimulate governance, policy and legal reforms to pave the way for sustainable, responsible and accountable development outcomes for national and transnational agribusiness operations and investors.

Norman Jiwan, Sawit Watch

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ACRONYMS

ADB	Asian Development Bank
AIPP	Asian Indigenous Peoples Pact
AKAD	Inter-Regional Working Implementation (<i>Antar Kerja Antar Daerah</i>)
ALRO	Agricultural Land Reform Office
AMAN	Alliance of the Indigenous Peoples of the Archipelago (<i>Aliansi Masyarakat Adat Nusantara</i>)
ARB	Agrarian Reform Beneficiaries
ASEAN	Association of Southeast Asian Nations
BAL	Basic Agrarian Law 1960
BPS	Statistics Indonesia (<i>Badan Pusat Statistik</i>)
BRWA	Ancestral Domain Registration Agency (<i>Badan Registrasi Wilayah Kelola Adat</i>)
CAO	Compliance Advisor/Ombudsman
CADT	Certificate of Ancestral Domain Title
CARP	Comprehensive Agrarian Reform Programme
CBD	Convention on Biological Diversity
CBFM	Community Based Forest Management
CBO	Community Based Organisation
CCHR	Cambodian Centre for Human Rights
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	United Nations Convention on the Elimination of all forms of Discrimination Against Women
CHRA	Cambodian Human Rights Action Committee
CICOM	Communities' Information and Communication Centre
CLEC	Community Legal Education Center
CLOA	Certificate of Land Ownership Award
CNO	Certificate of Non-Overlap
CPN	Community Peace Network
CPO	Crude Palm Oil

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CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CSO	Civil Society Organisation
DNP	Department of Natural Parks, Wildlife and Plant Conservation
DtE	Down to Earth
EIA	Environmental Impact Assessment
ELC	Economic Land Concession
EU	European Union
FAO	Food and Agriculture Organisation
FELDA	Federal Land Development Authority
FFB	Fresh Fruit Bunch
FoE	Friends of the Earth
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
FSC	Forest Stewardship Council
GDP	Gross Domestic Product
GLC	Government-Linked Company
HAM	Human Rights (<i>Hak Asasi Manusia</i>)
HCV	High Conservation Value
HDI	Human Development Index
HGU	Right of exploitation (<i>Hak Guna Usaha</i>)
HTI	Industrial Timber Plantations (<i>Hutan Tanaman Industri</i>)
HTR	People's Planted Forest (<i>Hutan Tanaman Rakyat</i>)
IACHR	Inter-American Court of Human Rights
IAHRC	Inter-American Human Rights Commission
IBRD	International Bank for Reconstruction and Development
ICC	Indigenous Cultural Communities
ICC	International Coordinating Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and

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	Cultural Rights
ICMM	International Council on Mining and Metals
ICRAF	World Agroforestry Centre
IDP	Internally Displaced Persons
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFI	International Finance Institution
IKAP	Indigenous Knowledge and Peoples
ILC	International Land Coalition
IMF	International Monetary Fund
IPF	Indigenous Peoples' Foundation for Education and Environment
IPO	Indigenous Peoples Organisation
IPRA	Indigenous Peoples' Rights Act
IRAM	Indigenous Rights Active Members
ISFP	Integrated Social Forestry Programme
ISPO	Indonesia Sustainable Palm Oil
KMAN	Congress of Indigenous Peoples of the Archipelago (<i>Kongres Masyarakat Adat Nusantara</i>)
Komnas HAM	National Human Rights Commission of Indonesia (<i>Komisi Nasional Hak Asasi Manusia</i>)
LGBT	Lesbian, Gay, Bisexual and Transsexual
LGC	Local Government Code
LGU	Local Government Unit
LPF	Licensed Protected Forests
LSM	Public Interest Group (<i>Lembaga Swadaya Masyarakat</i>)
LTR	Lands, Territories and Resources
MAFF	Ministry of Agriculture, Forestry and Fisheries
MIFEE	Merauke Integrated Food and Energy Estate
MoA	Memorandum of Agreement
MTPDP	Medium Term Philippine Development Plan (2004 – 2010)
NCIP	National Commission on Indigenous Peoples
NCR	Native Customary Rights
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission

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NHRCT	National Human Rights Commission of Thailand
NHRIS	National Human Rights Institution
NIPAS	National Integrated Protected Areas System
NIPT	Network of Indigenous Peoples in Thailand
NPA	Norwegian People's Aid
NTFP	Non Timber Forest Products
OECD	Organisation for Economic Co-operation and Development
PEFC	Programme for Endorsement of Forest Certification
PFE	Permanent Forest Estates
PHBM	Managing forests with the community (<i>Pengelolaan Hutan Bersama Masyarakat</i>)
PHRC	Philippines Human Rights Commission
PIR	Nuclear Smallholder Scheme (<i>Pola IntiRakyat</i>)
PL	Provisional Lease
PNG	Papua New Guinea
PolRI	Indonesian National Police (<i>Kepolisian Negara Republik Indonesia</i>)
PRI	Principles for Responsible Investment
RAI	Principles for Responsible Agricultural Investment
RFD	Royal Forestry Department
RRI	Rights and Resources Initiative
RSB	Roundtable on Sustainable Biofuels
RSPO	Roundtable on Sustainable Palm Oil
SABL	Special Agricultural and Business Lease
SCORE	Sarawak Corridor for Renewable Energy Project
SEANF	South East Asia National Human Rights Institutions Forum
SEDIA	Sabah Economic Development and Investment Authority
SIA	Social Impact Assessment
SIFMA	Socialised Industrial Forest Management Agreement
SRSG	Special Representative of the UN Secretary-General

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SUHAKAM	National Human Rights Commission of Malaysia
TAO	Local (Tambon) Administrative Organisations
TLA	Timber License Agreement
TNC	Trans-National Corporation
TNI	Indonesia National Armed Forces (<i>Tentara Nasional Indonesia</i>)
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention Against Torture
UNCERD	United Nations Convention on the Elimination of all forms of Racial Discrimination
UNCHR	United Nations Commission on Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNCTAD	United Nations Conference on Trade and Development
UNDD	United Nations Declaration on Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
UNPFII	United Nations Permanent Forum on Indigenous Issues
UN-REDD	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation
UNSRRF	United Nations Special Rapporteur on the Right to Food
UPR	Universal Periodic Review
VPSHR	Voluntary Principles on Security and Human Rights
WAMIP	World Alliance of Mobile Indigenous Peoples
WBG	World Bank Group
WRM	World Rainforest Movement

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FOREWORD

*Human Rights and Agribusiness:
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FOREWORD

By Sophie Chao

The process of globalisation and other transnational developments over the past decades have seen non-State actors such as cross-border corporations and other businesses play an increasingly important role internationally and at the national and local levels. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors with regard to human rights.

While broad-based business can, under the right circumstances, provide skills, opportunities and improved livelihoods for individuals and communities, untransparent deals, exploitative working conditions, poor safety standards, forced displacement and tenurial insecurity can also severely undermine human rights. Observing international human rights standards has traditionally been seen as the responsibility of governments, aimed at regulating relations between the State and individuals and groups. But the growing role of corporate actors, both within countries and across borders, has placed the issues of business and human rights firmly on the agenda of the United Nations and regional human rights bodies.

Most prominently, emerging understanding and consensus over the respective roles and responsibilities of governments and business with regard to the protection and respect of human rights have come about as a result of the UN ‘Protect, Respect and Remedy’ Framework on human rights and business. The UN Framework, elaborated by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, builds on major research and extensive consultations with all relevant stakeholders, including member States, civil society and the private sector. On 16th June

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2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights for the implementation of the UN Framework. This is the first time that a global standard has been established to address and prevent adverse impacts on human rights resulting from business operations.

From 28th November to the 1st December 2011, a workshop on 'Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform' was held in Bali, Indonesia. This landmark event was convened by the Indonesian National Human Rights Commission (Komnas HAM) and organised by Forest Peoples Programme and Indonesian NGO SawitWatch, with the support of the Rights and Resources Initiative, Samdhana Institute and RECOFTC – The Center for People and Forests. The workshop was attended by the National Human Rights Commissioners of Indonesia, Malaysia, Thailand and the Philippines, representatives of the Cambodian Centre for Human Rights (CCHR), the Timor Leste Ombudsman/Provedor, a member of the United Nations Permanent Forum on Indigenous Issues, notable academics, NGOs and indigenous peoples' organisations. Opening remarks were made by UN Special Rapporteur on the Right to Food, Olivier De Schutter.

The Bali workshop had three related objectives:

1. To lay the basis for the development of a regional human rights standard for agribusiness expansion in Southeast Asia.
2. To identify opportunities for the use of plural legal approaches in securing rights, especially in land, of indigenous peoples and other customary law communities.
3. To build mutual understanding between Human Rights Commissioners and regional lawyers, human rights activists and supportive NGOs, in support of the work of the Asia Pacific Forum for National Human Rights Institutions.

The business sector which formed the focus of Bali workshop was the palm oil industry. While it is recognised that this industry has brought economic benefits, employment opportunities and socioeconomic development to Southeast Asian countries, the expansion of large-scale oil palm plantations has also been associated with numerous adverse environmental and social impacts. Recent investigations and publications, along with numerous other reports, have revealed that oil palm operations have both directly and indirectly involved and generated social problems for local communities and indigenous peoples. Moreover, the findings also show that inadequate environmental impact assessment and monitoring have led to the destruction of forests, the conversion of peat land and severe damage to other high conservation value ecosystems.

This is the first time that the National Human Rights Commissions of Southeast Asia have come together to discuss and establish a standard with respect to human rights and agribusiness. The workshop focused on the challenges faced in ensuring respect for the rights of indigenous peoples and rural communities in the context of the rapid expansion of agribusiness, notably the palm oil sector, as well as the need to recognise their right to development and improve their welfare. The principal point that came out of the workshop was that companies have an obligation to respect human rights regardless of whether or not the country they operate in observes them. This is very important as weak national laws may be used by companies as an excuse to neglect human rights.

A significant outcome of the workshop was the development of a regional human rights standard – the *Bali Declaration on Human Rights and Agribusiness in Southeast Asia* – anchored in international human rights standards and the ICC Edinburgh Declaration.¹ Drawing from the UN Framework, the *Bali*

¹ Available at
<http://scottishhumanrights.com/international/biennial/edinburghdec>

Declaration stresses that ‘the responsibility of corporations to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.’

It is expected that the *Bali Declaration* will encourage governments and legislatures in the Southeast Asian region to take urgent steps to reform national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries’ human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence. The outcomes of the Bali workshop will be followed up by sustained advocacy to take the issues down to the ground in selected cases and advanced through the UN and ASEAN human rights fora.

Over the course of the four day workshop, over twenty five presentations were given on a wide range of thematic and regional topics. Each panel was followed by a brief discussion session. While some presenters provided written papers, a large portion of this publication was written by the editors based on Powerpoint and oral presentations given by the stated authors. Topics examined during the workshop include:

- legal reform and regional human rights standards
- securing customary rights through plural legal approaches
- the rights of indigenous peoples in international and national laws
- discrimination against indigenous peoples and local communities by the State and corporations
- trends in oil palm expansion across Southeast Asia
- the UN Framework

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- land grabbing and the threat to food security
- tenurial challenges and agricultural development
- indigenous peoples' knowledge and natural resource management systems

The *Bali Declaration*, drafted prior to the workshop, benefited from inputs and comments from all participants throughout the event. On the third day, the participants broke out into three groups: indigenous peoples, NGOs and National Human Rights Commissions. Each group discussed and identified potential synergies between and with the National Human Rights Commissions, in order to inform follow-up joint initiatives, recommend possible avenues for further advocacy, and finalise the Declaration, which was adopted by acclamation on 1st December 2011.

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CHAPTER I: SETTING THE SCENE

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Opening Remarks¹

By Olivier De Schutter

First, I would like to thank Dr. Marcus Colchester for his introductory remarks. It is a great pleasure for me to be able to contribute to this workshop, although unfortunately time constraints prevent me from attending in person.

The first time I worked on the issue of palm oil was when I held a hearing in Kuala Lumpur on the recognition of human rights in agribusiness in Southeast Asia in relation to the right to food. On that occasion, Fergus Mackay of Forest Peoples Programme presented a case study on the impacts of oil palm. This was followed by a visit to Sarawak where I had the opportunity to discuss with Dayak indigenous peoples who were seeing their forests disappear rapidly as a result of oil palm plantations being developed in the region. I was truly shocked to see the conditions in which development was taking place and the rampant deforestation that it was leading to. Agreements signed by village chiefs were being forced upon local communities by companies, resulting in the renunciation of all their customary lands and inherent customary rights. This was a vivid example of the nature and impacts of land grabbing, reminiscent in some ways of the blocking off of the commons from people to breed sheep in sixteenth and seventeenth century England.

As a result of globalisation, land has more value as it can satisfy the needs of faraway consumers who have a much higher purchasing power. Once land can satisfy the needs of those consumerists, pressures on land increase significantly. In the case of oil palm in Indonesia and Malaysia, the high demand for vegetable oil in Europe (and China) explains this pressure to develop plantations.

¹ Olivier De Schutter presented his Opening Remarks via teleconference.

In theory, local governments should strive to protect communities affected by the land grabbing phenomenon. The reality is that governments are often complicit with the corporations and investors seeking to develop the land in this way. Communities lack remedies, political power and grievance mechanisms and, in practice, we cannot really expect governments to intervene in supporting their rights.

From what I have witnessed in Malaysia (and which in many ways is similar to Indonesia and many parts of Africa), Free, Prior and Informed Consent (FPIC) requirements, supposed to benefit indigenous peoples, are in many cases not been complied with. If fully applied, this fundamental principle would support and justify further impact assessments to allow communities to decide what is in their best interests. Adequate information on environmental and social impacts of particular forms of land use are also part of fully implementing the right to Free, Prior and Informed Consent. Inherent in this principle is the right of communities to say 'no' to any project, to decide how the project will develop, and what compensation shall be made to them. As such, Free, Prior and Informed Consent is at the heart of the discussion concerning human rights, agribusiness and land grabbing today.

Free, Prior and Informed Consent is often interpreted as 'consultation', a reductionist misconception which poorly reflects the requirements for full implementation of the right to Free, Prior and Informed Consent. Communities must have the right to oppose forms of land use and seek alternatives to development projects with the investor and/or government. Originally developed for indigenous peoples, Free, Prior and Informed Consent is now becoming increasingly relevant for other communities finding themselves in similar situations, be they indigenous or not.

That being said, significant advances have been made in recent months. For example, governments, acting together with civil society, the private sector and international agencies within the Committee on World Food Security, and with the support of the Food and Agriculture Organisation (FAO), are currently developing

a set of Voluntary Guidelines for tenure in land, fisheries and forests, which will be a very important text as it is the result of widespread consultations over the past years with governments, international agencies, CSOs (including farmers' organisations) and the private sector. Serious negotiations are underway and the text is being discussed in the finest detail. Once finalised, this document will help define the rights of those who depend on land for their livelihoods. Although they are voluntary, I believe these guidelines will be too significant for governments to ignore and fail to include them in their domestic legislation. The Principles on Responsible Agricultural Investment² (jointly developed by the World Bank, the Food and Agriculture Organisation, the International Fund for Agricultural Development and the United Nations Conference on Trade and Development) will also have to comply with the FAO Voluntary Guidelines, although they may need to be revised in order to achieve this. As such, these Guidelines will serve as a framework in national law that is constraining enough to the government and the private sector for human rights in agribusiness to be genuinely supported.

Another development that should be noted is the endorsement by the Human Rights Council of its Guiding Principles on Business and Human Rights. While these principles could be stronger and more grounded in existing obligations of States and companies, it is a departure point for progress in these areas. In particular, two dimensions of the text should not be underestimated, as they have the potential to provide important leverage for future pressure to be exercised on businesses in order to ensure that they comply better with human rights standards. First, the text clearly underlines that *companies have a responsibility to respect human rights even where human rights are not fully respected by States in which they operate, or if the legislative framework is weak and loosely enforced.*

² Available at http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf

Companies today know that certain expectations exist, that they are expected not to infringe human rights and that they must monitor the impact of their activities on local communities' human rights. International organisations such as the OECD and the European Union are now seeking to implement this: the OECD Guidelines on multinational enterprises have now been amended to include a stronger reference to human rights, based on the UN framework, and the EU is seeking to make the framework operational in a range of sectors.

Second, the text states explicitly that *one major problem has been the segmented policies of States for different sectors, leading to a lack of unity in policies and leeway for political/economic vested interests in private companies by the State*. The Guiding Principles text insists on States acting much more consistently across policy areas and create set of incentives (rewards and sanctions) to encourage companies to comply with human rights standards.

To conclude, while pressures on land and the rampant expansion of monoculture plantations for export production development is happening on land that could indeed be used in a far more sustainable manner, significant efforts are already being made within the international community to strengthen existing frameworks and put pressure on companies to take responsibility for human rights issues related to their operations. This is very encouraging. Events such as this workshop are crucial to move further in this direction, and benefit particularly from the involvement and experience of indigenous organisations, CSOs and NGOs. We are dealing here with highly delicate issues but these platforms for dialogue and discussion are essential. I look forward to seeing the results of the Bali workshop and the finalised Declaration.

Human Rights and Business -Towards Legal Reform and Regional Standards

By Nur Kholis

It is an honour for me to be here today, to speak on the important issue of business and human rights with a focus on plural legal approaches to conflict resolution, institutional strengthening and legal reform. On this occasion, I would like to speak about business and human rights in general, examining the extent to which international rules for the protection of human rights create binding legal obligations on companies. The questions I seek to answer are: what defines businesses' human rights obligations? And how far do these extend?

There is growing interest in the responsibility of private companies to respect human rights. What was once a marginal issue is now a major concern of companies, as well as governments, intergovernmental and non-governmental organisations, investors and consumers. In July 2000, UN Secretary-General Kofi Annan launched the Global Compact, an unsponsored appeal which called on companies to commit themselves to respect nine core principles in relation to human rights, labour and environment.³ Hundreds of companies, including many of the world's largest, have joined this initiative. In December 2000, the governments of the United States and the United Kingdom, along with a group of extractive industry companies and non-governmental organisations, agreed on a set of principles, known as the *Voluntary Principles on Security and Human Rights*⁴ (VPSHR), to guide companies on security and human rights.

³ See www.unglobalcompact.org

⁴ Available at http://voluntaryprinciples.org/files/voluntary_principles_english.pdf

In June 2008, the United Nations Human Rights Council (Council) was unanimous in welcoming the ‘Protect, Respect and Remedy’⁵ policy framework that the Special Representative of the UN Secretary-General on Business and Human Rights had proposed for addressing business and human rights challenges. Now widely referred to as the UN Framework, it rests on three pillars: the State’s duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulations and adjudications; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.

Of course, insisting that companies behave in an appropriate fashion is not new. In relation to the environment and workers’ rights, companies have long been subject to regulation by governments and lobbying by advocacy organisations. What *is* new is the degree to which such expectations are being recast in human rights terms, and the degree to which new human rights claims are being advanced in relation to the private sector. The ‘spotlight’ of human rights concerns, traditionally focused on governments, is now increasingly turned on the conduct of private actors including businesses.

The human rights duties of businesses can be identified using a traditional dissection of human rights law. Most human rights give rise to four complementary duties: respect, protect, promote and fulfil. Governments are burdened not only with the passive, ‘negative’ duty to avoid violating the right (i.e. to respect), but also with the active, ‘positive’ duties which under certain circumstances require the provision of essential services (i.e. to protect, promote or fulfil). When a Special Rapporteur assigned by the UNHRC or other human rights monitors goes into a country to assess whether a government is acting in compliance with its obligations, he or she

⁵ Available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf

will examine all four of these areas. In contrast to the extensive responsibilities incumbent upon governments, the human rights duties of businesses as well as individuals are framed primarily in negative terms; that is to say, to refrain from violating the rights of others through their activities. For instance, a business or an individual should 'respect' people's right to adequate housing and therefore should not impede access to it. But neither a business nor an individual has the duty to protect, provide or fulfil the right to adequate housing.

But what about positive responsibilities to protect, promote, and fulfil rights? Should businesses have such obligations? Some human rights activists would certainly claim so, based firstly on the fact that businesses are members of society, and as such should participate positively in that society, and secondly based on the immense power of businesses. But there are reasons to challenge both these claims. Businesses are certainly community members and will often contribute to that community through the provision of community services, centres, facilities, infrastructures and so forth. But it is important to define duties in terms of what should be strictly required, not what would be ideal in the perfect society. Other members of society are not burdened - legally, or through social pressure - with positive obligations to actively promote human rights, only to refrain from violating them.

Businesses should be subject to no more, and no less, responsibility. As for the power of businesses, it is true that in the modern world businesses can be more powerful than governments, and are often in a position to exercise immense power over the government. But power does not necessarily imply equivalent responsibility. The natural extension of such an argument would lead one to the very nonsensical position of maintaining that a stronger individual has more duty than a weaker individual, and that a larger company or government has a greater duty than a smaller one. We must not confuse 'can' with 'must'.

In this light, should businesses have *any* positive responsibilities in relation to human rights? In four significant areas, they should.

First is in relation to their workers. Businesses control workers in the sense that they not only have the capacity to exercise authority over them, but also because the structure of business is such that authority is routinely exercised. So long as they exercise this level of control, businesses should act like a government in relation to the workers who are, in effect, their ‘citizens’, and promote, protect and secure their rights. Health and safety regulations are a good example of the application of this concept of fuller duties in relation to employees. For example, under most national legal systems, a business must not only refrain from abusing its workers, but it also has a ‘positive’ responsibility to make sure a worker is not abused by a co-worker.

Second, businesses have a duty to ensure that their products are not used in a way or to an end that violates human rights. This comprises the responsibility to take reasonable measures to prevent both the *intentional mis-use*, and the *unintentional wrongful use* of the product. For example, a chemical company has a responsibility both to avoid selling toxic chemicals to an oppressive government which is likely to mis-use them *and* to inform users of any safety precautions which must be taken before using the chemicals. Given the ability of human beings to harm other human beings through the ingenious use of all manner of products, this responsibility must be limited. To avoid the imposition of unrealistic responsibilities, it is suggested that responsibility should only extend to what a business can legitimately be expected to foresee as a potential wrongful use or mis-use of its products.

Third, a business should assume positive responsibilities in relation to anyone residing on the land on which they operate. This applies particularly to indigenous peoples and disenfranchised minorities. The company then has a responsibility to negotiate and to take into account the wishes of the group on whose land its activities are underway. This includes the ‘positive’ duty to keep the people

informed of plans for land use changes , to give the people a voice in those changes, and to ensure that the ‘voice’ of the people, that is to say, their leaders, is actually representative of the will of the majority.

Fourth, companies should incur positive duties when they *de facto* replace the government. Sometimes, when a company moves into an area, the government allows it to effectively take over that area. The company will build up the land, establish roads and transportation, infrastructure, utilities, and so forth. The government, particularly where it is unstable or geographically remote, will simply step out of the area, leaving a vacuum of governance in its place. The company fills that vacuum, thus becoming the only authority in the area. When this happens, the company needs to take on some of the positive responsibilities of the government with respect to human rights. This includes making sure the population in the area is safe and secure and that they have adequate provisions for their livelihoods.

It is clear that the four areas of more extensive responsibilities identified previously derive not from the power of businesses *per se*, but rather from the requirement that businesses ensure that the generally more far-reaching effects of their operations do not negatively affect people or communities. These negative effects - or rather, the *proximity* of the company to these effects - should also be of central consideration in determining the degree of responsibility of a company for the protection of any particular human right.

The proximity of a company to human rights violations can be viewed on three levels: direct, indirect, and no connection. ‘Direct’ entails a distinct, clear and unbroken connection between the activity of the company and the human rights violation. Examples include a company being discriminatory in its hiring practices, or locking the doors on workers to prevent them from running away. In such cases, the company has a straightforward and immediate responsibility to do whatever is necessary to mitigate or stop the violation.

‘Indirect’ entails a violation which the company contributes to, but does not directly initiate or perpetrate, by enabling an abusive practice to be established or continued. For example, companies will sometimes buy from suppliers or producers who violate human rights in their operations. Or, a company might undertake a joint venture with an oppressive government. In such cases, the company still has a certain degree of responsibility to take action to mitigate and compensate for the harm, but the action on their part should be proportionate to the nature of the link between the company and the violation in question.

In recent years, businesses have been the target of consumer action and human rights campaigns seeking to make them more responsive to human rights concerns. Many of these campaigners have targeted the business world because of the immense potential of business to bring about change. While these campaigns have undoubtedly been founded on good intentions, their effects have sometimes been destructive due to the unreasonable demands made of the business sector. As a result the real responsibilities have in some cases been left unfulfilled.

By defining the minimum responsibilities of businesses operating abroad, Komnas HAM, drawing from the Edinburgh Declaration, aims to go some way towards ensuring that these minimum responsibilities are not ignored. Some companies will want to go beyond that lower threshold, either because it will benefit their public relations, or because their customers want them to address these rights, or because they are guided by an ethical, social or religious tradition which demands more of those who have the power to effect change. But we believe that this should be a choice made freely by each business.

Most discussions on ‘standards’ deal with voluntary codes of conduct rather than legal regulations, and human rights standards tend to be referred to as guidelines, rather than legal provisions to which companies must adhere. However, there are signs that this is changing.

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In conclusion, ladies and gentlemen, I would like to assure you that the relevance of international law and of legal enforcement is beginning to be treated very seriously indeed. There is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory or incoherent efforts lacking in consistency. It is time however to give serious attention to the role international law can play in ensuring that companies are accountable in relation to human rights.

Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia

by Marcus Colchester

The purpose of this presentation is to demystify what we mean by legal pluralism and clarify the different bodies of law in existence that we need to think about at the same time. The three main bodies of law are customary law, superimposed national laws, and emerging international law, particularly international human rights law. All of these can be said to be operating simultaneously. Each system has its own internal logic, and legal pluralism is about how these levels of law relate to each other.

Customary norms are those by which societies regulate themselves. In the past, anthropologists have asserted that custom becomes customary law when infractions become punishable, but perhaps these kinds of definitions are not particularly helpful, as the world is too varied to be categorised into simple boxes according to definition. Customary law is itself plural and regulates life through many different layers and levels, such as through codes of conduct, oral decision-making systems, and unrecorded or unconscious social norms.

Multiple layers in customary law exist in Southeast Asia, including laws relating to land ownership and use, village laws, norms related to trade and larger relations and interactions with States and political bodies, religious laws and so forth.

The region's experience of colonialism also reveals the extent and influence of customary law as understood and approached by colonial regimes. As Niccolo Machiavelli famously noted in *The Prince*:

When states, newly acquired, have been accustomed to living by their own laws, there are three ways to hold them

securely: first, by devastating them; next, by going and living there in person; thirdly by letting them keep their own laws, exacting tribute, and setting up an oligarchy which will keep the state friendly to you... *A city used to freedom can be more easily ruled through its own citizens... than in any other way.*¹ (emphasis added)

This principle was at work in the colonial regimes of the Chinese (‘ruling barbarians through barbarians’), the British (indirect rule), the Dutch in Indonesia and the French in Indo-China. All of them encouraged local leaders to retain power, exercise their authority through the enforcement of customary law, raise taxes on behalf of the colonial power and thus avoid the costly imposition of direct administration and the rule of (imposed) law.

Although systems of indirect rule perpetuated discrimination and even racism, a result has been that today customary law retains much of its vigour and is still considered a source of rights, notably to land. However, there exist pitfalls in the way States deal with customary law. Elites may be co-opted or even created to be more answerable to the State or outside powers rather than accountable to their own people. There is the risk of codification and control of peoples’ way of organising their lives so that others can more easily manipulate it i.e. ‘freezing tradition’. There is also the invention or regulation of native courts whereby administrative annexation of indigenous systems of decision-making lead to a takeover of peoples’ capacity to rule their own affairs. As for native titles, they are generally treated as a lesser form of land right subject to State mediation, although some advantages do accrue through the recognition of certain indigenous peoples’ rights as different to normal property rights.

In Papua New Guinea (PNG), it is frequently cited that 97% of national territory is recognised as clan land based on custom, but there is a lack of clarity about whom these rights are vested in. It is

¹ Machiavelli 1513:16.

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thus possible, even easy, for outside interests (or collusive local actors) to create fake landowner associations in order to gain access to land and resources. 5.6 million hectares in PNG have already been allocated to other interests in this way. A moratorium was imposed after public outcry and people are now resisting formal titling of their land as they are sure that it will result in the same kinds of capture of their rights rather than their defence.

In Malaysia, NCR (Native Customary Rights) exist in law but are weakly interpreted and limited by further amendments. Hundreds of cases are underway in the courts, especially Sarawak. It is encouraging that the courts have begun to rule in favour of rights based on custom and the Constitution rather than just based on the Land Code. Unfortunately, the Executive continues to pursue a more limited interpretation of NCR, leading to this proliferation of cases in the courts. What is now required is a modification of the law to recognise customary rights and for overarching policy and legal reforms.

Comparison of plural laws

	Indonesia	Malaysia	Thailand	Cambodia	Vietnam	Philippines	Timor Leste	Papua New Guinea
Intl HR Treaties Ratified	Many	Few	Many	Many	Most	Many	Most	Most
Constitutions protect custom	Yes	Yes	Some	-	-	Yes	?	Yes
National laws respect customary rights	Weak	Weak	Unclear	Yes	-	Yes	?	Yes
Courts decide in favour of custom	Weak (not consolidated)	Strong	-	-	-	Yes	?	Yes

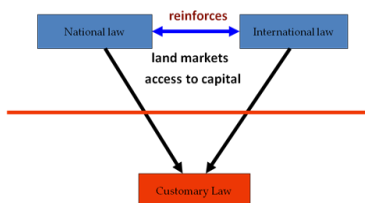
With regards to indigenous peoples' rights in international law (e.g. UNDRIP), international treaties and related jurisprudence state that indigenous peoples *do* have rights to land and territory that they have traditionally owned, occupied or otherwise used (as part of the right to self-determination within the State i.e. 'internal self-determination'). The international courts have ruled that both

indigenous and non-indigenous tribal peoples have right to their customary lands, based on a conjoint reading of their rights to property and the collective right to self-determination.

What is apparent is that the three bodies of law (customary law, State law and international law, each with their many subsidiary layers) operate in relative independence of each other. Societies organised through customary law have historically been confronted by the dual imposition of statutory laws and international laws, which, by and large, have justified severe limitations of the rights and freedoms of indigenous peoples.

International law recognises the rights of indigenous peoples including their rights to; self-determination; to own and control the lands, territories and natural resources they customarily own, occupy or otherwise use; to represent themselves through their own institutions; to self-governance; to exercise their customary law and; to give or withhold their Free, Prior and Informed Consent to measures which may affect their rights. Indigenous peoples are now practised at invoking international law to support reforms of State laws so they recognise indigenous peoples' rights in line with countries' international obligations and in ways respectful of their customary systems.²

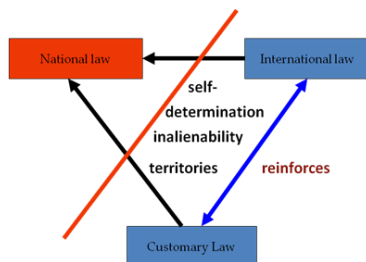
Western individualist laws: 1st and 2nd generation human rights



² Colchester & Chao 2011a.

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3rd generation human rights



Summarising the history of international human rights laws we can say that whereas the first and second generations of human rights laws emphasised individual human rights and tended to strengthen the way markets and capital could alienate land from indigenous peoples in line with national laws, third generation human rights have re-emphasised collective rights to self-determination, territoriality and the validity of custom.

This reconfiguration of human rights thus poses a challenge to States whose laws and policies discriminate against indigenous peoples and other peoples who make up the populations of their countries. By insisting that these peoples' collective rights must also be recognised, secured and protected by law, international laws and judgments have reaffirmed the validity of customary rights and the relevance of customary law. A substantial volume of jurisprudence has emerged in the UN treaty bodies, at the Inter-American Commission and Court of Human Rights and, more recently, at the African Commission on Human and Peoples' Rights, which sets out how these rights need to be respected and which instruct and advise national governments on how to reform national laws and policies in line with countries' international obligations.³

³ MacKay (ed) 2005-2011.

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How does this relate to agribusiness? People have a voice, have the right to say no, and have the right to negotiate with the government and companies the terms on which they agree (or do not agree) to be involved in and affected by the private sector. It is in support of these peoples that we hope that this meeting will be carried out.

Trends in Oil Palm Expansion in Southeast Asia: The Human Rights Implications

By Norman Jiwan

This conference is a follow-up to two workshops organised in 2010. The first, a regional workshop on trends in oil palm expansion in Southeast Asia, was held on 19th to 20th August at RECOFTC – The Center for People and Forests in Bangkok. Participants came from Indonesia, Malaysia, Thailand, Vietnam, Cambodia, PNG and the Philippines. A second workshop on legal pluralism was held in Cagayan de Oro, Philippines, on 23rd to 24th August 2010. Country presentations were made by organisations Sahabat Alam Malaysia, IDEAL, Tenaganita, Communities' Information and Communication Centre (CICOM - Malaysia), WALHI and Sawit Watch (Indonesia), Partners with Melanesians Inc. (PNG), NGO Forum (Cambodia) and the Faculty of Agronomy, and was supported by partners Forest Peoples Programme, Rights and Resources Initiative, RECOFTC-Thailand and Norwegian People's Aid. GTZ-Germany was also invited to attend.

Southeast Asia is experiencing an expansion and intensification in the conversion of forest and swidden land to oil palm plantations.¹ Optimal land to production ratio is achieved through oil palm monocultures over extensive areas of land, usually accompanied by the building of processing mills and roads for crop transport purposes. There are 4.6 million hectares of oil palm plantations in Malaysia and most expansion is now occurring in Sabah and Sarawak. Land is growing scarce: by 2002, expansion in Peninsular Malaysia was down to the last 340,000 hectares of conversion forest. Despite this, the Sarawak government plans to double the area under oil palm with a target of 60,000 to 100,000 hectares per year on customary lands. The mode of expansion is in the form of large estates with most smallholders in schemes with State-mediated

¹ Colchester & Chao 2011b.

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leaseholds on State or customary land. Only 10% are independent smallholders.

<i>Planting trends and patterns of production</i>			
Country	Plantation area (ha)	Planned expansion (ha)	Patterns of production
Malaysia	4.6 million	60,000 – 100,000/year mainly in Sabah and Sarawak	State-mediated leaseholds on State or customary lands. Large estates with most smallholders (SH) in schemes; few independents (10%)
Indonesia	9.4 million	10 – 20 million+	State-mediated leases for large estates on State lands. SH 40% area, half in schemes linked to estates and half independent
PNG	0.5 million	2 million – 5 million	Mainly “associated” smallholders schemes (90%), though SABLs and Nucleus Estate Model
Thailand	644,000	80,000/year	Mainly independent smallholders (70%)
Cambodia	118,000	Not known	Mainly large estates through ELC mechanism
Philippines	46,608	Potential for 304,350	Leaseback schemes and outgrower agreements between cooperatives and agribusinesses
Vietnam	650	70,000 – 100,000 by 2015	Experimental only to date

Oil palm plantations are estimated to cover 9.4 million hectares in Indonesia, where the most vigorous expansion worldwide is underway. Native land owners surrender their land to the State to be developed by private companies, usually but not always, with associated schemes for smallholders. Approximately 600,000 hectares are cleared each year and expansion is relentless in Sumatra, Kalimantan, Sulawesi and West Papua and is now increasing on small islands such as Siberut, Halmahera and Yamdena.

Papua New Guinea's oil palm plantations cover around 500,000 hectares and are located in West New Britain, Oro, Milne Bay and New Ireland. Recently, there has been a rapid spread of areas set aside for plantations through apparently fraudulent 'special agricultural and business leases' (SABLS) covering 5.6 million hectares of customary lands acquired without prior negotiation with the traditional owners. Cambodia's oil palm plantations, covering 118,000 hectares, have expanded as large estates over substantial areas of so-called 'vacant' land in forested regions through the issuance of Economic Land Concessions (ELC) whereby large allocations of State private land are granted to private companies for large scale agricultural investment. Communities with informal or customary rights in these areas have been pushed aside.

In contrast, large estates are rare in Thailand. The small-scale character of the Thai palm oil industry allows a broader distribution of rents than might be the case in countries where a few big companies dominate the industry and individual land ownership is limited. Plantations cover 644,000 hectares in total. Farmers owning less than fifty hectares manage approximately 70% of the total area planted with oil palm, and the majority are independent smallholders.

Community and indigenous peoples' rights in land have been affected by the different ways in which oil palm is expanding across Southeast Asia. In Indonesia, weak recognition is given to customary rights in national law, and these rights give way to development when sanctioned by the State as in the greater interest

of the country.² In Malaysia, a similarly weak recognition of rights is evident. In PNG, recognition of customary and indigenous peoples' rights is strong on paper and in practice communities are actively resisting the titling of their lands. However, there are ways in which these lands can and have been alienated in fact, if not in law. The Land Act (1996) allows long-term leases to be issued by the government over customary lands through a lease-leaseback process defined under the Land Act (1996) for periods of up to ninety nine years and the recipient of these leases can be non-indigenous companies.

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 plantation developers to manipulate landowners through bribery, through creating non-representative associations, and through making (often unfulfilled) promises of careful land management and provision of services.

Thailand has seen complex land tenure reforms carried out while State recognition of customary rights is beginning in Cambodia. In Vietnam, where all land is effectively that of the State, use rights are conferred and heritable but must also give way to development if development is seen by the State as in the greater interest of the nation. Finally, strong agrarian movements have taken place in the Philippines, providing for redistributive reallocation of land for peasants, while the Indigenous Peoples' Rights Act (IPRA) can be seen as a major advance in terms of indigenous rights in the region, although still undermined by weak rule of law.

² Colchester et alii 2006.

Land acquisition patterns

Country	Process and Issues
Indonesia	State mediated leases on State lands in which customary rights first extinguished. Smallholder titled.
Malaysia	State mediated leaseholds on State or customary lands. Smallholder titled.
PNG	Smallholders retain rights or 'lease-lease back' (now less common). Old settlement schemes. Effectively breaks up communal land.
Thailand	Land purchase on open market.
Cambodia	Economic Land Concessions on 'State Private Land'
Vietnam	Land allocations by the State can entail compulsory relinquishment of rights and forced resettlement (has not yet happened for oil palm)
Philippines	Permit issued by the State through estate ownership, lease agreement and outgrower schemes.

Political connections are playing a significant role in the way oil palm is expanding across the Southeast Asian region. In Indonesia, the 'real economy' is under the table, in the hands of the so-called *mafia hutan* or 'forest mafia'. In Malaysia, the government of Sarawak strongly influences the allocation of concessions in a highly untransparent process. In PNG, it is reported that 2.3 million hectares of customary land have been allocated through corruption. Thailand's land allocation process also appears unclear, as is the allocation of Economic Land Concessions (ELC) in Cambodia. In the Philippines, the oil palm (or 'tree of peace') and oil palm plantations are being introduced by the government as a means of minimising conflict in conflict-prone areas subject to rebellion and separatist movements, through the establishment of joint partnerships, economic development and employment generation.

A wide range of problems have resulted from the way in which oil palm plantations are expanding. Communities are experiencing internal division and inter-community conflict as a result of the 'divide and rule' techniques used by companies, for instance, in terms of employment opportunities offered to local inhabitants. The

displacement of indigenous peoples is compounded with land disputes, the deprivation of access to traditional territories and the loss of customary livelihoods. There is a serious lack of information available to indigenous peoples and local communities on the impacts and consequences of oil palm expansion on their customary lands. Certain groups are particularly vulnerable as a result of their limited rights, such as women and migrant workers.

Numerous negative health impacts have also been reported, such as for instance, the hazardous effects of pesticides and chemicals such as paraquat. With the exception of Thailand, little training on the safe use and potential risks of these chemicals is made available to local inhabitants and plantation workers, compounded with poor medical facilities, lack of suitable protective equipment and the weak or nonexistent implementation of safety regulations.

Subcontracted migrant workers, particularly vulnerable to work and human rights abuses, are being lured by companies with false promises of land and employment. When they do succeed in finding a job, they tend to be overworked and underpaid. This is exacerbated by untransparent and delayed remuneration and the fact that workers are regularly charged extra fees for transport and debt repayment. Hiring and firing workers remains the prerogative of the companies.

Finally, the environmental impacts of large-scale mono-crop plantation expansion are now well established.³ These include the loss and degradation of forest resources, water pollution, pest infestation, soil depletion, increased vulnerability to drought and desertification, and increased carbon emissions.

Other major issues resulting from the way in which oil palm is expanding include the lack of access to reliable and complete information regarding projected plantations and the control of the media by the State and corporations. The permit issuing process shows a severe lack of respect for indigenous peoples' and local

³ WRM 2001; WRM 2006; Wakker 2005; DtE 2002.

communities' right to Free, Prior and Informed Consent as enshrined in international law and a number of voluntary standards in the industry sector. Whereas certain communities do choose to work on plantations, those who refuse are frequently criminalised.

The influence of the military is also at play, operating indirectly but firmly present in the structure of palm oil companies and employed on plantations by companies as protectors of property and staff. The influence of investors and the lure of economic gain also encourage governments to support the expansion of plantations, often based on the myth that the land allocated for plantations is vacant, idle and degraded land, when in fact, these are lands encumbered by customary rights and essential to the livelihoods of indigenous peoples and local communities.⁴

To conclude, in order to ensure that oil palm only develops in beneficial ways, voluntary standards of organisations such as the Roundtable on Sustainable Palm Oil (RSPO) need to be backed up by national tenurial and governance reforms which establish mandatory requirements all the way up and down the supply chain. If working on their own, voluntary standards will not be enforceable. Second, there is a need to ensure that local peoples' land rights are truly respected and protected and that workers' rights are secured. Without such protections, expansion is likely to benefit investors, traders and national elites at the expense of indigenous peoples, the rural poor and the vulnerable ecosystems upon which they depend for their livelihoods.

Research on oil palm expansion across Southeast Asia shows that where farmers and indigenous peoples' land is secure and there is rule of law, oil palm tends to be developed as a smallholder crop with better outcomes in terms of livelihoods. However, where land rights are insecure or law enforcement is weak, oil palm tends to be developed in the form of large estates with problems for prior occupants and ensuing land conflicts and human rights abuses.⁵

⁴ Colchester et alii 2007; Colchester & Jiwan 2006; Borras et alii 2011.

⁵ Colchester & Chao 2011b.

Regional Approaches to Human Rights – Towards Standards Setting

By Tint Lwin Thauung

It is now six decades since the proclamation of the Universal Declaration of Human Rights, and yet the world still faces major gaps in the understanding, promotion and defence of human rights. The Universal Declaration on Human Rights was adopted by the UN General Assembly on 10th December 1948, and was declared a common standard for all peoples and nations. In 1993, the Vienna Declaration reaffirmed commitment to the Universal Declaration in the wake of the Cold War, and stated that human rights – comprising civil, political, economic and cultural rights – are interrelated and indivisible.

Despite the proclamation of the Universal Declaration, a growing number of human rights violations related to the exploitation of natural resources continue to be reported. According to UNEP, 40 % of inter-State conflicts were associated with natural resources exploitation over the last sixty years.¹ In particular, Burma (Myanmar), Cambodia, Indonesia, Nepal and PNG stood out in the Asia-Pacific region due to civil wars and internal unrest fuelled by natural resources exploitation. Most conflicts occurred between ethnic groups, or local people, and the government. In addition to political motivations, competition over control over natural resources such as forests, natural gas, seas and mineral resources, is one of the key drivers of violent conflicts. An example of this is the ongoing civil war along the eastern border of Myanmar between ethnic Karen national races and the military governments of Burma (Myanmar) which has persisted for over six decades. This protracted civil war has led to reportedly devastating violations of human rights, including violence, ethnic cleansing, gang rapes, forced

¹ UNEP 2009.

labour, and floods of refugees fleeing into neighbouring countries, as well as the massive destruction of forests and forest resources.

Complex political and economic systems are shaping the landscape of Southeast Asia. The economies of Indonesia, Malaysia, Myanmar, Cambodia and Lao PDR rely mostly on natural resource exploitation. Vietnam, Thailand and Singapore are also seen as the economic hubs of Southeast Asia whose processing industries dominate the national economy. Southeast Asian countries are highly politically diverse, featuring centralised Communist systems as well as emerging democracies. The complexities of the political systems in place pose a number of challenges to the transparency and efficiency of judicial systems in Southeast Asia, particularly in countries still facing economic hardship. According to a report by Transparency International, Singapore earned the highest score in the corruption index (i.e. the least corrupt country) and Myanmar was ranked with one of the lowest scores (i.e. one of the most corrupt countries) while other countries in Southeast Asia were mostly ranked in the lower range of the corruption index (i.e. high corruption).² Most notably, corruption in the private and public sectors has been a major cause of illegal logging leading to rapid and uncontrolled deforestation in the region.

Compounded with the complexity of existing political systems, countries of the Asia-Pacific region are inhabited by a huge diversity of ethnic groups and nationalities, most of whom reside in natural resource rich border areas. The traditional practices, beliefs, religions, cultures and knowledge of these peoples vary significantly varied from one to the other. But at the end of the day, their commonality lies in the fact that they are all ‘human beings’, and as such, their traditional laws and customary practices must be respected and acknowledged by modern law.

A number of initiatives have been undertaken to this end. Notably, the ASEAN Intergovernmental Commission on Human Rights

² Transparency International 2011.

(AICHR) was launched on 23rd October 2009 with the mandate to ‘promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.’³ National Human Rights Commissions have also been established in a number of ASEAN countries and demand to build their capacity is growing. Furthermore, various rights-based organisations and private sector initiatives pushing for the development of social safeguards in certification schemes have approached the issue of human rights and business from different angles, although challenges remain in their implementation.

In a recent roundtable of ASEAN Chief Justices organised by ADB and UNEP in Jakarta, Indonesia, discussions focused on capacity-building measures and the need to understand and acknowledge traditional and indigenous laws in addressing conflicts related to natural resource exploitation. The judges held the common view that practising conventional and national laws alone does not take into account sufficiently the views and perceptions of local people whose traditional jurisdictional practices have persisted over generations. The challenges lies in getting judicial experts to understand and put into practice the great diversity of traditional and indigenous legal systems, most of which are still orally transmitted.

Judicial systems should be free from political, military and personal influences in the handling of illegal forest activities. Judicial professionals must keep abreast with rapidly changing circumstances in terms of economic development, political dynamics and the growing demand for social justice. It is evident that legal institutions in Southeast Asian countries are in a position to take a leading role in promoting basic human rights as well as indigenous peoples’ rights. Through reform, collaboration and the adoption of a holistic approach, judicial professionals in these

³ AICHR Terms of Reference. Available at <http://www.asean.org/DOC-TOR-AHRB.pdf>

countries can play an active role in reducing human rights violations associated with natural resource exploitation. Revising national frameworks to make them more transparent, simplified and participatory are critical to addressing and dealing more effectively with human rights violations. Judicial professionals can also set an exemplary role model for other relevant institutions in promoting the right conduct and moral ethics. They can also engage in actively promoting information sharing with other stakeholders and updating their practices to cope with changing circumstances. Through networking, capacity-building and maintaining high morality in professional conduct, judicial professionals can become exemplary game changers in combating illegal forest activities.

Market-driven certification schemes such as the FSC (Forest Stewardship Council), PEFC (Program for Endorsement of Forest Certification), Fairtrade and the RSPO are essentially grounded in the need for strong respect of human rights, labour rights and people's participation in decision-making and benefit-sharing processes. REDD+, a recent emerging mechanism to address global climate change, also requires the implementation of a process for the respect of the right to Free, Prior and Informed Consent in dealing with local communities so that they can actively participate in REDD+ practices at the local, regional and national levels.

Recognition and consideration of traditional and indigenous laws and rights, as well as respect for cultural and gender dimensions, must become a fundamental norm for all forms of development, in particular, those that involve changes in land uses.. RECOFTC (Regional Community Forestry Training Centre for Asia and the Pacific) intends to continue its steadfast support for both people and policymakers to improve respect for human rights around Asia and the world. One of three guiding principles of RECOFTC is to provide support for strong and clear rights for forest peoples. One avenue through which we build capacity in promoting human rights is conflict management training and related research. RECOFTC also supports the Forest Governance Learning Group in ten countries (three in Asia and seven in Africa), where the focus is on

social justice in forestry. In our work on REDD+, RECOFTC focuses on ensuring social safeguards within the REDD+ mechanism to protect the rights and livelihoods of local people. RECOFTC also provides training for trainers to more effectively implement certification schemes in Asia.

To move toward greater respect for human rights, greater coordination among stakeholders is critical. These include governments, regional mechanisms such as ASEAN, civil society, the private sector, faith groups, academics and local communities. Developments to this end, such as the *Bali Declaration on Human Rights and Agribusiness* which is a prime outcome of this meeting, need to be followed up with actions, monitoring and reform in order to ensure that human rights standards are better acknowledged and respected by all stakeholders, and for effective and visible impacts to be made at the local level.

DISCUSSION

The opening remarks of Olivier De Schutter on land acquisition and food security, and the four presentations introducing the themes of human rights, agribusiness, oil palm expansion in Southeast Asia and regional approaches to human rights, stimulated a discussion focused on the following key issues.

Access to justice and redress mechanisms.

In some cases, court rulings may be positive but the executive may not support or implement the decisions taken by the court. The question is therefore as to how the implementation of court judgments can be verified and sustained, possibly with the support of National Human Rights Commissions. Resorting to alternative voluntary mechanisms of arbitration was also suggested as a possibility.

Customary and statutory law.

In many cases, customary laws and rights are either subordinated to or neglected in statutory law. The fact that many customary laws are unwritten and orally transmitted makes them particularly difficult to formalise within national jurisdiction. This asymmetry needs to be dealt with such that customary rights are given equal weight, but the question remains as to how to implement this at the practical level. Should blanket/basic recognition be given to customary rights, or a more detailed form of recognition? In other words, how can we get the best of both worlds?

The risk of manipulation of customary law.

There are dangers in the over-specific *and* under-specific definition of customary laws, both of which risk being manipulated and misused. We need to find a middle ground between these two extremes. Every place will be different in its context, be it in terms of the law, the political framework, the economy, the culture and so forth. It is thus important to constantly inform ourselves by our national and local realities rather than seek simple answers. We

must recognise both the great diversity in problems and therefore in the solutions.

Bringing the buyers into the picture.

In addition to the three important players involved - the State, the companies and the communities – we must not leave the purchasers out of the picture. Their responsibilities and roles must also be taken into consideration as they play an important part in creating and shaping the market. This is particularly the case for India, China, the Middle East and Indonesia. Addressing the supply chain in both domestic and export-oriented production is also critical.

The power of corporations versus the State.

It was pointed out that in Indonesia, companies can actually wield more power and influence than the State itself. Some have their own contracted police and security forces, sets of rules, procedural norms and territorial claims. This imbalance in power leads the State to surrender to the demands of corporations for capital, land, labour and so forth. This is of major concern if we appeal to governments to put human rights back into business. There are serious problems of law enforcement, exacerbated by the limited reach of National Human Rights Institutions. The problem in Indonesia is that often, companies just do not care about human rights or their responsibility to respect them. Human Rights Commissions have in the past been rejected as mediators by companies (including foreign investors), even though their involvement was explicitly requested by the communities. In these cases, the companies wield great power and the governments are reluctant to oppose them, as they fear giving the impression that they are creating a non-conducive investment climate.

Who has customary rights?

Customary laws have been perceived as highly feudal and inequitable, particularly with regards to more marginalised groups within society, such as women, youth, the landless and the poor. Migrants pose another problem – should their practices also be

considered as customary and thus afforded the same weight? After all, they may also have claims to land and resources if they have depended on them for many years, and if they too have been subject to abuse and repression under statutory laws and practices.

Divers paths to justice.

Many remedies do exist to resolve the tensions between human rights and agribusiness development, and all of them need to be explored. One can work directly with the companies in violation of human rights. One can bring in local governments as active participants in the process. There are also voluntary standards to appeal to, or complaints can be taken to local and national courts. International ombudsman bodies, international courts and UN bodies can act as further avenues for redress. In the experience of FPP, remedy can best be achieved by pursuing multiple paths at the same time, and one needs to keep the options open at all times.

Different ways of dealing with the private sector to curbing human rights violations.

Three important strategies were identified as instrumental to curbing human rights violations by companies. One is to target and stop the source of capital of the company (e.g. international financial institutions). Another is to strengthen peoples' capacity and empowerment, so that they have control over their natural resources. The third way is to control the buyers and influence their consumer choices.

The discussion ended with a number of open-ended questions:

Are international human rights institutions able to create mechanisms to constrain the power of companies to violate the rights of indigenous peoples and local communities when the company is stronger than the State?

*Human Rights and Agribusiness:
Plural Legal Approaches to Conflict Resolution, Institutional Strengthening
and Legal Reform*

In what practical ways can capacity-building for indigenous peoples' movement and human rights institutions be achieved to deal with the expansion of oil palm?

What kind of remedial mechanisms and mechanisms of redress can be established for communities negatively affected by agribusiness development?

*Human Rights and Agribusiness:
Plural Legal Approaches to Conflict Resolution, Institutional Strengthening
and Legal Reform*



CHAPTER II: HUMAN RIGHTS AND BUSINESS IN INTERNATIONAL LAW

*Human Rights and Agribusiness:
Plural Legal Approaches to Conflict Resolution, Institutional Strengthening
and Legal Reform*

The second session began with a discussion revisiting the challenge of companies wielding greater power and influence than the State, raised in reference to oil palm companies operating in Indonesia. While this was agreed to be of great concern in terms of the protection and recognition of human rights, it was also acknowledged that the State too has a legal responsibility to protect the rights of its citizens, particularly when such rights are undermined by the activities of corporations. Governments play a key role in the issuance of permits and lease agreements over concessions, and can, provided there is the political will to do so, base these decisions on a human-rights based evaluation of the development project in question. As such, the State can and must play a seminal role in the recognition of indigenous peoples' rights and the restitution of lands grabbed by companies. The question remains as to what political configuration is necessary to enable such practices.

Indigenous Peoples and International Human Rights – Plural Approaches to Securing Customary Rights

By Devasish Roy

The concept of indigenous peoples from a human rights and political perspective

There is no internationally agreed definition of indigenous peoples. However, ILO Convention No. 169, and its earlier version, ILO Convention No. 107, provide some criteria to help identify indigenous peoples.¹ Similarly, UN Special Rapporteur Martinez

¹ Article 1(1)(a), ILO Convention No. 169 states: 'This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own

Cobo also referred to some identifying criteria, which have come to attain the respect of a formal definition within the United Nations system.² The aforesaid criteria, in combination, include self-identification as a group, close attachment to a territory, cultural uniqueness, marginalisation, and so forth.

With a broad overview, and drawing upon the criteria mentioned in the ILO Convention and the Cobo report, we may identify three major characteristics that generally distinguish indigenous peoples from other peoples. First, that indigenous peoples tend to be those that have been excluded from modern nation-building processes - including in designing the architecture of the State structure, involvement in major political and economic decision-making processes, and in the process of framing land and resource ownership and use laws among others - and hence have a marginalised or disadvantaged status within society. Second, that indigenous peoples tend to govern themselves through customary laws and traditional legal and other decision-making institutions,

customs or traditions or by special laws or regulations;(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'. Article 2, ILO Convention No. 169 further clarifies the concept of indigenous peoples: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

² Jose Martinez Cobb, Study of the Problem of Discrimination against Indigenous Populations, UN Document: E/CN.4/Sub.2/1986/7/Add.4, para 379: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'

often based upon oral traditions, whether or not the same are formally recognised by the legal system of the concerned State. Third, that indigenous peoples exercise a number of collective rights that are intertwined with their identity and their integrity as peoples, including their rights over their land, territory and natural resources, based upon the their right to self-determination, as peoples.

A fourth characteristic may be added: that indigenous peoples generally practice a form of spiritual pluralism (this phrase is preferred here to ‘syncretism’ and ‘polytheism’), even while adhering to a mainstream religion (in contrast, non-indigenous peoples, when they adhere to any formal religion, generally follow a single faith to the exclusion of others e.g. Christianity, Islam or Judaism - the case of Hinduism is somewhat more complex).

Two of the aforesaid four factors, namely, the practice of customary law by indigenous peoples, particularly concerning land and natural resources, and the close links between the identity of indigenous peoples and their collective land and resource rights, are particularly relevant to our discussion on the question of securing customary resource rights for indigenous peoples. However, before the discussion proceeds further, it is important to anchor it within the framework of international human rights law, and where relevant, national human rights regimes.

Indigenous peoples’ rights and the UN Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) can be best understood as contextually re-interpreting existing human rights law in a non-discriminatory manner, while drawing upon existing international standards in United Nations declarations and inter-governmental human rights treaties. No United Nations member State today opposes the Declaration any longer, and it has been acknowledged in the conferences of the UN Framework Convention on Climate Change (UNFCCC) and in a number of other global human rights and environment-related

processes in recent years.³ Some countries have reproduced its provisions in domestic laws. The Declaration may thus be regarded to have attained the status of customary international law, which binds the United Nations system, and all its member States, to implement the rights stipulated therein, despite the reservations maintained by some governments.

The UNDRIP provides for the removal of all discriminatory acts against indigenous peoples, including through affirmative action and other ‘special measures’, aiming to bring forth *substantive* equality, as opposed to mere *procedural* equality, focusing on the result, rather than the process. Thus it has been said that ‘the [UN Declaration on the Rights of Indigenous Peoples] is an important normative instrument in this context, and reflects the existing international consensus on the scope and content of indigenous peoples’ rights’, as reflected in judicial pronouncements of

³ During the adoption of the Declaration, only four member states of the UN - namely, the USA, Canada, Australia and New Zealand - voted against its adoption. All of the aforesaid states have since reversed their position, now opting to support its implementation. However, several governments in Asia, including Bangladesh, China, India and Indonesia, have made cautious remarks about the applicability of the provisions of the instrument to their citizens who regard themselves as indigenous, and about the discrepancies between the Declaration and their national laws. See, *inter alia*, Erni C 2008 ‘Introduction: The Concept of Indigenous peoples in Asia’ in Erni C (ed) 2008. pp. 13-25.

international human rights treaty monitoring bodies⁴ and of superior courts in some countries.⁵

Broadly speaking, there are two core concepts that are relevant to the rights of indigenous peoples under international human rights law, including the UNDRIP. One of them is the *absolute prohibition against discrimination*, which is a human right of a high status, regarded as a peremptory norm of international law or *jus cogens*, and hence, one that may not be derogated from under any circumstances. The UNDRIP declares that indigenous peoples and individuals are equal to all other peoples and individuals, and that there can therefore be no discrimination to prevent the exercise of these rights by the peoples and individuals concerned (article 2).

In other words, the Declaration clarifies that collective and individual human rights that apply to a people or an individual, as the case might be, apply equally to indigenous peoples and individuals, and that it must be ensured that the concerned rights are able to be exercised by the peoples and individuals concerned in a manner that is not subjected to discrimination of any kind. This was deemed necessary to emphasise because the history of humankind, particularly over the last five centuries or so, is replete with examples of gross acts of discrimination perpetrated against indigenous peoples, whether through colonialism - transcontinental

⁴ See, for example, the views of the UN Committee on the Elimination of All Forms of Racial Discrimination: CERD/C/ECU/CO/19; CERD/C/NIC/CO/14; CERD/C/FJI/CO/17; CERD/C/USA/CO/6, Annual Report of the UN High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General on the rights of indigenous peoples, UN Document A/HRC/10/51, 14 January 2009, para 16, as cited in Roy & Henriksen 2010.

⁵ Roy & Henriksen 2010. See, for example, The Supreme Court of Belize 2007, Consolidated Claims: Claim No. 171 of 2007, and Claim No. 172 of 2007, para 131.

and from the same geographical land mass, region or sub-region - or otherwise.

Three preambular paragraphs of the Declaration, among others, draw particular attention to the historical circumstances of discrimination. One such paragraph in the Declaration states:

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust’.

A related paragraph reads:

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind.

Yet another paragraph clarifies the issue of discrimination even further when it states the following:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests’. This paragraph in a way sets the parameters of, and the context within which, the corrective measures that are now needed to address these past, and often ongoing, injustices may be framed.

Crucial aspects of the Declaration concerning the right of self-determination

The Declaration clarifies that this right attaches to indigenous peoples, including through autonomy and self-government. The preamble further states:

Recognising and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

In the same vein, the plurality of the situations of indigenous peoples in different parts of the world is acknowledged in the following manner:

Recognising that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

The United Nations Declaration on the Rights of Indigenous Peoples and indigenous peoples' land and resource rights

In addition to the aforesaid broad areas of non-discrimination and self-determination, the UNDRIP contains several provisions on the civil, political, economic, social and cultural rights of indigenous peoples. The Declaration makes specific reference to their land rights and resource rights and the need for the formal recognition of these rights (at articles 25 and 26). The complex issues of non-recognition of indigenous peoples' land rights, including those based upon their customary laws and procedures, the appropriation of their lands and the need to provide redress, among others, have

also been dealt with in a detailed manner, such as in the two articles of the UNDRIP, reproduced below.

Article 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28 (1):

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Flowing from the right to self-determination is the relatively recently-expounded principle and right of Free, Prior and Informed Consent (FCIP). UNDRIP provides several specific references to Free, Prior and Informed Consent in addition to the one in the context of restitution and compensation for appropriated lands [(article 28(1))].

These include Free, Prior and Informed Consent in relation to relocation (article 10), restitution of cultural, intellectual, religious and spiritual property (article 11), adoption and implementation of legal and administrative measures (article 19), conservation and protection of the environment (article 29), militarisation (article 30) and projects affecting indigenous peoples' lands and territories (article 31).

Other international human rights instruments and indigenous peoples' rights

It is important to bear in mind that international human rights principles and norms constitute the *floor* and not the *ceiling* of standards to be respected. They reflect a *progressive* development of law and they cannot be regressive. An example of this is the progression in human rights standards and approaches as evidenced in the evolution of ILO Convention No. 169 on Indigenous and Tribal Peoples from a far more integrationist or assimilationist approach to indigenous peoples as implicit in some of the provisions of the ILO Convention No. 107 on Indigenous and Tribal Populations. In addition to revisions of the actual provisions of the earlier standards on indigenous peoples (such as the provisions of ILO Convention No. 107), in the case of monitoring too, a progressive approach is now applied, e.g., when supervising the provisions of the ILO Convention No. 107.⁶ In this light, international declarations and treaties can be seen as tools and instruments that States and the UN system can employ to take forward and adapt to changing contemporary and progressive contexts and needs, while accounting for the historical circumstances of exclusion, forced assimilation and discrimination.

The ILO Convention No. 169, along with the ILO Convention No. 107 (which is no longer open for ratification, after it was revised and the more progressive Convention No. 169 was adopted), are the only international human rights treaties that deal directly and substantively with the rights of indigenous peoples. In the Asia-Pacific region, only Fiji and Nepal have ratified Convention No. 169, while Convention No. 107 remains valid for Pakistan, India and Bangladesh.

Among other major international human rights and environment-related instruments that are relevant to indigenous peoples' land and

⁶ Swepston 1990:677-714; Roy & Kaye 2002:19.

resource rights are the following: the United Nations Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966 [1976]), the International Covenant on Economic, Social and Political Rights (1966 [1976]), the Convention on the Elimination of all forms of Racial Discrimination (1965 [1969]), the United Nations Convention on the Elimination of all forms of Discrimination Against Women (1979), the Rio Declaration and Programme of Action (including Agenda 21 and the Forest Principles; 1992), the Convention on Biological Diversity (1992) and the UN Framework Convention on Climate Change (1992). Several countries in Asia have ratified some of the treaties named above, and also adopted national legislation reflecting some of the provisions of the aforesaid treaties and declarations.

Indigenous peoples and national laws in Asia

Indigenous peoples are known by different terms in Asia and in other parts of the world and their rights are treated in a varied manner in constitutional and other domestic legal instruments. Examples include ‘ethnic minorities’ (in Laos, Vietnam and China), ‘hill tribes’ (Thailand), ‘natives’ (Malaysia), ‘tribes’ (India, Pakistan and Bangladesh) and ‘*masyarakat adat*’ (meaning customary law people in Indonesia). Some of the governments of the aforesaid countries do not formally acknowledge the relevance of the indigenous peoples’ declaration in their national contexts.⁷ Only the Philippines uses the English phrase ‘indigenous cultural communities/peoples’, while the English version of the draft Constitution of Nepal also refers to indigenous peoples.

Irrespective of the terminology used, several countries in South and Southeast Asia do possess extensive constitutional and other legal instruments dealing with indigenous peoples’ rights - by whatever name they are called - including on representation, non-discrimination and affirmative action, and land and natural resource

⁷ Erni 2008.

rights, including those based upon customary law. Some of the most progressive legislation on indigenous peoples' rights, including constitutional provisions, is to be found in the Philippines, Malaysia and in India.⁸ Nepal has recently made reasonable progress in drafting constitutional and other laws on its indigenous peoples. In other countries, the situation varies from reasonably strong safeguards - such as in Cambodia - to moderate-level safeguards - such as in Indonesia, Laos and Bangladesh (for its Chittagong Hill Tracts region).⁹ As a matter of strategy, advocates of indigenous rights in Asia and elsewhere may invoke national constitutional provisions on non-discrimination and other matters, and attempt to 'flesh out' these provisions by supplementing them with contextual interpretation of international human rights law, including from UNDRIP, and any human rights treaties that the country might have ratified or acceded to.

The concept of indigenous customary land rights under national laws in Asia

In some countries of Asia, there is national legislation on customary land and resource-related matters. In some of these cases, especially where there is constitutional recognition and entrenchment, indigenous peoples are able to invoke these provisions to secure their customary land and resource rights at least to some extent. In practice, however, even in such countries, customary resource rights have often to make way to competing and contradictory national regimes governing 'forest' lands, or other areas, wherein no formal titles have been granted to indigenous communities or individuals, and where the State sees a compelling interest in facilitating commercial plantations and/or extractive industries. This is the case in varying degrees in Indonesia, Thailand, Laos and Cambodia, and even in Malaysia, Philippines and India.

⁸ Roy 2005.

⁹ For a detailed discussion of the status of customary law in the Chittagong Hill Tracts, Bangladesh, see Roy 2005 and Roy 2004.

Colonialist forestry regimes, Eminent Domain and the devaluation of customary law

Among the most problematic issues in several Asian countries are the remnants of State-centric and exploitation-oriented forest and land laws that were initiated during the colonial periods, particularly in the nineteenth and twentieth centuries (Thailand too has similar laws, although it was never formally colonised by a foreign country). One such concept is what in some jurisdictions is referred to as the *principle of Eminent Domain*, which, stated simply, reserves for the State an ‘eminent’ or ‘pre-eminent’ right to take over or use lands of certain categories with the strength of force and sanctions, to the exclusion of others (in our case, indigenous peoples). This principle is often invoked in accompaniment with State-granted concessions to private and corporate interests. A similar notion prevails in the Philippines, following the Spanish tradition of colonial jurisprudence, where it is known as the *Regalian doctrine*.¹⁰

Forest-related laws in South and Southeast Asia in particular, exemplify the use of the *Eminent Domain* principle in its starkest

¹⁰ ‘We, having acquired full sovereignty over the Indies, and all lands, territories, and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining to the royal crown and patrimony, it is our will that all lands which are held without proper and true deeds of grant be restored to us as they belong to us, in order that after reserving before all what to us or to our viceroys, audiencias, and governors may seem necessary for public squares, ways, pastures, and commons in those places which are peopled, taking into consideration not only their present condition, but also their future and their probable increase, and after distributing to the natives what may be necessary for tillage and pasturage, confirming them in what they now have and giving them more if necessary, all the rest of said lands may remain free and unencumbered for us to dispose of as we may wish?’ Fr. Joaquin G. Bernas SJ 2008. Available at <http://opinion.inquirer.net/inquireropinion/columns/view/20080922-162061/Ancestral-domain-vs-regalian-doctrine>.

manifestation. These laws often neglect or otherwise subordinate indigenous peoples' and local communities' customary land and resource rights.¹¹ Vast swathes of lands acquired for plantation or industry-oriented 'forestry', exploitation of mineral resources and other 'development' purposes are frequently classified as 'vacant', 'idle' and 'degraded', or as 'wastelands', to justify invoking the acquisitionist principle.¹² Sometimes these overriding powers are even expressly mentioned in national constitutions.¹³

Another challenge, also often related to the Eminent Domain principle, although not directly drawing upon it, is what may be regarded as the 'fossilisation' of customary land and resource rights of indigenous peoples. Fossilisation - not a formally recognised or academically agreed upon term by any means - denotes a subterfuge often employed by States to 'freeze' customary law to a particular historical period in time, in a decidedly reductionist manner, in order to deny indigenous rights by asserting over-riding State rights over lands, territories and resources. For example, if an indigenous community traditionally 'used' the resources of their lands and territories without ever transferring the 'ownership' of those lands and territories – as they did not have a tradition of written title or of alienating their title - it was argued that the community had no right over the 'title' to the land, which, somewhat by default, was said to 'belong' to the State alone. Similarly, rights over sub-surface resources, such as minerals, are often appropriated by States to the exclusion of indigenous peoples.

¹¹ For an overview of statist and colonialist forest-related regimes in Asia, see Lynch & Talbott 1995.

¹² See. e.g., the Forest Act, 1927 (esp sections 3 and 5), applicable, with some variations, in Bangladesh, India and Pakistan.

¹³ Such acquisitionist powers have been made to apply in India to 'any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans': Article 31A(2)(iii), Constitution of India. See also Sing 2005:51.

A similar effect is also brought about by either de-recognising customary laws, or refusing to provide formal recognition to such laws, or by formally defining these laws, customs and practices in a reductionist manner, through statutes, in the process, reducing the former's status into mere 'customs' that are subservient to statutory laws, whenever a conflict between customary law and statutory law emerges. Where rights are acknowledged, these are regarded as mere 'user' rights or *usufructs* in the nature of mere revocable licences. Even where statutes acknowledge customary rights, whether through 'codification' of customary law, or through its acknowledgement in a statute dealing with related issues - such as in the *Sarawak Land Code* of Malaysia - the statute, while recognising customary law, also at the same time minimalises and denigrates customary land laws, by subverting them to other considerations or expedience of the State.

Thus, from a broad, if somewhat over-simplified perspective, indigenous peoples in Asia may be seen to face a threefold onslaught on their customary land and resource rights from three related but different sources: (i) colonialist forest laws; (ii) de-recognition or fossilisation of customary law; and (iii) denigration of customary law. The challenge that indigenous peoples face in combating the concerned discriminatory legal regimes that I mention here is no easy task, especially where the interest of the State is often seen to be coincidental with the interests of private corporate bodies and market forces. The political and economic asymmetry between indigenous peoples on the one hand and State and market forces on the other, makes the challenge all the more difficult to address, let alone surmount. However, there is one tool that provides a basis to make the 'playing field' somewhat more 'level' or even; by invoking international (and where applicable, national) human rights standards. Although few in number, examples of limited success are not totally absent in different parts of the world. Recent examples in Asia include directions of UN human rights monitoring entities to several Asian governments -

such as Nepal and Indonesia - to refrain from discriminatory conduct against their indigenous peoples.¹⁴

Decolonising colonialist forest laws

In lands categorised as ‘forests’ of differing categories in South and Southeast Asia - whether labelled as ‘reserved forests’, ‘forest reserves’, ‘protected forests’, ‘national parks’, ‘game reserves’ or otherwise - the State generally reserves to itself the exclusive right to manage, conserve and utilise the resources to the exclusion of all, including forest-dwelling and forest-adjacent communities, most of whom are indigenous peoples. The Forest Act of 1927, drafted during the colonial period, and which still applies in modified form in Pakistan, India and Bangladesh, exemplifies this approach. The Act treats ‘forest land’ and ‘waste-land’ in a similar manner, asserting that the State has ‘proprietary rights’ over such lands, and which, hence, may be taken over for administration by the State as a ‘reserved forest’, and thereby subjected to a strict regime of enforcement of criminal sanctions for any form of agricultural or other use by forest-dwellers or others.¹⁵ Although the passage of the Forest Dwellers Rights Act of 2006 in India has attempted to reverse this trend somewhat, by according limited recognition of the land rights of forest-dwellers, including indigenous peoples, similar

¹⁴ The UN Special Rapporteur on Indigenous Peoples has censured the Government of Nepal regarding the involvement of indigenous peoples on the drafting of the Constitution of Nepal. The UN Committee on the Elimination of All forms of Racial Discrimination (CERD) has advised the Government of Indonesia to respect indigenous peoples’ rights concerning palm oil plantations in Indonesia funded by the International Finance Corporation.

¹⁵ Section 3, Forest Act, 1927. Section 5 of the Act declares that after such notification as a ‘reserved forest’, ‘no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made.....’. A bill being considered by the Government of Bangladesh - the Forest (Amendment) Act of 2012 - proposes to reinforce this concept of ‘waste land..... which is the property of government, or over which the Government has proprietary rights...’. See also Stebbing 1992:468, and Gadgil & Guha 1992:153.

progress has not been made in other areas of land-related laws. In most of the other countries of South and Southeast Asia, the recognition of customary land rights of indigenous peoples in areas regarded as ‘forests’, remains absent or weak.¹⁶

Recognising customary law and procedure: generic recognition versus defined recognition

The status of the customary laws of indigenous peoples, including on land and forest areas is varied. In some countries official recognition is weak or almost totally absent. Here, the focus needs to be on obtaining recognition. The provisions of the UNDRIP, the ILO Convention No. 169 and the Convention on Biological Diversity, among others, can serve as important tools in lobby and advocacy work. Indigenous rights activists in Nepal have made reasonable progress in reproducing some of the principles and standards of UNDRIP and the ILO Convention No. 169 in the interim draft Constitution of Nepal. Earlier, activists in the Philippines succeeded in incorporating several crucial principles from (the then draft) UNDRIP into Philippines national laws, including in the national constitution, and the Indigenous Peoples’ Rights Act of 1997 (IPRA), which, among others, recognises the concept of *ancestral domains* of indigenous communities.

Even more compelling in facilitating reform of national laws and policies may be to refer, not to international legal standards, but to examples of national legislation from other countries. Governments are often concerned with the ‘operationalisation’ of laws and the burden that they must bear to implement such laws, and hence ‘workable’ examples of actual situations in countries, as opposed to principles of international law, may be more persuasive than abstract

¹⁶ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Supporters of the Act claim that it will ‘redress ... [historical injustices] committed against forest dwellers, while including provisions for making conservation more effective and more transparent’.

principles or rights. The recently-formed Adibashi Parliamentary Caucus in Bangladesh has recently mounted a campaign to enact an indigenous peoples' rights law in Bangladesh, modelled along the lines of the Philippines IPRA. How much influence this will have on actual legislation, remains to be seen, but at least the debate has progressed beyond the stage of general demands made by indigenous activists. Earlier, indigenous negotiators from the Chittagong Hill Tracts, including the regional political party, the *Jana Samhati Samiti*, were able to obtain formal recognition to customary law and procedure through an amendment to a law dating from the British colonial period, namely, the Chittagong Hill Tracts Regulation of 1900, through the passage of a new law, the Chittagong Hill Tracts Land Disputes Resolution Commission Act of 2001. The Jana Samhati Samiti had ended a two decades-old guerrilla struggle for self-rule, by entering into a written accord in 1997, known generally as the 'Peace Accord' on the Chittagong Hill Tracts.¹⁷ Such generically recognised customary land rights, as in the Chittagong Hill Tracts, are a potentially valuable tool in securing customary resource rights based upon oral traditions, practices and usages.

*The case of the Chittagong Hill Tracts, Bangladesh: the 'shield' tool
and the restitution of alienated lands through a commission on land*

The Chittagong Hill Tracts Regulation of 1900 is an example of the generic recognition of customary law. While the regulation does contain several colonialist underpinnings - implicitly including avenues for the State to invoke Eminent Domain principles contained in Forest and Land Acquisition statutes - it does not attempt to define the customary land and resource rights of the indigenous people. The regulation vests authority upon the government to 'regulate' the ownership, management and use of lands, including those based upon customary law. Therefore, unless expressly negated, this leaves sufficient leverage for the indigenous

¹⁷ For a detailed discussion on the contents of the accord, along with its current implementation status, see UN 2011 and Roy 2006:115-146.

peoples to invoke their customary rights over untitled forest, swidden and grazing lands. The aforesaid safeguards are additionally strengthened by the role of indigenous leaders and officials, who are formally and legally vested with land administration and land management authority.

At the level of the *mauza*, containing several villages or hamlets, is a headman.¹⁸ The headmen regulate the customary law of untitled lands, and at the same time, title grants and title transfers - for homesteads, plantations and market centre lands - are not generally made except on their recommendation. At the level of the district is a civil bureaucrat of the national government - the Deputy Commissioner - who has the authority to provide land titles and allow land transfers.¹⁹ Concurrently, at the district level, there is a *district council* (called a 'hill district council') whose chairperson and two-thirds of the members are indigenous people.²⁰ The deputy commissioners may not provide land titles, land transfers or compulsory acquisition of lands, without the previous sanction of the district councils. Generally, on the basis of law and longstanding practice, title grants and title transfers are also not sanctioned except on the recommendation of the headman of the *mauza*.

The aforesaid role of indigenous leaders and officials is of particular significance in the case of communally managed and used forest, grazing and swidden commons, where the communities' long-term interest lies in continuing to sustainably use such lands - on a communal and inter-generational basis - rather than to obtain private and alienable title (which may, however, be applicable for private homesteads, orchard lands, lands in urban centres, etc). Such a regime may be regarded as providing a 'shield', in that it protects or 'shields' the concerned communities against the alienation of their lands. This safeguard in the nature of a 'shield' may be contrasted with the cases where private title (e.g. where a homestead, orchard

¹⁸ Rules 37, 38 and 40, Chittagong Hill Tracts Regulation, 1900.

¹⁹ Section 7, Chittagong Hill Tracts Regulation, 1900.

²⁰ Acts XIX, XX and XXI of 1989.

or urban plot is concerned) is obtained, whose title may be mortgaged or transferred, upon the recommendation of the headman and the consent of the district council. The latter prerogative may be regarded in the nature of a 'sword', and hence opposite to the 'shield'.

The recognition of customary law in the Chittagong Hill Tracts Regulation, hitherto implicit, rather than express and unequivocal, was further strengthened by an amendment made in 2003 and put into effect in 2008.²¹ Primarily concerned with the introduction of formalised courts of law manned by judicial officials - until then presided over by officials of the executive arm of government - the law obliges civil judges to try cases 'in accordance with the laws, customs and practices of the district...', and also expressly bars them from trying cases that are under the jurisdiction of the traditional chiefs and headmen.²² Thus the civil law of the Hill Tracts - including contract, tort and other matters - must account for customary law and procedure.

The Chittagong Hill Tracts Land Commission is another example of the generic recognition of customary law. While the recognition provided in the 1900 Regulation deals substantively with land management, ownership, use and transfer, the law on the commission facilitates the restitution of alienated lands of indigenous people, including through the application of customary law and procedure. The law that establishes this commission, despite its other shortcomings, has a number of positive features for safeguarding indigenous peoples' land rights. First, it provides a

²¹ CHT Regulation (Amendment) Act, 2003 (Act 38 of 2003).

²² Section X(4) of the Act reads: 'The Joint District Judge as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned, except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachari and Bandarban respectively which shall be tribal by the Mauza Headmen and Circle Chiefs' (now incorporated as section 8(4) of the CHT regulation, 1900).

generic recognition of customary law, without attempting to define what customary law is, thereby minimising the risks of undermining and devaluing the contents of customary law, and providing the indigenous peoples an avenue to define or construct the content and nature of those rights.

Second, on account of the reference to ‘laws, customs and practices’, the Act leaves it open to potential indigenous litigants to invoke statutes (laws) and customary procedure (‘practices’) in addition to the substance of custom-based ownership and use principles. Third, by providing the commission with the authority of a ‘civil court of law’, the law provides executive authority or ‘teeth’ - backed by penal sanctions and other coercive force of the State - to the rulings of the commission. Fourth, the indigenous members of the commission (traditional chiefs, and the indigenous chairpersons of the hill district councils and the Chittagong Hill Tracts Regional Council) constitute the majority of the membership of the commission - which also includes a retired Supreme Court judge as chairperson and a senior civil servant as a member - and thus provides an opportunity for a non-discriminatory consideration of customary law-based claims by adjudicators who are well-versed in the principles of customary law and procedure.²³

The case of Northeast India: the ‘shield’ in the national constitution

Other examples of ‘shields’ to protect and secure indigenous customary land and resource rights include the special dispensations in the Constitution of India with regard to the indigenous peoples-inhabited northeast Indian states of Mizoram and Nagaland and with regard to autonomous district councils in several other parts of

²³ There are two major weakness of the present law, which are expected to be removed through amendments. One of them concerns the chairperson’s prerogative to impose her or his own opinion as the decision of the commission in case of disagreements among the members. The other is the quorum for the commission’s decisions, which does not require the presence of all the indigenous members.

Northeast India that are inhabited predominantly indigenous peoples ('scheduled tribes'). The former provisions expressly bar the federal Government of India from legislating on a number of specified matters. These include (i) the religious or social practices of the Mizos; (ii) Mizo customary law and procedure; (iii) administration of civil and criminal justice involving decisions according to Mizo customary law; and (iv) ownership and transfer of land (unless agreed to by the Legislative Assembly of Mizoram or unless contrary to central laws already applying to the State prior to the coming into effect of the aforesaid provisions).²⁴ The second example concerns autonomous district councils in several states of northeast India inhabited by 'scheduled tribes', mirroring to an extent the autonomy provided at the State (province) level, with regard to the management and allotment of land (except reserved forest), customary law disputes and so forth.²⁵

Plural approaches to securing customary land and resource

The above discussion has drawn attention to two broad areas of law; namely, international human rights principles - which may be invoked to reinterpret national laws and policies - including both situations where eminent domain principles undermine customary rights, such as in areas categorised as 'forests', and situations where customary land and resource rights have attained a reasonably high level of recognition under national law. We have also discussed actual situations where customary law has been generically recognised to some extent. However, discussion has not touched upon actual strategies to achieve the desired objectives, which, in

²⁴ Article 371G, Constitution of India. The aforesaid safeguards were incorporated as a result of the Mizoram Accord of 1985, which ended the Mizos' armed struggle for self-rule in the 1970s and 80s. This is a unique example in Asia of the constitutional entrenchment of the provisions of a peace accord. The situation of the Chittagong Hill Tracts Accord - which has not been constitutional entrenched - is to be contrasted. The provisions of article 371A, applying to Nagaland State, are almost identical.

²⁵ 6th Schedule to the Constitution of India (articles 244 and 275).

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any case cannot be dealt with in the absence of detailed information about, and a deep understanding of, the legal, political and other contexts in the different countries. Several approaches may be employed to secure the land and resource rights of indigenous peoples in Asia.

A ‘plural’ approach that combines litigation in national courts, complaints in national human rights institutions and in international human rights mechanisms and processes, political lobbying, engagement in international and national policy-making processes, is among the various ways and means to secure customary rights. The strategy for engagement at local, national and international processes must be determined by activists from the countries concerned, in alliance with others.

International Jurisprudence - Informing the Content of the Respect, Protect and Remedy Framework

By Fergus MacKay

The UN Framework

In 2008, the UN Secretary General's Special Representative on Business and Human Rights, Professor J. Ruggie, presented his framework for addressing human rights and business operations. This is now known as the 'UN Framework' and was endorsed by the Human Rights Council in 2008. It has become the focal point for a number of international efforts in relation to human rights and the private sector. In 2011, Guiding Principles were presented to and endorsed by the Human Rights Council (A/HRC/17/31), and the Council established a Working Group on human rights and transnational corporations and other business enterprises to coordinate future action. The mandate of the working group includes conducting on-site visits and receiving complaints about corporate activities that may violate human rights. In addition to UN activities, the UN Framework has also been endorsed by the International Finance Corporation and the Equator Principles Financial Institutions, which together are responsible for a large percentage of private sector finance globally.

Professor Ruggie's final report to the Council recommends that special attention is needed in relation to indigenous peoples and their rights. It is therefore to be expected that the new Working Group will devote some energy to assessing and addressing indigenous peoples' rights in relation to business operations, as will other UN mechanisms. The Special Rapporteur on Indigenous Peoples, for instance, is now working on principles in relation to indigenous peoples and extractive industries. The Special Rapporteur on Right to Food has looked in some detail at indigenous peoples' rights in relation to land grabbing and large scale agro-industry, including the rights of small-holders. The

Special Rapporteur on Contemporary Forms of Slavery has looked at the relationship between indigenous peoples' land rights and exploitative labour practices (see below).¹ Various UN treaty bodies have examined all of these and other issues when they review country reports and in their case-related jurisprudence.

The UN Framework has three main elements: PROTECT, RESPECT and REMEDY. It is the State's duty to a) PROTECT against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. It is the transnational corporations (TNCs) and other business enterprises' responsibility to b) RESPECT human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and c) REMEDY is the need for greater access by victims to effective remedy, both judicial and non-judicial. It goes without saying that National Human Rights Commissions have a role to play in providing remedies.

With regard to a), the State's duty encompasses the totality of its human rights obligations, either by virtue of treaty ratification or through provisions of general international law. With regard to b) and according to the Guiding Principles:

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Addressing adverse human rights impacts requires taking adequate measures for

¹ *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian.* UN Doc. A/HRC/12/21, 10th July 2009.

their prevention, mitigation and, where appropriate,
remediation.

In order to meet their responsibility to respect human rights, business enterprises need to have in place policies and processes. These include a policy commitment to meet their responsibility to respect human rights; a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Applicable Obligations

In line with the preceding, it is clear that the obligations of States are the primary reference point, both in relation to the conduct of States themselves and also in relation to the responsibilities of TNCs. National human rights commissions therefore have a dual mandate: to monitor State acts and omissions and to monitor TNC acts and omissions in relation to human rights generally and the UN Framework more specifically.

The obligations of States and the responsibilities of TNCs with regard to indigenous peoples can be located in several laws and policies:

- National law: potentially including extra-territorial obligations (see CERD recommendations as they relate to indigenous peoples affected by TNC operations in third countries)²

² See *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, 25/05/2007*, CERD/C/CAN/CO/18, at para. 17 (recommending that ‘In light of article 2.1 d) and article 4 a) and b) of the Convention and of its general recommendation 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on

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- Ratified international conventions and the associated jurisprudence, including ILO Conventions (more than 200 conventions exist of which many are relevant to oil palm expansion, such as the Convention on Forced Labour)
- The UNDRIP as it largely restates existing international law and is thus a relevant ‘codification’ of existing norms that enjoys almost universal endorsement by the international community.
- General international law
- Commitments of States made during the UPR of the Human Rights Council
- Industry Standards and Corporate Policies and related instruments (e.g. RSPO, ICMM)
- IFI policy instruments where applicable (e.g. IFC, ADB, IBRD)

Jurisprudence

Human rights instruments are quite general in their language and just like constitutions and some statutory language are elaborated through the jurisprudence of the bodies and mechanisms that are authorised to oversee compliance with those instruments. The remainder of this paper will focus on relevant and illustrative jurisprudence as it pertains to indigenous peoples with a focus on agro-industry such as oil palm plantations.

Again, the UNDRIP is an indispensable tool for determining the general principles that apply in the context of indigenous peoples’

the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends to the State party that it explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard’). Almost identical recommendations have been made by CERD to the United States of America, the United Kingdom and Norway.

rights as it largely restates existing international human rights law and compiles these standards into one easily referenced document.

Indonesia

The former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people identified oil palm plantations in Indonesia as placing indigenous peoples ‘on the verge of completely losing their traditional territories and thus of disappearing as distinct peoples.’³

The UN Committee on the Elimination of Racial Discrimination (UNCERD) expressed serious concern about denials of indigenous peoples’ rights in Indonesia in its 2007 concluding observations, including in connection with large-scale agro-industry and the associated legislative framework. In paragraph 17 thereof, the Committee, *inter alia*, urged Indonesia to review its laws ‘to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands.’⁴ It also observed that ‘references to the rights and interests of traditional communities contained in domestic laws and regulations are not sufficient to guarantee their rights effectively.’⁵ It further noted the human rights problems in connection with Indonesia’s expansion of oil palm plantations into indigenous territories (along the Indonesia-Malaysia border in Kalimantan), ‘and the threat this constitutes for the rights of indigenous peoples to own their lands and enjoy their culture.’⁶

The Committee consequently recommended that the State ‘secure[s] the possession and ownership rights of local communities before

³Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Oral Statement to the UN Permanent Forum on Indigenous Issues Sixth Session, 21 May 2007, at p. 3.

⁴ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Indonesia, 15/08/2007*. CERD/C/IDN/CO/3, at para. 17.

⁵ *Ibid.*

⁶ *Ibid.*

proceeding' with the Kalimantan oil palm mega-project, and ensures that extensive and prior consultations are held in order to secure indigenous peoples' free, prior and informed consent in relation to that project.⁷ The Committee reiterated this at its March 2009 session, recommending again that Indonesia secure indigenous peoples' ownership rights to their lands, territories and resources and obtain their consent as conditions precedent to the further development of oil palm plantations.⁸

At its March 2009 session, the Committee adopted a communication under its early warning and urgent action procedures. Therein the Committee states that Indonesia 'continues to lack any effective legal means to recognise, secure and protect indigenous peoples' rights to their lands, territories and resources.'⁹ This was in reference to the adoption of regulations on REDD. This conclusion was reiterated at the Committee's August 2009 session in another communication adopted under the urgent action and early warning procedures.¹⁰

Most recently, in September 2011, the CERD adopted a communication about the MIFEE project in Papua, which involves oil palm plantations and other large-scale agricultural developments. Therein, the Committee expresses concern about alienation of indigenous lands in favour of oil palm and other companies, alleged manipulation of communities in order to secure their agreement to land acquisition and the failure to adequately obtain indigenous peoples' prior consent in relation to the project itself. Noting that Indonesia has failed to respond to its prior recommendations and

⁷*Ibid.*

⁸Communication of the Committee adopted pursuant to the early warning and urgent action procedures, 13th March 2009, at p. 2.

⁹*Ibid.*

¹⁰Communication of the Committee adopted pursuant to the early warning and urgent action procedures, 29th September 2009. Available at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia28092009.pdf

communications, the CERD requests information of the measures that may have been adopted to secure indigenous peoples' consent, to protect the traditional livelihoods of the affected people, and to ensure that they are not adversely affected by the transmigration of workers from other parts of the country.

Papua New Guinea

In September 2011, the CERD addressed proposed restriction to judicial challenges to the grants of environmental permits for oil palm and other activities and found that these violated the right to judicial remedies. It also looked at threats to indigenous lands caused by long term leases under Special Agricultural and Business Licenses. It recommended that indigenous land rights be protected, that SABLs not be issued without verified Free, Prior and Informed Consent, and that effective judicial remedies be maintained through which indigenous peoples could challenge alienations of their lands, the issuance of environmental permits, and the manipulation or coercion of Free, Prior and Informed Consent.

Similar recommendations have been made in relation to other countries in the region.

Cambodia

In April 2010, the CERD noted:¹¹

The Committee is concerned, however, that the quest for economic growth and prosperity is pursued, in some cases, to the detriment of particularly vulnerable communities such as indigenous peoples. The Committee is particularly concerned about reports of the rapid granting of concessions on land traditionally occupied by indigenous peoples without full consideration, or exhaustion of procedures

¹¹ CERD/C/KHM/CO/8-13, 1st April 2010, at para. 16.

provided for, under the land law and relevant sub-decrees (arts. 2 and 5).

The Committee recommends that the State party ensure that a proper balance between development and the rights of its citizens is achieved and that its economic development does not come at the expense of the rights of vulnerable persons and groups covered by the Convention. It also recommends that the State party develop appropriate protective measures, such as a delay in the issuance of a concession on lands inhabited by indigenous communities who have applied to be registered legally in order to obtain land titles until the issue of collective ownership titles and indigenous peoples' rights to possess, develop, control and use their communal lands, where at issue, has been assessed and determined, and after consultation with and the informed consent of the indigenous peoples.

The Committee further encourages corporate business entities when engaging in economic land concessions to take into consideration their corporate social responsibility as it relates to the rights and well-being of local populations.

Labour rights issues

On 10th July 2009, the Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, noted:

48. Bonded labourers are mostly from socially excluded groups, including indigenous people, minorities and migrants, who suffer additionally from discrimination and political disenfranchisement.

49. The indigenous and minority populations are more vulnerable to bonded labour because in many countries, they have limited access to land for their traditional income-generating activities such as cultivation or hunting. The issue of land ownership is closely linked with the phenomenon of bonded labour.

The Report further recommends that:

...businesses should include human rights principles, including provisions on the prevention of and protection against forced labour, in all contracts with joint venture partners, suppliers and subcontractors. Businesses should apply human rights through their entire business supply chains.¹²

ILO Convention No. 29

In 1994, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) submitted an Individual Direct Request concerning Convention No. 29 on Forced Labour 1930 with regards to Indonesia, noting:

In previous comments the Committee, referring to the question of free choice of work for contract labourers, after expiration of their contracts, had noted Ministerial Decision No. 12/MEN/BP/84 of 24 January 1984 which provides for various protective measures for contract labourers in Sumatra, such as the obligation of suppliers of plantation labour to bear all costs for returning workers to their homes. The Committee also noted various ministerial regulations providing guidelines for the inter-regions employment (AKAD). The Committee noted that under the Ministerial Decision, AKAD workers should be free to decide upon expiration of their contracts to stay on or to return to their places of origin. However, under the guidelines, labourers are to be persuaded to stay in the regions rather than to go back to their places of origin.

The Committee also requests the Government to supply information more generally on measures taken to supervise the activities of labour contractors, to investigate allegations

¹² UN Doc. A/HRC/12/21, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, 10th July 2009.

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of forced labour and to ensure that all illegal exaction of work is strictly punished. The Committee would appreciate if the Government would provide information on the activities of the labour inspectorate in this regard.¹³

¹³ Committee of Experts on the Application of Conventions and Recommendations (CEACR) Individual Direct Request concerning Convention No. 29 on Forced Labour, 1930 with regards to Indonesia, noting: (ratification: 1950) Submitted: 1994 (Document No. (ilolex): 091994IDN029).



CHAPTER III: INDONESIA

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Human Rights and Business in Indonesia - The Mandate and Findings of Komnas HAM

By Nur Kholis

Corporate expansion in Southeast Asia has had tremendous, and often negative, impacts on local residents and indigenous peoples. International human rights law mechanisms commonly limit the responsibility for gross human rights violations to State actors. At the regional level, the AICHR, the human rights body in Southeast Asia has very limited and minimal authority. National standards have also been developed by certain countries to address human rights abuses.

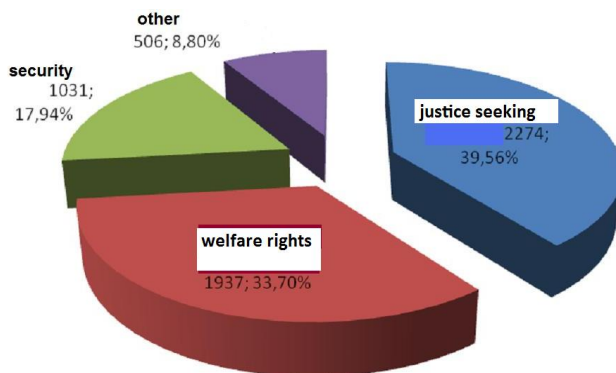
At the national level, Komnas HAM's mandate (Law 39/1999) is to monitor and investigate human rights violations; to mediate conflict and disputes; to study and conduct research on human rights; and to promote human rights through education. Every year, over 5,000 complaints are received by Komnas HAM. Thousands of these result from the activities of corporations. Conflict with companies are the second largest cause of human rights violations (the first being the police). Issues of conflict include land disputes, relationships between companies and workers, forced evictions, environmental damage and others. Mostly, the complaints were followed up by monitoring and investigation, and in some cases were mediated by Komnas HAM.

Of the complaints received by Komnas HAM in 2009, 39.56% (or 2,274 cases) related to justice-seeking, 33.70% (or 1,937 cases) related to welfare rights, 17.94% (or 1,031 cases) related to security and 8.80% (or 506 cases) to the enjoyment of other rights. 22.73% (or 552) of the institutions reported to Komnas HAM in 2008 were companies, 31.17% (or 757) were local governments and 46.11% (or 1,120) of cases involved the Indonesian National Police (or PolRi).

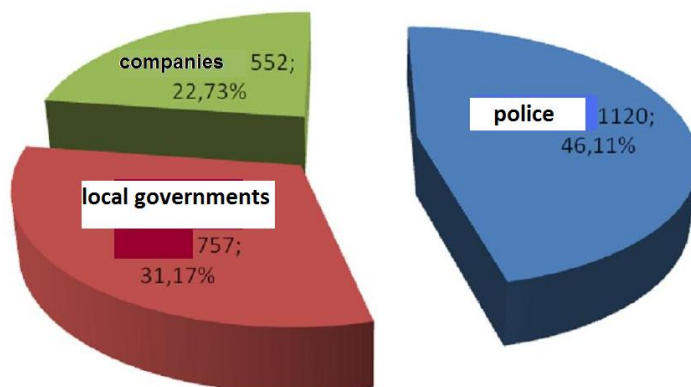
Komnas HAM also conducted research on the right to work in plantations in 2010 and case studies were carried out in several provinces such as Riau and East and West Java. The objective was to measure the extent to which the government was fulfilling its obligation to protect, respect and fulfil people's right to work in plantations. The findings of the studies revealed that both the government and corporations failed to provide minimum standards in terms of the right to work for local people in plantations in four dimensions: availability, accessibility, freedom and strengthening participation.

This situation points to the need for several actions to be taken. First, it is essential to coordinate amongst the existing national systems in order to resolve and mitigate the harmful impact of business on local communities, especially in the plantation and mining sector. Second, it is necessary to provide or facilitate access for victims to redress and complaint mechanisms where national mechanisms are considered ineffective. This can be done by formulating a regional mechanism which could involve and draw from practices in other regions such as Latin America, Europe and Africa. Third, it remains the responsibility of States to impose and abide by the UN 'Protect, Respect and Remedy' policy framework in order to better manage the human rights challenges posed by agribusiness expansion and activities across the region.

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Complaints received by Komnas HAM in 2009

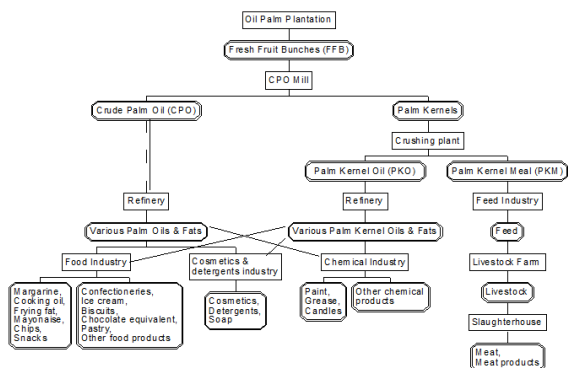


Institutions reported to Komnas HAM in 2008

Oil Palm Expansion and the Need for Human Rights Standards in Indonesia

By Norman Jiwan

Palm oil is widely promoted for its versatile uses as an edible oil, a component of foodstuffs and cosmetics, and as a bio-fuel feedstock. This has triggered increasing market demand and the massive expansion of mono-crop plantations. Palm oil has also been promoted as a means of generating State revenues, boosting rural development, contributing to poverty alleviation and creating employment opportunities. At the same time, the expansion of oil palm plantations has resulted in land grabbing and the appropriation of rights by companies and the State which undermines the livelihoods of indigenous peoples and other land and natural resource users.¹



The various uses of palm oil

¹ Colchester & Fay 2007.

The Indonesian government has as its objective that of becoming the best sustainable palm oil producing country in the world. To this end, it regards the Roundtable for Sustainable Palm Oil (RSPO) standard as a platform to develop its own sustainability standard, namely, the Indonesia Sustainable Palm Oil System (ISPO). Indonesia aims to produce forty million tons of differentiated palm oil based products by 2020. The composition of this production is expected to be 30% food base, 50% energy base and 20% other. 35% of the palm oil produced will be for domestic use and 65% for export.

<i>National mandatory biofuel target</i>			
	2005-2010	2011-2015	2016-2025
Bio diesel	Biodiesel 10% diesel consumption 2.41 million kL	→ Biodiesel 10% diesel consumption 4.52 million kL	→ Biodiesel 20% diesel consumption 10.22 million kL
Bio Etanol	Bioetanol 5% premium consumption 1.48 million kL	→ Bioetanol 10% premium consumption 2.78 million kL	→ Bioetanol 15% premium consumption 6.28 million kL
Bio Oil			
- Biokerosin	Biokerosin 1 million kL	→ Biokerosin 1.8 million kL	→ Biokerosin 4.07 million kL
- PPO for power plant	PPO 0.4 million kL	→ PPO 0.74 million kL	→ PPO 1.69 million kL
Bio Fuel	Biofuel 2% energy mix 5.29 million kL	→ Biofuel 3% energy mix 9.84 million kL	→ Biofuel 5% energy mix 22.26 million kL

Oil palm plantations have expanded from 8.5 million hectares in 2009 to nearly 29 million hectares in 2011, while provincial targets for planting total is of almost 29 million hectares. The largest are found in Bengkulu, Jambi, Kalimantan, Maluku, Aceh, South and East Sulawesi, and Sumatra. Annual expansion from 2004 to 2009 has been of 600,000 hectares and is predicted to increase in coming years.

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Province	2009		2010		2011	
	Existing (ha)	Expansion (ha)	Existing (ha)	Expansion (ha)	Existing (ha)	Expansion (ha)
BANGKA BELITUNG	171,535		171,535		185,508	
BANTEN	17,375		17,375		17,375	
BENGKULU	200,000	500,000	200,000	500,000	200,000	500,000
DIYAH ISTIMEWA YOGYAKARTA						
DKI JAKARTA						
GORONTALO	0		0		0	
IRIAN JAYA BARAT	30,171		30,171		30,171	
JABU	694,310	1,000,000	694,310	1,000,000	694,310	1,000,000
JARA BARAT	11,881	20,000	11,881	20,000	11,881	20,000
KALIMANTAN BARAT	525,000	5,081,900	525,000	5,081,900	525,000	5,109,200
KALIMANTAN SELATAN	391,671	500,000	391,671	500,000	391,671	500,000
KALIMANTAN TENGAH	737,550	2,401,300	737,550	2,401,300	1,114,120	2,888,400
KALIMANTAN TIMUR	368,500	1,600,000	368,500	1,600,000	409,400	1,808,000
KEPULAUAN RIAU	54,700		54,700		54,700	
LAMPUNG	164,780	500,000	164,780	500,000	164,780	500,000
MALU KUTU	61,590		61,590		61,590	
MAKLU UTARA						
MENGKONGE ACEH DARUSSALAM	283,285	1,225,000	283,285	1,225,000	283,285	1,520,000
NUSA TENGGARA BARAT						
NUSA TENGGARA TIMUR						
PAPUA	97,000	6,000,000	97,000	6,000,000	97,000	7,000,000
RIAU	2,900,000	3,038,900	2,900,000	3,038,900	2,900,000	3,049,200
SULAWESI SELATAN	72,133	500,000	72,133	500,000	72,133	500,000
SULAWESI TENGAH	81,307	500,000	81,307	500,000	81,307	500,000
SULAWESI TENGGARA	21,213	1,100,000	21,213	1,100,000	21,213	1,300,000
SULAWESI BARAT	117,261		117,261		117,261	
SUMATERA BARAT	327,653	500,000	327,653	500,000	327,653	500,000
SUMATERA SELATAN	718,068	1,000,000	718,068	1,000,000	718,068	1,000,000
SUMATERA UTARA	1,044,230	1,239,700	1,044,230	1,239,700	1,044,230	1,319,600
TOTAL	8,491,227	26,710,800	9,091,227	26,710,800	9,522,926	28,994,400

Source: Kasub-Matris Hutan 2011

Oil palm investments and operations in Indonesia have led to a wide range of well-documented human rights abuses.² The establishment of plantations on customary lands without Free, Prior and Informed Consent reveals a serious disregard for customary rights and tenure. Plantations are being established through untransparent means and in circumvention of formal laws and procedures. Where consent is sought from affected communities, it is at times obtained through coercion and manipulation. Customary leaders, for example, have been manipulated into surrendering traditional community domains that legally cannot be put on sale. In certain cases, compensation money was not given after the takeover of the land by companies. The socio-economic benefits promised to affected communities, such as money, compensation or job opportunities, remain unfulfilled in a majority of cases.³

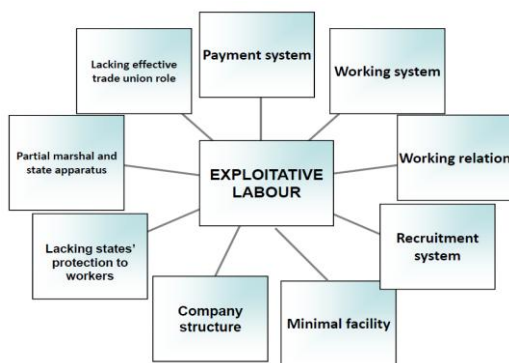
Furthermore, environmental impact studies have been reportedly carried out *after* plantations are established. In some cases, lands not

² Colchester 2011.

³ Tiominar 2011.

developed within the stipulated period raise the suspicion that the areas are actually being exploited for other resources such as timber. Community resistance and protests have been crushed through coercion and the use of force. Serious human rights abuses remain rife across the country's oil palm plantations.

Exploitative working conditions are a cause of particular concern. The development of monopsonistic relations between smallholders and oil palm companies has led to widespread abuse and violation of their rights. Ambiguity regarding the value of their land and the terms of lease have led to numerous smallholders, and particularly indigenous peoples, releasing their land for derisively low prices and for undetermined periods of time. The conversion of former farmland to cash crop plantations forces smallholders into a cash-based economy in which their food security is diminished and their use of land restricted by the oil palm companies. When forced into dependency on the companies due to financial and technical constraints, smallholders are the first victims of fluctuating prices for crude palm oil (CPO) on international markets. Lacking the capital and liquidity to absorb production and market failures, they rapidly fall into debt.



Smallholder farmers are often subject to the violation of the terms and conditions of partnership agreements signed with companies. In

some partnerships, communities end up in debt as a result of their participation in partnership schemes because they are not informed of the financial management plan of the project.⁴ The facilities and resources needed are sometimes monopolised by the company and its subsidiaries, such as seeds, fertilisers, pesticides and working tools. Fresh Fruit Bunch (FFB) prices are untransparent and determined by the company. Plots allocated to smallholders tend to be of poor soil quality and smaller than the area stated in the contracts.

Furthermore, the facilities provided for smallholders and workers are of sub-standard quality. Minimal clean and safe drinking water is made available to them, food is poor and conditions in the barracks sometimes inhumane. On top of this, plantation workers often find themselves working overtime and underpaid, forced to achieve unrealistic production targets, and made to pay fines otherwise. Finally, the working conditions on plantations pose serious risks to the health of the workers, particularly pesticide sprayers who are rarely provided with the protective gear needed to avoid injury and chemical intoxication.

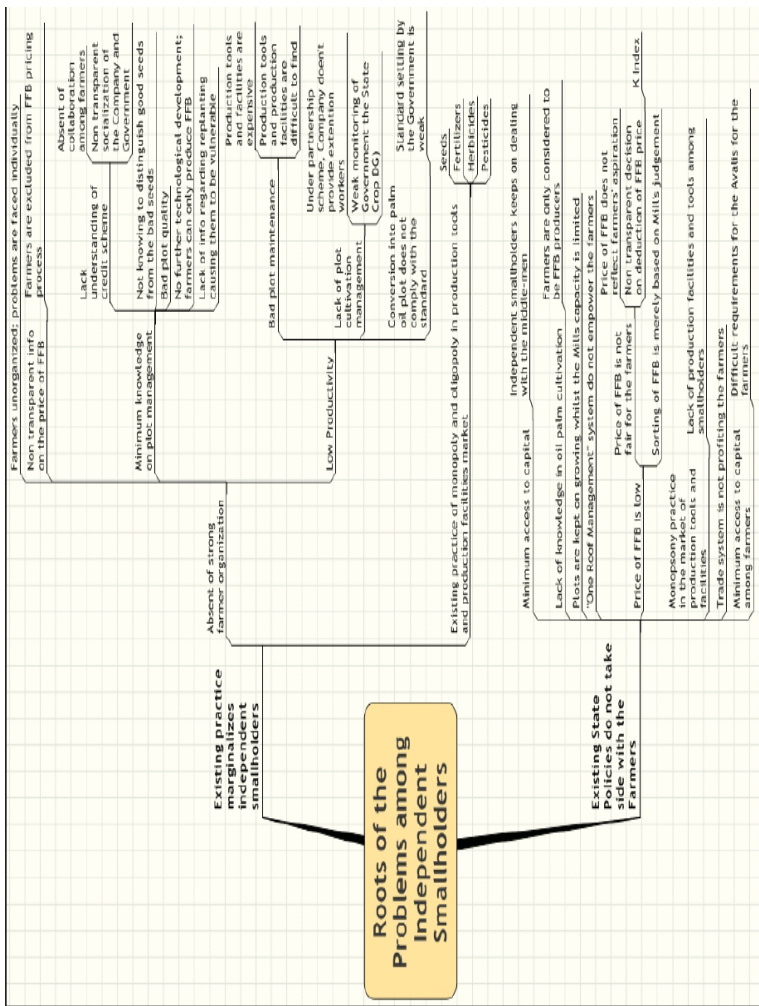
Of particular concern are the slavery-like practices and conditions that have been documented in oil palm plantations. This includes occurrences of debt peonage and instances of physical aggression, torture and intimidation. Child labour and exploitation on plantations constitute a serious violation of the United Nations Convention on the Rights of the Child. Female workers are particularly disadvantaged, earning less than permanent male workers, and usually employed in high risk activities, such as chemical spaying, fertilising, weeding, and so forth. Appropriate working safeguards and requirements are lacking, as are insurances and health services for workers. Women rarely receive allowances or bonuses, nor do they benefit from maternity leave and

⁴ Colchester 2004.

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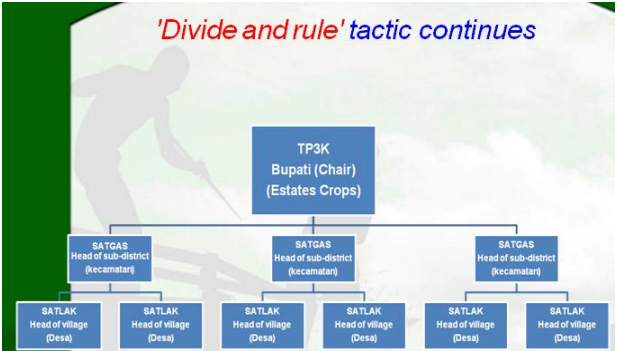
menstruation leave. Reproductive health services are lacking, and sexual exploitation of female workers has also been reported.

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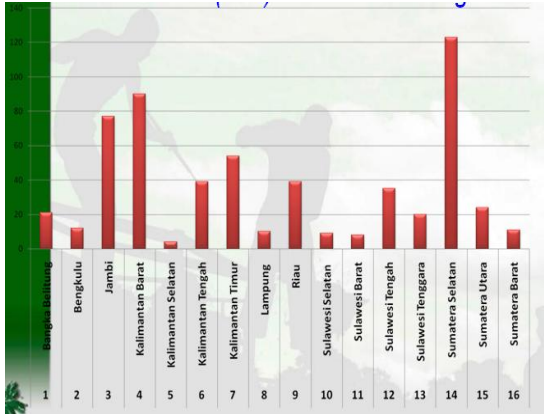


Roots of the problems among independent smallholders

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Companies in the palm oil sector continue to apply ‘divide and rule’ tactics in land acquisition processes. For example, local community leaders are frequently co-opted into supporting the companies without the consent of the communities they represent. Biased district and sub-district officials give their consent to projects with personal interests in mind. This has led to internal conflicts, antipathy and civil resistance, as investors manipulate social relations on the ground to the disadvantage and peril of local communities.



663 ongoing conflicts in oil palm plantations were reported by June 2011

Conflict in oil palm plantations

By June 2011, Komnas HAM and SawitWatch had document 663 ongoing conflicts between oil palm plantation companies and local communities, with the highest frequency in South Sumatra, East Kalimantan and Jambi.⁵ At the time of writing, 108 individuals had been detained over the last sixty days and seven victims killed. Progress towards the resolution of disputes and the provision of compensation to local communities remains slow.

Conflicts of particular gravity include that of Tambusai Timur (Riau – 2004), Belimbing (East Kalimantan – 2005), Runtu (Central Kalimantan – 2005), Suku Anak Dalam (Jambi – 2005), the incident in Kuansing (Riau - June 2010), the shooting incident at KDA (Jambi – 2011), and the violent clashes at PT SWA Sodong (South Sumatra - 2011).

Leniencies in the national legal framework

The abuse and oppression of indigenous peoples, workers and local communities in oil palm plantations are the outcome of State-sanctioned development models and legal frameworks that do not take into account the rights of these communities as stipulated in international human rights standards signed or ratified by Indonesia.

Foreign plantations were nationalised as State-owned companies in 1945 – 1968. A thirty three year lease period was stipulated in law UUPA No. 1/1960. The late 1970s to mid 1980s saw the first expansion of State-owned companies under the New Order regime. From 1985 to 1998, the Indonesian government set out their formula and strategy to become the world's largest producer of oil palm. The financial crisis of 1997 – 1998 caused investments to stagnate. Palm oil companies faced severe financial difficulties in maintaining existing and new plantings. IMF monetary conditionalities imposed deregulation, restructuring and joint venture measures in an attempt

⁵ Komnas HAM & SawitWatch 2010.

to overcome the crisis. From 2002 to 2007, the expansion of investments and oil palm plantation development was boosted by the passing of law No. 18/2005 and the increasing momentum of decentralisation movements and policies. The next two years saw the full guarantee of plantation expansion through a regulatory framework focused on agricultural development and the presidential decree on bio-fuel targets.

Relevant legislations include Act No.5/1960 of the Basic Agrarian Law, which stipulates that HGU (*hak guna usaha* – right of exploitation) can be leased on State land, but also denies land restitution upon the expiry of the HGU. Act No. 18/2004 stipulates a ninety five year lease period for both private and State-owned plantation companies, also denying land restitution upon expiry of the lease. Regulation No.26/2007 of the Ministry of Agriculture provides guidelines for plantation business permits, extending the size of the location permit for oil palm plantations from 20,000 hectares to up to 100,000 hectares per company in a single province. MoA regulation No.14/2009 legalises the use of peat lands for oil palm cultivation, allowing conversion for peat lands of up to three metres in depth.

Lacking or absent investment safeguards

A significant impediment to the rights-based development of oil palm plantations is the lack of enforceable investment safeguards. For instance, over the last five years, fifty one banks have financed the expansion of plantations in Papua and West Papua. Yet only eleven of them (including one Indonesian bank) have adopted the safeguards of the United Nations Environmental Programme Finance Initiatives. Ten foreign banks have adopted the United Nations Principles for Responsible Agricultural Investment. Another ten have adopted the Equator Principles, and only four foreign banks have adopted the RSPO Principles and Criteria.

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Safeguards	Adoption
<i>Over the last five years, there are 51 banks financing the expansion of oil palm plantations in Papua and West Papua</i>	
<i>(1) United Nations Environmental Programme Finance Initiatives</i>	<i>11 banks (1 Indonesian bank)</i>
<i>(2) United Nations Principles for Responsible Investment</i>	<i>10 foreign banks</i>
<i>(3) Equator Principles</i>	<i>10 foreign banks</i>
<i>(4) RSPO Principles and Criteria</i>	<i>4 foreign banks</i>

<i>Issues</i>	CAO	SC	FIs
Illegal use of fire to clear lands	N	X	???
Clearance of primary forests	N	X	???
Clearance of areas of high conservation value	N	X	???
Takeover of indigenous peoples' customary lands without due process	Y	X	???
Failure to carry out FPIC consultations with indigenous peoples	Y	X	???
Failure to negotiate with communities or abide by negotiated agreements	Y	X	???
Failure to establish agreed areas of smallholdings	Y	X	???
Social conflicts triggering repressive actions by companies and security forces	X	X	???
Failure to carry out or wait for approval of legally requirement environmental impact assessments	X	X	???
Clearance of tropical peat and forests without legally required permits	X	X	???

The failure of the IFC Compliance Advisor/Ombudsman, the supply chain and financial intermediaries to actively protect environmental and human rights standards is of serious concern. As the table above reveals, a number of issues still remain to be addressed and resolved, and in a number of cases, existing accountability

mechanisms and safeguards (such as the IFC CAO) have failed to apply standards to financial intermediaries and the supply chain.

Indonesia and international human rights obligations

Human rights standards are desperately needed in Indonesia as laws and practices are inconsistent with the State's obligations pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination and other international laws. However, there have been some success stories so far. In 2007, a submission was made under the Early Warning and Urgent Action Procedures of CERD was made regarding the oil palm mega-project running from West to East Kalimantan, which resulted in strong recommendations made by CERD to Indonesia. In the same year, a complaint to the CAO of the World Bank/IFC resulted in a shocking audit by the CAO that led World Bank President Robert Zoellick to suspend funding for oil palm worldwide in 2009/2010.

In 2010, a submission on the situation in oil palm plantations and the right to food was made to United Nations Special Rapporteur on the Right to Food, which resulted in a positive recognition on his part of the problems and issues at stake. In 2011, a submission was made under the Early Warning and Urgent Action Procedures on MIFEE in West Papua to CERD. The Committee contacted the Indonesian government directly about this issue, providing strong recommendations for action. In 2011, a judicial review against Plantation Act 18/2004 at the Indonesian constitutional Court resulting in the revocation of articles 21 and 47 from the Plantation Act. Despite these achievements, however, changes and improvements remain largely of an ad hoc nature.

The table below shows the international human rights conventions signed and/or ratified by Indonesia to date. The dates refer to the UN adoption of the said covenants and their ratification by state parties respectively. The laws cited below refer to national laws enacted by the government of Indonesia after the ratification of the related international human rights instrument. After ratification of

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ICCPR and IESCR, the right to self-determination was annulled as an obligation of the State party. The final row explains follow-up actions taken to consolidate the obligations of the State, as stipulated in the core international human rights laws or the key Covenants.

ICCPR	IESCR	ICERD	CEDAW
Civil and political rights	Economic, social and cultural rights	Elimination of racial discrimination	Elimination of discrimination against women
23 rd March 1976; 23 rd Feb 2006; 23 rd May 2005	3 rd Jan 1976; 23 rd Feb 2006; 23 rd May 2005	4 th Jan 1969; 25 th June 1999; 25 th July 1999	3 rd Sept 1981; 13 th Sept 1984; 13 th Dec 1984
Law No.12/2005	Law No.11/2005	Law No.29/1999 Law No.40/2008	UU No.7/1984
<i>Optional protocol is not ratified</i>	<i>Reject interpretation of 'right to self-determination'</i>	<i>Reservation against Art. 22</i>	<i>Reservation against Art. 29</i>
<i>Annul 'right to self-determination''</i>	<i>Annul 'right to self-determination''</i>		
<i>Reporting, Follow-up</i>	<i>Reporting</i>	<i>Reporting, Urgent action and early warning procedure, Follow-up</i>	<i>Reporting</i>
United Nations Declaration on the Rights of Indigenous Peoples			

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Body	Mechanisms	Results
United Nations, Committee on Racial Discrimination (2007)	Early Warning and Urgent Action Procedures on mega project along West to Eastern Kalimantan	Strong recommendations to Indonesia
World Bank/IFC (2007)	Accountability mechanism, complaint procedure of CAO	Suspension of funding on palm oil world wide (2009-2010)
United Nations, Special Rapporteur on Right to Food (2010)	Submission on palm oil case and state of rights to food	Positive recognition of the problems and issues
United Nations, Committee on Racial Discrimination (2011)	Early Warning and Urgent Action Procedures on MIFEE	Strong recommendation to Indonesia
Indonesia Constitutional Court (2011)	Judicial review against Plantation Act (Law 18/2004)	Constitutional Court revokes article 21 and 47

The Roundtable on Sustainable Palm Oil (RSPO) standards

The Roundtable on Sustainable Palm Oil's (RSPO) standard for the certification of sustainable palm oil was adopted in 2005. The standard is designed to divert palm oil expansion away from primary forests and areas of high conservation value, requires the recognition of customary rights in land, obliges growers to only acquire lands with the Free, Prior and Informed Consent of prior rights-holders, makes it mandatory that operations respect the rights of workers', migrants' and women' and pay fair prices to smallholders.

Originally developed mainly to suit large palm oil estates, the standard requires detailed annual audits of mills and their supply bases as well as audits of the 'chain of custody' to ensure produce from uncertified plantings does not get accepted into the certified supply chains. However both the Indonesian and Malaysian governments have raised concerns that the voluntary standard of the RSPO is too high and they have instead pledged to develop mandatory national standards for each country. NGOs, on the other hand, have complained that RSPO members are getting certified when their independent reviews suggest that the companies do not comply with the RSPO standard.

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Standards endorsed by the State, the World Bank, the RSPO and the ISPO

<i>Bottomline to sustainable palm oil</i>	<i>State</i>	<i>World Bank</i>	<i>RSPO</i>	<i>ISPO</i>
1.Respect for international laws	Yes	Yes	Yes	Yes
2.No conversion of primary forest and HCV areas	No/Yes	No	Yes	Yes
3.Free, Prior and Informed Consent	No	Yes	Yes	No
4.Respect for customary rights	No/Yes		Yes	No
5.Conflict resolution mechanisms	No	Yes	Yes	No
6.No burning/use of fire	Yes	No	Yes	Yes
7.No violence	No	No	Yes	No
8.Gender equity	No	Yes	Yes	No
9.Respect for workers' rights	No	No	Yes	No

In the light of the above, I would like to offer the following recommendations.

1. Corrective and affirmative action is critical for affected and vulnerable groups such as women, children workers, bonded labourers, stateless children, indigenous peoples and local communities.
2. The issuance of new permits must be suspended until all existing permits have been reviewed and problems on the ground resolved.

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3. The State must develop national human rights standards in agribusiness in order to enable, reconcile and incorporate international best practices into State policy.
4. National human rights regimes must be empowered to incorporate and institutionalise cross-cutting issues and arrangements relating to food sovereignty, human rights and the climate responsibility of the palm oil sector.
5. Legal reforms are critical for the implementation of credible, sustainable and responsible palm oil development and production, consistent with a human rights based approach to agribusiness.

Indigenous Rights and Customary Law in Indonesia

By Abdon Nababan

The reality of Indonesia: an overview

Indonesia is an archipelagic country composed of more than 17,000 islands, with a population of 240 million in 2010. Indonesia is a country of mega-biodiversity, with forty seven major types of ecosystems. It is also a country of mega-cultural diversity: more than 1,000 ethnic and sub-ethnic groups and languages have been identified across the country. There is no updated data to indicate the population of each ethnic group, but based on BPS data from 2000, only fourteen major ethnic groups have a population of more than one million. These are Java, Sunda, Melayu, Madura, Batak, Minangkabau, Betawi, Bugis, Banjar, Banten, Bali, Sasak, Makassar and Cirebon. Other less numerous ethnic groups can be considered as 'ethnic minorities'.

Indigenous peoples in Indonesia: who are they?

A range of terms have been used to refer to indigenous peoples in Indonesia. *Masyarakat hukum adat*, or customary law communities, is a term found in a number of laws and policies, including the 1945 Constitution, the 1960 Basic Agrarian Law, the 2009 Environmental Law and the 1999 Forestry Law. In the 1945 Constitution and the 2nd Amendment of 2001, the term *masyarakat tradisonal* - traditional community – is used. In the 2001 Papua Special Autonomy Law, we find the various terms *orang penduduk* and *suku asli Papua*. *Masyarakat adat* is another term found in the National Education Law and the 2007 Coastal and Small Islands Law, among others.

Distinguishing elements

A number of elements were identified which distinguish indigenous peoples from other segments of society. These are:

- 1) A group of people sharing the same cultural identities: indigenous peoples have distinct characteristics in terms of language, spiritual values, norms, attitudes and behaviours that distinguish their social group from others.
- 2) Distinct living areas, understood as ancestral territory, ancestral domain and customary territory: these include land, forests, sea, coastlines and the natural resources therein, as well as the religious and socio-cultural systems associated with and anchored in them.
- 3) Knowledge systems: also called ‘traditional wisdom’ or ‘local wisdom’, these are not only preserved as traditional forms of knowledge rooted in past practices but also enriched, adapted and developed in line with changing needs and contexts.
- 4) A common regulatory and governing system: these include customary laws and institutions for social organisation, behavioural regulation, self-governance and governance of natural resources.

Based on the definition and characteristics described above, AMAN estimates the total population of indigenous peoples (*masyarakat adat*) in Indonesia to be around fifty to seventy million, or 23% to 32% of the total population.

About AMAN

AMAN was established by the First Congress of Indigenous Peoples of the Archipelago (KMAN) in 1999 as the first national independent indigenous peoples’ organisation in Indonesia. With strong support from national and local NGOs and its own network, AMAN has evolved into a widespread movement throughout almost all parts of the archipelago. There are now 1,696 indigenous communities organised through twenty one regional chapters and

fifty nine local chapters of AMAN throughout the country. At AMAN's First Congress, held on 17th March 1999, a definition was developed for indigenous peoples as follows:

Indigenous peoples are a group of people who have lived in their ancestral domain/indigenous territory for generations, have sovereignty over the land and natural resources, govern their community by customary law and institution which sustain the continuity of their livelihood.



Map of Indonesia

Indigenous peoples' rights as constitutional rights

The diversity of indigenous cultures is acknowledged and reflected in the national motto of Indonesia, '*Bhinneka Tunggal Ika*', or Unity in Diversity. Article 18b point (2) of the UUD/Constitution of 1945 (2nd Amendment 1999) states that the traditional rights of

indigenous communities (*masyarakat hukum adat*) to govern and regulate their peoples and manage their resources are recognised and respected by the State. Article 28i point (3) of the same law also states that the cultural identity and traditional rights of indigenous communities are to be respected and protected by the State as human rights.

However, a strong tension exists between indigenous peoples, who self-govern by means of customary laws, and the sectoral laws of the hegemonic State of Indonesia. National development policies and laws systematically destroy indigenous local systems of organisation and resource use and management. The imposition of State control (*hak menguasai negara*) over natural resources has transformed the communal and collective rights of indigenous peoples over natural resources in their ancestral domain. The 1999 Forestry Law, for example, states that customary forest (*hutan adat*) is classified by the government as State forest, leading to exploitation rights being granted to State-owned and private companies. The imposition of uniform village-level governance, supported by the local military (BABINSA and KORAMIL) has destroyed indigenous community-based governance and undermined indigenous value systems, ideologies and customary laws. All these sectoral hindrances have generated numerous conflicts between and within communities, with the State and with corporations.

Main challenges faced by indigenous peoples in Indonesia

Indigenous peoples throughout Indonesia are suffering from the ecological degradation of their habitat and the impoverishment of biological diversity and other natural resources. Indigenous peoples are also a highly economically disaffected section of society. Where huge profits are being made from the exploitation of natural resources by the State and corporations, indigenous peoples represent 'poverty in the midst of plenty'. Economic marginalisation is compounded with the lack of political space for indigenous peoples to be involved in the formal political structures of policy and law making processes. Intra- and inter-community conflicts and

social disintegration result from the multiplying human rights violations that indigenous peoples suffer.

Customary laws and indigenous judicial systems

It is not that plants do not want to grow, it is the earth that does not want them. It is not that customary law does not want to work, it is that it has lost its ground.

M. Yakub, an indigenous elder from Rejang Lebong

Customary laws in some parts of Indonesia have not only have lost their biophysical environment, but also the social environment that shapes and sustains them. Dominant groups within customary societies are increasingly questioning the value and legality of customary laws, and trying to undermine and replace them with the enforcement of ‘modern’ national laws. The younger generation sometimes perceives customary laws as mystical, irrational and backward. Furthermore, indigenous leaders are increasingly losing their legitimacy due to their abuse of power and their involvement in ‘customary laws for money’ deals, driven by personal gain and vested interests.

Challenges from the past

This phenomenon is not new and has been a feature of historical developments for centuries. The infiltration of new values and religious rules from imported religions such as Hinduism, Buddhism, Islam and Christianity in many places has undermined and overruled customary laws. The monarchic period also saw kings and rulers defining, interpreting and enforcing rules on customary societies whose own customary laws were inevitably affected as a result. The Dutch colonial authorities enforced colonial laws but at the same time also recognised customary laws.

In the pre-reform period following independence, the unification of laws and judiciary systems under Law No. 23/1947 abolished the *swapraja* judiciary in Java and Sumatra, a movement later extended

to the whole of Indonesia through 'Urgent' Law No. 1/1951 on the judicial system, structure and authority. Only the religious courts remained in place. The unification of laws and of the judiciary system was completed with Law No. 14/1970, later revised by Law No. 35/1999. The politics of controlling and ruling over indigenous peoples was completed with Law No. 51/1979 concerning the homogenisation of the village governance system. After the reformation in 1998, the adoption of Law No. 22/1999 (revised by Law No. 32/2004) regarding local governance stimulated an effort to revive indigenous governance systems by allowing autonomy, and acknowledging original structures of governance at the village (or other) level based on local indigenous culture.

However, a number of challenges from the past still undermine the customary rights of indigenous peoples. The implementation of discriminatory policies over several centuries has made it difficult in some places to identify customary laws and indigenous judicial systems at all. Hegemony over time has eroded the genuine features of customary laws and indigenous judicial systems. The original rules, structures and the procedures involved are now more difficult to ascertain.

Furthermore, the erosion of identity has also eroded the confidence of indigenous peoples concerning their customary laws and judicial systems. The misuse of indigenous identity by certain elites for the sake of personal gain and interest has also placed the rights of less favoured segments of society at risk. In addition, customary laws and judicial systems have been blamed for racial conflict, and wrongly perceived as threats to democracy and justice.

Customary laws are no longer portrayed in their true sense as a set of collective values and rules to regulate the life of the community, the relations among community members, their relation with nature, and their relation with their creator. Nor are they seen as a tool to preserve social and ecological harmony. Instead, customary laws are manipulated as a 'tool to distinguish' in a highly negative and discriminatory way.

Opportunities for revitalising customary laws and judiciary systems

In response to the challenges described above, a widespread advocacy movement has developed, led by indigenous leaders and legal practitioners. The ideal of resolving conflicts by restoring harmony and balance has given an opportunity for customary laws to regain their place within indigenous peoples' societies in the midst of significant pressures resulting from the nature of the national legal system. Conflict resolution achieved through customary laws is not only about seeking justice, but also about restoring balance and peace among families and community members. This is why dialogue and rituals are frequently used methods of achieving conflict resolution in indigenous communities.

Since they are systems developed by communities themselves, customary laws and judicial systems are 'closer' and more relevant to their lives, easier to understand and relate to, more accessible and significantly more affordable in comparison to appealing to the national judicial system. In effect, it could be said that the crises and problems within the national judicial system itself today have made indigenous customary laws and judicial systems even more relevant as means of resolving conflict and preserving social order, as long as these customary systems are prepared to continue to evolve and adapt to the contemporary contexts in which they operate.

Opportunities for further legal and policy reform (since reformasi 1998)

Since the reform of 1998, the political situation in Indonesia has been characterised by a much greater degree of democracy. Decentralisation policies and local autonomy may also open up opportunities for indigenous peoples to advocate their rights through formal political processes at the district and provincial levels. The next few years will be critical for the consolidation and strengthening of indigenous peoples' organisations at various levels and in various dimensions.

A number of opportunities for further legal and policy reform already identified and taken up by AMAN and other indigenous peoples' organisations include:

- Official collaboration between indigenous peoples' organisations and the Indonesian Government: for instance, through the AMAN-National Commission on Human Rights (to implement Law No. 39/1999), the AMAN-Ministry of Environment (to implement Law No. 32/2009) and the AMAN-National Land Agency (to implement BAL 1960)
- Assistance to the government in identifying indigenous peoples in Indonesia: this is related to the critical note delivered by the Government of Indonesia at the signing of the adoption of UNDRIP.
- Establishment of an independent Ancestral Domain Registration Agency (BRWA): this was launched at AMAN's 11th anniversary on 17th March 2010 in Medan.

Securing Customary Rights through Plural Legal Approaches – Experiences and Prospects

By Mumu Muhajir

This presentation is derived from preliminary results of research carried out by Epistema since July 2011 with the aim of reviewing tenure security among communities who have resolved their conflicts or who are still facing prolonged conflict. If we see conflict as war, it can be shown that under certain conditions communities may be or could be winning the battle. The location of the study was Central Java and West Kalimantan but for the sake of this presentation, other research findings that correlated with the issues at hand have also been included.

First, what do we mean by tenure security? Three domains must be analysed to understand tenure: the legal dimension, the actual practices in the field and the perceived aspects/perceptions of tenure of local communities themselves. All three of these facets are in interplay although all three are not always simultaneously present or equal in weight and relevance.

Having identified the essential dimensions of tenure security, one may ask, in what situation and in what ways can communities secure their rights? The first method is through omission, whereby the State and/or license holder does not intervene in local communities' practices, livelihoods and uses of land and natural resources. This tends to be heavily influenced by the political and economic context of the local community in question. If the government sees that they will gain from the legalisation of one community, they will go for it. If not, they will not.

The case of omission relies heavily on two factors. First is the degree of power of the community. For example, in certain areas of Banten, the communities have a strong local organisation and are as

a result able to manage forest areas that legally belong to the government agency dealing with forest areas (*Perusahaan Hutan Negara Indonesia* or Perhutani) and convert them into agro-forest. The second factor is that of the value of the land under conflict itself. In Kaliputih, Kendal, a State estate company is attempting to seize disputed land which is located near a road and of relatively flat relief. Remote and steep land is not sought after by the company. As such, the value of the resource in question shapes the degree to which it is seen as an attractive asset and as a result, the degree of competition over the resource.

State legalisation allows recognition by the State of the existence and way of life of certain communities. The State thus gives autonomy to certain communities to manage their own land. In Indonesia, even though this recognition is supported by the Constitution and many other policies, the problem lies in its implementation, which is heavily dependent on the political interests of State actors and challenged by relations of distrust between the State and communities. Recognition of communities' rights and livelihoods in Indonesia is achieved through various channels, such as province or district regulations (*peraturan daerah* or *perda*), governor or Bupati decrees (*surat keputusan*) and certain established criteria (e.g. recognition of existence, full autonomy, or recognition of certain restricted rights). However, the question remains as to how the budget allocated by the State to support communities is distributed and synchronised with other State policies.

The second way in which communities can achieve tenure security is through the granting of land titles and licenses. Communities can gain a certain degree of tenure security from the various forms of licensing that the State has in place to manage natural resources. The licensing itself depends on the status of the land (e.g. forest land, land outside forest area and so on). However, the granting of land titles only happens in land outside forest areas. In situations of conflict, land titling policies rely heavily on agrarian reform policies and pressure from communities. For instance, in the case of Tratak, Batang, landless farmers seized neglected land belonging to one

company and, after a prolonged period of conflict with the company, have been promised land titles from the national land agency. However, Tratak is a special case. Agrarian reform policy remains easily spoken of but difficult to implement, and actual cases of successful implementation are rare.

In forest areas, communities can also gain some security from several forms of licensing such as *Hutan Kamasyarakatan* (community forests), *Hutan Desa* (village forests) or *Hutan Tanaman Rakyat* (peoples' plantations). These licenses give communities access to the forest but the complicated mechanisms they entail are a major barrier. More than twenty forms must be completed and submitted by communities to obtain the license and as a result only very few communities have managed to obtain them. The problem is exacerbated by the lack of policy support from the State as can be seen from the very small area of forest allocated to communities to access in comparison to what the State has allocated to private companies.

The third way in which communities can strengthen their tenurial security is through agreement. Agreement is generally reached with a license holder (usually a company) but in some cases, can be reached between the community and government institutions. Although an agreement may not be the most solid means of achieving tenurial security, it can act as a way for parties involved to seek mutual understanding and dialogue in areas where conflict and disputes exist. An agreement also gives communities, who in some cases lack strong legal awareness and backing, a way to access forest areas so that they can use the land to meet their daily needs.

Two forms of agreement can be reached. The first category involves the State and includes the PHBM (*pengelolaan hutan bersama masyarakat* or 'managing forests with communities'), an agreement between Perhutani and communities around a forest area. Another form of agreement is the PIR (*pola intirakyat* or Nuclear Smallholder Scheme), an agreement between private companies and communities. There are also agreements with national parks or other

conservation areas. In the second type of agreement, the State is not involved, but the parties use the States' instruments as a 'shield'. In Bunyau, for instance, the agreement between the communities and the company was strengthened by the presence of a notary, whom both parties saw as representing the State.

The broad range and diverse forms of agreements means that such agreements can end up acting as double-edged swords. If the community is weak, then it will be disadvantaged from the start. If it is strong, then it can draw greater benefits from the agreement. For instance, the communities of Ngareanak, Kendal, used the PHBM agreement as a shield to protect them from the intervention of a Perhutani. The solidity of their organisations (and their charismatic leader) gave them more power to draft a more favourable PHBM agreement (e.g. no payment to or benefit sharing with Perhutani), reduce the presence of Perhutani staff involved and enjoy greater flexibility as to how to interpret the terms of the agreement.

Another important means available to communities is that of out of (State) court decisions. I differentiate this from agreement because in the case of out of (State) court decisions as a means of conflict resolution, the win-lose solution is open and impartial third parties are present. Some of the decisions taken in out of (State) court decisions can become legally binding on both parties if registered at a district court. Such decisions can be implemented through various mechanisms and institutions, including *adat* courts and arbitrations. In West Kalimantan, at least nine companies were punished in accordance with customary law between 1999 and 2011. However, most companies denied the *adat* court verdict and retaliated against the communities by using the legal apparatus of the State.

(State) court decisions are a means of conflict resolution that is frequently avoided by communities, and particularly *adat* communities. This is not always due to the corruption associated with State court decisions, but the fact that the system itself is reluctant to accept legal pluralism in its practices, and as a result, communities tend to lose out.

A number of prospects exist for local communities in Indonesia today. First, the legalisation of full autonomy for indigenous peoples and local communities is underway through the drafting of the Indigenous Peoples Draft Bill (RUU Masyarakat Adat). Integrative and incorporative policies are being accelerated and expanded, as can be seen from the provisioning of areas for community forestry, the opening up of several options for communities to access conservation forest, and so forth. Second, there is a shift in State policies towards recognising, protecting and fulfilling the rights of communities, as evidenced by several State documents. Some departments have also begun to open up the debate about tenure and conflict more widely. Lastly, communities are increasingly able to use a variety of legal instruments to strengthen their tenurial security and in some cases, resort to a hybrid instrument of State and customary law in order to protect their livelihoods and basic rights.

Land Grabbing and Human Rights Issues in Food and Energy Estates in Papua

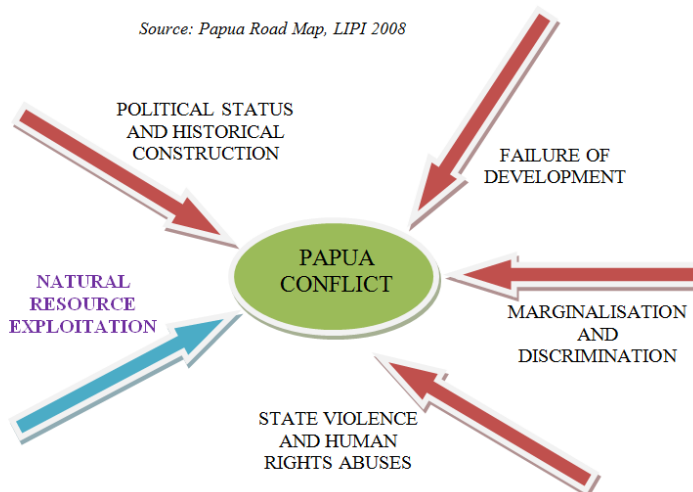
By Septer Manufandu

Papua covers an area of forty two million hectares of which 85% is forest. The Papuan people consist of 256 tribes, with a total population of 2.8 million, including a large number of migrants. The Special Autonomy Law No.21/2011 was granted to Papua essentially as a political compromise between the central government and the Papuan people. However, the implementation of this highly controversial law has been far from effective and positive in its impact due to ongoing political tensions and perceived independentist aspirations on the part of the Papuan people.

Conflict in Papua can be attributed to five main factors, depicted in the diagram below. First is the persistent marginalisation of and discrimination against local communities at the social, economic and political levels. Second is the failure of achieving development in line with the understanding and aspirations of the local population, and their lack of means to participate in related decision-making processes. Third is persistent State violence against the Papuan peoples who are perceived as threatening the territorial integrity of Indonesia because of their independentist activities. Fourth is the political and historical path that has transformed Papua into the subject of ongoing intense conflict and competition. The fifth dimension, emphasised by NGO FOKER LSM Papua, is that of natural resource exploitation in Papua at the hands of companies and backed by the Indonesian government with little or no consideration given to its impacts on indigenous peoples and local communities on the ground.

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Source: Papua Road Map, LIPI 2008



Since 1980, hundreds of natural resource companies have been operating in Papua. The extent of natural resource exploitation across the region is remarkable, as is the ensuing loss of livelihoods and food security of local inhabitants. Over fifteen million hectares of land have been allocated to companies as mining, logging, oil palm, and oil and gas concessions, leaving little space for Papuan peoples to access their customary lands or sustain their livelihoods.

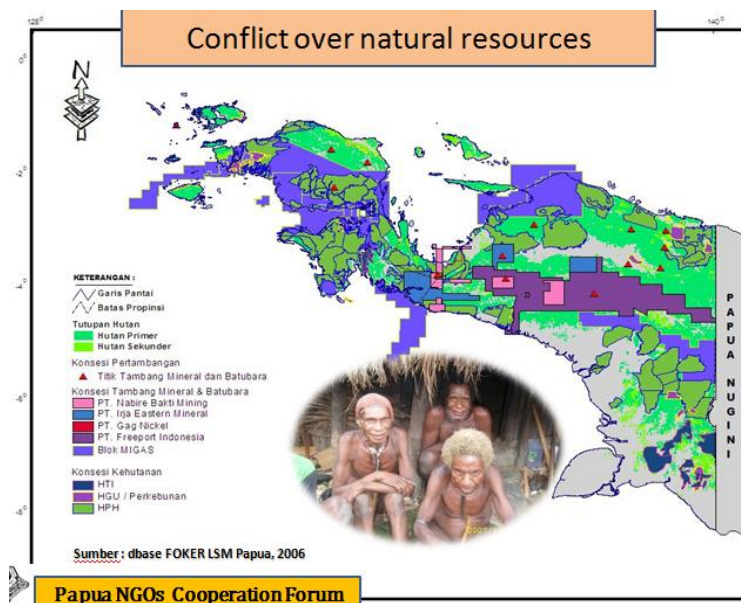
Twenty eight mining companies operate in Papua and seventeen in West Papua, and the exact extent of the area they occupy is unknown. PT Freeport along, the largest gold and copper mining company in Indonesia, occupies 2.6 million hectares of land. The MIFEE project, a vast food and energy estate in Merauke, covers over 1.6 million hectares of land and is operated by thirty two companies. Oil palm plantations in Papua and West Papua occupy at least two million hectares, and seven million hectares of land have been identified for further expansion of the crop. The largest plantations range from 150,000 to 300,000 hectares.

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In addition, seven million hectares have already been identified by the government for conversion to plantations, and most of the targeted areas are comprised of natural forest. Permits have already been allocated for 2,064,698 hectares. So far, at least thirty two investors have secured concession permits. Most of these are Indonesian but companies of Japanese, Korean, Singaporean and Middle Eastern origin are also believed to be involved.

Province	Companies	Hectares	Number of companies
Papua	PT Freeport	2,600,000	1
	HPH/IUPHHK-HA (logging)	5,202,478	21
	Copper, gold, silver and tin mining	No data	28
	MIFEE Project	1,616,234	32
West Papua	HPH/IUPHHK-HA (logging)	4,174,970	23
	LNG Tangguh Project	3,416	1
	Copper, gold, silver and tin mining	No data	17
Papua and West Papua	Oil palm expansion	2,064,698	19
TOTAL		15,661,796	142

Natural resource companies operating in Papua



Map of natural resource conflict by operating company

The Merauke Integrated Food and Energy Estate (MIFEE)

In 2008, the government issued Presidential Decree No.5/2008 with a focus on economic development through large-scale investment in food production estates. The Decree encouraged investors to develop food crop plantations in the region and became the foundation for the establishment of the Merauke Integrated Food and Energy Estate (MIFEE), a mega-project covering 1.2 million to 1.6 million hectares of commercial plantations.

The principal commodities to be produced under the umbrella of MIFEE are timber, palm oil, corn, soya bean and sugarcane. From available data from 2009, it was calculated that 316,346 hectares would be converted to oil palm plantations, 156,812 hectares to sugarcane plantations, 97,000 hectares to maize plantations, 973,057

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to industrial forest plantations, 69,000 hectares to food crops, and 2,818 hectares to wood processing facilities.

No	Investor Name	Area	Type of bussines/crops
1.	PT. Bio Inti Agrindo	39.900 Ha	Palm
2	PT. Ulin Agro Lestari	30.000 Ha	Palm
3	PT. Dongin Prabhawa	39.800 Ha	Palm
4	PT. Berkat Cipta Abadi	40.000 Ha	Palm
5	PT. Papua Agro Lestari	39.800 Ha	Palm
6	PT. Hardaya Sawit Papua	62.150 Ha	Palm
7	PT. Mega Surya Agung	24.697 Ha	Palm
8	Pt. Agrinusa Persada Mulia	40.000 Ha	Palm
Area of palm		: 316.347 Ha	
	PT. Tebu Nusa Timur	12.000 Ha	Sugarcane
10.	PT. Papua Resources Indonesia	20.000 Ha	Sugarcane
11.	PT. Agri Surya Agung	40.000 Ha	Sugarcane

12.	PT. Nusantara Agri Resources	40.000 Ha	Sugarcane
13.	PT. Hardaya Sugar Papua	44.812 Ha	Sugarcane
Area of Sugarcane		: 156.812 Ha	
14.	PT. Muting Jaya Lestari	40.000 Ha	Maize
15.	PT. Digul Agro Lestari	40.000 Ha	Maize
16.	PT. Tjipta Bangun Sarana	14.000 Ha	Maize
17.	PT. Muting Jaya Lestari	3.000 Ha	Maize
Area of Maize		: 97.000 Ha	
18.	PT. Energi Hijau Kencana	90.225 Ha	Industrial Forest
19.	PT. Plasna Nutfah Marind Papua	67.735 Ha	Industrial Forest
20.	PT. Inocin Abadi	45.000 Ha	Industrial Forest
21.	PT. Balikpapan Forest Indonesia	40.000 Ha	Industrial Forest
22.	PT. Wanamulia Suskes Sejati	61.000 Ha	Industrial Forest
23.	PT. Wanamulia Suskes Sejati	96.553, 560 Ha	Industrial Forest
24.	PT. Wanamulia Suskes Sejati	116.000 Ha	Industrial Forest
25.	PT. Kertas Nusantara	154.943 Ha	Industrial Forest
26.	PT. Selaras Inti Semesta	301.600	Industrial Forest
Area of Industrial Forest		: 973.057,56 Ha	
27.	PT. Sumber Alam Sutera	15.000 Ha	Food Crops
28.	PT. Bangun Cipta Sarana	14.000 Ha	Food Crops
29.	PT. Karisma Agri Pratama	40.000 Ha	Food Crops
Area of Food Crops		: 69.000 Ha	
30.	PT. Muting Mekar Hijau	18 Ha	Wood Processing
31.	PT. Medco Papua Industri Lestari	2.800 Ha	Wood Processing
Area of Wood Processing		: 2.818 Ha	
32.	PT. Cupta Beton Sinar Perkasa	1.200 Ha	Harbor developer
Area for harbor developer		: 1.200 Ha	
TOTAL AREA		: 1.616.234,56 Ha	

Source: Badan Koordinasi Penanaman Modal Daerah dan Pertijman (BKPMDDP), Pemerintah Kabupaten Merauke, 2009

Agribusiness companies involved in MIFEE

The consequences of MIFEE for indigenous peoples and local communities

The MIFEE agro-industrial mega-project encompasses around two million hectares of traditional indigenous lands. The Malind peoples and others are presently experiencing and are threatened with imminent irreparable harm due to the massive and non-consensual alienation and conversion of their ancestral lands and forests.

In particular, the food security of the Malind peoples is under serious threat as the lands they traditionally depended on for their subsistence is now being converted to agro-industrial concessions. The slogan of MIFEE ‘feed Indonesia and then the world’ is no reassurance to local farmers, who are concerned that the project will undermine their traditional agricultural livelihoods and food sovereignty. This situation can be captured by the phrase ‘*food versus forests, profits versus people*’, as the MIFEE project is leading to rampant deforestation of primary forest for the production of food, and where the profits derived will not accrue to local communities but will rather threaten their very survival.

MIFEE is already having serious negative impacts on local communities. For instance, in Kampong Boepe, District Kaptel, Merauke district, indigenous communities are beginning to find it difficult to find firewood, hunt animals, obtain clean water and cultivate their staple food, sago. This is a result of company PT Medco Papua Sustainable Industries having cleared the forest on which local communities depend to obtain food. It is not only at a practical level of obtaining food that lowland Papuans are threatened, but also in terms of their cultural practices and social identity. This brings to mind Jean Anthelme Brillat-Savarin’s famous words: ‘tell me what you eat, and I will tell you who you are’. As reported by community members, the loss of means to produce and consume sago is not only about nutrition, but also about cultural identity, as it is central to many ritual practices and beliefs. Robbing Papuans of their identity and subsistence is thus no less than food racism.

Apart from the serious threat to food security of the Papuan peoples posed by MIFEE, the huge workforce needed to operate the project is of major concern for local communities, who risk finding themselves outnumbered by three to one. Additionally, it is estimated that between two and four million workers will be moved into Merauke - a process that has already commenced - to provide labour for the MIFEE project, further threatening the rights and well-being of the Malind who number approximately 52,000 persons. According to the 2010 census, the total population of Merauke is approximately 173,000. The total indigenous population of Merauke is approximately 73,000.¹ This demographic transformation vastly increases the prospect of cultural dispossession of local Papuan people and conflict between different ethnic groups over land and natural resources as these grow scarcer.

These serious concerns prompted Forest Peoples Programme and twelve other signatories to make a Request for Consideration of the Situation of Indigenous Peoples in Merauke on 21st July 2011 under the United Nations Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures. UNCERD issued a formal communication to the Permanent Mission of Indonesia on 2nd September 2011. However, Indonesia failed to respond to the communication, prompting the signatories to send a Request for Further Consideration under UN CERD's Urgent Action and Early Warning Procedures on 6th February 2012.²

¹ *Request for Consideration of the Situation of Indigenous Peoples in Merauke, Papua Province, Indonesia*. United Nations Committee on the Elimination of Racial Discrimination, Seventy-ninth session, 08 August - 2 September 2011.

² Available at

http://www.forestpeoples.org/sites/fpp/files/news/2011/08/CVR%20LTR%20EW_UA%20Indigenous%20Peoples.pdf;

http://www.forestpeoples.org/sites/fpp/files/news/2011/08/EW_UA%20Indigenous%20Peoples%20Merauke%20Indonesia%20July%2031%202011%2

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Peaceful demonstration against MIFEE project in Jayapura

0Final.pdf;
<http://www.forestpeoples.org/sites/fpp/files/publication/2011/09/cerduaindo-nesia02092011fm.pdf>;
<http://www.forestpeoples.org/sites/fpp/files/publication/2012/02/2012-cerd-80th-session-ua-update-final.pdf>

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Oil palm plantation in Waris, Jayapura Regency



Rajawali group oil palm plantation, Keerom Regency

The threat to the food security of Papuan peoples is even greater in the light of the existing poverty in the region. In 2010, the poverty

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rate in West Papua was of 36.8% and in Papua province 34.88%, representing 71.68% of the total population. These two regions have the highest poverty rates in Indonesia, as well as the lowest Human Development Index (HDI).

Portrait of poverty in Indonesia, 2006-2010					
Provinsi/Province	TINGKAT KEMISKINAN (%)				
	2006	2007	2008	2009	2010*
Nanggroe Aceh Darussalam	28,28	26,65	23,53	21,8	20,98
Sumatera Utara	15,01	13,90	12,55	11,51	11,31
Sumatera Barat	12,51	11,90	10,67	9,54	9,5
Riau	11,85	11,20	10,63	9,48	8,65
Jambi	11,37	10,27	9,32	8,77	8,34
Sumatera Selatan	20,99	19,15	17,73	16,28	15,47
Bengkulu	23,00	22,13	20,64	18,59	18,3
Lampung	22,77	22,19	20,98	20,22	18,94
Kepulauan Bangka Belitung	10,91	9,54	8,58	7,46	6,51
Kepulauan Riau	12,16	10,30	9,18	8,27	8,05
DKI Jakarta	4,57	4,61	4,29	3,62	3,48
Jawa Barat	14,49	13,55	13,01	11,96	11,27
Jawa Tengah	22,19	20,43	19,23	17,72	16,56
DI Yogyakarta	19,16	18,99	18,32	17,23	16,93
Jawa Timur	21,09	19,98	18,51	16,68	15,26
Banten	9,79	9,07	8,15	7,64	7,16
Bali	7,08	6,63	6,17	5,13	4,88
Nusa Tenggara Barat	27,17	24,99	23,81	22,78	21,55
Nusa Tenggara Timur	28,34	27,51	25,65	23,31	23,03
Kalimantan Barat	15,24	12,91	11,07	9,3	9,02
Kalimantan Tengah	11,00	9,38	8,71	7,02	6,77
Kalimantan Selatan	8,32	7,01	6,48	5,12	5,21
Kalimantan Timur	11,41	11,04	9,51	7,73	7,66
Sulawesi Utara	11,54	11,42	10,10	9,79	9,1
Sulawesi Tengah	23,63	22,42	20,75	18,98	18,07
Sulawesi Selatan	14,57	14,11	13,34	12,31	11,6
Sulawesi Tenggara	23,37	21,33	19,53	18,93	17,05
Gorontalo	29,13	27,35	24,88	25,01	23,19
Sulawesi Barat	20,74	19,03	16,73	15,29	13,58
Maluku	33,03	31,14	29,66	28,23	27,74
Maluku Utara	12,73	11,97	11,28	10,36	9,42
Papua Barat	41,34	39,31	35,12	37,53	36,8
Papua	41,52	40,78	37,08	35,71	34,88
Indonesia	17,75	16,58	15,42	14,15	13,33

West Papua and Papua have the highest poverty rates in Indonesia, as well as the lowest HDI

Papua has experienced dramatic change in demography which projects such as MIFEE will only exacerbate. The proportion of indigenous Papuans and migrants are 52 % and 48% respectively, according to the 2003 National Government census. In the span of just seven years, the migrant population had risen to 53.5% of the total population of 2,833,381. The annual population growth rate for Papuans since 1971 has been of only 1.67%, whereas the non-Papuan population has grown at a rate of 10.5% in the same period. Calculations of population growth predict that by 2030, the Papuan population will be reduced to a mere 15.2%, in what is effectively a demographic disaster for native Papuans.

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Tahun	Jumlah penduduk		Total Penduduk	% Comparison		annual growth Rate	
	Papuan	Non Papuan		Papuan	Non papuan	Papuan	Non Papuan
1971	887,000.00	36,000.00	923,000.00	96%	4%	1.67%	10.5%
1990	1,215,897.00	414,210.00	1,630,107.00	75%	25%		
2005	1,558,795.00	1,087,694.00	2,646,489.00	59%	41%		
2011	1,700,000.00	1,980,000.00	3,680,000.00	47%	55%		
2020	1,956,400.00	4,743,600.00	6,700,000.00	29.2%	70.8%		
2030	2,371,200.00	13,228,800.00	15,600,000.00	15.2%	84.80%		

Source: Elmslie 2010

Not only are Papuan peoples losing their access to food and livelihoods, and increasingly outnumbered by migrant workers, they are also subject to persistent intimidation by military personnel and the army, who now number 16,000 across Papua. Violence and the violation of human rights of local people by the army and military in the name of security are rife. Merauke Regency, being located next to an international border, is one of the most military-dominated regencies in Papua. Major projects such as MIFEE receive particular attention from Indonesia's security forces as they are seen as crucial to the national economy and because corrupt police staff and soldiers see the potential in such projects for significant personal profit.

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Indonesian National Armed Forces (TNI) bases and deployed units in West Papua



Location of police forces in West Papua

Conclusions

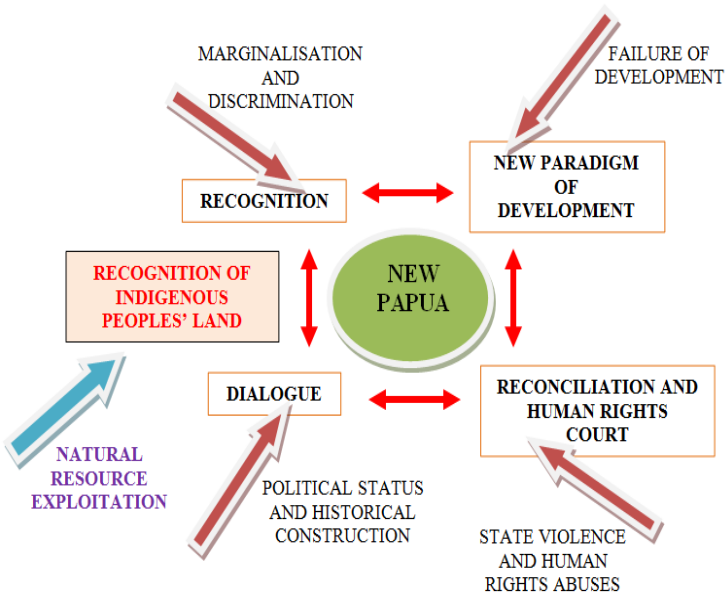
To conclude, I would like to revisit the diagram of causes of conflict in Papua examined earlier in this paper in order to offer recommendations as to how to proceed towards resolving the numerous human rights violations which Papuan peoples are suffering on a daily basis.

Of crucial importance is the need for the State to recognise indigenous peoples' customary lands and the importance of these lands and natural resources therein to their livelihoods and cultural identity. This in turn will help resolve and mitigate conflict and the grabbing of resources from indigenous peoples without their Free, Prior and Informed Consent. Second, the cultures, values and social organisations of Papuan peoples must be recognised by civil society and the State in the form of laws and policies tailor-made to the region, in order to put an end to the rampant socioeconomic discrimination and marginalisation Papuan peoples are victim of.

Third, it is recommended that a new paradigm of development, anchored also in indigenous peoples' understandings and aspirations for their futures, be elaborated, as it is evident that the current model is operating with complete disregard for human rights. In addition, iterative and participatory dialogue between all key stakeholders, including indigenous peoples and local communities, is critical to rehabilitate the political status of indigenous Papuan peoples. Finally, Papuan peoples must be given access to affordable, accessible and equitable mechanisms of redress to which they can appeal as victims of State-sanctioned violence and abuse.

All these recommendations are interlinked and mutually complementary. If they are genuinely taken on board and implemented at the local level, these recommendations can act as the basis for the construction of a 'New Papua', one that is free from violence and based on respect for human rights, in line with the international human rights treaties and conventions signed by the Indonesian State.

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Towards a 'New Papua'

DISCUSSION

The presentation on MIFEE stimulated a lengthy discussion on the particularly sensitive situation in West Papua, and the challenges posed by transmigration programmes in Indonesia more generally. The nature of customary rights and the consequences of formalisation of tenure through titling were examined, as well as the need to address workers' rights in oil palm plantations.

The consequences of transmigration programmes.

Palm oil development is part of resettlement programmes in several Southeast Asian countries. In Indonesia, for instance, transmigration programmes of labour workers on oil palm plantations began prior to the 1980s, after which the pattern of development changed and migration became more difficult. This was largely a result of strong protests and rejection on the part of local communities (particularly in Kalimantan) of incoming migrants and the unjust privileges given to them, such as access to land. The new model today is that of food and energy estates, such as the 1.2 million hectares MIFEE estate in West Papua. Two to four million workers will be moved into Merauke to provide labour for the MIFEE project, whereas the population of the Malind peoples is of only 52,000 persons. New transmigration programmes might be initiated to resolve this problem, but are not going to be accepted by local communities.

Basically, palm oil cannot be sustainably produced if there is insufficient land, lack of a labour force or the absence of cooperative communities that can draw benefit from oil palm expansion, as well as the absence of supportive development facilities and infrastructural improvements initiated by the government. The pattern of oil palm expansion largely depends on whether the government and the private sector can really make sure that expansion, capital flow and labour flow are achieved smoothly.

Oil palm as a means of poverty alleviation.

In Malaysia, the Philippines and Indonesia, the government justifies oil palm development as part of regional development for economic growth and the generation of employment opportunities in poor rural areas. For instance, the FELDA scheme is claimed by the government to be a programme of land distribution to landless people. The question is whether people on the ground are actually getting the benefits of oil palm expansion – is the money being devolved to the grassroots level? Are benefit-sharing mechanisms in place? And how is the food security of local communities sustained if the land they depend on for subsistence cultivation is converted to oil palm plantations?

The problem of 'eminent domain'.

Human rights violations and enforcement can only be effective if the principle of 'eminent domain' is eliminated once and for all. This principle – essentially that the State has the right to determine your future and what is best for the people – is a root cause of land grabbing and ensuing human rights violations. If this is not addressed properly, it is unlikely that any human rights enforcement will happen in the near future.

Population colonisation in West Papua.

The situation in West Papua is effectively 'population colonisation' for political ends, whereby the government moves in vast numbers of non-Papuan migrants as a way of influencing referendum outcomes. The Indonesian Constitution states that international law is higher than national law provided that it is applicable. There is the possibility of appealing to CERD but also to national constitutional litigation, and through Komnas HAM's own mandate and position in relation to the implementation of national and international laws.

The flexibility and adaptability of customary laws.

When talking of customary laws and rights, it is important to avoid perceiving these as archaic and unchanging practices. On the contrary, customary rights have proved more than capable of

adapting and evolving to meet new challenges and contexts. A legally pluralistic approach is one that recognises the relative flexibility of custom and how custom manages to retain its legitimacy and value as a result.

The challenges of implementing collective rights.

Collective resource use and land rights may be a customary practice of indigenous peoples across the Southeast Asian region, however, formalising collective rights is a daunting task. Many issues will have to be considered, such as how collectively held land will be inherited, and how governance responsibilities will be distributed. Formalising collective rights must be a long-term process – if rushed, it could end up worsening the situation of indigenous peoples, possibly fostering greater inter- and intra- community conflict, without bringing about the benefits associated with formalised collective ownership and use.

The false hope of the moratorium.

Hopes that the two year moratorium on forest clearance in Indonesia would slow oil palm's expansion have now dissipated as the government has excepted areas where preliminary permits have already been handed out. It is critical that the government be taken up on its accountability and responsibility to respect the moratorium for lands for which permits have not yet been issued.

Contemporary forms of slavery persist in oil palm plantations.

More advocacy and actions are needed to protect workers' rights. Debt slavery, or debt peonage, was discovered during an independent fact-finding mission by FPP, HuMa and SawitWatch in October 2011 on an oil palm plantation owned by Wilmar subsidiary PT Asiatic Persada.¹ Persistent slavery-like working conditions have to be addressed urgently by appealing to the ILO.

¹ Colchester et alii 2011.

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Rights of migrants versus right of indigenous peoples.

The massive influx of migrants to Papua could allow local Papuans' votes to be swamped by migrants' vote in a plebiscite for self-determination. At the same time, however, many of the migrants in Papua are themselves very poor, and also have the rights to a livelihood. There are therefore contradictory rights at play.

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CHAPTER IV: MALAYSIA

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Land Rights and Indigenous Peoples in Malaysia

By Jannie Lasimbang

Introduction

Indigenous peoples maintain distinct spiritual and material relationships with their customary land as part of their identity as peoples. The recognition, promotion and protection of rights over indigenous peoples' customary lands and resources are vital for their development and cultural survival. Indigenous peoples continue to be adversely affected by the consequences of mainstream development and conservation practices, and are often deprived of their traditional land and resource base.

In Malaysia, the indigenous peoples or 'natives' of Sabah and Sarawak are accorded special rights and privileges under Article 153 of the Federal Constitution, while Article 161(a) allows for State laws in Sabah and Sarawak to provide for the reservation of land for indigenous peoples or to give preferential treatment to indigenous peoples in cases of appropriation of land by the State. Under Article 8(5) (c) of the Federal Constitution, the Federal Government is empowered to legislate for the 'protection, well-being and advancement' of the natives of Sabah and Sarawak, which should be understood to mean that the Federal and State governments in Peninsular Malaysia owe a fiduciary duty towards them, including with regards to the reservation of lands.

Conflicts over land experienced by indigenous peoples in Malaysia are complicated and long-drawn. This paper will attempt to give an overview of some of the key issues and challenges faced.

Indigenous peoples of Malaysia¹

In Malaysia, 'indigenous peoples' are identified in the Federal Constitution and relevant State laws, including the aborigines of Peninsular Malaysia and the natives of Sabah and Sarawak.

With regards to Peninsular Malaysia, Article 160 of the Federal Constitution of Malaysia provides that 'aborigine' means an aborigine of the Malay Peninsula, while Section 2 of the Aboriginal Peoples Act 1954 specifies that 'aboriginal racial group' means one of the three main aboriginal groups in West Malaysia, divided racially into Negrito, Senoi and Proto-Malay.² Each group further consists of several sub-ethnic groups as follows:

¹ Section 2 and 3 are taken from SUHAKAM's 'Background Paper on the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia'.

² Section 3 on the definition of 'aborigine' under the Aboriginal Peoples Act 1954 further states the following:

(1) In this Act an aborigine is -

(a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;

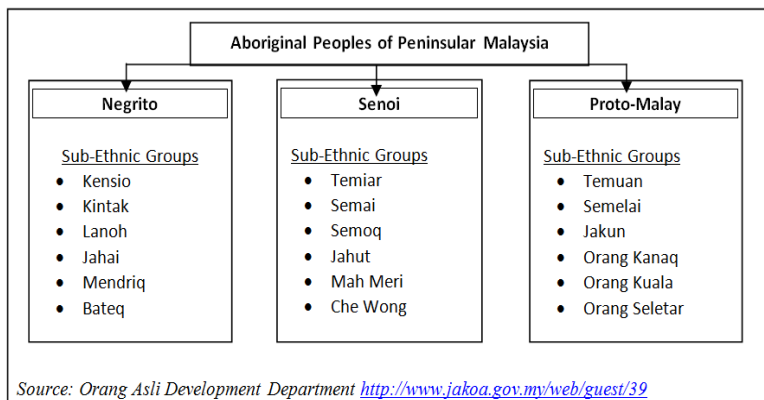
(b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or

(c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

(2) any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.

(3) any question whether any person is or is not an aborigine shall be decided by the Minister.

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With respect to the natives of Sarawak, article 161a(7) of the Federal Constitution of Malaysia and Section 3 of the Sarawak Interpretation Ordinance (Cap. 1 1958 Ed.) state that the indigenous peoples of Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.³

In relation to Sabah, Article 161A (6)(b) of the Federal Constitution of Malaysia and Section A41(10) of the Sabah Constitution provides that for a person to be considered as a native of Sabah, the following criteria must be fulfilled: (a) citizen of Malaysia (b) child or

³ Additionally, Article 161A(6)(a) of the Federal Constitution of Malaysia states that in relation to Sarawak, 'native' means a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the state or is of mixed blood deriving exclusively from those races.

grandchild of a person of a race indigenous to Sabah and (c) born either in Sabah or to a father domiciled in Sabah at the time of birth.⁴

⁴ Further to the Federal Constitution, Section 2 of the Interpretation (Definition of Native) Ordinance (Sabah Cap.64) state the following:
(1) Wherever the word 'native', used as a substantive, occurs in any written law in force at the commencement of this Ordinance, other than the Ordinances set out in the Schedule to this Ordinance, or in any written law coming into force after the commencement of this Ordinance, unless expressly otherwise enacted therein, it shall mean either –
(a) any person both of whose parents are or were members of a people indigenous to Sabah; or
(b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or
(c) any person who is ordinarily resident in Sabah, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the state of Sarawak or the state of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63 [Act 155.].
Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in Sabah, then the qualifying period shall be reduced to two years; or
(d) any person who is ordinarily resident in Sabah, is a member of a people indigenous to the Republic of Indonesia or the Sulu group of islands in the Philippine Archipelago or the states of Malaya or the Republic of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63 [Act 155.].
(2) In the definition of 'native' set out in subsection (1) hereof-
(a) 'ancestor' means progenitor in the direct line other than a parent;
(b) 'native community' means any group or body of persons the majority of whom are natives within the meaning of paragraph (a) of subsection (1) and who live under the jurisdiction of a Local Authority established under the

Protection of Native Customary Rights (NCR) to land in Malaysia⁵

In Malaysia, the Federal Constitution protects rights critical to maintaining the special relationship between native communities and their lands. This relationship underlies the spiritual, cultural, economic and social existence of native communities. The right to property, livelihood and equality before the law, safeguards for native interests, the fiduciary obligation of government officials and recognition of customs as law, all play a role in the recognition and protection of native title.

Native title arises out of native customs which are part of the law of Malaysia and protected under the Federal Constitution. Because they embody and protect the special relationship between natives and their land, the application of customs in recognising native title ensures the continued existence of these native communities. The implementation of customs is also consistent with the common law, which directs courts to define native title with reference to native customs.

The constitutional protection of equality before the law requires recognition of native customs on an equal basis with non-native property rights. The principle of equality also requires that, once recognised, native title must be afforded the same protection as non-native property interests. This means that methods for registering and protecting native title must be implemented on the basis of equality with non-native property interests. In practical terms, this

provisions of the Rural Government Ordinance* [Cap. 132.] or of a Native Chief or Headman appointed under the provisions of that Ordinance;

(c) 'parent' includes any person recognised as a parent under native law or custom.

(3) No claim by any person to be a native by virtue of the provisions of paragraphs (b), (c) and (d) of subsection (1) shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3.

⁵ Bulan & Locklear 2008.

requires surveying lands, properly registering native title interests, and issuing documentary titles to natives and native communities once they have established Native Customary Right (NCR). In sum, in terms of proprietary rights, equality between natives and non-natives will only be achieved when comparable protections under law and customs take their rightful place alongside the other sources of law in existence in Malaysia. Anything short of full recognition for the relevant native law and customs will perpetuate the discrimination against native peoples that has resulted in the erosion of their fundamental human rights.

In addition to its role as a vehicle for implementing native customary land tenure, native title is a property right that is given constitutional protection. It is a right that cannot be taken away except in accordance with the law and upon payment of just compensation. Recognition and protection of native title is also required as part of the constitutional right to livelihood, which guarantees native title based on the essential role of land in the economies and cultural identity of native communities. In determining adequate compensation for the deprivation of native title, the role of land in the livelihood of native communities is a relevant factor. In addition, damages other than compensation in cash may be necessary in cases where the deprivation of property also constitutes a deprivation of livelihood.

Underlying the protection of NCR is the fiduciary obligation of the Federal and State government towards natives. To meet their fiduciary obligation, government officials must not take actions that are inconsistent with the interests of their beneficiary and may not delegate their discretionary power to a third party. Furthermore, the fiduciary obligation requires that government officials consult with and obtain the consent of native communities prior to taking actions that may infringe on or extinguish their native title rights.

Furthermore, there is an emerging body of judicial authorities reaffirming recognition of and protection for native title arising out of traditional laws and customs. Native title protects the rights of

natives in and to the land and thus represents full beneficial ownership of land. Where that property interest is extinguished, the government must pay adequate compensation according to the requirements of Article 13 of the Federal Constitution.

NCR to land represents a non-documentary title held by the community which is permanent, heritable and transferable. However, natives may only transfer the land to other natives or the government subject to the conditions of the native title. Because the land subject to native title is an essential component of community life, Article 5 of the Federal Constitution protects the interest of the natives as a right to livelihood.

The Malaysian courts have in fact endorsed this in several judgments that essentially accorded native title to indigenous lands, territories and resources. These include the judgments in the cases of *Adong Kuwau*⁶, *Nor Nyawai*⁷, *Sagong Tasi*⁸, *Rambilin*⁹, *Madeli Salleh*¹⁰ and more recently, *Andawan Ansapi*¹¹. These judgments attest that native title arises out of native customs and that these customs, which define the content of native title, are part of the law of Malaysia and are protected under the Federal Constitution. The implementation of customs is also consistent with common law, which directs the courts to define native title with reference to native

⁶ *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*, No. 24-828-1994 (High Court, Johor Bahru, 21st November 1996).

⁷ *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors*, No. 22-28-99-I (High Court of Sabah and Sarawak, Kuching, 12 May 2001).

⁸ *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors*, No. MTI-21-314-1996 (High Court of Malaya, Shah Alam, May 27, 2010).

⁹ *Rambilin binti Ambit v Assistant Collector for Land Revenue, Pitas*, No. K 25-02-2002 (High Court of Sabah and Sarawak, Kota Kinabalu, 28th September 2010).

¹⁰ *Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh*, No. 01-1-2006 (Q) (Federal Court, Putrajaya, 8th October 2007).

¹¹ *Andawan Ansapi & 5 Ors v Public Prosecutor*, No. K41-128-2010 (High Court of Sabah and Sarawak, Kota Kinabalu, 5th March 2011)

customs.¹²

Given the interplay between common law, legislative provisions, the Federal Constitution, the existence of indigenous customary practices and the native conception of property, a morally defensible concept of native customary rights must not only look to common law and statutory provisions, but must also fully incorporate native perspectives. Where the rights are provided by statute, any inadequacy must be compensated by reference to constitutional provisions to give full recognition of customary rights to land.

Since its establishment, the Human Rights Commission of Malaysia (SUHAKAM) has received complaints and memorandums from indigenous communities alleging various forms of human rights violations. These represent the highest number of complaints annually. In response to these complaints, SUHAKAM conducted investigations into specific cases, carried out field studies, held dialogues with the relevant communities and roundtable discussions with the State government and other relevant agencies as well as private enterprises mentioned in these complaints. Based on SUHAKAM's various studies, it was found that a majority of these complaints relate to Native Customary Right to land, including the recognition of NCR; allegations of encroachment and/or dispossession of native land; gazettelement of native land into forest or park reserves; and overlapping community claims on native land. Literature reviews on the issues concerned also revealed that the alleged deprivation of rights to native customary land occurs widely amongst the indigenous peoples of Malaysia.

SUHAKAM is of the view that a problem of this magnitude cannot be overcome through piecemeal approaches or be addressed on a case by case basis. Instead, there is a need to tackle the root causes of the issues at hand in a comprehensive manner by taking cognisance of the experiences of indigenous peoples all over

¹² Bulan and Locklear 2008.

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Malaysia and through a human rights lens. It is with this objective that SUHAKAM has initiated the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia (see Annex 1 for the Terms of Reference of the National Inquiry).

Issues and challenges related to NCR

Land issues faced by indigenous peoples are complicated, to say the least. A compilation of the complaints received by SUHAKAM is in the table below.

Region/ CATEGORY	2002 - 2010			National Inquiry		
	Sabah	Sarawak	PM	Sabah	Sarawak	PM
Administration/ Compensation	657	97	17	185	73	
Land Acquisition	62	*	*	4	*	
Plantations/ Encroachment	41	110**	26**	54	47**	
Forest Reserve	56	8		31		
Park/Wildlife Reserve	5			6	2	
Water Catchment	3	7		9	3	
Resettlement	-	1	1	-		
More than one category***				94	47	
Court cases					23	
	824	223	44	383	195	

* data may be included under "Administration/Compensation"

** may include issues related to land in Forest Reserves

*** mainly relates to administrative encroachment

Relevant authorities have been seeking solutions to some of these problems, although some of these may have actually ended up further complicating them. Key issues and challenges raised by indigenous communities in Malaysia can be categorised broadly as follows.

Differing perspectives on NCR.

A key challenge with respect to the land claims of indigenous peoples in Malaysia is the fact that indigenous peoples' perspectives on land ownership differ from the government's perspectives as embodied in the present laws and policies related to land, despite

constitutional guarantees. Although the understanding of NCR is incorporated in some of the laws in Sabah and Sarawak, they represent a half-baked understanding of customary laws and practices which exist to this day. In Peninsular Malaysia, the National Land Code does not have any provision to recognise Orang Asli customary land rights.

An example is the criteria for NCR land in the Sabah Ordinance 1930, where fallow period is not recognised and only fruit trees and plants of economic value are part of the criteria of establishing NCR to land. In Sarawak, the government limits NCR land to cultivated areas opened prior to 1st January 1958 and does not recognise traditional areas such as *pemakai menoa*, *pulau galau*, nor the perspectives of land ownership of the nomadic and semi-nomadic Penan. The preferred collective form of land ownership through the gazettement of Orang Asli reserve land is not respected and the government is intent on pursuing individual land distribution.

Administrative

Extremely slow surveying and processing of NCR land claims.

This includes the gazetting of native reserves by the relevant authorities (Lands and Surveys Department in Sabah and Sarawak, and the Lands and Mines and Orang Asli Development Departments in Peninsular Malaysia). As a result, encroachment leading to dispossession and insecurity are rampant, and constitute key reasons for discontent among indigenous peoples of Malaysia. This is also a direct result of the non-recognition of indigenous NCR perspectives.

For the Orang Asli, requests to gazette traditional lands, resettlement or the regroupment of areas as Orang Asli Reserve land were reported to be very slow. Among the key challenges cited by authorities are lack of funds to carry out surveys of Orang Asli areas, non-existing clear legal provisions to alienate Orang Asli land, and the State's reluctance to alienate land that will be controlled by a Federal department i.e. the Orang Asli Development Department. The government is currently in the process of

amending the Aboriginal Peoples Act to implement the Orang Asli Land Ownership policy, both of which the Orang Asli object to. The government adopted the controversial policy of granting individual land ownership in 2009 and the amendment to the law has to be made so that this policy can be implemented.

In Sabah, indigenous peoples have been made to apply for their NCR land under provision Section 12 (application for any citizen of Malaysia) of the Sabah Land Ordinance 1930, even though a specific provision (S14) exists which is much simpler and faster. As a result, their NCR applications are subjected to review by eleven departments and disadvantaged by competing applications from the private sector and government agencies as well as other individuals who are moneyed and familiar with the system. Many also have difficulties with procedures and land enquiries, and the government's response of issuing Communal Titles this year (which are not based on NCR) is being questioned as it appears to be contrary to the recognition of NCR.

In Sarawak, the cut-off point of 1st January 1958 adopted by the government for NCR claims is considered to be a major administrative challenge for both indigenous communities and the authorities. Although proof of NCR includes aerial and other photographs, historical and other documents and oral evidence, there is still a tendency to rely primarily on aerial photos.

Inadequate compensation (i.e. not based on market price) or no compensation is being provided for land taken compulsorily by the government or companies for construction, plantations and other development projects.

Conversion of lands and transfer of land ownership did not follow proper procedures and there were irregularities in land sales.

There have been a number of complaints in Sabah in which native title land was transferred to other persons – many to non-natives, although this is expressly prohibited by law – without the knowledge of the owners. Brokers using power of attorney letters

have been reported to have enabled large areas of land to be purchased by companies and individuals, which affected villagers claim to have been done fraudulently.

Encroachment on NCR Lands

Numerous complaints and statements have been received from community representatives of alleged encroachment into NCR lands. Many resulted from private sector and government-linked companies and agencies opening up plantations and logging activities. NCR land claimed by communities were allocated or already alienated to companies, including foreign companies, government agencies and government-linked companies (GLCs). These claims often reflect the lack of knowledge or information on the part of the affected communities, and their own enquiries with relevant departments and the private sector failed to provide them with information. In Sabah, there are allegations that applications for land titles were rejected without the knowledge of claimants and approved to a more recent applicant. This has resulted in land disputes between different communities and with outsiders.

In Sarawak, the issuance of Provisional Leases (PL) has become a major issue. Although the conditions for the issuance of PL include the identification and exclusion of NCR land, in most cases, this condition is not adhered to. Currently, there seems to be confusion over which body should handle conflicts that arise subsequently, although both the Sarawak Lands and Surveys Department and the Ministry of Land Development admit that this falls under their purview.

Another issue is the intrusion of outsiders into indigenous lands. In Peninsular Malaysia, many of the Orang Asli often just give in and move away when individuals (often Malay and Chinese individual farmers) claim that have proof that the land belongs to them. In the case of Sabah, encroachment by illegal immigrants is reported to have become far more serious. There have also been reports of intrusion into government land reserved for projects such as farming

schemes earmarked or allocated for a particular indigenous community.

NCR land included in forest/wildlife/water catchment reserves and parks.

Another set of issues faced by Malaysian indigenous peoples concern NCR land claimed or applied for by communities that have been alienated as Forest, Wildlife and Water Catchment Reserves and Parks, the threats and prohibitions by enforcement officers, and the demolition of properties and crops by the Forest Department.

Prior to the declaration of a Forest Reserve, the forest laws of Sabah and Sarawak require an enquiry to ensure that 'local inhabitants' are made aware of the intention to declare land as a Forest Reserve and to settle any existing claims. These two provisions represent the greatest areas of contention for communities today, particularly in terms of the process followed in the 'enquiries' and settlement of claims. Such enquiries and subsequent settlements have rarely been carried out in accordance with the requirements. In Peninsular Malaysia, no such provision exists to protect the rights of Orang Asli communities.

It should be noted that there have also been some sincere efforts by the relevant authorities to allow access to resources within such protected areas through co-management arrangements. Such arrangements, when mutually agreed to and featuring shared decision-making power, have the potential to resolve conflicts that can lead to win-win situations.

NCR Land Development

The other set of complaints received relate to land development on NCR lands such as joint-venture projects, for instance, the *Skim Tanam Semula Komersial* (Commercial Replanting Schemes) in Peninsular Malaysia, the 'new concept' (*konsep baru*) schemes in Sarawak, and joint-ventures subsequent to the issuance of Communal Titles and Agropolitan projects in Sabah. Many of these joint-ventures are facilitated by government agencies, namely, the

Orang Asli Development Department in Peninsular Malaysia, Pelita in Sarawak and the State investment arm, SEDIA, in Sabah. For many years, the success or failure of such schemes was not reviewed because they were seen as poverty eradication programmes and therefore seen as benevolent and not assessed or audited.

Conclusion

Protracted land conflicts are bad news for any country. More efforts are needed to address and recognise indigenous peoples as rights holders of their lands. As resources become scarce and population grows, failure to do so will only aggravate conflict. Discord will result from contestation over resources and the priority given to State development over indigenous development. An example of this is subsistence, small scale farming and cottage industries being seen as unproductive and therefore not prioritised compared to large scale business. Viewed from a human rights lens, the State bears the responsibility of promoting and protecting human rights and is answerable to any consequences resulting from its land policies and legislation.

ANNEX 1: TERMS OF REFERENCE OF THE NATIONAL INQUIRY

The Terms of Reference of the National Inquiry are as follows:

- i. To determine the constitutional, legal, administrative and political recognition of indigenous peoples' right to land and their effectiveness in protecting and promoting indigenous peoples' right to land.
- ii. To inquire into the land rights situation of indigenous peoples and the impact of the recognition or non-recognition of indigenous peoples' right to land on their social, economic, cultural and political rights, taking into consideration relevant international and domestic laws.
- iii. To identify the constraints which impede the full enjoyment of indigenous peoples' right to land in accordance with their needs and requirements.
- iv. To create and promote greater awareness, knowledge and understanding of indigenous peoples' right to land and their way of life.
- v. On the basis of the facts and determinations arising from the National Inquiry, to develop recommendations to the Federal and State government relating but not limited to the following:
 - a. the review of domestic land laws and other related laws and policies, with a view to incorporating a human rights focus therein, addressing, in particular, the problems faced by indigenous peoples in their land claims; and
 - b. the formulation of strategies and a plan of action with the aim of protecting and promoting indigenous peoples' right to land as an indivisible and integral part of the protection and promotion of their other human rights.

Experiences with Oil Palm Expansion in Sarawak – the Need for New Standards

By Thomas Jalong

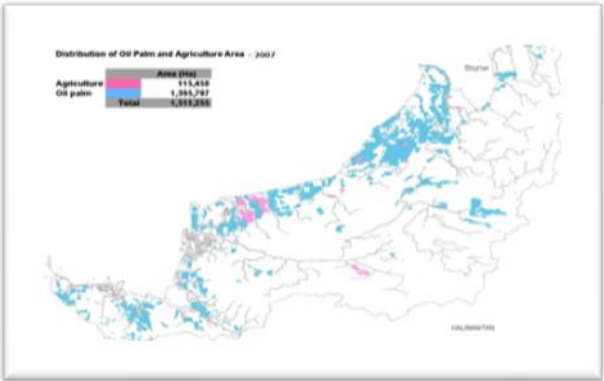
I am very concerned about this development because it affects my people's livelihood. I do not agree with this type of development and the manner in which it is conducted. The development of plantations in this area will definitely result in the destruction and loss of our lands which we depend on for our survival. The company should recognise our existence here. Our people were born here, brought up and nurtured in this area and we want to continue to live on this land and its surrounding forests.

Alung Ju, Penan Chief of Peliran

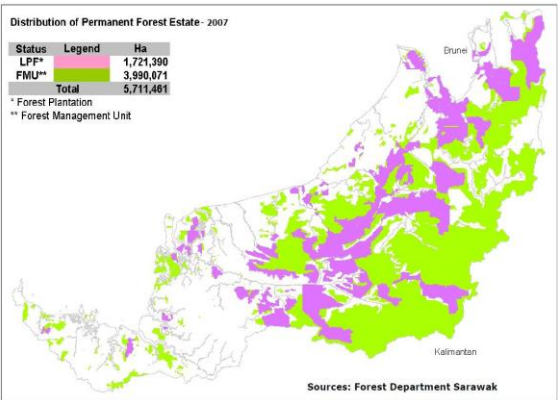
Oil palm expansion, still relatively new in Sarawak, but widespread in Sabah, has been promoted by the Malaysian government since the mid-90s as a way of achieving 'rural development'. A target area for Sarawak of one million hectares was to be planted by 2010 and a further two million hectares by 2020. Plantations are located on both mineral soil and peat swamp land (40%), both of which are frequently traditionally inhabited by indigenous peoples and the source of their livelihoods and cultural identity since time immemorial. State land as well as customary land is used for large scale plantation development by the private sector. Some plantations have even been developed on Permanent Forest Estates (PFEs) and within Licensed Planted Forests (LPF), in part as a result of the classification of plantations as forests by the State. The *Konsep Baru* ('New Concept'), which is claimed to be carried out in the form of joint ventures with native customary rights landowners, has further promoted the expansion of plantations on Native Customary Lands.

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By 2007, the total area of oil palm plantations and other agricultural lands had already reached 1,511,255 hectares. Oil palm plantations cover over 500,000 hectares of peat swamp forest in Sarawak, representing over 38% of the total peat swamp surface area. A comparison of the maps below also reveals the frequent overlap of plantations with Permanent Forest Estates.

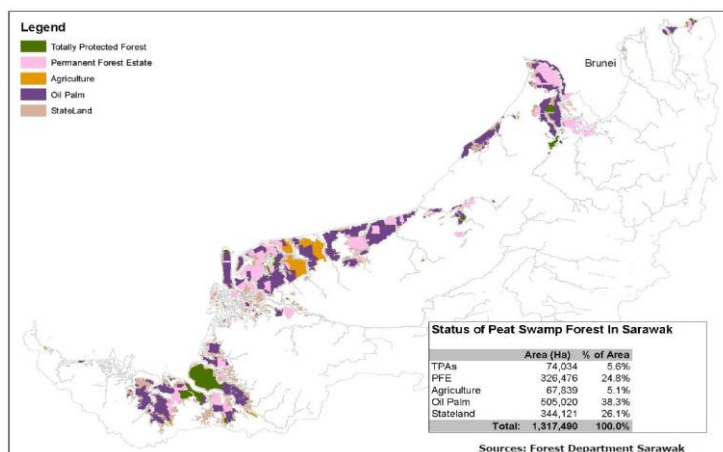


Distribution of oil palm plantations in Sarawak



Plantation development in permanent forest estates

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Oil palm development in peat swamp forest

The development of oil palm plantations is achieved through a variety of arrangements. One is development on Native Customary Lands through concept of joint ventures, whereby 60% of the development and profits is in the hands of the company, 30% in that of NCR landowners and 10% in those of the trustee (mainly LCDA, a State government agency also known as Pelita). In other cases, licences or provisional leases (PL) are directly issued to companies for a period of 60 years. In addition, reforestation programmes such as LPF (Licensed Planted Forest) account for 30% of oil palm concessions across the country. In some cases, plantations are established through private negotiations between companies and communities and/or landowners in which profit sharing or the rental of lands is calculated by acreage or the number of trees to be planted. Finally, landowners themselves may take the initiative to plant oil palm as a means of diversifying their sources of income.

A number of arguments in favour of the development of oil palm plantations lie behind this expansion. First is the potential of the palm oil industry to boost national and State economic development. Second is the notion that establishing plantations on so-called 'idle

and degraded' land gives value and productive use to unused land. Third, oil palm plantations are seen as a means of creating employment opportunities and developing rural infrastructure, such as in the form of roads. The production of bio-fuels such as palm oil is also a primary objective of the Sarawak Corridor for Renewable Energy (SCORE) project, which also aims to increase hydropower development through the promotion of mega-dams. An additional twelve HEP dams are projected for 2020 and thirty more by 2030-2050.

Impact of oil palm expansion on indigenous peoples and local communities

The impacts of the intensification and expansion of oil palm monocultures are well-documented. Environmental impacts exacerbate societal conflicts resulting from the conversion of vast expanses of land into monoculture oil palm plantations. These include: soil depletion due to the shallow rooting of palm trees and an increase in the risk of drought and desertification; hydrological changes on peat soil; carbon releases due to the draining of peat swamp; the destruction of community forests, protected forest and permanent/reserve forest; the depletion of wildlife and vital forest resources; and the disruption of catchment areas and ecologically sensitive areas of major river systems.

Major issues faced by indigenous peoples and local communities as a result of oil palm expansion include: conflicts and disputes over land; lack of respect for customary rights; the absence of transparent communications and consultations; the violation of the right to Free, Prior and Informed Consent; the denial of people's right to represent themselves through their own chosen representatives; limited or absent payments of compensation; increased security threats from the influx of immigrant workers; lack of transparency and participation in Environmental Impact Assessments and; inadequate mechanisms for the redress of grievances.

Actions taken by communities in response to the violation of their rights have taken various forms. Joint complaint letters have been sent to companies and to the Land Survey Department, Forestry Department and other relevant authorities. Community participatory mapping has been carried out to delineate the customary lands of communities and convey their importance to communities' livelihoods. Petitions and letters have also been addressed to the State and federal leaders, and meetings and negotiations held with implicated stakeholders. Dialogue has also been established with the Malaysian Human Rights Commission (SUHAKAM). Cases of dispute have also been taken to the civil courts. Direct actions were also carried out in the form of non-violent protests and blockades resulting from communities' frustration and marginalisation in decision-making processes and negotiations related to the development of oil palm plantations.

An example of indigenous peoples' struggle against the encroachment and development of oil palm on their customary lands without respect for their right to Free, Prior and Informed Consent is that of the *Long Teran Kanan community vs IOI* (an RSPO Board Member). This twelve-year court case over customary rights and land was finally ruled in favour of the community of Long Teran Kanan in 2010. However, IOI has continued to occupy community lands and operated with a 'business-as-usual' approach while the State government as co-defendant still wishes to appeal to the higher courts. Numerous other problems persist on the ground such as the pollution of water resources, poor road maintenance, the use of hazardous agrochemicals, and others. An RSPO grievance was filed against IOI by the affected community and NGOs in November 2010. The case is currently being mediated by an independent third party under the RSPO.

Another example is the case of the *Ibans of Ulu Niah vs BLD*. The Ibans of Ulu Niah participated in a joint venture with BLD, but several years later, were told by BLD that the lands included in the joint venture were not under Native Customary Rights, and therefore the agreement was rescinded. No dividend was given or even

considered by the company. The villagers strongly protested against this, and the company responded by bringing in a great number of 'security men' from other areas, bearing weapons to intimidate and harass the duped community.

Up to this day, the lack of response from the government and companies to local communities' and indigenous peoples' protests against the development of their lands without their consent and participation in decision-making remains a serious concern. Often, the State or corporations will attempt to put pressure on indigenous chiefs and community leaders and engineer their consent in order to obtain a decision from them that is in their own interests (i.e. elite capture). They may even influence the appointment and official recognition of chiefs and leaders of local communities to increase their compliance. Intimidation and harassment through the deployment of gangsters is not unheard of. Other tactics include secret arrangements with village chiefs and community leaders by companies without the knowledge or consent of other community members, the creation of factions within and between communities as a 'divide and rule' strategy, the enactment of laws to make community mapping illegal, and the amendment of land laws to limit the means by which local communities can acquire Native Customary Rights, or to limit the scope of Native Customary Rights lands.

The challenges faced by indigenous peoples and local communities are further exacerbated by sub-standard Environmental Impact Assessment (EIA) exercises and the lack of compliance of companies to EIA recommendations. Furthermore, the State and companies frequently disregard international human rights laws and conventions (such as UNDRIP and ILO 169) as non-binding. The State administration pays no respect to court rulings when they favour local communities. In most cases, companies and government agencies appeal against such decisions. While meritorious in its objectives, the RSPO standards remain voluntary in nature, and thus many companies do not feel the need to be involved in it. Finally, a serious lack of documentation of customary

practices and laws is hampering local communities' and indigenous peoples' efforts to make their rights to land recognised in practice, and particularly in the face of economically and politically powerful corporations, sanctioned and encouraged by the State.

In this light, it is recommended that the Malaysian State urgently reviews its oil palm development and land use policies, and actively adopts and implements the principles of the UNDRIP in these policies. Furthermore, stronger efforts and support from civil society, NGOs and the international community to empower and build the capacity of local communities are urgently needed if their rights are to be protected. Finally, it is critical to the sustainable and rights-based development of oil palm plantations that palm oil companies subscribe to the RSPO principles and criteria and fully respect the right to Free, Prior and Informed Consent of indigenous peoples and local communities.

To conclude, at the heart of the conflicts, injustices and human rights violations resulting from the development of oil palm plantations without consideration for local communities and indigenous peoples' rights, lies the issue of land. Land is the object of contestation and intense competition, but it is also the key to sustainable development and to the livelihoods of local communities, who have a right to their customary lands. For indigenous peoples and local communities, land is, and will remain, the source of their survival. Legal and tenurial reforms at the State and national level, as well as the recognition of and respect for customary rights as defined and practised by the indigenous peoples in State and national laws and policies, are therefore essential to the continued existence and welfare of indigenous peoples and local communities.

DISCUSSION

The discussion explored the potential that legal pluralism as a concept and practice can offer in the context of concrete experiences on the ground, the shared colonial legacy and inherited tenurial challenges in Southeast Asian countries, and the difficulty of accessing effective remedy through the formal court system for indigenous peoples and local communities.

The nature of evidence in court cases.

The idea that ‘stories matter’ as evidence in claims to land in court cases is also something that US legal courts are beginning to pay attention to. It is important to recognise that stories are important in how we express rights and ownership. This is particularly relevant where customary rights and laws are orally transmitted. Stories and anecdotes will be most effective when backed with participatory maps with which indigenous peoples and local communities can delineate the areas of cultural, economic and historical value to them.

The challenges of ‘half-baked’ legal pluralism.

In Malaysia, native customary rights to land are recognised in State law, but these rights are absolutely inadequate and lack appropriate provisions. This stems in part from the half-baked approach of legal pluralism, the ‘frozen snapshot’ moment approach to customary rights inherited from the British colonial period, and which does not serve the interests of people. The manifestation of this is highlighted in ongoing poverty alleviation schemes. The basis of this is that it completely lacks any understanding of customary law and the right to Free, Prior and Informed Consent. The language of State law on rights of indigenous peoples and land is weak.

Is it time to redefine customary rights, perhaps through native courts, to set up a new form of legal pluralism that is more in touch with what is happening now. A lot of what governments do at the moment ends up disallowing development on indigenous peoples’

own terms. Poverty alleviation schemes, for example, are effectively a way of taking land away from indigenous peoples.

The shared colonial history of Southeast Asian countries.

All countries in Southeast Asia (apart from Thailand) share a colonial history. Perhaps this is why there are so many similarities between their experiences with human rights and agribusiness expansion. Following decolonisation, systemic structural adjustments allowed major development projects to come into the picture, thereby threatening the rights of the peoples and the environment. There appears to be a systemic problem at the root of these issues.

The concept of equal protection.

Going back to very basic principles, the Constitution states the right to 'equal protection'. This does not mean treating everybody the same way but rather protecting the rights of different groups and individuals within a country. This concept should be stressed in attempts to make human rights recognised in business. It may be useful to argue these principles through international principles as well.

Untransparent contracts and costly court cases.

In joint ventures with companies, contracts sometimes remain unwritten for three years or more. Payments are delayed for up to three years as well, yet no one questions this. And when workers are finally paid, the sum is a measly 150 dollars a year for a whole family. The situation in the courts is no better. Each new case is re-argued for the same issues over and over again. This defeats common sense. The cost of litigation is extremely high and the ability of pro bono lawyers is limited. On top of that, even when a case is pending in court, the company may already have started developing the land that it continues to have access to.

The discussion ended with a number of open-ended questions:

What is the role that national human rights institutions can play, given these concerns and the NHRIs' own mandates?

In what areas can the NHRIs partner so that they can play a more strategic role?

Is there a consolidated list of cases on indigenous peoples' rights that have reached the Supreme Court at the national or regional level? If so, how can the NHRIs access and make use of this?

What about the role of foreign investors and any eventual programmes between them and indigenous peoples?

How can the political economy standing in the way of legal reform in Malaysia be addressed and reconfigured?

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CHAPTER V: CAMBODIA

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Human Rights Standards and Agribusiness Expansion in Cambodia

By Chor Chanthya

Cambodia is signatory to a number of international human rights instruments which recognise the basic rights and freedoms that all humans are entitled to. Human rights are also protected by Cambodian law under Article 31 of the Constitution of the Kingdom of Cambodia. However, businesses have and continue to violate almost all recognised human rights enshrined in international and national law.

For example, trade unions have been suppressed and leading trade unionists assassinated, violating the right to freedom of association. Extensive child labour persists in numerous factories. The right to equality is violated through widespread discrimination against women, lesbian, gay, bisexual and transsexual (LGBT) individuals and individuals with disabilities. With regards to housing rights, hundreds of thousands of Cambodians are currently at risk of eviction or have already been violently and forcefully evicted in order to make way for investors to exploit land and natural resources. Indigenous peoples have also suffered numerous violations of their right to possession of ancestral lands and to the maintenance of their traditions and customs.

Businesses operating in Cambodia have an obligation to respect all Cambodian laws. These include the Labour Law (1997) which protects workers' rights and forbids child labour; the Land Law (2001) which protects housing rights and indigenous peoples' rights; the Law on Peaceful Assembly (2009) which protects workers' and peoples' right to demonstration; and the Penal Code (2009) according to which a serious human rights violation may constitute a criminal offence.

However, as Human Rights Watch states, 'the government continues to turn a blind eye to the fraudulent confiscation of farmers' land,

illegal logging and the widespread plundering of natural resources.¹ Surya P. Subedi, UN Special Rapporteur for Human Rights in Cambodia, has also commented that the manner in which land is managed and used by the (Cambodian) Government for various purposes continues to be a major problem. Land grabbing by people in positions of power seems to be a common occurrence. These problems are of particular relevance in Cambodia where most people are dependent on land for their livelihoods as farmers and where, according to the United Nations, there is one of the highest rates of deforestation in the world after Indonesia and Vietnam.

A study by the Cambodian Centre for Human Rights (CCHR) on land conflicts throughout Cambodia between 2007 and 2011 was compiled using publicly available information dating from 2007 to the present, English and Khmer media, NGO and IPO publications and CCHR field research and interviews. This study found that 47,342 families have been affected or could potentially be affected by the land conflicts examined. At least 5% of land in Cambodia has been the object of dispute in the last four years.

In 2008, ahead of the elections, Prime Minister Hun Sen announced that the Royal Government would continue to invest in physical infrastructural development in order to boost investments to promote agricultural productivity. The United Nations Permanent Forum on Indigenous Issues (UNPFII) found that road development, one of these infrastructural developments, had had a serious impact on indigenous communities. The study conducted by CCHR confirmed that this development has led to an increase in instances of land conflicts in previously remote areas of Cambodia such as Ratanakiri and Mondulakiri, as well as other regions bordering Vietnam.

Land conflicts in Cambodia have been exacerbated by the Economic Land Concession (ELC) mechanism, which grants private State land to concessionaires through an ELC contract for industrial and/or agricultural exploitation. The purpose behind the mechanism is to

¹ Human Rights Watch 2005.

increase employment opportunities in remote rural areas, encourage small-scale and large-scale investments and benefit local economies. While the Ministry of Agriculture, Forestry and Fisheries (MAFF) reported eighty six ELCs granted in 2010 for a total land area of 1,041,144 hectares, the NGO forum, a network of Cambodian NGOs, identified 229 granted ELCs and 171 ELCs in open development.

According to research conducted by CCHR, 35% of land disputes reported in the public domain in the last four years involve ELCs. ELCs are affecting more than 30,000 families across Cambodia and no equitable or appropriate solutions to land disputes have yet been made available to them. Furthermore, 12% of ELCs exceed the 10,000 hectare legal area limit, as stated in the sub-decree of the Economic Land Concession. Instances of threats, intimidation, violence and/or the destruction of property were reported in 54% of the ELC conflicts. In 33% of the cases, a victim of land conflict was reportedly arrested. In 94% of reported ELCs, the developer is either the main perpetrator or one of the perpetrators of the land dispute.

A notorious example of the human rights abuses caused by the issuance of ELC permits to investors without the Free, Prior and Informed Consent of local inhabitants is that of Prey Lang. Prey Lang is the largest lowland dry evergreen forest remaining in the Indochinese Peninsula. Ongoing conflict in the area has affected as many as 700,000 predominantly indigenous people. Three major issues of concern have surfaced as a result. First, the clearance of primary forests in the establishment of ELCs. Second, frequent intimidation of the communities by local and government authorities. And third, the loss of land and natural resources that form the basis of communities' traditional livelihoods. The trauma experienced by the communities as a result of the conversion of their customary lands into an ELC for the purpose of business investment is embodied in the words of Phok Hong, an indigenous Kuy from Prey Lang:

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If I lose Prey Lang, I lose my life. Every day, I worry about losing Prey Lang. I worry that the land broker and the company will destroy it and I will lose my way of life. If we lose Prey Lang we lose the forest, the herbal remedies, the wild life and most importantly the indigenous traditions that have been passed down through many generations of our ancestors. Today I will pray for the world to appreciate the importance of Prey Lang and help us put an end to this conflict.

Community Experiences with Agribusiness Expansion in Cambodia

Seng Maly and Ny Sophorneary

The evolution of legislative frameworks on land in Cambodia

An examination of community experiences with agribusiness expansion in Cambodia requires an understanding of the evolution of the formal legislative framework in which this expansion has and is occurring. In June 1989, following the overthrow of the Khmer Rouge Regime, Regulation No. 03 on Land Use and Management Policy was passed as an interim ruling on how land was to be allocated to people and to the State. As stipulated in the policy, land was to be provided to people as a form of property in the amount of 2,000 square meters per family. Paddy land or farmland for agribusiness purposes was to be provided as a form of possession to people and/or families. Each family was allowed to possess up to five hectares of land.

Land concessions of over five hectares were to be devoted to the cultivation of major crops in order to support the national economy, where the term of the land concession depended on the maturation period of the crop. The concessioner's right to the land concession would end with the first crop harvest but land concession rights could be renewed. Furthermore, Regulation No. 03 stipulated that land concessions granted had to be in proportion to the size and capacity of each family. Agribusiness development was to be promoted through the provision of certain types of land, such as pagoda plots, cemetery plots, school plots, hospital plots, laboratory stations, farming plots, factories, enterprise plots, irrigation system buildings and so on, to people via a clear loan contract, valid for three years only.

In contemporary Cambodia, the Land Law of 2001 is the most significant piece of legislation, along with Sub-Decree 146 of 2005 on Economic Land Concessions. The Land Law recognises Cambodian citizens' right to possess and own lands (art. 4, 8, 29, 30, 31 and 38).

No person may be deprived of his ownership, unless it is in the public interest. Ownership deprivation is to be carried out in accordance with the forms and procedures provided by law and regulations and accompanied by the payment of fair and just compensation in advance of the deprivation (art. 5).

Article 5 cited above is also applicable for the protection of indigenous peoples' lands. The Land Law guarantees the exercise of collective ownership by indigenous peoples through their own authorities, customary rules and mechanisms for decision-making. The law recognises indigenous customary rules for the self-management of communities:

...the groups actually existing at present shall continue to manage their community and immoveable property according to their traditional customs (art. 23-27).

Furthermore,

Any existing indigenous community can apply for a land title (as collective ownership) as long as they have registered their group and thus become a legal entity (art. 23).

No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community (art 28).

[Where] an infringement [is] committed against land rights of indigenous communities by an authority who is responsible for the management of the zone in which the immovable property is located, [the authority] shall be fined from one million and five hundred thousand (1,500,000)

Riel to nine million (9,000,000) Riel and/or put in prison
from 2-5 years and shall receive administrative sanctions in
addition. (art.265)

Finally, the Land Law stipulates that plots of indigenous community land are not subject to purchase and sale to outsiders, that is to say, individuals or bodies who are not members of the indigenous community. This provision is part of the protection that the Land Law provides to indigenous communities' collective ownership, use and management of their lands.

The Land Law also stipulates the conditions under which Economic Land Concessions (ELC) can be granted. Individuals groups and legal entities have the right to apply for (economic) land concessions (art.48). ELC areas are restricted to a maximum of 10,000 hectares and existing concessions which exceed this limit are to be reduced. The procedures for reductions and specific exemptions are determined by the Sub-Decree on Economic Land Concessions (2005), as are the procedures for granting ELCs for industrial agricultural exploitation. Furthermore, the issuance of land concession titles where surface areas are greater than those authorised in favour of one specific person or several legal entities controlled by the same persons is prohibited (art. 59).

Sub-decree No. 146 on Economic Land Concessions was passed in December 2005. Several major articles in this Sub-Decree are relevant to local communities, as according to these articles, ELCs may be granted as a means of increasing employment opportunities in rural areas, intensifying and diversifying livelihood opportunities and encouraging ecologically sound natural resource management.

ELCs may only be granted on land that meets all five of the criteria stated in Article 4. First, the land must be registered and classified as State private land in accordance with the sub-decree on State land management and the sub-decree on procedures for establishing cadastral maps and land registers or the sub-decree on sporadic registration. Second, land use plans for the land must have been

adopted by the Provincial-Municipal State Land Management Committee and land use must be consistent with this plan. Third, environmental and social impact assessments must have been completed with respect to the land use and development plan of the ELC project. Fourth, where population resettlement may occur, this must be carried out in accordance with existing legal frameworks and procedures. The Contracting Authority must ensure that there will not be any involuntary resettlement of lawful landholders and that these landholders' access to private land is respected. Furthermore, public consultations with residents of the locality and authorities regarding the projected use of the ELC must be carried out.

As stipulated in Article 5 of the Sub-Decree, ELC proposals are evaluated based on the degree to which they are seen to contribute to:

- An increase in agricultural land and industrial-agricultural production with the use of modern technology
- The creation of employment opportunities
- The improvement of living standards for local people
- The sustainability of environmental protection and natural resource management
- The avoidance or mitigation of adverse social impacts
- The establishment of linkages and mutual support between social land concessions and economic land concessions
- The processing stage of raw agricultural materials, to be specified in the concession contract

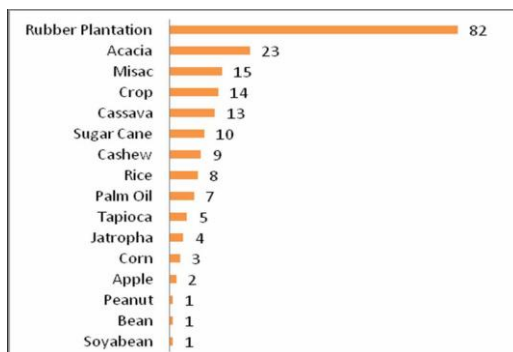
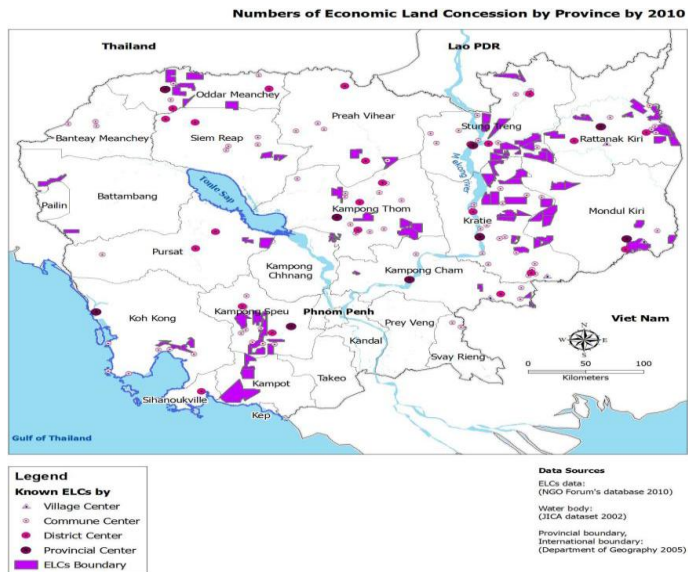
Economic Land Concessions – the situation on the ground

A total of 252 ELCs have already been granted in eighteen provinces of Cambodia, covering an area of over 1.7 million hectares.² Rubber is the major crop cultivated in these ELCs,

² These are estimated figures as statistics have not yet been finalised.

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followed by acacia, *misac*,³ cassava, sugar cane, cashew, rice, oil palm, tapioca, jatropha, corn, apples, peanuts, beans and soybeans.



Agro-industrial plantation crops in Cambodia

³ A type of tree.

However, many downsides to the ELC scheme have already been identified. For example, it is rarely the local communities or indigenous peoples who benefit from agricultural cultivation and production in ELCs but rather the private companies and foreign investors exploiting the land. Most of these companies carry out illegal activities within the ELCs granted to them and routinely disregard the five criteria for ELC acquisition stipulated in Article 4 of the Sub-Decree. Furthermore, there is a lack of transparency and no accountability mechanisms in place for the resolution of disputes and conflicts occurring in the ELCs. The court system in Cambodia remains weak and corrupted by pressures and influence from wealthy and influential individuals and companies.

The impacts of agribusiness (agro-industry) on local communities

The violation of the Sub-Decree on Economic Land Concessions by foreign investors has had documented harmful impacts on indigenous peoples and local communities. A whole range of other negative consequences have resulted from this, first and foremost of which is land conflict. Most agro-industry projects have resulted in land-related disputes as local communities protest against the loss of their customary lands to investors and companies, including their cultivation fields, farms, paddy fields, spiritual sites, burial grounds, community-protected areas and community forests. In addition, local communities are being displaced against their will, routinely intimidated and effectively forced to ‘sell’ their land to agribusiness companies. Many communities are told by government officials that the land under dispute is State land, that they have no rights to it, and that they have two options – to settle now, or to risk losing their land in the future without any form of compensation whatsoever.

Countless local communities are living in fear of arrest or murder over land disputes. It is not infrequent for companies to resort to military action against communities if they protest to their presence and activities. In some cases, communities are forbidden access to their former customary lands, prevented from joining workshops

and activities organised by NGOs, or banned from gathering into groups altogether.

In addition, the livelihoods and food security of local communities are placed at serious risk. In many cases, where land has been granted as ELC, communities are prohibited from accessing the forest to collect NTFPs, and raising animals or obtaining water from within the ELC area. Whereas some companies offer jobs to local people, these are often refused, as they are underpaid and far from equitable. The traditional culture and practices of local communities and indigenous peoples has also suffered. Where agro-industry is developed on customary lands, companies rarely consult the local communities properly prior to the development of the project or seek to better understand the value of the land to these communities. This has led to the destruction of highly important cultural spaces in indigenous peoples' worldviews which are central to their identities, such as burial grounds and sacred forests.

Negative environmental and health impacts have also been reported as affecting villagers living near or around ELCs where factories and mills operate, including serious cases of chemical poisoning. For example, at a sugar cane factory located in Sre Ambel district, Koh Kong province, chemical fertilisers flowed into the stream which local villagers depend on for drinking water and bathing, and for their cattle. Nowadays, these villages can no longer use the stream as they did before, some of their cattle have died from water poisoning, and there is a serious lack of fish available to sustain their livelihoods. Illness also resulted from the pollution of the streams, including diarrhoea and itchiness. Moreover, most villagers report headaches and dizziness from the smell of the fertilisers during the sugar cane planting season.

Irregularities and overlaps in land use areas

Compounded with the detrimental impacts examined above, lands allocated to agro-industrial projects have been found to overlap with other land use types. For example, fifty four out of eighty seven

agro-industry projects were found to be overlapping with evergreen forest or semi-evergreen forests, greater than 500 hectares in size. A large number of agro-industrial concessions also overlap with areas customarily owned, managed and used by indigenous peoples. According to data gathered from six villages, the livelihoods of up to 667 households comprising 3,281 individuals have been either directly or indirectly affected since their accessibility to non timber forest products (NTFP) is now no longer guaranteed or condoned. Finally, agro-industrial concessions may overlap with protected areas. Out of eighty seven ELCs for which coordinates were provided, mapping revealed that twelve overlapped with either protected areas or protected forest, although the exact size of this overlap is unclear.

Advocacy efforts of communities

A wide range of advocacy efforts in varied forms have been undertaken by local communities and indigenous peoples in response to the human rights violations resulting from the granting of ELCs to agribusiness corporations under inequitable and untransparent conditions.

Case study: The sugar cane plantation in Sre Ambel district

This land conflict occurred in two ELCs located in Sre Ambel district, Koh Kong province, in south-western of Cambodia, along the Thai border. The parties in conflict were 220 families living in the three villages of Trapang Kandol, Chikhor Leu, and Chouk, against the companies Koh Kong Sugar Industry and Koh Kong Plantation. These two companies are jointly held by Ouknha Ly Yong Phat, a senator from the Cambodia's People's Party (owning 20% of the shares), Khon Kaen Sugar Industry of Thailand (owning 50% of shares) and Ve Wong Corporation of Taiwan (owning 30% of shares). Recently, Senator Ly Yong Phat sold his 20% of shares to Khon Kaen Sugar Industry Public Company Ltd. (KSL). Both companies operate as a single plantation through a joint venture.

On 19th May 2006, the land of the villagers of Trapang Kandol, Chikhor Leu, and Chouk was bulldozed in the presence of armed forces and cleared for the establishment of a sugar cane plantation and processing facilities. Around 1,490 hectares were grabbed from the communities and allocated to the companies as ELCs. In response to this, the communities filed a complaint to the court, appealing for the ELC contracts to be annulled. The companies had never consulted them before clearing their land. Furthermore, they had destroyed their crops, harmed their cattle and buffalos and seized their farmland. Both companies were also reportedly illegally granted 19,100 hectares (9,700 hectares to Koh Kong Plantation and 9,400 hectares to Koh Kong Sugar Industry).

An extensive advocacy effort was led by the local communities in response to the violation of their land rights. At the domestic level, the villagers gathered to protest against land clearing, participated in a protest march in Phnom Penh, built a barrier on a national road, protested in front of the commune chief's house, held a press conference and a radio broadcast and published numerous newspaper articles. They also filed a complaint to the court, sent an intervention letter to state institutions such as the Parliament, the Ministry of the Interior and the Council of the Ministry, and submitted joint complaints with national networks in support of their cause.

At the international level, CLEC supported the villagers in sending a complaint to the Human Rights Commission of Thailand, and a complaint to the EU commission in Brussels via the Everything but Arm project. Letters were also sent to Tate and Lyle (UK company) to urge them to take action and put pressure on KSL, to an American Sugar Refining company working with KSL, and to Deutsche Bank in Germany who finances KSL. More recently, joint workshops and press conferences with Thai NGO networks have also been organised.

At the time of writing, the Koh Kong court had invited the affected villagers to clarify their complaint in a pre-hearing process four times. The complaints sent to the Thai Human Rights Committee and EU Commission were being processed. The letters sent to Tate and Lyle, and the American Sugar Refining company remained unanswered. The letter sent to Deutsche Bank successfully prompted them to withdraw an investment of ten million Euros from KSL. However, the livelihoods and conditions of the villagers are far from resolved, and will never be until their lands are returned to them and their rights restored.

Community mobilisation and the building of community solidarity are witnessed in the form of collective village protests against land clearing. Villagers have organised peaceful assemblies before the court, national State institutions and the residences of local authorities. They have engaged in dialogue with decision-makers via public forums in order to urge them to intervene and resolve ongoing land conflicts. In some cases, local community members have blockaded national roads as a way of pressuring the authorities to address their grievances. Villagers also resort to sending petitions or joint complaints to State institutions in order to bring to light their plight. Some have also sought legal aid, submitting complaints to the courts in order to claim land back or to claim just and fair compensation for land lost. Networks are also being established from the village up to the national level, such as IRAM (Indigenous Rights Active Members) and CPN (Community Peace Network).

Growing media coverage through press conferences, radio talk-shows and newspaper articles, is providing greater national and international support and exposure to the abuses that these communities are experiencing. Examples of this are the media coverage of the sugar cane plantation case in Koh Kong, and the rubber plantation case in Kang Yu village, Ratanakiri (see text box). Also linking these experiences to the international level, International Human Rights Day, Indigenous Peoples' Rights Day and other such events are being celebrated in order to raise awareness on the rights and cultures of indigenous peoples and to highlight their ongoing discrimination.

DISCUSSION

The discussion revolved around the challenge of making companies accountable to human rights standards in national and international law when operating transnationally, particularly in countries where respect for human rights is weak or loosely enforced.

Collaboration between Human Rights Commissions on trans-border cases.

A major problem is that of companies operating in foreign countries and seeing themselves as only legally accountable to the country in which they operate, leading to their own State arguing that they cannot legally control them. The HRCs need to work together to find ways to work with cross-border cases and help each other across Southeast Asia to establish different channels of advocacy in order to put human rights back into trans-border cases.

The UN Framework as a tool in advocating for human rights in trans-border cases.

There is no reason why international human rights institutions cannot examine what cross-border companies are doing, as there is already a legal basis for doing so in the form of the UN Framework. The UN Framework deals in depth with the issue of human rights and business with corporate liability. In particular, the report highlights:

the expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts.¹

The challenge of appealing to the court.

The difficulty of challenging powerful people in Cambodian courts is compounded with the fact that formal judicial proceedings are very slow and judges tend not to be responsive, even when they have been replaced upon demand of the complainants. The impunity

¹ Ruggie 2008:7.

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of people in power was identified as a key obstacle. Alternative dispute resolution is also being tried but again is unresponsive for high profile cases and ELC cases, although it has proved useful in the resolution of minor disputes.

Untransparent contracts.

The lack of transparency of ELC contracts needs to be addressed, as does the lack of respect for the right to Free, Prior and Informed Consent of indigenous peoples and local communities in the allocation of concessions to companies. It was suggested that a country-wide evaluation of how permits are granted should be carried out and the results compared with the international human rights standards that Cambodia has signed and/or ratified.

Human rights bodies in Cambodia.

While Cambodia does not have an independent national human rights commission, there are human rights bodies in place under the National Assembly, Senate and Government. However, these have so far not been responsive to appeals from civil society and NGOs.



CHAPTER VI: PHILIPPINES

*Human Rights and Agribusiness:
Plural Legal Approaches to Conflict Resolution, Institutional Strengthening
and Legal Reform*

Human Rights Standards and Agribusiness Expansion in Philippines

Loretta Ann P. Rosales

‘Towards a rights-based approach to agribusiness’

The Philippines is largely an agricultural country. Almost half of its total land area, which translates to roughly 14.2 million hectares, is classified as agricultural land. In 2008, the agriculture and forestry sector employed 35% of the labour force of the Philippines, making it the single biggest employer among all economic sectors in the country. The country’s leading export products are likewise agricultural in nature: coconut, banana and sugar. Yet the agriculture sector contributes merely 20% to the country’s total gross domestic product (GDP). In 2010, all economic sectors posted growth levels, except for agriculture, which even suffered contraction. Moreover, of the poor households in the Philippines, about 56.4% belong to those engaged in agriculture.

What do these numbers tell us? They tell us that in order for the Philippines to meet its development goals, it has to pay crucial attention to the agriculture sector. If the Philippines is to address poverty and unemployment, it must implement policies and programmes specifically directed to this critical and sensitive sector.

It is an open secret that the key to Philippine economic and human development is agriculture. In fact, Article XII Section 1 of the 1987 Philippine Constitution mandates that ‘(T)he State shall promote industrialisation and full employment *based on sound agricultural development and agrarian reform...*’ In other words, agriculture is supposed to be the backbone of Philippine economy. But why is it that the Philippines is far from achieving its self-imposed goal of industrialisation and full employment? I can offer three reasons: 1) the dismal implementation of agrarian reform 2) the lack of agricultural support services and 3) the export-oriented food policy of the government while feudal land tenure relationships persist.

You see, agrarian reform has always been central to Philippine history and political economy. Agrarian reform was one of the battle cries of the Filipinos during the 1898 Philippine Revolution against the Spanish colonisers, who took all the lands under the legal fiction of the *Regalian Doctrine*, and made slaves out of the Filipinos as overworked-underpaid cultivators. Agrarian reform is also one of the root causes of the ongoing armed conflict in the Philippines. Most of the members of the insurgencies come from the peasantry who feel that they have long been deprived of the land that is rightfully theirs. From the 1930s up to the present, the Philippine government has always failed to meet its own land distribution target year-in and year-out.

Another problem area is the inefficient delivery of agricultural support services, particularly irrigation and credit facility. Less than two thirds of the irrigable lands are actually serviced by the government, and many irrigation systems are being provided by private sector instead. As to credit facility, it appears that it is not the small farmers who benefit from agricultural loans of the government because of the latter's tedious requirements. While there are existing rural banks supported by the government, they are however inaccessible to small farmers because in practice they are predisposed to cater to big businesses.

Lastly, agricultural production in the Philippines is basically geared towards satisfying the needs of the global market. This is adhering to the Ricardian economic theory of comparative advantages, which calls for the abandonment of self-sufficiency in favour of exporting select products. This policy is pursued in order to earn the foreign currency with which to buy our country's needs from the country which can produce it with the least marginal cost. This policy clearly manifests in the country's increased exportation of its agricultural products at the same time that its importation of the most basic commodities, particularly rice, reached an all-time high. In 2007, the value of agricultural exports amounted to US\$3.35 billion or 27.12% higher than in 2006. Coconut oil remained the country's top agricultural export, comprising about 21% of the total

of agricultural exports. The opposite trend occurs in rice: in 1984 the country imported 191,000 metric tons of rice, but in 2008 it ballooned to 2.1 million metric tons, making the Philippines the biggest importer of rice in the world.

With this as a background, the economic (and largely political) decisions that the current Philippine government should make are quite clear: distribute agricultural lands to the landless farmers, provide enhanced support services and extension programmes, and redirect policies to prioritise domestic needs and the domestic market. In order to attain industrialisation and full employment, the government should also create an enabling environment for a vibrant and dynamic agribusiness. Agribusiness expansion is not only a constitutional requirement – it is also an economic imperative for the Philippines.

The Agribusiness Expansion I am talking about is not one driven by international market forces or controlled by the multinational and domestic elites. Article II Section 11 of the Philippine Constitution also provides that ‘(T)he State values the dignity of every human person and guarantees full respect for human rights.’ In making human rights a core State policy, the Philippine Constitution mandates that human rights norms be at the fulcrum of government functions and programme of actions. Agribusiness Expansion must therefore have for its end goal the protection and promotion of human rights.

Thus, we must adopt a Rights-Based Approach to Agricultural Expansion. And this goes not only for the Philippines but for all Southeast Asian countries. *A rights-based approach to agribusiness expansion is agribusiness expansion that is based on human rights norms, guided by human rights principles and standards, and geared towards the realisation of human rights for all.*

The human rights norms that are of primary relevance to Agribusiness Expansion are the right to food, right to water and right to development. Of course, all of us here know that these are

human rights and what these human rights entail. I shall no longer discuss their normative contents. The point is that Agribusiness Expansion, in order to be meaningful and beneficial must result in every human being having sufficient, safe and nutritious food on his table at least three times a day. It must result in the eradication of hunger. Agribusiness Expansion must not divert too much potable water to irrigation of agricultural lands and processing of agricultural products, to the detriment of personal and household water uses. Lastly, Agribusiness Expansion should lead to the development not of the State *per se* but of every individual – a kind of development that is measured not by the traditional indices of GDP and GNP but by the degree to which freedom from want and achievement of potentials are enjoyed by everyone. With these norms, it becomes pretty clear that States cannot blindly pursue an export-oriented economic policy without regard to basic and material rights of its citizens.

A Rights-Based Approach to Agribusiness Expansion gives special attention to the marginalised and vulnerable who have less power in asserting their rights. In the context of Agribusiness, they are the landless farmers, the indigenous peoples and the women. As I have already mentioned, Agribusiness Expansion must be controlled by those who actually till the land and not by those who own the capital and make decisions in the comfort of corporate board rooms. Agribusiness Expansion must not trample upon the rights of indigenous peoples to their ancestral lands, their way of life and their own idea of economic development. Equally important is the imperative that Agribusiness Expansion must recognise the vital role of women in agricultural production and development and must not discriminate against them based merely on traditional gender roles and imbalanced structure of relations.

As I conclude, allow me to offer concrete recommendations that will steer us towards the realisation of a Rights-Based Approach to Human Development.

First, we must work towards greater synergy amongst all government agencies involved in land utilisation and natural resources development. Public funds should be appropriated to Agribusiness Expansion where possible and necessary, with all related agencies working together towards its success. In case public participation is not feasible or not desirable as a matter of policy, government must stretch its regulatory muscles to ensure the Agribusiness does not go against the ends of human rights and economic development.

Second, there must be greater cooperation between rights holders on the one hand (including civil society, peoples' organisations and communities) and the duty bearers on the other hand (government agencies and corporate entities). Both must strive to realise human rights; they cannot be opposed to each other at all times. Constructive engagement will go a long way in ensuring compliance with human rights norms and standards in an intricate and technical business operation such as agribusiness.

Lastly, we must always conduct not only Environmental Impact Assessments (EIAs) but also Human Rights Impact Assessments to ensure that the environmental and socio-economic effects of the proposed agribusiness operations are well-considered before actual operation. All these ensure that a Rights-Based Approach to Agribusiness is in place in the whole cycle of Agribusiness – from planning, to operation, to monitoring and assessment.

The recommendations I make are applicable not only in the Philippine setting, but to the whole of Southeast Asia. Agribusiness Expansion is a worthy endeavour, but we must be anticipative of any unintended adverse consequences that it may cause both to the environment and to the people, especially the immediately affected community. More importantly, we must locate Agribusiness Expansion in a development framework that is centred on the development of the human person.

Indigenous Rights, Legal Pluralism and Human Rights Standards - Towards an Integrated Approach

By Jennifer Corpuz

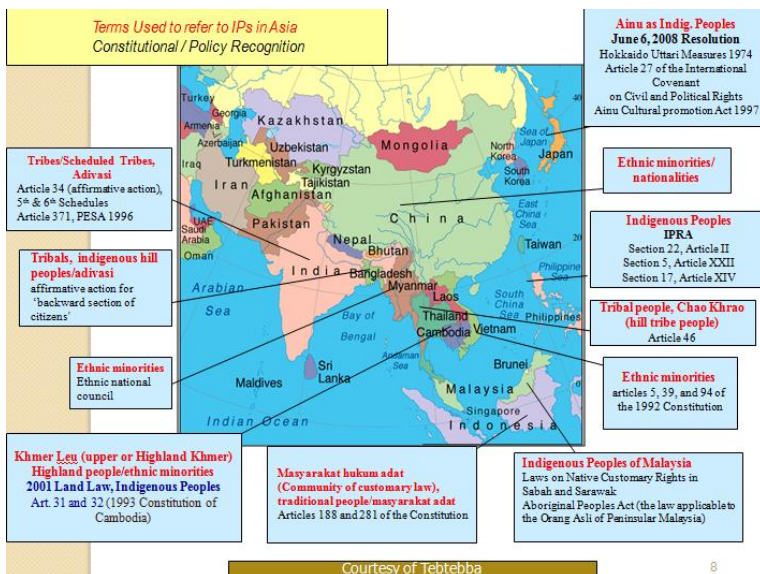
Indigenous peoples in Southeast Asia

While there is no internationally accepted definition of who 'indigenous peoples' are, certain elements have been identified and used in working definitions. These include: self-ascription/self-identification as indigenous peoples; traditional lifestyles; a culture and way of life which is different from other segments of the national population; different social organisation and political institutions; historically continuous residence within a certain area, or before other populations 'invaded' or came to that area; and a special relationship with the land. In Asia, indigenous peoples are known under a variety of terms, including indigenous cultural communities, highland peoples, *adivasis*, *janajati*, Aborigines, Natives, *orang asal*, *masyarakat adat*, tribes/hill tribes/tribal people, ethnic minorities and a number of other terms.

Indigenous peoples in the Philippines

No accurate figures are available for the total population of indigenous peoples in the Philippines. The estimated indigenous population in 1995 was of around 12.8 million. Indigenous peoples comprise an estimated 17% of the total Philippine population, representing over 110 different ethno-linguistic groups and residing mostly in the province of Mindanao (61%) over an average area of five million hectares. Other indigenous peoples are found in Luzon (36%) and the Visayas (3%).

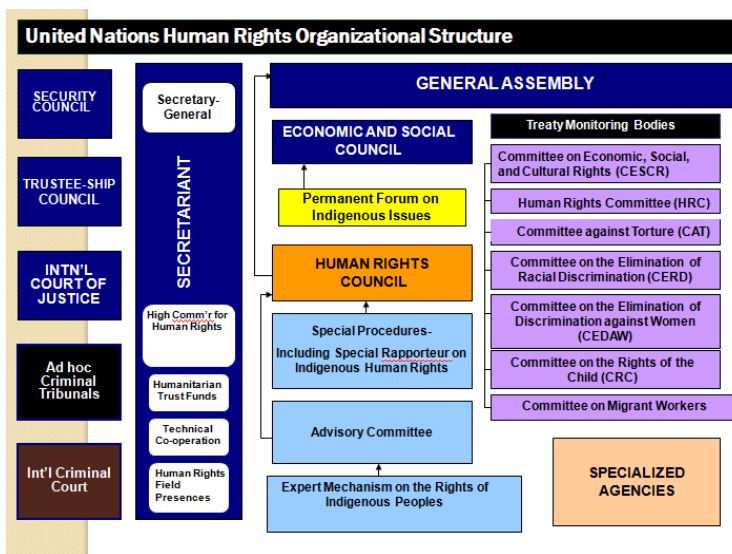
*Human Rights and Agribusiness:
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Indigenous peoples' rights in international law

Articulations of indigenous peoples' rights are to be found in a number of human rights instruments, multilateral environmental agreements, United Nations agency policies and financial institution policies. Examples include the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), *ILO 169* and *ILO 107*, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Committee on the Elimination of Discrimination against Women* (CEDAW), the *United Nations Convention on the Rights of the Child* (UNCRC), the *Convention on Biological Diversity* (CBD), the *United Nations*

Framework Convention on Climate Change (UNFCCC) and the Rio Declaration. Indigenous peoples' rights are also present in the policies of the United Nations Development Programme (UNDP), the World Bank, the International Finance Corporation (IFC), the United Nations Reduction of Emissions from Deforestation and Forest Degradation (UN-REDD), the International Fund for Agricultural Development (IFAD), the Food and Agriculture Organisation (FAO), the Asian Development Bank (ADB), the Intra-American Development Bank (IADB) and others.



The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples 2007 states the right of indigenous peoples to non-discrimination, to self-determination, to political participation, to nationality, to life, to spiritual, linguistic and cultural identity, to education, to information, to development, to Lands, Territories and Resources

(LTR), to intellectual property rights (community intellectual rights), to Free, Prior and Informed Consent, to movement/mobility, to treaty rights, to traditional knowledge, to women and children's rights, to health, and to the conservation and protection of their environment. It also protects indigenous peoples from forced assimilation and from relocation without their Free, Prior and Informed Consent.

Legal pluralism in the Philippines

The population of the Philippines in 2010 was estimated at ninety six million, spread over a land area of 300,000 sq km (or 30 million hectares) composed of 7,107 islands. The legal system in the Philippines is a hybrid of Civil and Common Law which is highly pluralistic and in which judicial decisions form part of the Land Law. Law in the Philippines adopts the generally accepted principles of international law as part of the Land Law. In addition, there also exist indigenous customary law and *shari'a* law. *Shari'a* law recognises the legal system of the Muslims in the Philippines as part of the Land Law. It codifies Muslim personal laws and provides for an effective administration and enforcement of Muslim personal laws among Muslims, such as via the *shari'a* courts.

Indigenous peoples' customary law

In the Indigenous Peoples Rights Act (IPRA), primacy is given to customary laws and practices (Sec. 65):

When disputes involve ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples], customary laws and practices shall be used to resolve the dispute.

Communities also have the right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary.

Furthermore,

Customary laws, traditions and practices of the ICCs/IPs of the land where the conflict arises shall be applied first with respect to property rights, claims and ownerships, hereditary succession and settlement of land disputes. Any doubt or ambiguity in the application and interpretation of laws shall be resolved in favour of the ICCs/IPs (Sec. 63)

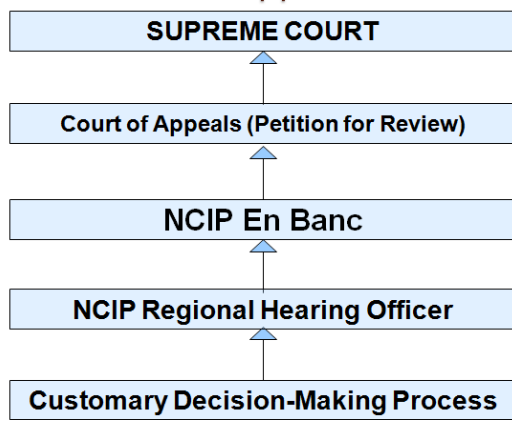
The legal foundations and core principles of IPRA are derived from various international instruments, such as *ILO Convention 169* and the then draft *Declaration on the Rights of Indigenous Peoples*, and national laws such as Native Title and the 1987 Constitution. IPRA protects the rights of indigenous peoples to: land and resources; ancestral domains and ancestral lands; social justice and human rights; self-governance and empowerment; cultural integrity; self-determination; the right to own and control the lands, territories and natural resources they customarily own, occupy or otherwise use; the right to represent themselves through their own institutions; the right to self-governance; the right to exercise their customary law; and the right to give or withhold their Free, Prior and Informed Consent to measures that may affect their rights.

Jurisdiction of the National Commission on Indigenous Peoples (NCIP)

The National Commission on Indigenous Peoples (NCIP) exercises quasi-judicial power, exercised through its Regional Hearing Officers, the NCIP Legal Affairs Bureau and the NCIP En Banc:

The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs: Provided, however, that no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws ... (Sec. 66 IPRA)

Decision and Appeals Process



However, case studies have shown that NCIP suffers from a variety of limitations. These include its lack of decision-making capacity, the inadequate information on customary laws made available to NCIP, inaccessible procedures for indigenous peoples living in remote areas, and the unresolved problem of how to deal with cases where one party is indigenous and the other non-indigenous, or a corporation.

Free, Prior and Informed Consent: improving the relationship between businesses and indigenous peoples

Free and Prior Informed Consent refers to the consensus of all members of the ICC/IPs which is a) determined *in accordance with their respective customary laws and practices* b) *free from any external manipulation, interference and coercion* and c) *obtained after fully discussing the intent and scope of the plan/programme project activity, in a language and process understandable to the community*. Free, Prior and Informed Consent is given by the concerned ICCs/IPs upon the signing of a Memorandum of Agreement (MOA) containing the conditions, requirements, benefits

as well as penalties of agreeing parties as the basis for the consent given.²

Activities requiring 'Regular' FPIC

In accordance with Section 6A of FPIC Guidelines 2006, 'regular' FPIC is required for:

1. Large-scale development, exploitation and utilisation of land, water, air, and other natural resources within ancestral domains/lands;
2. Exploration of mineral and energy resources within ancestral domains;
3. Programmes, projects and activities that may lead to the displacement and/or relocation of indigenous peoples;
4. Resettlement programmes or projects by the government or any of its instrumentalities that may introduce migrants into ancestral domains whether permanent or temporary;
5. Management of protected and environmentally critical areas, and other related joint undertakings within ancestral domains;
6. Bio-prospecting activities;
7. Industrial land use including the establishment of economic zones;
8. Large scale tourism projects;
9. Large scale agricultural and forestry management projects; and

² The Philippines' FPIC Guidelines can be found in several documents, including RA 8371 (IPRA) 1997; Implementing Rules and Regulations of IPRA (IPRA IRR – A.O. 1, s. 1998); FPIC Guidelines – A.O. 3, s. 1998; FPIC Guidelines – A.O. 3, s. 2002; and FPIC Guidelines of 2006 - National Commission on Indigenous Peoples (NCIP) Administrative Order No. 1, 2006.

10. Other activities similar or analogous to the foregoing.

Activities requiring ‘Special’ FPIC

Activities which require ‘Special’ FPIC, on the other hand, include:

1. Small-scale exploration and utilisation of land, water and natural resources within ancestral domains/lands as defined under existing laws, rules and regulations of governing or regulating agencies;
2. Commercial research undertaken by the government, private persons, corporations or foreign entities for direct or indirect commercial use, such as publication, documentation, paid lectures, and so forth;
3. Unsolicited government projects for the delivery of socio-economic services and development including projects of charitable institutions, civic or non-government organisations, the direct and primary beneficiary of which are ICCs/IPs who own the ancestral domain, except when the same are formally coordinated with NCIP;
4. Activities that would affect ICCs/IPs’ spiritual and religious traditions, customs and ceremonies, including ceremonial objects or access to religious and cultural sites, archaeological explorations, diggings and excavations, unless the council of elders/leaders require the conduct of the FPIC process prescribed under section 26;
5. Programmes, projects and activities not requiring permits from government agencies;
6. Feasibility studies for any programme, project, activity or undertaking relative to any of those enumerated in Section 6 (A);
7. Occupation of military or organising paramilitary forces, establishment of temporary or permanent military facilities, or military exercises within the domains, except when requested by concerned elders/leaders in writing. Military operations within ancestral domain areas when made in connection with hot pursuit operations, securing vital government installations, and programmes and projects against clear and imminent danger, shall not require

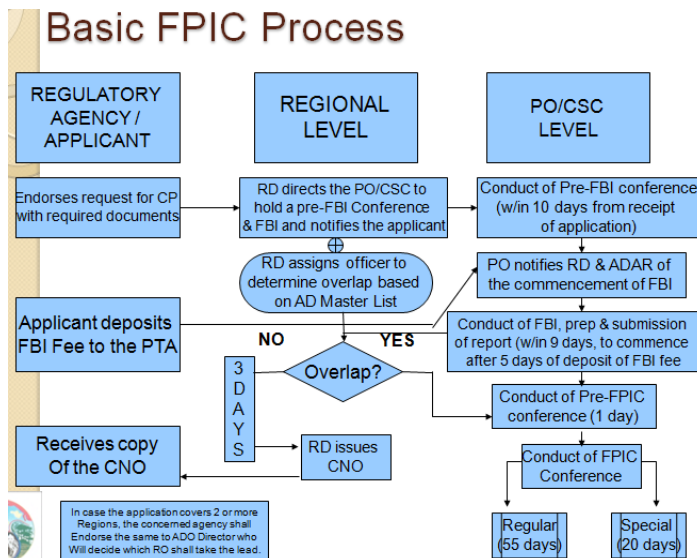
FPIC. The cessation of hostilities and the presence or absence of clear and imminent danger shall be determined by the elders/leaders who may notify in writing the occupying military/armed force to vacate the ancestral domain; and

8. Such other activities analogous to the foregoing nature (Section 6B, 2006 FPIC Guidelines).

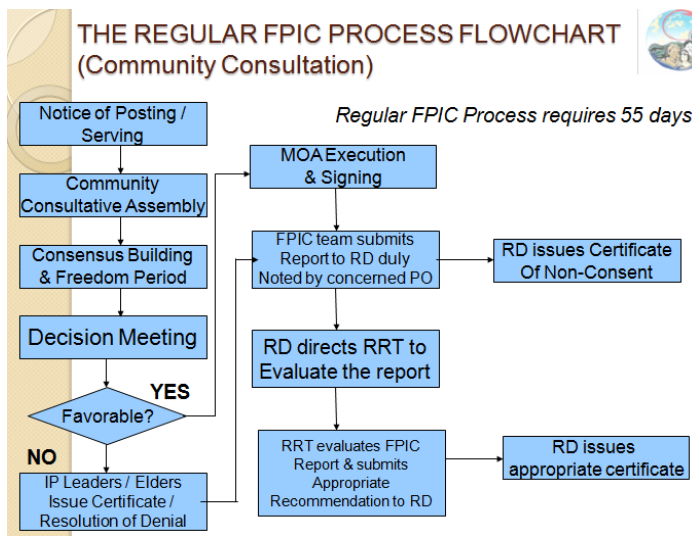
For ‘Regular’ FPIC, mandatory activities include the posting of notices and invitations; holding a community consultative assembly; a consensus-building period; and a decision meeting. For ‘Special FPIC’, mandatory activities include a first meeting, a consensus-building period and a decision meeting (see diagrams below).

Steps in the FPIC Process of the 2006 Guidelines

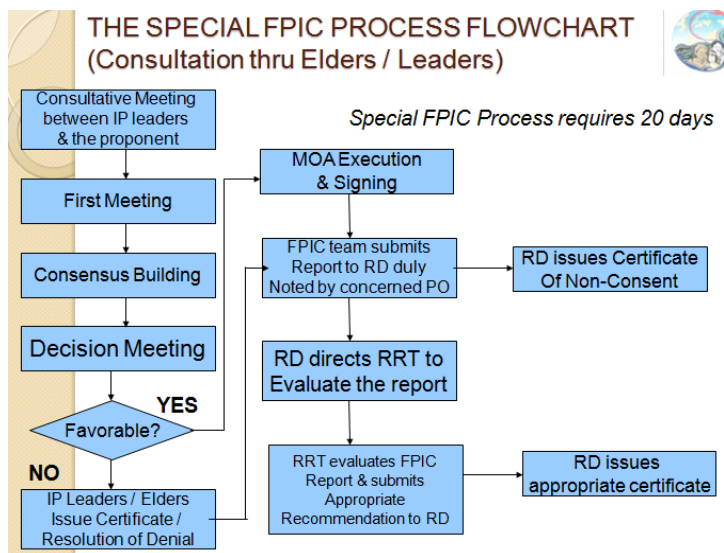
A number of steps are involved in the FPIC process as per the 2006 Guidelines. First, the project proponent files an application with the relevant regulatory agency. The regulatory agency refers the application to NCIP, which endorses the application to the NCIP Regional Office. NCIP then refers to the Master List of Ancestral Domains. This can result in the issuing of a Certificate of Non-Overlap (CNO). A pre field based investigation conference is then held, ensuing which a proper field based investigation is carried out, which begins after the payment of a fee by the project proponent to the NCIP Trust Fund. A pre-FPIC conference is then held, before FPIC Proper begins, also upon payment of an FPIC fee. The FPIC Proper process includes provisions for the participation of NGOs and results in either consent (an MoA) or non-consent.



The ‘Regular’ FPIC process requires fifty five days. First, a notice of posting/serving is issued, followed by a community consultative assembly. After a consensus building and freedom period, a decision meeting is held. If the decision is favourable, an MoA is executed and signed. The FPIC team submits their report to the Regional Office who directs the evaluation of the report. Recommendations are submitted to the Regional Office that will issue the appropriate certificate. If the outcome of the decision meeting was unfavourable, the Regional Office issues a certificate of non-consent (see diagram below).



The ‘Special’ FPIC process requires twenty days. It differs from the ‘Regular’ FPIC process in that a consultative meeting between the indigenous leaders and the project proponent initiates the process, followed by a first meeting, consensus building and the decision meeting.



Obstacles to the FPIC process

However, from the preliminary findings of Free, Prior and Informed Consent case studies, a number of obstacles have been identified. These include the lack of capacity of both NCIP and indigenous peoples, as well as the lack of resources available to them. Compounding this is the dire economic situation of most indigenous peoples, including their lack of access to basic social services. Furthermore, ineffective monitoring and review mechanisms lead to a high number of irregularities. A lack of inter-agency cooperation was also identified. In addition, the FPIC process suffers from the lack of, or ineffectiveness, of existing benefit-sharing mechanisms, inaccessible grievance mechanisms, political influence and corruption, as well as a continued lack of respect for customary laws and practices.

Oil Palm Expansion and Human Rights in the Philippines

By Jo Villanueva

The Philippines Constitution contains important provisions regarding land and natural resource use and management. Article 12, section 2 of the Constitution, for example, states:

All lands of public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timbers, wildlife, flora and fauna, and other natural resources are owned by the State. *With the exception of agricultural lands, all other natural resources shall not be alienated.* (emphasis added)

However, land use conflicts have and continue to occur in the Philippines as a result of a number of factors. One of these is the failure of existing land use policies to address conflicting and overlapping land claims and conflicts. Another is the lack of prioritising in terms of land uses. In addition, conflict frequently arises when industries are established in ecologically critical areas or prime/irrigated lands of high agricultural value. Furthermore, market-biased policies favouring the development of monoculture plantations have led to rampant agribusiness encroachment in forestlands, ancestral domains and protected areas. In particular, mining operations in such areas are one of the most controversial and problematic issues in terms of land rights in the Philippines, and risk being further aggravated by the Philippine government's mining target of 9 million hectares. Land rights of indigenous peoples are undermined by the formal legal status of both public and private lands as open for mining. There is also a lack of systematic information on land uses and hazardous areas across the country.

The Philippines palm oil sector

The first oil palm plantation (280 hectares) in the Philippines was established in the 1950s by Menzi in Zamboanga. Recently, the government target for oil palm plantations was raised to a further expansion of one million hectares, in part stimulated by competition with Indonesia and Malaysia, as well as Thailand. In the Philippines, palm oil is largely produced to supply domestic demand, both as an edible oil and as a bio-fuel, the latter particularly since the 2006 Bio-Fuel Act. Agribusiness in general is being promoted by the government as key to the Philippines' economic development. The existing area of oil palm plantations is of 54,748 hectares (2011) and a further 1,000,000 hectares are to be developed from 2011 to 2022, of which 500,000 hectares will be located in Mindanao.

Drivers of oil palm investments

A number of national and global factors lie behind the expansion and intensification of oil palm cultivation in the Philippines. First are the soaring global prices for palm oil and the increasing market demand (both domestic and international markets) for palm oil as a component in foodstuffs and cosmetics. Second is the increased domestic demand for agro-fuels, partly enhanced by the Philippine Biofuels Act of 2006 which set targets for agro-fuel use. In line with this Act, 1.37 million hectares of land are currently targeted for the production of agro-fuel feedstock (e.g. coconut, jatropha, palm oil for biodiesel and sugar, sweet sorghum, cassava and molasses for bioethanol).

Government policies have also played a key role in supporting the expansion of oil palm plantations. The Foreign Investments Act of 1991 (amended in 1996 to RA 8179) liberalised the entry of foreign investments into the country by relaxing restrictions on the participation of foreigners as equity shareholders in local firms. The Medium Term Philippine Development Plan (MTPDP) 2004-2010 stipulated the development of 'at least two million hectares of idle lands for agribusiness to create ten million jobs.' The Local

Government Codes (LGC) have also made it easier for the private sector to deal directly with Local Government Units (LGUs).

Further, areas that are open for oil palm plantations include those lands awarded by government to Agrarian Reform Beneficiaries (ARBs), Certificates of Ancestral Domain Titles (CADT's), including forest areas such as those under the Community Based Forest Management CBFM), Integrated Social Forestry Programme (ISFP) and Socialised Forest Management Agreement (SIFMA) and other privately titled lands, and public lands under the jurisdiction of LGUs.

The limited public investment in agriculture, lack of government support to ARBs, CADT and CBFM/ISFP holders to develop and benefit from their lands/tenure as well as attraction to 'high return of investment' and facilitation of financing from banks are key factors for oil palm expansion.

Land acquisition schemes

Land acquisition schemes in the Philippines include nucleus estate/leasebacks (as in the case for the companies FPP, Agu Mill and KENRAM), lease agreements (e.g. CLOA and ISFP) and outgrowership schemes (e.g. private lands and CADT areas). Emerging schemes include joint venture agreements (e.g. CADT, CBFM) and co-management with LGUs (e.g. as in the case of areas previously under Timber License Agreement (TLA).

However, a number of problems have resulted from these types of land acquisition schemes. Onerous partnership agreements have been reported by local community organisations, as well as complaints that contracts tend to be monopolised by the palm oil mills/corporations. Land rental is very low. There is also a serious lack of respect for the right to Free, Prior and Informed Consent of indigenous peoples as in the case of Palawan and also in Bgry. Happa, in Impasug-ong, Bukidnon. Other negative consequences of oil palm expansion include the displacement of indigenous peoples

(e.g. in Palawan), land conversion (e.g. prime agricultural lands, forest lands, ancestral domain) in Palawan, Sultan Kudarat, North Cotabato, and threats to the food security, traditional livelihoods and health of local communities and indigenous peoples whose lands are being developed/converted into oil palm plantations.

Existing deals and partnerships involved in oil palm development include financial and management agreements, marketing agreements (also involving financial and technical aid), and self-financing that include marketings agreement with a particular palm oil processing mill. Frequently reported problems with these types of deals include an imbalance in power and control and the monopsonistic dependence of communities on the corporation, communities' vulnerability to fraud, the violation of terms of the contract, delayed payments, the burden of heavy indebtedness of local community cooperatives, the takeover of community lands by corporations should they fail to manage the plantations and numerous other grievances.

Tenure rights have also suffered from these agreements. For example, collective titling in the form of Agrarian Reform Beneficiaries (collective CLOA), when tied to market-led schemes, undermines the redistributive principles of agrarian reform (e.g. women not benefiting at all in terms of access and control of land, employment and leadership in cooperatives). Also, land reconsolidation and displacement have resulted from the reform, which is inimical to the ideals and principles of agrarian reform as farmers are obliged to give up control over their lands. In addition, the rights of smallholder farmers have been undermined by contracts which are too often skewed in favour of the interests of oil palm mills and companies. Finally, displacement, the loss of ancestral lands and the lack of Free, Prior and Informed Consent in such agreements seriously undermines the identity, livelihoods, food security and access to land and resources of indigenous peoples and local communities.

Challenging the promises of the palm oil industry

Oil palm is being promoted by the government and the industry as highly promising in terms of income, employment and benefits to landowners as well as key to a thriving domestic industry and hitherto untapped international market. There are indeed ARB cooperatives and ‘outgrower’ farmers that have benefited from palm oil production, but there are many experiences as well that point to disincentives, violation of rights, land grabbing, violation of contracts and so forth, by the industry.

The oil palm industry is expanding amidst overlapping land rights and escalating conflicts in relation to mining, logging and other forms of land grabbing such as for the establishment of large-scale bio-fuel/agro-fuel plantations. Legal remedies and policies are in place, but not always functioning. The State policy framework and legislation on land and resources generally supports oil palm expansion. However, it is often contradictory to indigenous peoples’ rights (e.g. UNDRIP, IPRA) and environmental laws, overlapping with other land uses such as ancestral domains, agricultural lands that communities depend on for food (e.g. staple crops such as rice, corn), forests and protected areas.

Thus, it is imperative to develop an approach and plan of action that does not compromise food security, environmental sustainability, socio-economic development, poverty alleviation, land rights and workers’ rights for the sake of economic gain to be drawn from the exploitation and extraction of palm oil. This approach must allow investors to make profit but also encourage them to equitably share and provide lasting benefits to smallholder oil palm farmers, contract growers and outgrowers, and rural communities, inclusive of women and other potentially marginalised groups.

Recommendations

In the light of how oil palm plantations are operating and expanding in the Philippines, a number of recommendations for action are

made below. A number of issues are in need of speedy resolution if they are not to deteriorate into conflict and disputes. One of these is the need to improve access to justice and make the legal system responsive to injustices experienced by indigenous peoples and local communities as a result of the activities of the oil palm sector. Another is the need to resolve long-standing legal cases related to the palm oil sector. Stronger protection also needs to be provided for workers' rights (both women and men) who are employed in oil palm mills and plantations. The violation of contracts signed by companies with indigenous peoples and ARB cooperatives must be taken to Court in order to seek resolution and redress grievances. Finally, the phenomenon of 'land grabbing' must immediately be addressed, including those affecting indigenous peoples such as the Tabung Haj controversy in Lanao.

Civil society and NGOs need to continue consolidating their collective actions and agenda-setting in addressing oil palm issues (for example, the Philippines Oil Palm Watch). They must also engage in further monitoring of oil palm expansion across the country and document critical human rights issues emerging from this expansion. Furthermore, civil society must appeal for the development of stronger systems of license and land use permit assessments, based on existing human rights standards for agribusiness. In addition, there is an urgent need to encourage and facilitate critical engagement, constructive dialogue and meaningful collaboration between the different stakeholders involved in and affected by the oil palm industry. This includes smallholder farmers, cooperatives, landowners and planters, NGOs, indigenous peoples, industry intermediaries, relevant government bodies, and so forth. Support must also be given to small-holders groups, cooperatives and 'federations' in order to link them with the Roundtable on Sustainable Palm Oil (RSPO) and relevant governmental agencies in order to better protect and demand the respect of their rights. Finally, local, national regional and international networks working on oil palm-related issues must be linked together so as to stimulate information exchange and joint action.

Governments must also prioritise the passing of a national land use code that would set aside lands for food production and protect these lands from conversion to other uses such as mono-crop plantations and mining. Governments also need to develop a comprehensive agricultural development framework and plan which clearly articulate the national policy on food security, food self-sufficiency, agricultural land use and investments. This framework must also ensure equitable benefit and risk sharing between stakeholders involved, and be based on the need for environmental sustainable agribusiness that mitigates, rather than exacerbates, climate change. The NCIP must put into place a fast track processing mechanism for CADTs within existing and projected oil palm plantations.

The government also needs to improve investment regulatory and monitoring frameworks and mechanisms for land investments in agribusiness, including those facilitated directly by LGUs and/or private consolidators. The provision of legal and capacity-building support to poor smallholders, including both women and men who enter into agricultural land investments (also for NGOs) is also critical. Finally, the right to Free, Prior and Informed Consent, equitable benefit-sharing and the transparency of contracts must be prioritised in any oil palm project.

Furthermore, government/public investment support to empower smallholder farmers, and indigenous peoples must be provided, and the food security of these communities addressed and protected. The government must also provide financial support and other relevant services to CADT areas, CBFM and CLOAs, as this is currently lacking. In addition, it is recommended that the government put in place regulatory and enforcement mechanisms to forestall forest degradation and seek to put an end to the negative social, economic and cultural impacts that this causes to indigenous peoples and local communities.

With regards to smallholder farmers, indigenous peoples and ARB cooperatives, greater awareness needs to be built within and between communities regarding their legal rights. Local level

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and Legal Reform*

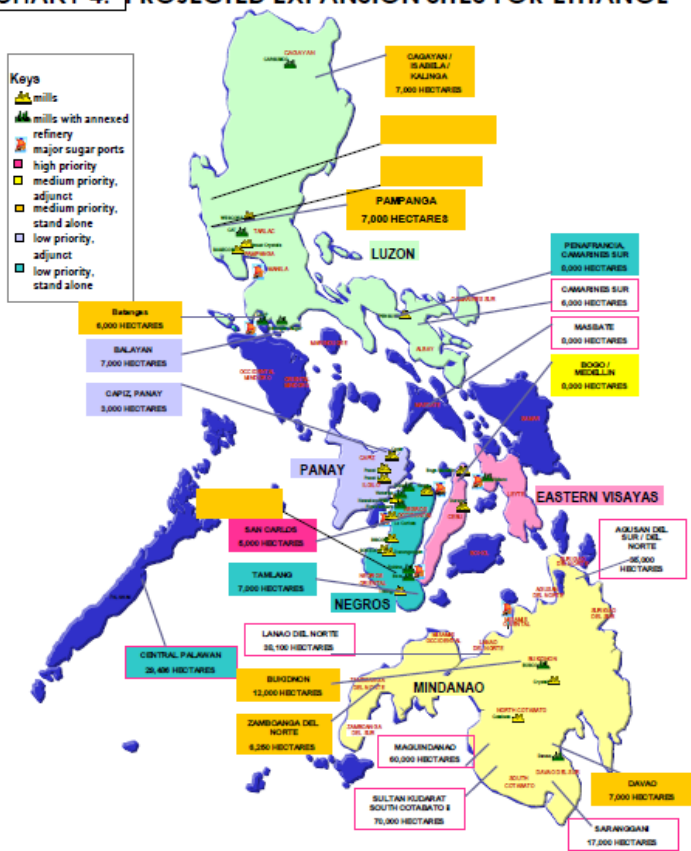
capacity-building will allow communities to make informed choices when signing contracts or agreements with investors, palm oil companies and banks. In addition, the RSPO must be used as a mechanism to provide political space to local communities.

Standards in the palm oil industry must be improved through certification processes such as the RSPO, as well as sustained advocacy and lobbying for more robust safeguards, based on the principles of both national and international laws with respect to agribusiness and human rights.

It is also important to document ‘success stories’ which show how oil palm can be grown without undermining human rights, ecological preservation, respect for cultural norms, women’s rights, and other critical elements to the livelihoods of local communities and indigenous peoples. Case studies of abuses and violations of human rights can also be used for advocacy purposes as well as joint action with the Commission on Human Rights. Detailed analyses of the social, economic and environmental impacts of agro-fuel development are critical and it is strongly recommended that a moratorium on agro-fuel development be placed before such studies are carried out.



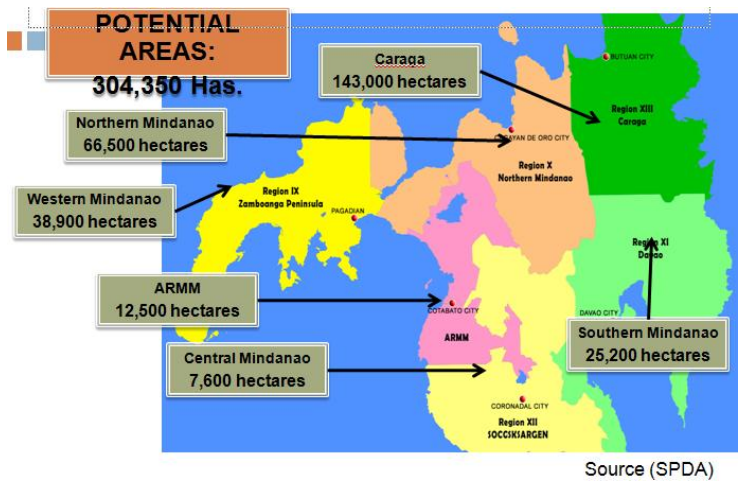
CHART 4. PROJECTED EXPANSION SITES FOR ETHANOL



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[224]

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and Legal Reform*



Potential oil palm plantation area in Mindanao

Product	Average Annual Production (MT)	Average Annual Usage (MT)	Short Fall %
Palm Oil	54, 333	94,400	42.50
Palm Kernel	6,544	7,277	10.00

National Crude Palm Oil (CPO) Production

DISCUSSION

The presentations stimulated a discussion about the progress that the Philippines has made in the last twenty years in terms of policies and practices related to indigenous peoples. Other areas of discussion included the remaining challenge of recognising and protecting the rights of smallholders, possible areas of collaboration between the Philippines HRC and NCIP, and the need for a rights-based approach to agrarian development at the core of the *Bali Declaration*.

Challenges for smallholders.

Advances in Philippine policies and practices have been quite fast over the last twenty years. However, challenges remain at the local level for indigenous peoples and smallholders, the latter of whom have perhaps received less attention. The rights of farmers and indigenous peoples are recognised for about five million hectares, but the challenge is how this will translate into actual exercise of rights, participation, access to justice and access to benefits. The expansion of oil palm plantations to one million hectares leads us to question how secure these rights really are on the ground.

Collaboration between the Philippines Human Rights Commission and NCIP.

It was suggested that the Philippines HRC and NCIP should seek to work together in their quasi-judicial function. Arbitration should also be showcased, including at ASEAN. The HRC and NCIP need to identify pathways of convergence in their work and objectives, through the sharing of lessons learned and best practices. NCIP will need the HRC to achieve its goals, as well as the presence of independent experts.

Lesson sharing on the impact of oil palm plantations between Indonesia and the Philippines.

It was suggested that palm oil watchdog organisations in the Philippines connect with SawitWatch in Indonesia and share

information and case studies for joint advocacy. It was also suggested that the Asian Indigenous Peoples Pact (AIPP) create a list of cases of human rights violations by companies and work with SawitWatch and oil palm watchdogs in the Philippines to get these violations recognised.

A number of other points raised included:

- The law does not deliver justice, but it is the use of the law that may. The key issue is to identify what limits indigenous peoples from accessing the law and what the HRC do about it.
- Good laws do exist in the Philippines, such as CARP, NIPAS and IPRA, but the problem is that they frequently overlap in their jurisdiction, or contradict each other. Efforts must be made to harmonise both laws and land use plans.
- There is a critical need to establish a Regional Human Rights Recourse Mechanism for Southeast Asia.
- Agribusiness must adopt a Human Rights Based Approach based on the initiatives and rights of farmers, women and indigenous peoples.



CHAPTER VII: THAILAND

*Human Rights and Agribusiness:
Plural Legal Approaches to Conflict Resolution, Institutional Strengthening
and Legal Reform*

Human Rights, Land Tenure and Agricultural Development in Thailand

By Amara Pongsapich

Land Policies: The issue of public and private land

Public Land

The concept of public land is a new concept which is alien to the customary livelihoods and tenorial systems of most villagers in Thailand. Traditionally, land which was not privately owned could be used by anyone. It could be located within the village or forested area where everyone was free to gather wood, or it could be a body of water where fish was caught for food. In the old days, generally speaking, no one claimed land as a means of accumulating wealth; instead, individuals claimed land for crop cultivation. Private ownership is a capitalistic concept which became meaningful only in the last century. In the old days, people lived in settlements and cultivated the land surrounding them, with a common understanding of who cultivated which plot, without having a real sense of land ownership.

Later, when population size increased and land became scarce, the sense of land ownership gradually developed. People started to claim ownership to land, but only enough to cultivate. No large plantation or feudal type systems developed. Land which was not claimed was forest land, bodies of water and some village public land.

During the nineteenth century Ayutthaya and early Bangkok periods, under the *sakdina* system, the kings gave land to bureaucrats as rewards. People working for the kings and royal families were ranked approximately based on the amount of land granted. And, since the two capitals, Ayutthaya and Bangkok were

located in the Central Plain areas where land was fertile and suitable for paddy cultivation (the only commercial crop known at the time), most land grants were in these areas. The sense of land ownership was formally introduced at the turn of the twentieth century during the reign of King Rama V, when an Australian consultant introduced cartography to the kingdom. Announcements were made inviting people who owned land to register. However, only people in the Central Plain areas, mostly elites living near the capital, received the information and were able to register their land rights. People in remote areas did not have access to this information and most villagers did not register their rights to land even if they were cultivating it.

In 1924, lands which had not been registered by individuals were declared by the government as public or government land without there being any real legal document issued to identify boundaries. Land classification started in 1941 when the first Forestry Act was promulgated in an attempt to look into public land. In addition to the Forestry Act, other forestry-related laws were gradually introduced. These are the Wildlife Preserves Act (1960), the National Parks Act (1961), the National Reserve Act (1964) to be followed by the Land Reform Act (1974) and the Forest Plantation Act (1992). It should be noted here that the Land Reform Act came about after the so-called student coup of 14th October 1973 when the military dictatorship was overturned. This date has been marked as the beginning of modern democracy of Thailand.

From 1974 onwards, the Department of Lands started to identify public land and planned to complete all identification of both private and public lands within ten years. However, this had proven a very difficult task because old land markers were made of wood and had rotted, so boundaries could not easily be drawn. The task was made doubly difficult as farmers had occupied the so-called 'public land' for many years. These farmers paid land tax annually and were given receipts (*pho bo tho*) acknowledging that they were occupying and utilising these plots of land. The villagers believed that these receipts were equivalent to land ownership papers.

Private Land

The land holding pattern in Thailand varies from region to region. In the North, the size of land holdings is very small and there is some degree of tenancy. In the Central Plain, the size of land holdings is large with a high rate of tenancy. In the Northeast, most villagers cultivate their own land and there is little landlessness or large-scale land ownership.

The traditional understanding of ‘right of ownership’ has been very loose. It consisted in the implicit recognition and acceptance of the rights of first settlers and squatters in the absence of any formal legal basis. In 1955, settlers and squatters were asked to request legal documents called *so kho nung* which are deeds for initial occupation of an approximate plot which needs to be later confirmed by proper measurement to qualify for a more definitive document. After having announced in 1955 that land claims could be made through petitions, the government more or less took the stand that all unclaimed land was government land. However, it was found that this position could not be acted upon since it did not have substantive validation. Having moved into an area which they thought was unclaimed and having started to cultivate the land, settlers and squatters also went to the land office to pay land tax and were given a receipt (*pho bo tho*). This piece of paper was given to anyone who declared his occupation and utilisation of a piece of land without actually specifying the legal status of ownership. The district office accepted the tax payment without examining the actual plot, which may well have been on public land or in a national reserve area. The settlers and squatters cannot be blamed for the mistake of assuming that they had legal rights to land for which they had been paying land tax for many years. In the eyes of the villagers, the difference between public land and private land remained very unclear.

The process of declaring government land is a cause of conflict between government officers and the people. Government officers include both land officers and foresters. Land officers have to deal

with earlier squatters on so-called government land while foresters have to deal with settlers/squatters who settled in forest lands.

The Agricultural Land Reform Office (ALRO)

The Agricultural Land Reform Office (ALRO) was set up according to the 4th National Development Plan (1977-81) as a means to help solve developmental problems of the country through land consolidation programmes. Once an area was declared as a land reform area, no transaction was supposed to be made for a period of three years. During this period, land reform officers had to collect information on the present land ownership status and make plans for land consolidation programmes. When this was completed, people could move into their allotted plots and were given documents of occupation. Land at this point could be transferred to sons or daughters but not sold.

One problem which land reform officers encountered was that when a land reform area was declared, all land transactions were supposed to be frozen for three years. Farmers owning more than the allotted size of land were asked to sell the excess to the ALRO. But since most of the farmers had no legal papers, their land was taken without compensation. In the eyes of the villagers, the ALRO was set up to take land away from them and not to provide them land. *This is a misconception.* Land documents are seen as desirable in the eyes of villagers because the documents may be used for mortgages or as collateral when borrowing money.

Forest land

Forestry Policy has been included in the First National Development Plan (1961-64) and indicates that 50 % of the nation's total land area should be forested. As the population increases, forest encroachment has been observed and forest areas have been gradually reduced to 40% and now 25%. Land use for agriculture gives highly attractive returns to individuals including local villagers as well as urban investors. The cultivation of cash crops such as cassava and sugar

cane, have become very popular. Roughly speaking, forest areas may be classified as protected forest and commercial forest.

Protected forests are forest areas having a slope greater than thirty five degrees and a high potential for erosion if not covered with forests and preserved for environmental conservation, including upper-watershed and erosion-prone areas, in addition to stable forests. Declared national parks, reserved forests and wildlife preserves are included in this category.

The management policy of protected forests consists of three main conservation activities, namely, the prevention of encroachment, forestry management, and reforestation to restore forest cover in areas where natural forest has been disturbed.

Confrontation between State conservation forest policies and individuals' rights to livelihood transformed into a human rights issue, as observed during the 1970s and 1980s. During the 1980s, there was a strong debate over the conservation of forest areas 'without people' and the right of people living in the forest areas to their subsistence. Advocacy groups started to promote the concept of 'community forest' at this time. Unfortunately, advocacy groups have not yet succeeded in promulgating the Community Forest Act, which has failed to pass the scrutiny of Parliament.

Commercial forests are areas which contain valuable timber and should remain forested for the production of timber and related items. In general, these areas have low agricultural suitability and require a high investment for agricultural use. The management of commercial forests has as its objective the realisation of potential economic benefits derived from the utilisation of forest resources. Activities include logging, wood products industry, and reforestation for commercial purposes. The Forest Plantation Act (1992) is an outcome of the government's support for commercial forests.

Agricultural development policies

The First Five Year National Development Plan (1962-66) came about with the assistance of a team of experts from the World Bank. Adopting the concept of growth-centred development, the first and second plans focused very heavily on infra-structural developments with the construction of physical infrastructures such as roads, railroads, airports, dams and irrigation systems. Social infrastructures were also created including the construction of schools and health care centres. These infrastructural constructions were viewed positively by government officers as well as villagers hoping that these constructions would bring about development. The first two multipurpose dams, Bhumibhol Dam and Sirikit Dam, were established during this period. In this early stage of rapid infrastructural development, there were no Environmental or Social Impact Assessments required as part of the feasibility studies due to the lack of adequate knowledge of both the government and civil society.

During the 1970s, in the third and fourth plans, population control policy was adopted and decentralisation concepts introduced. Regional urban centres were identified as growth centres to attract people away from Bangkok. The promotion of cash crop cultivation such as maize, sugar cane, cassava, jute and Para-rubber was achieved through a policy introduced by the government during the fourth plan (1977-81). Agricultural development programmes were introduced to increase crop productivity. Many poverty eradication programmes were implemented during the fifth plan (1982-86) based on the concepts of self-reliance and people's participation. During the 1980s, still adopting the growth-centred development paradigm, villagers were encouraged to cultivate cash crops for export, resulting in serious forest encroachment. Agricultural products constituted 25 % of the GDP. 60% of income was from exports and 70 % from labour.

The switch from import-substitution to an export-oriented policy can be seen from the widespread industrialisation activities undertaken

during the sixth and seventh plans (1987-91 and 1992-96). Other agricultural activities promoted by policies of this period include commercial forestry, the cultivation of fast growing trees, forest plantations and the production of other types of forest products. Agricultural products became the main export products of the country. During the seventh plan, the government supported the agro-processing industry, contract farming, agricultural machinery, as well as other products such as textiles, metals, petrochemicals, iron/steel, and tourism.

The negative impacts of growth-centred development on people have been widely documented. The debate between growth-centred and people-centred development paradigms started in the 1980s and intensified in the 1990s. The people-centred development paradigm was included in the text of the eighth plan (1997-2001). However, the sincerity of the economists in the planning offices has been questioned. With strong resistance from the people locally, globally and transnationally, a gradual shift in development paradigms has occurred. The 1997 economic and financial crisis opened the eyes of many investors. The fall of the financial sector was saved partially by the strength of the agriculture sector in 1998 as the price of agricultural products helped save the economy to some degree. Aggressive investments were slowed down, and the 'efficiency economy' concept was promoted and finally adopted in the tenth development plan (2007-2011).

Impacts on human rights: conflict over use of natural resources

The rapid economic expansion of the past is partly a result of intensive exploitation of natural resources, without systematic management and rehabilitation of the resources leading to greater conflicting resource use. Thailand's natural resources, which had once served as key contributing factors to national economic prosperity, have now become constraints for future development which must be carefully taken into consideration. Conflict over the use of natural resources may be summarised as follows:

1. The development of the land tenure system relegated many farmers to the status of landless cultivators. Frequently referred to as 'encroachers', they are seen by officers as 'illegal' because they have no land documents, despite the fact that most of their ancestors have been cultivating the land for generations.
2. Dam construction has forced people out of their former settlements to give way to reservoirs. These communities became involuntarily internally displaced persons (IDPs) without being provided with adequate, if any, compensation. They have been forced to give up their rights to fertile land in exchange for infertile land and meagre compensation.
3. During the 1980s when the debate over forestry policy was strong, the government succeeded in promulgating the Forest Plantation Act in 1992, while the Community Forestry Act never succeeded. This resulted in the growth of large plantations producing cash crops and forestry products. More and more small farmers become landless or contract farmers.

Conclusion

The *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) states clearly the State's obligations to protect the rights of individuals to economic, social and cultural rights. Similarly, the *Declaration on the Right to Development* was endorsed by the United Nations General Assembly in 1986. In the same year, a group of experts confirmed that Right to Development are an extension of the ICESCR as is evident in the document adopted by the General Assembly titled 'Limburg Principles on the Implementation of the ICESCR'. The 1993 Vienna World Conference on Human Rights reaffirmed that Rights to Development are universal, cannot be violated and are fundamental rights. Rights to development cover economic, social and cultural rights with the aim being the sustained wellbeing of the people on the basis of participation as well as equal and fair distribution of

benefits. There are only ten articles in the Declaration covering the basic concepts and the roles of the State.

To further strengthen as well as bring about the realisation of the right to development, the UN General Assembly again adopted the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights in 1977, ten years after the adoption of the Limburg Principles in 1986. The Maastricht Guidelines identified clearly the obligations of States in respecting, protecting and fulfilling the economic, social, and cultural rights of people. States have the obligation to respect and not violate rights of the people, the obligation to protect the rights of the people from being violated by third parties, and the obligation to fulfil the rights of people through rules, laws and regulations, as well as provide financial and other support. The States' obligation to 'fulfil' requires that the conduct or implementation of projects and programmes to provide services to the people is in accordance with human rights standards. States also have the obligation to 'result', meaning that States must take concrete actions to provide fundamental rights and protect people from human rights violations.

In 2005, UN Secretary General Kofi Annan appointed Prof. John Ruggie as his Special Representative on the issue of human rights and transnational corporations and other business enterprises. In 2008, the Special Representative of the Secretary General (SRSG) proposed a 'three pillars' framework to address business and human rights. The framework covers: (1) the State's duty in international law to protect citizens from the violation of human rights by transnational business; (2) the corporate responsibility to respect human rights; and (3) the need for access to effective remedies including through appropriate judicial or non-judicial mechanisms. The Special Representative held many consultative meetings and the Framework has been endorsed and employed beyond the Human Rights Council by governments, business enterprises and associations, civil society, workers' organisations, national human rights institutions and investors.

It is clear that the UN Framework follows the Maastricht Guidelines with some adjustments. While the Maastricht Guidelines suggested that States have the obligation to ‘protect, respect, and fulfil’, the Ruggie Framework expanded further that in addition to States’ obligation to fulfil (through the obligation to conduct or implement and the obligation to result), States need to be clear on their obligation to provide effective remedy to people whose rights have been violated. The third pillar, ‘remedy’, substitutes the ‘fulfil’ pillar which focuses on the State’s obligation to provide infrastructure and services to fulfil the basic and fundamental rights of all people. The ‘remedy’ obligation brings in the dimension of reconciliation and compensation.

In its resolution 8/7, the Human Rights Council extended the Special Representative’s mandate to June 2011, asking him to ‘operationalise’ the Framework and agreeing that the recommendations should take the form of ‘Guiding Principles’. According to Clause 11 of the Report:

The Guiding Principles addressing how governments should help companies avoid getting drawn into the kinds of human rights abuses that all too often occur in conflict-affected areas, emerged from off-the-record, scenario-based workshops with officials from a cross-section of states that had practical experience in dealing with these challenges. *In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice* (UN General Assembly 2011). (emphasis added)

Human Rights Standards and Community Livelihoods in Thailand

By Nirun Phithakwatchara

*Excellencies and Colleagues from National Human Rights
Institutions,
Representatives from Civil Society Organisations and Community-
Based Organisations
Academicians, Distinguished Participants and Friends,*

It is my great pleasure and privilege to be able to participate in this workshop and share my experiences relating to community rights in Thai society. As a member of the National Human Rights Commission of Thailand, I have acted as Chairperson to the Subcommittee on Community Rights under NHRCT for over two years since the inauguration of the second group of persons appointed in office at the Thai Human Rights Commission in 2008.

Apart from my medical expertise, I have also been professionally deeply involved in environmental and natural resource-responsive and political reform movements in the capacity of volunteer activist for over thirty years. In this light, I would like to describe my experiences so far with the never-ending struggle in processes of community rights recognition in Thailand. The two dimensions I will focus on are the evolution of community rights infringement in Thai society and the emergence of community rights and capacity-building in Thai society.

The evolution of community rights infringement in Thai society

Over the past fifty years, Thailand has been recognised as a country employing various capitalist tools for its ‘great-leap-forwarding’ in terms of economic and social development. This development has been carried out under the direction of the National Economic and Social Development Plan, currently under Plan No.10 (2007-2011).

This Plan has been primarily implemented in the mindset of capitalism and economic growth, focusing on the change in mode of production from subsistence to cash-oriented development.

However, a number of infringements have been committed as a result of greedily aggressive development leading to the aggravation of relationships between communities, the government and enterprises, as the government has played an instrumental role in facilitating and legitimating the grabbing of land and the seizing of natural resources by enterprises and investors.

These developments have had a number of consequences. First is the transformation of collective assets into individual belongings with the allocation of title deeds. Second is the commoditisation of natural resources, for instance, the acquisition and purchase of plots of land and huge concessions for agricultural and forestry plantations or mono-crops of rapidly increasing value. Third is the capitalisation of natural resources and assets, for instance, the construction of dams on main rivers with the purpose of generating hydraulic power, as in the case of Pak Moon Dam, in Ubolratchathani province, and the Private Electricity Power Plant Project in the coastal area of Bor Nok-Hin Kruad, Prachubkirikhan province.

These developments overwhelmingly disregarded people's participation and were mainly focused on responding to the State's Policy on Energy Generation for energy consumption and utilisation in industrial and urban areas. Recently, for example, a number of evidence-based monitoring and evaluation studies have revealed that while the Pak Moon Dam, a project of huge investment obstructing the longest river in the north-eastern part of Thailand, would be able to generate around 136 megawatts of energy, the livelihoods of communities in the river basin would be severely disrupted. This case sets a precedent for the failure in the implementation of a development project without people's participation.

In another example, when the Private Electricity Power Plant project in the coastal area of Bor Nok-Hin Kruad, Prachubkirkhan province was proposed, all the local communities in Bor Nok-Hin Krud protested against it and the interpretation of the concept of community rights behind it, as stipulated in the 1997 Constitution of the Kingdom of Thailand. The Project was scrutinised with political engagement, people's participation and a judicial process, and was eventually terminated. This case sets a precedent for community rights being exercised and defended in the face of development.

Meanwhile, the Eastern Seaboard Industrialisation project, which was developed in Maptabud district, Rayong province almost twenty years ago is causing a high level of pollution and leading to the destruction of natural resources and the environment with severely detrimental impacts on local communities. This prolonged development with total disregard for people's participation is led by the government and the investment sector. Prior to this, the people of Maptabud community had depended on a 'three-pronged balanced economic system', comprising the agricultural, tourism and industrial sectors. Agriculture was later added to their means of livelihood but declined with the spread of industrial zones, operated by foreign or domestic investors who together represented an average of 80% to 90% of investments.

In the past few years, the health and safety of Maptabud community has gradually deteriorated. In 2010, the Eastern People's Network initiated a litigation case against the Project by filing a case to the Administrative Court, with unliquidated claims against the government. They demanded the prioritisation of investments for environmental schemes, preventive measures to mitigate negative impacts on health and sanitation, social welfare schemes for an improved quality of life and provisions for people's active participation.³

³ See Compilation I: Factual Profiles of Case-Studies on Community Rights.

At the same time, regional cooperation through the ‘ASEAN Community’ collective agreement in 2015 was elaborated based on constructive ideas and dialogue on a number of ‘care-and-share’ platforms with the participation and inputs of civil society. However, this initiative is unavoidably challenged by the development of liberal economic policies across ASEAN countries. Several transnational mega-projects have been developed and implemented in response to transnational investments, such as the Hutgyi Dam Construction Project on the Salaween River on the border between Thailand and Burma (Myanmar⁴); the Baan Kum Dam Project on the Mekhong River at the border between Thailand and Lao PDR; and huge extensions of agricultural concessions on plots of land by Thai investors in Lao PDR and Cambodia for the low-cost production of sugar, coffee, rubber and oil palm.

The expansion of foreign investments in ASEAN countries has contributed to the prosperity and integration of the State and business sectors involved. The business sector is estimated to represent 10% of the ASEAN population. However, the remaining 90% of the population have involuntarily become sacrificial surrendering victims of this development. They are being robbed of their natural resources and healthy environment while their livelihoods and social capital are being destroyed.

Over the last two years, the Sub-committee on Community Rights of NHRCT has been involved in the landmark controversial case of the Department of Natural Parks, Wildlife and Plant Conservation (DNP). DNP accused local communities living and cultivating crops within conservation areas of contributing to global warming. DNP litigated this case with a claim for indemnity and liability as set forth in Article 97 of the Act of Supporting and Preserving the Environmental and Surrounding Quality of Thailand, B.E. 2535. Five crucial factors, according to Article 97, were pointed out as benchmark indicators for the calculation of damages. These were the type of forest in question, the size of the destroyed area, the average

⁴ *Ibid.*

height of plants, the substantive profile of devastated areas and the clay body, with a resulting 150,000 baht (or approximately 5,000 USD) per rai.⁵

With the cooperation of academicians and experts, NHRCT examined the calculation of the formula from which this figure was derived and concluded that it was not only discriminatory but also in violation of the principle of equity. Technical surveillance was also found to be unreliable. The weakest point identified was the neglect of community participation. The formula for the calculation of the indemnity was therefore deemed an illegitimate infringement of community rights and the judicial process. According to the database compiled by the Land Reform Network of Thailand, there are 131 cases associated with civil case proceedings on global warming country-wide, allegedly affecting 500 communities. At the time of writing, thirty peasants were being litigated with claims for cumulative damages in the amount of 17,559,434 baht, or 585,315 USD.

Another landmark case of community rights infringement linked to ethnic discrimination in Thailand is the case of the expulsion and evacuation of the local Karen communities in Kaeng Kachan Natural Park, Petchaburi province. The main alleged infringers, the Unit for Preservation in Kaeng Kachan Natural Park No.10, Huay Mae Sarieng, Kaeng Kachan district, Petchaburi province, claimed that they organised a cohesive task force recruited from among officials to expel groups of local Karen residing in Jai Sang Din-Porn Rakam and Bang Kloi Bon villages, Huay Prik sub-district, located in Kaeng Kachan Natural Park, in early 2011. Rapid and aggressive searches of dwellings and residential areas were conducted, with the arbitrary destruction of barns and the confiscation of assets, as well as charges against the Karen of trespassing into the natural park and causing deforestation. In addition, charges of narcotic smuggling were fabricated against the Karen without any substantive grounds for evidence.

⁵ 1 rai = 0.395 acres.

According to an official investigation of NHRCT, the Karen communities have been living in the disputed area for over a hundred years. They are Karen-Thai citizens and depend on subsistence farming and hunting and gathering with rotational shifting cultivation, which is also legitimised and respected worldwide as ‘one of the modes of production for the sufficiency and preservation of natural resources’. Some villagers reflected on how they felt after being expelled and having their community rights derogated:

If we stay in our communities, although we are located in the natural park and do not have any money, we still have rice and chilli, so we can sell and barter them for other necessities. But if we are expelled and have to evacuate from our motherland, we need to adjust and compete with others under numerous constraints, languages, knowledge, skills and so on. How can we survive with only a minimum daily earning of 80 baht (around 2.6 USD) a day? Do we have the right to self-determination in terms of modes of living?

The case of Kaeng Kachan National Park reflects the way in which development can cause social disruption, conflict and the loss of basic necessities of life and fundamental community rights of indigenous peoples. It is cases of this kind that make it critical that the implementation of the law be revised not only in its legal dimension but also its moral one.

Emerging community rights: capacity-building and the strengthening of Thai society

This section reflects my personal point of view on the way forward in terms of strengthening community rights through the decentralisation of power, the strengthening of the self-managing capacity of local communities, and the checking and balancing of development. In order to achieve legitimacy and righteousness in social justice, I would like to propose four main components:

*Upraising and embedding of 'community rights' in the
decentralisation of power*

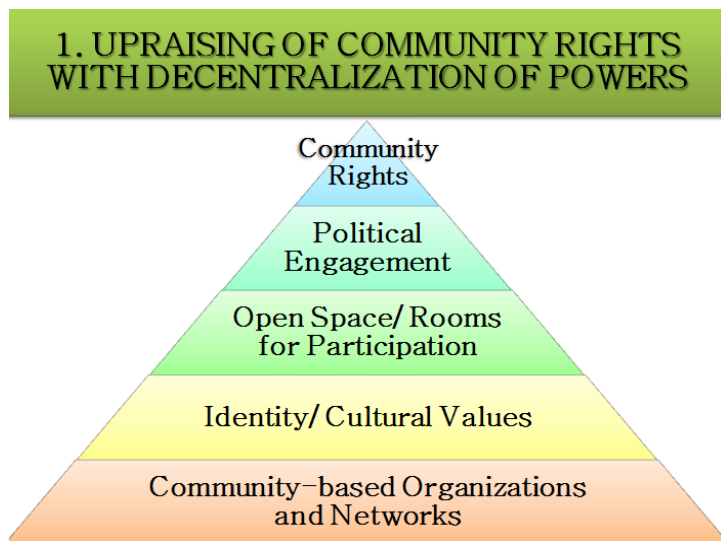
Community rights are enshrined in the Thai Constitution but they must also be exercised in practices of self-planning and management for a truly democratic process featuring the participation of community members in decision-making processes relating to development projects and their monitoring. Meanwhile, government authorities and political sectors have to encourage the development and emergence of community-based organisations (CBOs), networks and civil society organisations (CSOs).

Furthermore, access to information must be enhanced and expanded. In addition, communities must be fully involved in decision-making processes relating to natural resource exploitation and allocation. Indigenous peoples must also be primarily involved and responsible for the management of their intangible heritage, culture and folk wisdom. Integrated strategic plans also need to be elaborated through a collaborative process between the government and communities. Should these changes take place, a new and more constructive relationship and power dynamic would emerge between the government and communities, better reflecting the complexity of rights involved, as stipulated in the 2007 Constitution of the Kingdom of Thailand, Sections 66, 67, 85 and 87.

All efforts need to be put into raising awareness of these rights among the public.⁶ Community rights consist of numerous individual rights as well as collective rights of use, benefit and exercise. Community rights are important in negating the linear concept of rights, which tends to derogate and violate community rights when primarily focused on the development of investment and capitalism through the centralisation of power, as has been characteristic of the development of Thai society over the past fifty years. As such, it is very important to upraise and embed community

⁶ See Compilation II: The Constitution of the Kingdom of Thailand, B.E. 2550 (extracts on Community Rights only).

rights within the decentralisation of power. In order to implement the range of rights and establish safeguards to guarantee they are respected, laws, by-laws, codes and regulations need to be reviewed and substantially linked to each other.



Institutionalising supportive infrastructures for community rights

Apart from the establishment and streamlining of existing decentralising entities, such as the Local (Tambon) Administrative Organisations (TAOs), Community-based Organisations (CBOs) and Civil Society Organisations (CSOs), further steps must be taken in order to achieve collective bargaining power and the checking and balancing of power, particularly for the marginalised, unreached and unheard. The institutionalisation of supportive infrastructures must be initiated as follows:

- | | |
|-----|---|
| (a) | The enactment and promulgation of the Community |
|-----|---|

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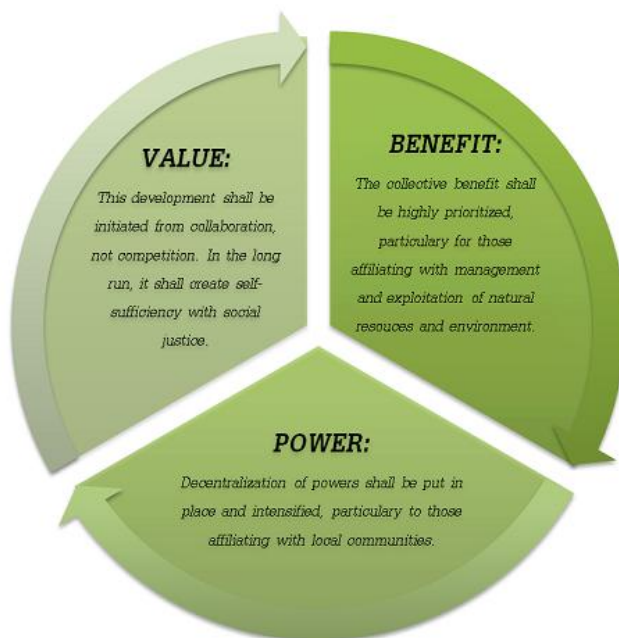
	Forest Act: lessons learned and best practices must be disseminated and examined to understand better how local communities can ‘care and share’ for the environment and natural resources in a way that benefits forest preservation.
(b)	The entitlement to community title deeds: this relates to the strategy and practice of checking and balancing the capitalisation of assets. It can also act as a safeguard against the loss, grabbing or seizure of land, especially in the name of development within specially administered economic zones.
(c)	Laws and by-laws pertaining to progressive tax rates must be issued.
(d)	A lending bank for arable lands must be established.
(e)	The development of land reform in general must include an increase in the negotiating power of communities with respect to natural resource management. This includes, for instance, their participation in the design of community plans and tailor-made by-laws.

Community rights and development

The nature of the complaints of community rights infringements in the development of mega-projects filed to NHRCT since its establishment in 1999 reveal that community rights are not necessarily against development. Development and community rights are not necessarily mutually incompatible. Instead, they appear to share a lot of common ground. Examples include the ideals of the enjoyment of civil and political rights, accessibility to information, freedom of expression, freedom of assembly and participation in decision-making processes, and so forth. In the long run, these common engagements could contribute to a checking and balancing process of development featuring both the State and the people and rooted in their shared accountability and concerns for economic development and community integrity.

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Human rights-based and politically aware development therefore needs to be undertaken through a tripartite model as follows:



Community rights and the right to fair trial and judicial process

Although Thailand respects the principle of rule of law as a way of maintaining social order, the violation of the right to the judicial process reflects the fact that there still exist loopholes, shortcomings and gaps between the law and its implementation, or otherwise put, between legality and righteousness. This includes, for instance, the above mentioned cases of legal proceedings with accusations against local communities of contributing to global warming, prolonged

detention and imprisonment, and the eviction or displacement of poor people striving to defend their right to the management and exploitation of natural resources. In these cases, laws are used as tools for controlling and abusing community rights and the right to the judicial process, especially that of marginalised and impoverished communities.

In this light, in order to initiate safeguarding policies and practices for ‘community rights with social justice’, it is recommended that the following interventions be implemented.

(a)	<p>Recognition of equality before the law:</p> <p>Laws must reflect the complexity of rights and legal proceedings, apart from civil and penal actions, and must integrate the entire spectrum of laws pertaining to community rights, including public law, the Universal Declaration of Human Rights (UDHR) and all relevant treaties and conventions. Religious values must also be selectively taken into consideration, as long as they are in line with the Rule of Law in compliance with the intent of the 2007 Constitution of the Kingdom of Thailand, Section 27.⁷</p>
(b)	<p>Mainstreaming and streamlining community rights for their integration in laws and by-laws:</p> <p>A number of applicable laws and by-laws must be developed as part of the civil and commercial codes and laws related to natural resources. Priority must be given to integrating community rights within these laws.</p>
(c)	<p>Recognition of people’s political intervention and</p>

⁷ See Compilation II: The Constitution of the Kingdom of Thailand, B.E. 2550.

	<p>participation:</p> <p>In order to achieve social and economic justice, community rights must be recognised where communities have been affected by development projects initiated by the government and the private sector.</p>
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Conclusion

Decades of profit-driven and aggressive development, compounded with unrestrained natural resource exploitation, have adversely affected numerous communities on the ground, especially the marginalised, unheard and unreached in Thailand. In response, the principle and value of community rights has been highlighted, discussed and acted upon at the countrywide level with the emergence of tailor-made approaches to community rights and the sharing of lessons-learned and success stories.

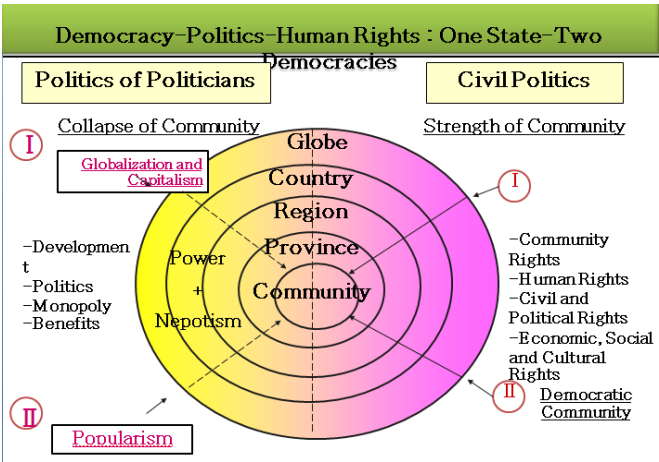
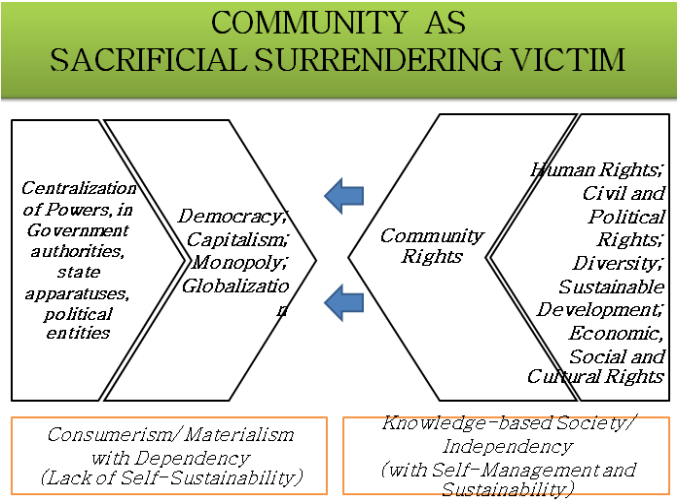
Nevertheless, the persistent and deeply embedded capitalist mindset in which the development and industrialisation of Thailand are grounded is plagued by a number of structural problems. The very survival of communities is endangered by the lack of concern for human rights behind development, as the resources they depend on (their homes, lands, farms and watersheds) are seized from them without their consent and without due compensation.

- For collective rights to be strengthened and sustained, they must be periodically reviewed and monitored. Community rights should be directed towards the benefit of the community and the public as a whole, and not for the monopoly of political power by any particular group.
- The exercise of customary rights must focus on the checking and balancing of power while also seeking solutions to structural problems at the social and policy levels.

- Social space needs to be created for and by community and the public as a whole in order to be able to exercise community rights on the ground.
- The main dimensions of community rights must be understood as: human values of equity and non-discrimination, human dignity, ethnic identity, right to self-determination and self-management with sovereignty and rights over natural resources, culture and livelihood.
- People's participation must be taken into consideration at every stage of the implementation of policies, plans, activities and so forth.
- The strengthening and recognition of community rights must be undertaken urgently but through a non-violent, peaceful and iterative approach.

Community rights can in this way be expanded through the creation of tripartite partnerships among communities, the government and investors. In the long run, these principles will give rise to greater equity, harmony, acceptance and tolerance between and among the diverse components of Thai society.

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Compilation I: Factual Profiles of Case Studies on Community Rights

Case-Study	Affiliating Parties		Ground of Abuse	Details of Abuse (and Recommendation s, if any)
	Alleged offender(s)	Abused person(s)		
<i>The Maptabud Industrial Estate Project in Rayong province</i>	Industrial Estate Authority of Thailand	People and communities in Maptapud district, Rayong province.	1) Violation against community rights of people residing in Maptabud district, Rayong province, on utilisation and management of natural resources and surrounding s; 2) Life and health threatening factors and violence against people residing in Maptabud district, Rayong province.	1) The project has created severe threats to the health, environment and community rights of residents. Health and environmental impact assessments have been conducted with a number of platforms for the participation of stakeholders and the general public; 2) Independent, reliable and expert organisations must be encouraged to provide opinions prior to the operationalisation of projects and activities.
<i>The Hutgyi Construction Project on Salaween River, Burma (Myanmar), managed by the</i>	The Electricity Generating Authority of Thailand	Karen and Thai communities in Sob-Moei village, Mae Sam Lab sub-district, Sob-Moei district, Mae Hongson	Community rights of residents on the site of construction , in-between the border of Thailand and Burma	1) The construction site of Hutgyi Dam is located on land that is disputed by Karen communities and the State Law and Order Restoration

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<i>Electricity Generating Authority of Thailand (EGAT)</i>		province, Thailand.	(Myanmar), have been violated and undermined, particularly the right to livelihood, fishing and agriculture.	Council. The Hutgyi dam construction project is described as a tool for development but has caused the evacuation of Karen communities, some of whom have fled to Thailand; 2) The arable and dwelling areas of Sob-Moei village, Mae Sam Lab sub- district, Sob-Moei district, Mae Hongson province would be submerged if the project goes ahead, and a massive involuntary evacuation will ensue.
<i>Case of Department of Natural Parks, Wildlife and Plant Conservation (DNP) with Civil Case Proceedings on Global Warming Accusation with Indemnity and Liability against the Land</i>	Department of Natural Parks, Wildlife and Plant Conservation (DNP)	In total 30 peasants and members of the Land Reforming Network of Thailand have been litigated in a civil case, in accordance with the Act on Support and Preservation of Environmental and Surrounding Quality of	1) Infringement against community rights to the management and exploitation of natural resources and surroundings, in accordance with Section 65 of the Constitution of the Kingdom of	1) Department of Natural Parks, Wildlife and Plant Conservation (DNP) litigated a case with claims for indemnity and liability, under Article 97 of the Act on Supporting and Preservation of Environmental and Surrounding Quality of Thailand, B.E. 2535, in the amount of 150,000 baht per rai (around 1,600

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<i>Reforming Network of Thailand</i>		Thailand, B.E. 2535, for an indemnity and liability cost of 17,559,434 baht in total.	Thailand, B.E. 2550 (see Compilation II); 2) Infringement of the right to judiciary and fair trial which the government is obliged to respect in compliance with Section 28 of the Constitution of the Kingdom of Thailand, B.E. 2550 (see Compilation II);	square meters); 2) The mode of calculation for this liability and indemnity depends on 7 damages (from man-made erosion or acts): loss of soil nutrients; loss of water absorbing capacity of soil; loss of humidity; soil damage; global warming; decrease of rainfall and explicit damage to forests.
<i>Case of expelling and evacuating of local Karen's community in Kang Kachan Natural Park, Petchaburi province</i>	The Unit for Preservation towards Kaeng Kachan Natural Park No.10, Huay Mae Sarieng, Kaeng Kachan district, Petchaburi province	Karen and Thai communities residing in Jai Sang Din-Porn Rakam and Bang Kloi Bon villages, Huay Prik sub-district, Kaeng Kachan district, Petchaburi province.	1) Violation against community rights of Karen and Thai including their right to reside within the Kaeng Kachan Natural Park, Petchaburi province, and violation of their right to traditional customs and	1) Allegations against local Karen charged with trespassing into the natural park and causing deforestation, regardless of their mode of product and shifting agriculture. There are also fabricated charges of narcotic smuggling without any substantive grounds of evidence; 2) Rapid and aggressive searches of dwellings and

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			livelihood; 2) Threats to physical freedom beyond their dwelling and residential areas.	residential areas conducted with arbitrary destruction of barns and confiscation of assets.
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**Compilation II: The Constitution of the Kingdom of Thailand, B.E.
2550**

(extracts on Community Rights only)

Section (s) in the Constitution	Content in Details
Section 27, <i>Chapter 3 Rights and Liberties of Thai People, Part 1 General Provisions</i> (Protection and Binding of Rights and Liberties)	Rights and liberties recognised by this Constitution explicitly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, the Courts, the Constitutional organisations and all state organs in enacting, applying and interpreting laws.
Section 28 <i>Chapter 3 Rights and Liberties of Thai People, Part 1 General Provisions</i> (Protection and Binding of Rights and Liberties)	<p>A person can invoke human dignity or exercise his rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals</p> <p>A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself in the Courts.</p> <p>A person may bring a lawsuit against the state directly so as to act in compliance with the provisions in this Chapter. If there is a law enforcing the exercise of any right and liberty as recognised by this Constitution, the exercising of that right and liberty shall be in accordance with such law.</p> <p>A person shall have the right to be enhanced, supported and assisted by the state in exercising of right under this Chapter.</p>

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<p>Section 66 <i>Chapter 3 Rights and Liberties of Thai People, Part 11 Community Rights</i> (Right to conserve or restore their customs, local wisdoms, arts or good culture of their community)</p>	<p>Persons assembling as to be a community, local community or traditional local community shall have the right to conserve or restore their customs, local wisdom, arts or good culture of their community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.</p>
<p>Section 67 <i>Chapter 3 Rights and Liberties of Thai People, Part 11 Community Rights</i> (Right to preserve and exploit natural resources)</p>	<p>The right of a person to participate with state and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be protected appropriately.</p> <p>Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organised, and opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.</p> <p>The right of a community to sue a government agency, state agency, state enterprise, local government organisation or other state authority which is a juristic person to perform the duties under this section shall be protected.</p>
<p>Section 85 <i>Chapter V Directive Principles of Fundamental State Policies, Part 8 Land Use, Natural Resources and Environment</i></p>	<p>The state shall act in compliance with the land use, natural resources and environment policies as follows:</p> <p>(1) preparing and applying the rule on the use of land throughout the country with due regard to the compliance with environmental condition, nature of land and water and the way of life of local communities, the efficient measures for preservation of natural resources, the sustainable standard for</p>

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<p style="text-align: center;"><i>Policies</i></p> <p style="text-align: center;"><i>(Guiding Policy on Land, Natural Resources and Environment)</i></p>	<p>land use and opinion of the people in the area who may be affected by the rule on the use of land;</p> <p>(2) distributing the right to hold land fairly, enabling farmers to be entitled to the ownership or the right in land for agriculture thoroughly by means of land reform or by other means, and providing water resources for the distribution of water to farmers for use in agriculture adequately and appropriately;</p> <p>(3) preparing town and country planning, and developing and carrying out the plan effectively and efficiently for the purpose of sustainable preservation of natural resources;</p> <p>(4) preparing systematic management plan for water and other natural resources for the common interests of the nation, and encouraging the public to participate in the preservation, conservation and exploitation of natural resources and biological diversity appropriately;</p> <p>(5) conducting the promotion, conservation and protection of the quality of the environment under the sustainable development principle, and controlling and eliminate pollution which may affect health and sanitary, welfare and quality of life of the public by encouraging the public, the local communities and the local governments to have participation in the determination of the measures.</p>
<p style="text-align: center;">Section 87</p> <p style="text-align: center;"><i>Chapter 3 Rights and Liberties of Thai People, Part 10 Public Participation Policy</i></p> <p style="text-align: center;"><i>(Guiding Policy on People's Participation)</i></p>	<p>The state shall act in compliance with the public participation policy as follows:</p> <p>(1) encouraging public participation in the determination of public policy and the making of economic and social development plan both in the national and local level;</p> <p>(2) encouraging and supporting public participation to make decision on politics and the making of economic and social development plan and the provision of public services;</p> <p>(3) encouraging and supporting public participation in the examination of the exercise of state power at all levels in the form of profession or occupation organisation or other forms;</p>

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	<p>(4) strengthening the politics power of the public, and preparing the laws establishing civil politics development fund for facilitating the communities to organise public activities and for supporting networks of the groups of people to express opinion and requirements of the communities in the localities;</p> <p>(5) supporting and providing education to the public related to the development of politics and public administration under the democratic regime of government with the King as Head of State, and encouraging the public to exercise their rights to vote honestly and uprightly.</p> <p>In providing public participation under this section, regard shall be had to approximate proportion between women and men.</p>
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Indigenous Peoples and Human Rights in Thailand – Options for Reform

By Kittisak Ratanakrangsri

Introduction

Indigenous peoples in Thailand are commonly referred to as ‘hill tribes’ and sometimes as ‘ethnic minorities’. Ten indigenous peoples are officially recognised and are usually called *chao khao*, meaning ‘hill/mountain people’ or ‘highlanders’. There are also other indigenous peoples living in different parts of Thailand such as the Chao Ley, Mani, and so forth. However, the term ‘indigenous peoples’ has not yet been recognised by the Thai State, the 2007 Thai Constitution referring to ‘traditional local communities’ instead. Section 66 of the Constitution states that:

Persons assembling to be a community, local community or *traditional local community* shall have the right to *conserve or restore* their customs, local wisdom, arts or good culture of their community and of the nation and *participate in the management, maintenance and exploitation of natural resources*, the environment and biological diversity in a balanced and sustainable fashion. (emphasis added)

Although the term ‘indigenous peoples’ has not yet been recognised, over the past ten years, many ethnic groups and traditional communities have started identifying themselves as such and using the term ‘indigenous peoples’, or *Chonpao Puinmuang* in Thai. They declared Indigenous Peoples’ Day in Thailand in 2007 and subsequently celebrated the passage of UNDRIP, adopted by the United Nations General Assembly in September of that year. The declaration of Indigenous Peoples’ Day in Thailand was undertaken in the name of the Network of Indigenous Peoples in Thailand (NIPT). The main purpose of this organisation is to raise awareness

of the issue of indigenous peoples and their concerns among the public and other related agencies.

The human rights situation of indigenous peoples

Indigenous peoples in Thailand are faced with various challenges and the situation in terms of their human rights remains dire. Their right to liberty and security has been violated, for instance, through the implementation of the drug suppression policy on 1st February 2003 by former Prime Minister Thaksin Shinawatra, which has led to numerous cases of arbitrary arrests and detention, torture, disappearances and extra-judicial killings. More than 2,000 people have reportedly been killed as a result of this policy (among whom were indigenous peoples), leading to the establishment of an independent commission to investigate the cases under the interim government led by General Surayut. This process has been very slow and no conclusions have yet been reached by the commission.

The right to nationality and citizenship of both indigenous and non-indigenous or stateless people has also been violated. Approximately 296,000 persons in Thailand still lacked citizenship in 2009, thereby restricting their freedom of movement and their ability to access public services such as basic health care and education. While some progress has been made in terms of policy reform, implementation on the ground remains challenging.

Rights to land, forests and natural resources of indigenous peoples are also endangered by policies stipulating that all land without a land title belongs to the State, regardless of whether people and communities have lived there in the past. Expanding protected areas are increasingly overlapping with indigenous peoples' customary lands, leading to the imposition of strict rules limiting their use of natural resources upon which they depend for their livelihoods. As a result, indigenous peoples who have lived and farmed on these lands for generations have suddenly become 'encroachers' and 'violators of the law'. Some of them have been evicted, such as in the Wang Mai and Kaeng Khachan national parks. Furthermore, their right to

practise rotational farming has either been prohibited or restricted, thus endangering their right to traditional occupations, livelihood and food security.

The case of Wang Mai village in Doiluang national park (2008)

The Doiluang national park was established in 1990. In 1994, five villages were relocated to the lowlands with the promise of compensation. A year later, some families returned to farm in the area where they used to live. In 2008, all these families' houses, crops and fruit trees were destroyed without any form of compensation.

Map of location of Wang Mai village in Doiluang national park



The marginalisation of indigenous peoples

The ongoing marginalisation of indigenous peoples is the result of a number of institutional and ideological factors. The centralisation of power over natural resource management is one such factor. Another is the prejudice against and misunderstandings of indigenous peoples in nationalistic policies.

The centralisation of power over natural resource management

The State started taking control over natural resource management (particularly in forests) in the late nineteenth century during the reign of King Rama V (1853 – 1910). Power was transferred from local rulers to the central government in Bangkok, who became responsible for granting logging concessions to European timber companies and collecting taxes from these companies. This move was undertaken through the establishment of the Royal Forestry Department (RFD) in 1896, under the advice of Mr. H. Slade who was later appointed and served as the first General Director of the RFD from 1896 to 1923. The main task of the RFD at the time was the issuing of logging concessions rather than conservation.

From the 1960s onwards, State policy placed more emphasis on the conservation of natural resources based on Western concepts and laws as tools to take control of and manage these reserves. Various forestry laws were enacted, including the Forestry Law 1941, the National Park Act 1961, the National Forest Reserve Act 1964, the Wildlife Sanctuary Act 1992, the Forest Park Act 1992 and the Reforestation Act 1992. As a result, large tracts of lands were declared protected areas and national forest reserves. Some of the protected area boundaries overlapped with indigenous peoples' traditional lands and territories, which has caused ongoing conflicts over lands and resources to this day.

The case of Kaeng Khachan national park (2011)

Around fifty Karen families have been affected by the Kaeng Khachan national park, established in 1981 on land that the Karen have inhabited for hundreds of years. In 1996 the Karen were resettled to the lowlands but suffered from the lack of farming land available there. As a result, some families returned to their homeland in 1997 and 1998, but were requested to move out of the national park by the park authorities in 2010. Negotiations carried out in 2011 failed and the national park authorities resorted to force in the second eviction in July of that year.

None of these legal instruments directly regulates the use, benefits or management of forest resources by communities. On the contrary, some of the provisions in these laws have criminalised indigenous communities for living on their traditional lands. The National Reserve Forest Act of 1964 and the National Park Act of 1961 form the basis for determining, controlling and maintaining National Reserved Forests and other protected areas in Thailand. The National Park Act 1961 makes unlawful many things that forest dependent people might do, such as collecting, taking away or altering forest products, endangering or damaging natural resources (timber, gum, resin, wood-oil etc.), disturbing or causing nuisance to other persons or wildlife, and so on. Thus this law affects the use rights of indigenous peoples and traditional communities (Section 16). The penalties for violations of Section 16 range from a fine of 500 baht to imprisonment for up to five years.

The State's centralised policy on natural resource management mainly focuses on wilderness conservation. This reflects the view that conservation can only be achieved by keeping people away from forests and only taking care of the trees and the land. This is clear from existing forestry laws, none of which make reference to land rights or community rights. Their thrust is primarily to preserve natural areas for education and recreational activities, to conserve the natural habitat in which wildlife can breed and multiply, and to prevent illegal hunting and the capture of animals. Natural areas are dedicated to conserving specific wildlife species as well as collecting native, exotic, rare and/or economically valuable plant species. *Totally absent* from these laws is the *social aspect of forests*, such as the relationship between humans and nature in terms of food, medicine, shelter and spirituality, an interdependence that many indigenous peoples have formed with their environment in forest ecosystems.

Prejudices against indigenous peoples and nationalist policies

Compounded with these institutional restrictions is the persistent misunderstanding of and prejudice against indigenous peoples, who

continue to be perceived as ‘forest destroyers’ (due to their customary practice of shifting cultivation), threats to national security (they are commonly perceived as communist party sympathisers) and drug traffickers. And while the 1997 and 2007 Constitutions recognise traditional knowledge and community rights in sustainable resource management, these have not yet been translated into concrete action. Nationalist ideology and policies also undermine indigenous peoples’ traditional institutions and customary rights through assimilationist policies geared towards the establishment of an integrationist State. On a more positive note, Thailand is beginning to recognise and promote multi-culturalism and the heterogeneity of its peoples.

Responses from indigenous peoples

In response to discriminatory policies and practices, indigenous peoples have engaged in a widespread movement to assert and defend their rights. The Network of Indigenous Peoples in Thailand, for example, is an alliance of twenty six indigenous groups scattered throughout various regions of Thailand. NIPT was established on 11th September 2007 in Chiang Mai during the indigenous peoples’ cultural festival. Its main functions are: to serve as a platform for continued learning and the exchange of experiences on issues facing indigenous peoples; to develop mechanisms for conflict and dispute resolution; and to promote the rights of indigenous peoples at various levels of advocacy. One of NIPT’s main objectives is to develop a Council of Indigenous Peoples in Thailand. This is being undertaken through a joint collaboration between indigenous leaders and other supportive organisations including some government agencies. The establishment of the Network of Indigenous Peoples in Thailand has also opened up opportunities for IPOs and CSOs to join forces to advocate for ‘community rights’ as protected under the Thai Constitution.

Options and challenges for reform

A major challenge is that of securing indigenous peoples' customary land and resource rights. For this to happen, a radical change of attitude and mindset is urgently needed on the part of involved agencies such as the Royal Forestry Department, national park authorities, policy makers and civil society more widely. Furthermore, the widespread misconception that 'forests and humans cannot co-exist' must be abandoned, and likewise with the negative and baseless stereotyping of indigenous peoples as forest destroyers because of their shifting cultivation practices, which have actually proved far more ecologically sustainable than previously believed.

Furthermore, existing policies urgently need to be translated into action anchored in a bottom-up approach that will support the realisation of community rights, as stipulated in Section 66 of the Constitution and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Examples of concrete actions to be taken include the issuance of Community Rights Acts, the delineation of community land and forest areas, and the review of existing forestry laws to bring them in line with the Constitution and international laws, for instance, the Convention on Biological Diversity (CBD).

Finally, efforts must be put into empowering and building the capacity of indigenous peoples and their institutions. Recognition of their rights and practices (including shifting cultivation, hunting and gathering, and fishing) at the same level as statutory laws is critical. In particular, the establishment of an Indigenous Peoples' Council could be an important channel through which to reinstate and protect the rights of indigenous peoples to their lands, resources and livelihoods.

Indigenous Peoples' Knowledge and Plural Legal Approaches in Thailand

By Prasert Trakansuphakorn

Over the last five decades and to this day, indigenous peoples in Thailand have suffered negative stereotyping and discriminatory policies. Underlying many laws, policies and programmes is the false perception of indigenous peoples as drug producers and consumers, and as threats to national security and to the environment. This paper will examine how plural legal approaches can support the recognition and protection of indigenous peoples' rights, customs and livelihoods.

Understanding indigenous knowledge

Indigenous forms of knowledge are the essence of indigenous peoples' sense of identity and cultural belonging. They encompass worldviews and beliefs, culture, customary laws and practices, needs and aspirations, traditional social relationships, legal institutions, and modes of self-governance and decision-making.

Examples of customary laws include those related to hunting and gathering. For example, among the Karen people, it is forbidden to take *geij hse duf* (sweet rattan shoots) or *s'klev mi* (a seasoning herb) back to the village, as they can only be used in the forest. Likewise, certain animals cannot be killed or hunted, such as the gibbon and hornbill, as this breaks the ecological balance and harmony of the environment. As a Karen proverb says, 'If a gibbon dies then seven forests become sorrowful, and if one hornbill dies, seven banyan trees become sad and lonely.'

A traditional song embodies the nature of the relationship that the Karen entertain with the environment and other members of their community:

(The order of elders)

We make a living following our forefathers' custom
We make a way of farming according to our
forefathers' order
Rice stalks heavy and laden with golden rice
bow down
The sweet scent of rice wine
comes from the community pavilion
and throughout the village⁸

Rituals also form a central part of customary laws and practices. For example, the *bgau quv* ritual includes an offering to the spirit-owner of the mountains and rivers, an offering to mother rice, an offering to the spirit-owner of fire, and a ritual to remove bad influences from the fields. This reflects peoples' spiritual beliefs on the proper use and management of essential natural resources such as water and rice.

Communal rights and sharing are also central to customary practices and resource management and use. A Karen proverb says:

When there is food to eat, the whole village eats
together. When there is hunger, the whole village goes
hungry together.

Among the Karen, land is owned by the community and usufructuary rights are enjoyed by individuals. Land is inherited and prohibited from sale to outsiders. All members of the community must use the land on a continuous basis, and fallow periods are considered periods of use. The transfer of land and its uses between different community members is subject to the approval of local committee members.

⁸ This traditional song was sung by Prasert Trakansuphakon during his presentation.

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The following proverb reflects the Karen concept of land use, in which land is used and managed communally for the benefit of the whole community:

Our brothers are close to each other, our sisters intimate with one another. When we farm, we do not divide the land among us. When we cultivate, we do not create land boundaries between us. Brothers, we cross our fingers, we exchange rice to eat and exchange homes to live.

The Karen take the interconnectedness inherent in communal land use very seriously. An example of this is their understanding of burning, in which it is recognised that burning in one area will impact upon other areas, and similarly, that farmland which is left fallow impacts upon the entire community, as finding alternative space to cultivate requires careful, community level negotiation. And so, community members strongly believe all resources are common resources, belonging to the entire community.

Customary land use and land ownership in the Thai State

The ownership, use and management of land among the Karen are determined by customary laws which define the rights of individuals and groups. Rotational farming, the most common form of agricultural cultivation among the Karen, is carried out through a complex mixture of private and communal rights, divided into three dimensions: usability (usufruct), management and guardianship. Rotational farming is not only an agricultural production system but also the embodiment of customary notions of how natural resources must be controlled and sustainably managed by the collectivity.

Under Thai national land laws, the only form of property right that exists is that of individual property rights, acquired through the allocation of individual land titles. The reasoning behind this, from the point of view of the government, is that titleholders can enjoy greater tenurial security if their land is titled to them on an individual basis. However, in reality, this approach to land tenure

creates significant problems. First, it drives up land prices by permitting those individuals who hold land titles to sell their land. Second, it opens up the possibility of fraudulent and illegal allocation and purchase of land titles where measures to prevent corruption and manipulation are not in place.

Research and fieldwork at the local level has shown that it is in fact possible to have different types of land titles which would improve the degree of tenurial security for local communities. An example is that of community land titles in the form of community forests. Community titles may help protect indigenous peoples and local communities from land grabbing and other forms of exploitation of the land rights legislation. It is therefore recommended that, in the future, the government promulgates a law for communal land ownership and communal land use, as this will serve to increase local communities' control of their lands and therefore enjoy greater food and livelihood security.

Communal land titles also give greater freedom of movement to community members who, struggling with poverty, may wish to move away from their village to seek employment as labourers. If land titles are collective, these individuals will then be able to return to work their land if and when they need to, giving them greater flexibility in terms of livelihood strategies.

Another tenurial arrangement which would benefit indigenous peoples and local communities would be that of land ownership controlled by a proportional land tax, whereby those individuals owning larger areas of land pay a higher tax than those owning smaller plots. This could help prevent land prices from increasing rapidly, and would also increase the likelihood that poorer people can afford to use and own land. Government support for land tax reforms is essential to realise more equitable land distribution.

Finally, it is crucial that the land management and allocation structures in place be reformed based on the principle of justice and equity, whereby indigenous peoples and local communities' right to

access, own and use land is not only recognised but protected and enforced.

The challenges of policy and practice

One of the Thai State's current conservation forest policies has involved the reforestation of areas which overlap with land customarily used by indigenous peoples. This has resulted in conflict between the Royal Forestry Department and local villagers, as the reforestation project significantly reduces the land available for indigenous peoples to pursue their agricultural activities. The reduced farming plots also mean that fallow periods are necessarily shortened, in turn impoverishing the nutrients in the soil and causing poor harvests and food shortages.

In many of the conflicts between indigenous peoples in the highlands and the State or operating corporations, the lands under contestation had been occupied by indigenous peoples long before the formation of the State and the issuance of policies and laws in operation today. As control of natural resources was increasingly centralised in the State, conflict between the State and local inhabitants increased in frequency and intensified into violence. In most cases, the conversion of land and resource use was implemented with complete disregard for the complexity and diversity of traditional resource management knowledge and practices, and without the participation of communities in planning and decision-making processes.

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*Destruction of Karen peoples' houses in Kaeng Krajaan National Park,
July 2011*

What emerges clearly from the many conflicts over natural resources in Thailand is that where formal State law alone is used in a linear approach that ignores customary legal institutions and practices, human rights violations tend to ensue. This is the case in the conflict between the Kaeng Krajaan National Park and the Karen people. The harassment of Karen villagers has been ongoing for some time and became severe in May, June and July 2011, when many of the villagers' houses and rice stores were burned and money, jewellery, fishing and agricultural tools stolen by a group comprising National Park wardens and military forces. As a result, some of these villagers have moved away and are now staying with relatives elsewhere. A number of them (allegedly around seventy people) are hiding in the forest in fear of meeting government officers, and are without sufficient food or shelter.

This alleged forceful action by the National Park has violated the human rights of the affected indigenous community on a number of grounds and has raised great concerns as it also involved unlawful arrests, intimidation and use of force. This action is in contravention of the Thai Constitution 2007, the Thai Cabinet Resolution adopted on 3rd August 2010 on policies regarding the restoration of the traditional practices and livelihoods of Karen people, and international human rights law, such as the UN Convention on Biological Diversity (CBD) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The need for legal pluralism in resolving land conflicts

In March 2008, two Karen people from Taak Province were arrested by the Royal Forestry Department and accused of clearing land, felling trees and burning down trees inside a national forest. In the civil court that ensued, the farmers were fined very heavily but eventually won their case in the Appeals court. This is the first time that indigenous peoples have claimed victory in a case related to the practice of rotational farming in Thailand, a success that can be largely attributed to the court's openness and willingness to receive information and advice from academics and civil society organisations. It could also be said that the victory resulted from the court's awareness of the necessity to adopt a legally pluralistic approach towards customary practices.

Understood as the existence of 'more than one legal order in one space', legal pluralism may open the space for customary laws to be protected and for customary rights to be given equal, or least recognised, weight in judicial proceedings. Customary laws guide the sustainable use of natural resources by communities and are the backbone of customary practices in their everyday lives. Acknowledging legal pluralism is key to resolving crises, conflicts and injustices, and to creating greater security in terms of local communities' rights, food, income and poverty alleviation.

At present, State laws give priority to the system of private land ownership, but do not recognise the customary laws of local, indigenous peoples relating to communal land use (usufruct). Instead, all of the State's forest and environmental laws diminish the rights of local communities by claiming the State's absolute right to control and manage natural resources. Furthermore, State conservation policies which prohibit rotational farming not only undermine the environmental sustainability that this practice is now known to support, but also force indigenous peoples to resort to foreign systems of agriculture which they are not familiar with.

Part of a legally pluralistic approach is the recognition that, for many indigenous peoples and local communities, rights accrue to collectivities rather than individuals, as do decision-making powers and management roles. For instance, where rotational farming is forbidden or no longer possible, villagers will work together as a group to pool and manage their resources. Where problems cannot be resolved at the family level, they are addressed by the whole community in search of resolution. Committees are established to perform these functions, such as village committees, forest committees and committees of elders. Although anchored in traditions stemming from the distant past, village committees adapt local knowledge and customary laws to changing contemporary contexts in order to solve community problems and continue the sustainable management of the community's resources.

When the State limits or denies communal land rights, communities are weakened, losing their land to people with power and influence, falling into rapid debt, and facing food insecurity. Communities have resorted to different means to resist the fragmentation of the group, such as expanding wet rice paddy fields, opening up their villages for tourism, producing handicrafts for sale, taking on labouring work or producing income crops.

In this light, it is recommended that further research and information sharing be carried out with regards to the benefits of a legally pluralistic approach to land tenure and rights. Sustained lobbying

and campaigning are also essential to push for governments to recognise and optimise the role of legal pluralism both in avoiding and resolving land conflicts. Finally, it should be pointed out that the Thai State has a legal responsibility to protect the rights of the Karen, as per Articles 66, 67 and 85 of the 2007 Constitution, which stipulate that local communities have the right to manage their own natural resources. Another important source of protection for their rights is the Cabinet Resolution on ‘Recovering the Karen Livelihood in Thailand’ of 3rd August 2010, which recognises communal land titles and the Karen system of natural resource management and rotational farming.

Oil Palm Expansion and Local Livelihoods in Thailand

By Jonas Dallinger

The findings presented in this presentation are based on experiences from the project on Sustainable Palm Oil Production in Thailand, which is part of the Climate Protection Initiative of the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and is implemented by GIZ (Gesellschaft für International Zusammenarbeit) in close cooperation with the OAE (Thai Office of Agricultural Economics). The purpose of the project is to prove the feasibility of sustainable palm oil production through introducing sustainability certification in Thailand, calculating and reducing the greenhouse gas emissions (GHG) of the Thai palm oil industry and implementing a certification pilot with smallholders.

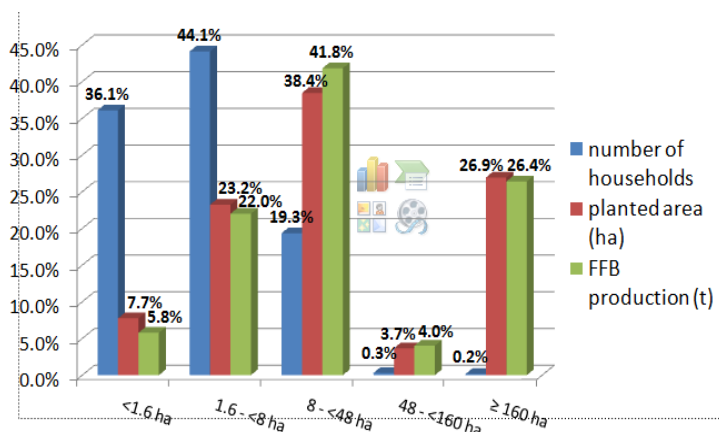
Thailand is the third biggest producer of palm oil in the world, with over 1.3 million tonnes of crude palm oil (CPO) produced in 2010, representing 3% of total world production. Smallholders play a critical role in the cultivation of oil palm. Over 70% of the area planted with oil palm is planted by smallholders, who represent 95% of all oil palm growers with a total of over 120,000 smallholdings. There are over sixty oil palm crushing mills operating in Thailand, leading to an over-capacity in crushing, which in turn gives smallholders the advantage of being in a good bargaining position when selling their produce.

The OAE-GIZ project identified some of the characteristics of the oil palm farmers participating in the certification pilot. Their average age was of 50.4 years. 63.4% had completed primary education, 22.3% secondary education and 14.3% had obtained a diploma of higher education degree. On average, families counted 3.9 persons. The average size of landholdings was of 10.7 hectares (of which 7.2 hectares was grown with oil palm). 75.2% of the oil palm farmers were not part of any organisation or group related to

oil palm farming. 70.8% were in continuous debt, mainly with the Bank for Agriculture and Agricultural Cooperatives BAAC. The household annual income of the farmers was of 470,650 Thai Baht (11,206 €) / year. 24.4% of the farmers in the pilot groups earned equal or more than 200,000 Thai Baht (4,800 €). 41.2% earned more than 400,000 Thai Baht (9,600 €) and 34.4% earned less than 400,000 Thai Baht. 44.7% of the farmers depended on oil palm for over 50% of their household income. 24.5 depended on oil palm for 51 – 75% of their household income. 30.8 % depended on oil palm for 76 – 100 % of their household income. These figures reveal that the oil palm farmers who were part of the study are relatively well off despite their debts.

1,287,509 tonnes of CPO were produced in 2010, of which 5% were exported, as opposed to an average of 10% exports over the last ten years. 29% of the CPO produced in 2010 was used for biodiesels. Oil palm development in Thailand involves the conversion of agricultural or unused land (such as unproductive paddy fields, waste land, rubber and fruit orchards, sugar cane) into plantations. Recently, expansion is occurring in the eastern and north-eastern provinces, and is largely a community-driven process due to the economic benefits of oil palm cultivation. The cultivation of oil palm in Thailand has not led to the development of large scale plantations as is the case in Indonesia and Malaysia.

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*Comparison of estimated household numbers, size of planted oil palm area
and production of Fresh Fruit Bunches (FFB)*

However, certain challenges to the oil palm sector have been identified. Although average Fresh Fruit Bunch (FFB) yields have been rising steadily over the last twenty years, average oil extraction rates have been falling over the same period. There remains untapped potential to increase palm oil production by increasing the oil yield per hectare.

Some of the obstacles faced to the optimisation and maximisation of oil palm and palm oil production include: the limited knowledge of oil palm cultivators of nutrient requirements, fertiliser application and soil fertility, as well as their often limited professional farm management skills. Training, record-keeping, the management of labour and transportation also require improvement. Limited financing, insufficient fertilisation and low quality seedlings are additional problems. Moreover, consequent quality pricing and hence incentives to harvest fully ripened FFB are lacking.

In the future, demand for palm oil is expected to increase in Thailand. A dynamic expansion of the production area is already underway through the conversion of other crops, due to the

economic attractiveness of growing oil palm and the plans of the government to increase the production of palm oil and the use of palm oil as a source of biodiesel. Sustainability certification is also increasingly gaining relevance in the Thai market. It is expected, however, that the requirements implicated will comprise a challenge for the Thai sector due to management and organisational requirements involved and the large numbers of smallholders with limited capacities. In addition, reduction in GHG emissions and reporting on progress in this respect will gain importance in the near future.

In conclusion, palm oil plays a crucial role in providing vegetable oil for food production as well as in the chemical industry and as an efficient source of bio-fuels. Investment in agriculture needs to be enhanced to meet the needs of a growing global population depending on increasingly scarce natural resources. Self-determination and fair and equal distribution of returns from agricultural investment to the local community must be ensured. Securing land rights, knowledge, finance and access to markets is crucial to ensure that the benefits of oil palm accrue to local communities. Strong human rights institutions and NGO-led research and other activities in the field are necessary to continue advocating for the rights of local communities and to call for better practices in the agribusiness sector.

DISCUSSION

In the ensuing discussion, the presenters gave more details of the cases in Thailand where indigenous peoples and local communities had faced human rights violations. The sustainability of oil palm plantations in the country was also subject to debate, with some arguing against the environmental and social viability of plantation expansion, and others suggesting that the way in which oil palm is expanding differs significantly in nature and consequences to other Southeast countries, such as Indonesia and Malaysia.

Contextualising land reform in Thailand.

Land reform initiatives in Thailand need to be seen within the wider nation State-building efforts of successive governments. In practice, the notion of ‘Thai-ness’ actually excluded a lot of people, including the hill tribes. The focus in national plans has been on economic development at the expense of cultural diversity, traditional knowledge and the respect for basic human rights. The drive for capitalist development is also creating cross-border issues with companies operating overseas and not seeing themselves as accountable to the laws of their own country as a result. This is particularly serious if the country in which they operate is either unable or unwilling to enforce human rights protection. There have, however, been positive developments in the Constitution of Thailand with regards to forest and land laws, which are openings for the recognition of indigenous peoples’ knowledge of natural resource management.

Constitutional rights of indigenous peoples.

Art. 85 and 87 of Thai Constitution were identified as provisions that indigenous peoples can invoke in support of their rights:

Article 85: the right of people to life and natural resources.

Article 87: the right to self-determination for culture and way of life in customary areas.

The sustainability of oil palm expansion in Thailand.

It was argued that the way in which oil palm is grown in Thailand is very different to Indonesia and Malaysia. The lack of available land means that there are no massive mono-crop plantations. Also, smallholders are in a good bargaining position to sell their produce, and are actually relatively well off despite their debts. Environmentally speaking, the land is not degraded by plantations either, as in the long term, the farmers replant their fields on plantation land.

On the other hand, the criminalisation and indebtedness of smallholders, and the dispossession of indigenous peoples such as the Karen was pointed as far from sustainable. However, the immediate relevance of this observation for oil palm development was questioned as most oil palm in Thailand is grown in the south where there are few indigenous peoples. On the other hand, it was suggested that this discussion might be more relevant to other crops than oil palm. It was pointed out that the notion of sustainability is also a long-term one that depends on what will happen to current and projected oil palm plantations within one, two or more decades, in both the environmental and social dimensions.

Strategies to address oil palm expansion.

The issues at stake in Thailand and other Southeast Asian countries were seen as similar in terms of human rights abuses and agribusiness expansion. The need for a strategic plan to empower indigenous peoples and give them political space to realise their rights was deemed critical. However, a number of important considerations must be taken into account in striving to this end. For instance, what can be done about vast oil palm plantations that get in the way and that the State seems to support and sanction? One strategy is to target banks and financing institutions to encourage them to establish public policies on human rights, which in turn will enhance the accountability of the bodies that are ‘calling the shots most of the time’.

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RECOMMENDATIONS AND CONCLUSIONS

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Following two days of theme and country-based presentations, the participants of the workshop broke up into three groups: indigenous peoples, NGOs and National Human Rights Commissions. Each group discussed and identified potential synergies between and with the National Human Rights Commissions, in order to inform follow-up actions and the content of the *Bali Declaration* as a regional standard for human rights and agribusiness. Recommendations were presented by each group, followed by a brief discussion.

National Human Rights Commission group



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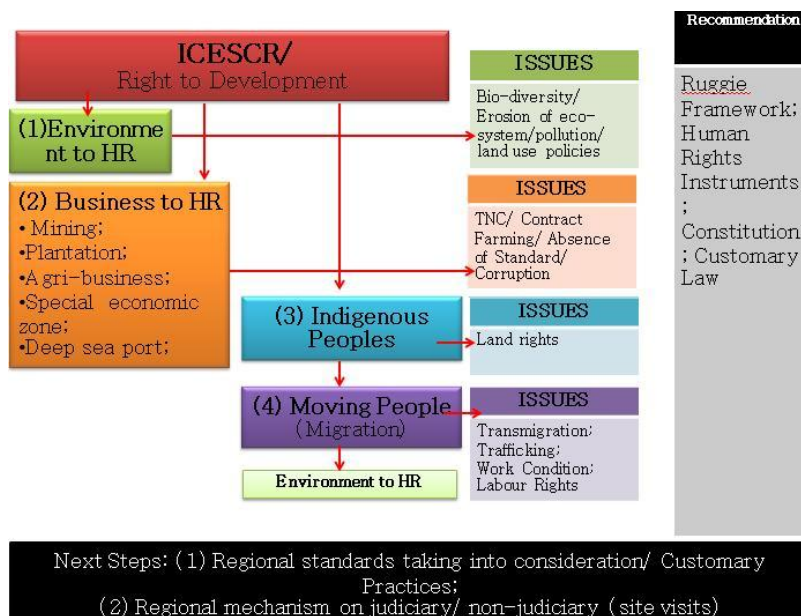
NGO group



Indigenous peoples group



Recommendations of National Human Rights Commissions



Recommendations of indigenous peoples representatives

- NHRIS should have a litigation function
- NHRIS to set up working groups on indigenous peoples' issues and to work directly with indigenous peoples
- Create a database on violations on indigenous peoples' rights
- Invite NHRIS as *amicus curiae* in court and other cases
- SEANF to help AICHR/ ASEAN to recognise indigenous peoples' rights in ASEAN Declaration on Human Rights

- Set up a regional human rights court (long term)
- Set up a regional human rights forum to address indigenous peoples issues (medium term)
- SEANF and NHRIs to bring laws into conformity with ratified treaties
- SEANF/NHRIs to study the different existing voluntary codes on agribusiness and develop common guidelines taking account of international human rights and UNDRIP
- SEANF/NHRIs to explore effective enforcement mechanisms when agribusiness violates indigenous peoples' rights

Recommendations of non-governmental organisations

- Raise both indigenous peoples and also agribusiness issues with ASEAN/AICHR
- Develop a regional report on Human Rights and Agribusiness
- NGOs to collaborate with NHRIs to take the *Bali Declaration* to national governments
- Strengthen national regulation of agribusiness
- Set up regional human rights court
- Collaborate with NHRIs to approach national governments
- Document cases and develop country report with NGO inputs
- Submit Declaration to next year's ASEAN meeting in Cambodia
- Engage with the business sector directly at ASEAN
- Map the different actors involved in the *Bali Declaration*
- Next year, bring together NHRIs, indigenous peoples/local communities and NGOs with private sector companies to look at specific cases of human rights violations in the light of the *Bali Declaration*

Initial ideas for action

- Publicise the *Bali Declaration on Human Rights and Agribusiness*
- Publish the proceedings of the Bali workshop
- Next year bring together NHRIs, indigenous peoples and local community representatives, NGOs and companies at a follow-up workshop to and engage in a dialogue with the private sector over cases of human rights abuses
- Set up a palm oil watch in Philippines linked to Sawit Watch
- Engage with international agencies
- Push for a Regional Human Rights Court and link this to AICHR
- Work with NHRIs to use Working Groups and treaty bodies
- Highlight advances in IFI policies on standards for agribusiness and human rights
- SEANF to raise concerns about MIFEE based on CERD but also invoking the UN Framework
- NHRIs to assess the issue of competing rights, especially the right to land versus the right to freedom of movement

DISCUSSION

A number of important considerations were raised following the presentation of recommendations by the three discussion groups.

Don't get carried away – there are no quick fix solutions.

It was pointed out that the actions and changes sought will not be achieved within a short time span. A long-term perspective is critical to the success of endeavours to bring about region-wide change. It took twenty years of education and sustained advocacy to bring about a change in ideas and for UNDRIP to be recognised. We have come a long way since 1948 when the Universal Declaration was passed. Things are improving and the rights of indigenous peoples have made great progress towards being recognised at the international level. For instance, bodies such as the IAHRC and the IACHR tend to be quite tentative when they start. If such a body is set up for Southeast Asia, it will take time before it can begin to address States and the private sector in a productive and sustained manner.

The mandate of institutions.

The apparent tension between the local, national and regional levels in terms of human rights awareness and implementation raises the question of what human rights institutions can achieve individually and collectively, and how can they interact at the larger international human rights level. This will depend on their mandate of course, but also how proactive they are willing to be, and how much they are willing to push the boundaries of their mandate.

Taking into consideration the State.

It was stressed again that, in dealing with human rights and agribusiness, it is not only the private sector that must made responsible and accountable for its actions, but also the governments.

Targeting financial institutions.

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Finances and financial flows involved in business operations and projects are very important as well. They can be used as a channel to put pressure on the private sector, as financial institutions *are* preoccupied by their reputation and commercial and legal risks associated with losing this reputation. It was suggested that a relationship be established with the Equator Principles, and that the NHRIs were in a strategic position to do this.

Establishing links with UN bodies and mechanisms.

It was recommended that the NHRIs contact the UN Working Group on Business and Human Rights, treaty bodies such as CERD and various relevant Special Rapporteurs, including maintaining communications with the Special Rapporteur on the Right to Food, Olivier De Schutter.

Engaging in dialogue with the private sector.

Bringing the private sector into the discussion about human rights and agribusiness was deemed critical. The convening power of the NHRIs was also seen as instrumental in engaging in a dialogue with agribusiness companies.

Working through ASEAN.

The ASEAN Declaration on Migrant Workers was highlighted as a relevant and useful way to engage in dialogue with ASEAN over human rights and agribusiness.

Funding considerations.

National Human Rights Commissions have limited budgets and limited staff and often face an overload of cases. It is important to stay realistic about what the NHRCs can achieve and the support they will need from NGOs and other institutions.

Opening up the definition of development.

The right to development is very important but ‘development’ is one of the most abused words in history. It means different things to different people. For instance, development as indigenous peoples themselves perceive and understand it is not necessarily the way the

State perceives it. We must therefore be very careful with the way we use the term ‘development’, and plural definitions are better than a single restrictive one.

The necessity of a collaborative approach.

The need for a collaborative approach by the HRC involving NGOs and indigenous peoples was seen as critical to the outcome and impact of the *Bali Declaration* and projected follow-up activities. The absence of any one of these groups would detract from the functioning of the entire initiative. Collaboration was unanimously seen as the key to effectiveness.

Towards Conclusions

By Marcus Colchester with Sophie Chao

Over the past four days, we have acquired valuable insights from indigenous peoples' representatives, NGOs, academics and the National Human Rights Commissions, into the challenges of putting human rights into business. Presentations focused on the obstacles to protecting the rights of indigenous peoples and rural communities in the context of the rapid expansion of agribusiness, notably the palm oil sector, as well as the need to recognise their right to development and improve their welfare. We have gained a remarkably broad and detailed impression of the great diversity of situations that exist on the ground.

The wide-ranging topics explored include international and national laws, customary rights, indigenous knowledge, indigenous peoples' rights, the impacts of agribusiness expansion, and the need for a legally pluralistic approach that gives equal weight to customary and statutory law. The rich and diverse sharing of lessons learned, experiences and recommendations has been instrumental in fostering stronger mutual understanding between the Human Rights Commissioners, regional lawyers, human rights activists and supportive NGOs.

The *Bali Declaration*, as the main outcome of this workshop, has the aim of encouraging governments and legislatures in the Southeast Asian region to reform national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries' human rights obligations, including the right to food, the right of all peoples

to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

I wish to thank all the participants who through their experiences and inputs have made this workshop a rich contribution and important step forward in the advocacy of a human rights based approach to business. In particular, I would like to thank the National Human Rights Commissions for their active participation in this dialogue, and for their genuine concern and intention to follow up the issues discussed, in close collaboration with supportive NGOs and indigenous peoples' organisations. I take this opportunity to sum up the key elements raised over the course of the workshop, and to briefly lay out the recommendations made by the participants for follow-up and collaborative action.

Food security and existing human rights standards in business

In his opening statement, United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, described how the fundamental right to food is being overwhelmed by the purchasing power of global markets. Agribusiness is expanding at the expense of local communities and indigenous peoples and the forests they inhabit and depend on. States are unable or unwilling to protect the rights of their own peoples, and indigenous elite collusion only makes things worse. However, significant efforts are already being made within the international community to address intensified pressures on land and the rampant expansion of monoculture plantations, which is encouraging.

Legal pluralism

An examination of legal pluralism across Southeast Asia showed how custom as a source of rights reinforced by international law can challenge exclusionary national laws. The rights of indigenous peoples and local communities to their lands and forests are only weakly secured in national constitutions and laws, even though

customary rights have existed since long before the nation States in which indigenous peoples now find themselves were even created. They regulate their daily affairs, and control and manage their lands and forests, in accordance with these laws which are both ancient in their origins and yet vital and flexible in their present day application.

International human rights treaties now affirm the rights of indigenous peoples and clearly recognise their rights to own and control the lands, territories and natural resources that they have traditionally owned, occupied or otherwise used. These rights derive from their customs and do not depend on any act of the State, which they so often pre-date. Customary law thus has both local and international validity, raising the question of how it is best accommodated by national law.

In fact, as many presentations revealed, the majority of Southeast Asian countries already have plural legal systems and to some extent custom is recognised as a source of rights in the constitutions and laws of a number of them. National and international courts have affirmed indigenous peoples' customary rights in land. And all these countries have endorsed and ratified key international laws and treaties. Thus the basis for securing indigenous peoples' rights through a revalidation of customary law exists.

Trends in oil palm expansion

The palm oil sector worldwide is in a phase of rapid expansion but has been strongly challenged by national and international civil society organisations that have shown that indiscriminate land acquisition and land clearing for oil palm is leading to rapid habitat loss and species extinctions, alarming green-house gas emissions, the dispossession of indigenous peoples, and the immiseration of the rural poor.

Rising global demand for edible oils and bio-fuels, global trade, escalating commodity prices and surging international investment are among the main drivers of this expansion. But domestic considerations are also significant. National governments are promoting oil palm to meet rising domestic demand for edible oils, to reduce their countries' dependency on imported fossil fuels and to limit their loss of foreign exchange. Moreover, where the circumstances are favourable, small scale farmers themselves are choosing to plant oil palm as a lucrative crop.

The consequences of oil palm expansion for local communities and indigenous peoples are thus very varied. Comparison of national experiences shows that where farmers' and indigenous peoples' lands are secure and where there is rule of law, oil palm tends to develop modestly as a small-holder crop with better outcomes for local people in terms of income, equity and livelihoods. However, where land rights are insecure or law enforcement weak, then oil palm tends to be developed as very large company-owned estates with serious problems for prior occupants and workers, ensuing land conflicts and human rights abuse.¹

To ensure that oil palm only develops in beneficial ways, voluntary standards of organisations such as the RSPO need to be backed up by national tenurial and governance reforms which make mandatory requirements that ensure local peoples' rights really are respected and protected. Without such protections, expansion is likely to benefit investors, traders and national elites at the expense of the rural poor and vulnerable ecosystems.

The role of National Human Rights Institutions

While their mandate and functions at the national level can vary, it is the realisation on the part of National Human Rights Institutions that they already have a strong agenda to work on the broad issue of

¹ Colchester & Chao 2011b.

business and human rights that has allowed for this landmark workshop to take place. Examples of intervention by NHRIs to date include their presence and leadership in investigations, mediations, advice-giving, *amicus curiae* to court cases, and public interest litigations. In particular, processes of public interest litigation may lead to effective ways of dealing with narrow ‘standing’ principles of adversarial justice systems.

The status of NHRIs puts them in a strategic position to collaborate towards bringing existing national laws into conformity with ratified treaties, and to explore effective enforcement mechanisms when agribusiness violates indigenous peoples’ rights. Further recommendations include NHRIs taking the initiative (with NGO and IPO support) to engage in a dialogue over human rights and agribusiness with international financing institutions, ASEAN, UN bodies and mechanisms, and the private sector. The importance of expanding the mandate and role of NHRIs in international human rights processes was also highlighted during this workshop.

International human rights law

Self-determination and non-discrimination are the core principles of international human rights law. It is important to bear in mind that international human rights principles and norms constitute the *floor* and not the *ceiling* of standards to be respected. They reflect a *progressive* development of law and thus they cannot be regressive. In this light, international declarations and treaties can be seen as tools and instruments that UN agencies must take forward and seek to adapt to changing contemporary contexts and needs.

Major sources of international human rights law examined which are relevant to indigenous peoples and local communities in the context of agribusiness expansion include: the United Nations Declaration on Human Rights (1948), the United Nations Declaration on Development (1986), the United Nations Declaration on the Rights of Indigenous Peoples (2007), ILO Conventions 107

(1957) and 169 (1989) on Indigenous and Tribal Peoples and Populations, the Convention on Biological Diversity (1992), the United Nations Framework Convention on Climate Change (1992), the International Covenant on Civil and Political Rights (1966 [1976]), the International Covenant on Economic, Social and Political Rights (1966 [1976]), the Convention on the Elimination of all forms of Racial Discrimination (1965 [1969]), the United Nations Convention on the Elimination of all forms of Discrimination Against Women (1979), the United Nations Convention on the Rights of the Child (1989) and the United Nations Convention Against Torture (1984).

Free, Prior and Informed Consent

Free, Prior and Informed Consent (FPIC) is the right of indigenous peoples to participate in decision-making and to give or withhold their consent to proposed projects that may affect the lands, territories and resources they customarily own, occupy or otherwise use. The right of indigenous peoples to give or withhold their Free, Prior and Informed Consent to measures that may affect them is most usefully seen as an expression of the right to self-determination. The right to Free, Prior and Informed Consent is articulated in several of the key international instruments above, which form the core guiding principles to which States have committed themselves as members of intergovernmental bodies through their ratification or adoption of these instruments. The right to Free, Prior and Informed Consent is central to indigenous peoples' exercise of self-determination with respect to developments affecting them.

The right to Free, Prior and Informed Consent has also gained prominence in recent years in the private sector, which recognises that respect for internationally recognised human rights has implications not only for governments but also for private investors and financial institutions. A number of international financial institutions have incorporated into their operational policies certain

aspects relating to the need to obtain the Free, Prior and Informed Consent of indigenous peoples for projects that may impact their lands and resources. While such policies are not legally binding, they are often included as conditions in loan agreements with companies and governments and guide financial institutions in the conduct of their lending activities.

Free, Prior and Informed Consent has been recognised explicitly as a right of indigenous peoples through UNDRIP. However, the right to Free, Prior and Informed Consent has come to be applied to vulnerable peoples who define their relations with their lands through customary law more generally. In this perspective, the right to Free, Prior and Informed Consent resides in the communities that will experience the direct, primary impact from the development of projects on their customary lands. In principle, the communities possessing the right to Free, Prior and Informed Consent are not only traditional or indigenous, although the applicability of this principle is most apparent in relation to indigenous peoples.²

There are indications from the authoritative interpretations of various UN bodies that the right to Free, Prior and Informed Consent could also apply to local communities in relation to development projects that impact their communal rights to lands and resources. Jurisprudential interpretation by human rights bodies and the increasing inclusion of the right to Free, Prior and Informed Consent in the operational policies of international financial institutions and non-State entities more generally supports the expanding reach of the right to FPIC.³

Indigenous peoples and the Universal Declaration on the Rights of Indigenous Peoples

² Oxfam Australia 2011:5.

³ De Schutter 2010:319; Oxfam Australia 2011:5; Centre for Social Responsibility in Mining and Synergy and Global 2009.

Although there is no universal definition of ‘indigenous peoples’, certain factors have been identified as relevant including: priority in time with respect to the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist.

The *United Declaration on the Rights of Indigenous Peoples* does not so much create new rights and obligations but rather declares already existing human rights obligations of States and hence can be seen as embodying to some extent general principles of international law. UNDRIP clearly articulates indigenous peoples’ right to Free, Prior and Informed Consent but also affirms related rights including indigenous peoples’ right: to be represented through their own institutions; to exercise customary law; to the ownership of the lands, territories and natural resources that they traditionally own or otherwise occupy or use; to self-identification; and, more fundamentally, to self-determination.

Rather than defining ‘special rights’ for indigenous peoples, UNDRIP takes into account their special circumstances and seeks to redress a history of marginalisation, dispossession and discrimination. Self-identification remains the single most crucial criteria and basis for claims of indigenous identity. The term ‘indigenous peoples’ is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not either aim to create a hierarchy between different communities or to act as a principle of exclusion, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups which have been historically marginalised.

The legacy of colonial forestry laws

In many Southeast Asian countries, national laws regarding land and development operate based on the principle of eminent domain, which, at a very simple level, invokes the ‘eminent’ or ‘pre-eminent’ right of the State to acquire, take over or use lands of certain categories with the strength of force and sanctions. Forest laws in South and Southeast Asia have a very colonialist orientation which is similar to that of the principle of eminent domain, whereby States reserve certain pre-eminent rights, often neglecting or subordinating indigenous peoples’ and local communities’ customary laws and rights. The vast swathes of lands acquired for development are frequently classified as vacant, idle and degraded ‘wastelands’ to justify invoking the acquisitionist principles described above. The shared colonial history of Southeast Asian countries may explain the similarities in their experiences and the systemic obstacles they face in terms of human rights and agribusiness expansion.

Custom as a shield, not a sword

It may be more strategic to seek ‘blanket’ recognition of customary law in a simple manner than to give detailed legislation on what those rights are. In the latter case, there is a risk of customary rights being reduced by being enveloped into exchange-oriented individualised rights, whose principles are governed by land law regimes themselves governed by statist title and registration systems, and so forth. It is important to note that blanket simple recognition of customary law may act as a shield where custom is only valid if it does not go against certain constitutional principles. Recognition without formal codification can leave more opportunities for indigenous peoples to assert their rights according to their own worldviews.

Custom as a shield - where the shield represents collective inalienable rights and sword represents alienable private titles - implies generationally transmitted, sustainable use and ownership (within the community and as against external agencies), which can help protect indigenous peoples’ lands and territories from being

alienated and taken over by outsiders (hence shielded), rather than as a right to alienate and transfer, commodify and marketwise land and resources (which would be the sword).

The United Nations Framework

In 2008, the UN Secretary General's Special Representative on Business and Human Rights, Professor J. Ruggie, presented his framework for addressing human rights and agribusiness operations. This is now known as the 'UN Framework' and was endorsed by the Human Rights Council in 2008. It has now become the focal point for a number of international efforts in relation to human rights and the private sector. In 2011, Guiding Principles were presented to and endorsed by the Human Rights Council (A/HRC/17/31) and the Council established a Working Group on human rights and transnational corporations and other business enterprises to coordinate future action. The mandate of the working group includes conducting on-site visits and receiving complaints about corporate activities that may violate human rights. In addition to UN activities, the UN Framework has also been endorsed by the International Finance Corporation and the Equator Principles Financial Institutions, which together are responsible for a large percentage of private sector finance globally.

Professor Ruggie's final report to the Council recommends that special attention is needed in relation to indigenous peoples and their rights. It is therefore to be expected that the new Working Group will devote some energy to assessing and addressing indigenous peoples' rights in relation to business operations, as will other UN mechanisms. The Special Rapporteur on Indigenous Peoples for instance is now working on principles in relation to indigenous peoples and extractive industries. The Special Rapporteur on Right to Food has looked in some detail at indigenous peoples' rights in relation to land grabbing and large scale agro-industry, including the rights of small-holders. The Special Rapporteur on Contemporary Forms of Slavery has looked

at the relationship between indigenous peoples' land rights and exploitative labour practices. Various UN treaty bodies have examined all of these and other issues when they review country reports and in their case-related jurisprudence.

The UN Framework has three main elements: PROTECT, RESPECT and REMEDY. It is the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. It is the companies' responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. Remedy is the need for greater access by victims to effective remedy, both judicial and non-judicial. It goes without saying that National Human Rights Commissions have a role to play in providing remedies. The Working Group on the issue of human rights and transnational corporations and other business enterprises can receive complaints about corporations from civil society, NGOs and NHRIs. The UN Framework has also been adopted by international financing institutions such as the IFC and Equator Banks.

In line with the UN Framework, the *Bali Declaration* stresses the responsibility of corporations to respect human rights as a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

A wide range of options are available to bring up the issue of human rights (and their violations) by companies, including, among others, extra-territorial obligations under national law, international law (CERD, UNDRIP, UNCESCR, ICCPR, ILO 107, ILO 169), commitments made by States during the Universal Periodic Review

of the Human Rights Council, United Nations Special Rapporteurs (on Indigenous Peoples and the Right to Food), industry standards and corporate policies and related instruments (RSPO, RSB, ICMM), and international financing institutions policy instruments were applicable (IFC, ADB, IBRD).

Discussion on international human rights law

The main elements in the discussion on international human rights law were as follows:

- The UN Framework is not enforceable of itself but requires States to develop necessary national frameworks and remedies.
- A new Regional Human Rights Standard is needed (with September 2007 as the cut-off date).
- NHRIs must make recourse to treaty bodies and the UPR.
- Even in countries like Malaysia which have not ratified many human rights treaties, NGOs and NHRIs can use special procedures immediately, such as the UPR procedure.
- Labour unions can complain to the ILO with reference to its 202 Conventions.
- International human rights bodies cannot deliver remedy directly but are tools to raise issues, and in this sense can be effective. The IACHR is relatively effective, and Africa has its African Commission. Southeast Asia needs to start this process too.
- It is necessary to start identifying who are indigenous peoples on the basis of self-identification, and also by using ILO and World Bank criteria.
- NHRIs are part of the State and therefore need to be proactive in addressing and engaging in dialogue with State bodies over human rights and agribusiness.
- Many different avenues can be used as remedies at the same time and this plural approach tends to work best.

Emerging issues in Malaysia

The presentations on Malaysia revealed the generally inadequate recognition and protection of customary rights. Land laws in particular are weaker than the Constitution, which recognises custom as a source of law and rights. The government remains tardy in recognising customary rights which are routinely trivialised and the limited approach of 'half baked legal pluralism' favours company expropriation as well as the extinguishment of Permanent Forest Estates for conversion to oil palm plantations. Massive expansion of oil palm is taking place in Sarawak in forests and peat lands under Native Customary Rights, with further expansion inland on so-called 'idle and degraded' land inhabited by impoverished rural populations in need of economic development. Among the complaints reported by indigenous peoples and local communities affected by plantations is the abuse of fiduciary trustees and delayed profit sharing.

Some positive changes have however been identified. Courts have at times recognised rights based on custom and now accept oral histories as evidence in court. The idea that 'stories matter' is a significant advance in judiciary processes, and allows for indigenous knowledge and sites of cultural importance, such as graves and shrines, to be taken into account in their claims to land and natural resources. However, the courts still tend to act very slowly. The debate over full restitution and what this constitutes is ongoing, with arguments including a 'land for land' approach, and monetary compensation for economic and cultural loss and damage.

The discussion on Malaysia brought to light the problems posed by neo-colonial economies in the whole region, in particular, the compromised concept of Native Title under colonially imposed laws. Cooptation and the engineered consent of indigenous elites acting in their private interests were also identified as key obstacles to the genuine realisation of the right to Free, Prior and Informed Consent. In terms of working conditions on oil palm plantations, the unclear terms of joint ventures and the derisively low pay received by workers were highlighted as violations of workers' rights under

international labour-related conventions. And while certification is being used in Malaysia with regards to palm oil, it is difficult for communities to access information about such mechanisms and to benefit from them directly.

At the judicial level, the injustices rampant in court processes, as well as their repetitive, expensive and time-consuming nature, are compounded by the lack of upholding of judgments passed, and the frequent lack of compensation payment made to victims of abuses by corporate bodies and the State. The difficulty of getting remedy through the courts results from the political economy standing the way of the State reforming its laws in conformity with the Constitution.

Resulting recommendations included:

- Apply the same standards to national and foreign investors.
- Explore the concept of ‘equal protection’ linked to international human rights law.
- Examine and optimise the roles of NHRIs in obtaining redress for indigenous peoples and local communities.
- Consolidate more information about best and worst practices by oil palm companies.

Emerging issues in Cambodia

While Cambodia has ratified most international human rights laws and human rights are protected by the Constitution, these laws are often not applied and rights continue to be routinely violated on the ground. Land grabbing is particularly prevalent, with serious impacts on rural people and causing a high rate of deforestation. Over 5% of national land is now the object of conflict and dispute.

State policies promote agribusiness as key to economic and infrastructural development, as well as the generation of employment opportunities for poor rural populations. The reality,

however, is that Economic Land Concessions are being arbitrarily allocated to companies for rubber, sugar, acacia and oil palm plantations without the Free, Prior and Informed Consent of local communities. This is triggering land disputes, forced evictions and a plethora of human rights abuses, with victims regularly being criminalised rather than compensated for their losses. While the 2001 Land Law allows private ownership, requires the payment of just compensation and secures indigenous peoples' rights, the untransparent contracts behind ELC leases of up to 99 years and 10,000 hectares often end up benefiting the companies rather than the people.

The case studies examined in the presentations unveil a grim picture of political collusion with international capital, backed by the army and resulting in false land sales. Current forms of social mobilisation in protest against human rights violations include demonstrations, the use of the media and powerful images, the formal (if ineffective) path of judicial proceedings and appeals to the legislature, and targeting the international investor supply chain.

While Cambodia does not have an independent national human rights commission, it does have human rights bodies under the National Assembly, the Senate and the government, but these have so far been unresponsive to appeals for civil society. It is very difficult to challenge powerful people in court and proceedings tend to be slow. Even when appeals for a change in judges are successful, there is no guarantee that they will be more responsive to the plight of the complainants. All this reveals the blatant impunity of people in positions of economic and political power. Alternative dispute resolution is being tried, but although it may be useful in resolving minor disputes, it remains ineffective in high profile cases.

Emerging recommendations included:

- Establish a transnational jurisdiction to monitor human rights in cross-border cases.

- NHRIs to follow the CERD's lead concerning host countries' responsibility to regulate their companies operation overseas.
- Harness the potential of the UN Framework to make host countries accountable for the operations of transnational corporations.

Emerging issues in the Philippines

The Philippines' thirty million hectares of land is equally divided into public and private land. 42% of the land is for agriculture and the labour force composes 33% of the total population of one hundred million. Major exports are coconut, banana and sugar, but agriculture only represents 20% of the GNP, and yet half of the poorest people in the country depend on it for their livelihoods. Agrarian reforms failed to put an end to colonial-feudal land ownership systems. Despite legal frameworks to redistribute land, policies were not enforced and priority was given to producing export crops rather than crops needed domestically. Extensions, credit and infra-structural factors favour the development of large farms. Violence against land reformers protesting against this model has been prevalent.

Oil palm has been grown in the Philippines since the 1950s and is being actively encouraged by the State in its bio-fuel policy. With its new target of one million hectares of oil palm, the Philippines is seeking to catch up with other Southeast Asian countries such as Thailand, and meet domestic as well as foreign demand. The liberalisation of investment and the use of so-called 'idle' lands for plantation development have led to the displacement of people and the loss of their food security. Many forms of tenure do exist, but all are overridden. Imposed and fraudulent land acquisition is rampant, as is the lack of respect for the right to Free, Prior and Informed Consent. Land disputes have resulted from this, leading to violence, insurgencies and counter-insurgencies, which overall create a highly militarised society without the rule of law.

In the positive side, good laws do now exist to protect the rights of indigenous peoples and local communities to land and resources, such as CARP, NIPAS and IPRA. However, they frequently overlap with each other in jurisdiction, or even contradict each other. Efforts to harmonise laws and land use plans have been undertaken in response to this.

Recommendations emerging from the presentations on the Philippines included:

- The adoption of a Human Rights Based Approach by agribusiness based on the needs, initiatives and rights of farmers, women and indigenous peoples.
- The need for law to be pluralistic in order to accommodate customary law and give it the same weight as statutory law (this is particularly relevant to the Philippines which is home to sixteen million indigenous people distributed in over 110 societies.)
- The recognition of ancestral domains/lands and FPIC in IPRA as an important channel for remedy-seeking.
- The lack of capacity of NCIP and its difficult grievance process. FPIC can be effective but large-scale projects are difficult to counter. The guidelines of NCIP are also problematic, prompting the need to put FPIC back into custom.
- Graft, corruption and the cost of judicial proceedings get in the way of access to justice for indigenous peoples and local communities.
- Make use of the scope for HRC (through its local offices) and NCIP to work jointly to protect human rights. An example of this is the public hearings held on Lumads in Mindanao, where armed conflict has been prevalent.
- HRC to become a comprehensive monitor on land and land-related violence and to promote human rights defenders, with the support of independent experts. They should also assume the important role of human rights awareness-raising.
- Create a Regional Human Rights Recourse Mechanism.

Emerging issues in Thailand

Traditionally held through royal award but farmed by the people, land ownership was privatised in the 1920s. However, land registration was slow and unregistered lands became public land. From the 1960s onwards, public lands were reserved for forests and conservation, but the community forestry law has not yet been approved. Despite the agrarian reform, the concentration of much land in the hands of few powerful entities still exists, although land for the development of large estates is limited. Mixed farming of oil palm and rubber by smallholders has proved profitable, but still lacks optimal efficiency. The commercialisation of forests and forest lands from the 1860s to the 1990s saw plantations expand in Northeastern Thailand on agricultural and indigenous customary land, triggering protests and disputes. Thai nationalist policies of assimilation and integration have in practice led to the exclusion of indigenous peoples from decision and policy-making processes. The 'one state but two societies' situation where nepotistic politics excluded people has been challenged by direct democracy through social organisation and the assertion of values and identity, stimulating legal reform and decentralisation.

The privatisation of the commons and the commoditisation of resources have undermined the self-sufficiency of indigenous peoples and local communities, causing a strong social movement in response. Indigenous peoples remain culturally, politically and legally marginalised, particularly by national security anti-narcotics and wilderness policies. 300,000 indigenous peoples lack citizenship and are stateless. Conflicts over natural resources continue to grow in number and intensity.

There is mounting concern over agricultural expansion achieved through land grabs and the use of cheap local labour. Climate change prosecution against forest farmers is leading to their unjustified criminalisation. In the landmark cases discussed, social mobilisation is underway against the development of dams and

agribusiness but the violent eviction of indigenous peoples continues. Communities have resorted to a number of strategies in order to defend their territories and livelihoods, including mini-credit projects, economic diversification and alternative incomes, such as through handicraft production and tourism.

Recommendations emerging from the discussion on Thailand included:

- Strengthen public participation in development and in the protection of rights and the rule of law, including with regards to communal land title (as per the previous Prime Minister's office decree).
- The need for further campaigns to recognise shifting cultivation as a legitimate and environmentally sustainable mode of agriculture, practised by indigenous peoples and local communities. The Thai Constitution also recognises the natural resource management role of 'traditional local communities'.
- Establish a national indigenous peoples' network and indigenous peoples' council.
- Promote customary law, practices and rituals, as well as indigenous peoples' knowledge on natural resource management, including in relation to fire management, achieving self-sufficiency and principles of egalitarian sharing.
- Make customary law recognised in court proceedings as part of a legally pluralistic approach to human and natural resource rights.

Emerging issues in Indonesia

Composed of over 17,000 islands and inhabited by 240 million people, Indonesia is a country of huge cultural diversity. 1,054 languages have been identified as spoken by a vast number of social groups, of which only fourteen number over one million people. Indigenous peoples in Indonesia are known by a number of terms, and generally self-designate themselves as *masyarakat adat*.

Constitutional protections exist for indigenous peoples' self-governance and customary knowledge as human rights. However, government policies are unevenly applied, and customary law is tolerated rather than recognised. Overall, indigenous peoples and local communities' rights remain weakly protected in the law.

Land conflicts in industrial plantation forests (HTI) and forest concessions (HPH) are rife. Komnas HAM, with its mandate of monitoring, investigation, researching, promoting and education on human rights, receives over 5,000 complaints a year, most of which are disputes between communities and corporations over land. Hopes that the two-year moratorium on forest clearance would halt existing permits have quickly frittered away as the government has excepted areas where preliminary permits have already been handed out.

Government targets for palm oil production indicate that the expansion of the crop is likely to continue and intensify, backed by national and foreign investments. The current eleven million hectares of plantations is expected to increase to 29.8 million hectares, of which half the produce will be for use as bio-fuel, 30% for export and 20% for domestic consumption. Where land tenure is insecure, the rights of indigenous peoples and local communities to customary lands are violated and their access to the natural resources they depend on for their livelihoods is restricted. Elite capture of leaders puts into question the extent to which agreements are reached are genuinely representative of the views of the community. Exploitative and monopsonistic relations between companies and smallholders are compounded with slavery-like practices, discrimination against women and child labour. Intimidation and attacks from company-hired armed security forces have also been reported. Violent conflicts are increasingly frequent, involving beatings, shootings and killings.

While the IFC CAO has been involved in mediation and seeking remedy for the human rights violations of local communities in

some parts of the country, these remedies have only addressed a few local land issues but not illegalities or the supply chain. Few banks have adopted safeguards which make respect for the right to Free, Prior and Informed Consent mandatory. At the national level, success was obtained in the constitutional Court with the amendment to the Plantations Act. Overall, however, human rights standards to regulate company practices are still desperately needed. Voluntary standards such as that of the RSPO may provide some room for people to complain about malpractice but systemic change is only likely to come about with legal reforms that secure peoples' rights to their lands and an independent police and judiciary that can enforce the law.

The process of government sponsored colonisation and militarisation in Papua is comparable to the situation that prevailed in the Chittagong Hill Tracts in Bangladesh prior to the Peace Pact. Most lands in West Papua are within logging, mining, oil and gas concessions. Oil palm concessions already cover over two million hectares. Now, major food and energy projects such as MIFEE in Merauke are taking over tribal lands and promoting mass migration, prompting the urgent need to make this an international issue.

The Special Autonomy Law, offered as a political compromise between the central government and the Papuan people, is not a solution, but instead becoming a serious problem, exacerbated by corruption at all levels and opposed by separatist movements. The massive influx of migrants into Papua may lead to local people being outvoted in a plebiscite on self-determination. At the same time, however, many of the migrants in Papua are themselves very poor, and also have the right to a livelihood. There are therefore contradictory rights at play. Komnas HAM has raised the issue of Papua with the President, the Ministry of Foreign Affairs, the Ministry of Internal Affairs and the General Attorney in a peace-building initiative.

Recommendations that emerged from the discussion included:

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- Stop issuing permits and review existing ones in terms of their compliance with human rights standards.
- Develop a binding national standard for agribusiness.
- AMAN to expand its scope and influence as a representative organisation for indigenous peoples.
- Create new partnerships for joint programmes between Komnas HAM, the Ministry of Environment and the National Land Agency.
- Implement the independent land registration of indigenous territories.
- Consider drafting a bill on indigenous rights.
- Make greater use of customary laws to resolve tenurial and natural resource conflicts.
- Further action on workers' rights by independent organisations.
- Use the CERD ruling and constitutional protections in national remedies and to develop Komnas HAM's position.

Concluding comments

It is vital that States place binding obligations on companies to respect human rights. The *Bali Declaration* calls on States to fulfil their legal obligations to protect the rights of their citizens, including indigenous peoples, in the face of unprecedented pressure by agribusinesses, notably their rights to own and control the lands and territories they have traditionally owned, occupied or otherwise used and their right to Free, Prior and Informed Consent with regards to activities planned on those lands. The Declaration also makes particular reference to the rights of workers, smallholders, communities, women and children under international human rights law.

It is clear that both immediate effectiveness and long term objectives will be needed in order to realise a human rights based approach to business. Efforts must be geared towards reconciling the different levels involved: international, regional, national and local. The UN

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Framework and responsibilities of corporations and States stipulated therein can act as an anchor for advocacy and the call for reform and accountability, in line with international human rights laws. The NHRIs can make greater use of their convening power and status to address their concerns about agribusiness with the Equator Banks, the United Nations Working Groups, United Nations human rights bodies, and the United Nations Special Rapporteurs where relevant. Building the capacity of ASEAN to progressively enforce human rights is another angle from which the NHRIs can influence region-wide processes and dialogue over human rights and agribusiness, pending the establishment of a commission and court.

The resources and time needed to put into action the recommendations that have emerged from this workshop must not be underestimated. Follow-up actions must be anchored in plural notions of development which match the reality of plural law. And a collaborative approach based on iterative dialogue involving all key stakeholders will be the key to their effectiveness and scope.

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THE BALI
DECLARATION
ON
HUMAN RIGHTS
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Recalling the inherent dignity, equal and inalienable rights of all human beings, the need for universal and effective recognition of human rights and fundamental freedoms, and the promotion of social progress and better standards of life in larger freedoms, as expressed in the Universal Declaration of Human Rights;

Recalling the universality, indivisibility, interdependence and interrelatedness of all human rights;

Emphasising the importance of respecting the collective rights of peoples and the development aspirations of people in developing countries, as set out in *inter alia* the UN Declaration on the Rights of Indigenous Peoples and the UN Declaration on the Right to Development;

Taking account of the Edinburgh Declaration which encouraged the International Coordinating Committee (ICC) of National Human Rights Institutions (NHRIS) and individual National Human Rights Institutions to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuses, greater accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches;

Welcoming the UN Human Rights Council's continuing engagement with the business and human rights agenda, particularly through the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, which follows the work of the UN Secretary General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises; the greater understanding and clarity about the appropriate roles and responsibilities of States and business with regard to human rights and the right of victims to access remedy emanating from the 'Protect, Respect, Remedy' Framework;

Recognising that the right to food implies that States take measures to ensure the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within their own cultures and that access

to such food must be achieved in ways that are sustainable and do not interfere with the enjoyment of other human rights;¹

Emphasising the findings of the UN Special Rapporteur on the Right to Food which highlight the threat to the right to food from large-scale land investments and show that because of inequitable access to land and capital, smallholders and agricultural labourers make up a combined 70% of those who are unable to feed themselves today and recommend that States and the private sector adopt enforceable laws, policies and procedures that respect the rights of indigenous peoples and rural communities to their lands and livelihoods and protect the rights and interests of smallholders, workers and women;²

Taking into consideration the recommendations of the UN Permanent Forum on Indigenous Issues, which note the need for corporations to adopt special measures to ensure that their operations respect the collective rights of indigenous peoples, especially where national legal frameworks are deficient;³

Recalling the report of the UN Expert Mechanism on the Rights of Indigenous Peoples on ‘indigenous peoples and the right to participate in decision-making’ which stresses the importance of State parties ensuring that corporations respect the rights of indigenous peoples to give or withhold their FPIC to operations that may affect their rights;⁴

Noting with grave concern the numerous reports from the UN, the World Bank, the International Finance Corporation (IFC), National Human Rights Institutions (NHRIs), the media and civil society organisations which show that accelerated investment and poor governance is leading to the ill-regulated expansion of agribusiness in the region, especially oil palm, which is: causing serious violations of human rights; prompting the massive takeover of

¹ E/C.12/1999/5, 12th May 1999.

² A/HRC/13/33, 22nd December 2009.

³ E/C.19/2007/CRP.6, 7th May 2007.

⁴ A/HRC/18/42, 17th August 2011.

indigenous peoples' and rural communities' lands without consultation or consent; provoking serious long term land conflicts and outbreaks of violence; leading to exploitative relations and other abuses of the rights of smallholders, migrants, workers, women, children, the elderly and detainees; the impoverishment of previously self-provisioning communities and peoples; and; leading to the destruction of forests and peatlands and high emissions of greenhouse gases.

Recognising the efforts of financial institutions, development agencies, investors and sectoral bodies to develop voluntary standards consistent with international norms to improve corporate performance, including the Food and Agriculture Organisation (FAO) 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests'; the FAO, the International Fund for Agricultural Development (IFAD), the World Bank and the United Nations Conference on Trade and Development (UNCTAD) 'Principles for Responsible Agricultural Investment that Respects Rights Livelihoods and Resources'; the 'Farmland Principles' of major global investors and; the Principles and Criteria of the Roundtable of Sustainable Palm Oil (RSPO);

Considering, however, that such measures must be complemented by actions by States to comply fully with their human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of the means of subsistence;

Considering that, while in the Americas there is a full functioning human rights system, including the Inter-American Commission and Court of Human Rights and that in Africa the African Union, African Development Bank and the Economic Commission for Africa have adopted a 'Framework and Guidelines on Land Policy in Africa- a framework to strengthen land rights, enhance productivity and secure livelihoods' consistent with the African Union's 'African Charter on Human and Peoples' Rights', in (Southeast) Asia there is lack of a dedicated regional human rights system or regional norms on land development;

Acknowledging that the majority of States in Southeast Asia have ratified the core human rights treaties and / or have constitutional and other national legal provisions, which recognise that custom is a source of rights, and these plural legal regimes need to be strengthened to give greater protection of rights;

Concerned by the lack of respect of peoples' rights by corporations, the fact that in many countries indigenous peoples' rights remain weakly recognised or unprotected and that government capacity to defend these peoples' rights is lacking;

Concludes therefore that there is an urgent need for States in Southeast Asia to protect, respect and secure the rights of indigenous peoples and rural communities whose rights are being violated by agribusiness investment and the operations of palm oil corporations.

The Conference therefore resolves:

To work with governments, legislatures and corporations in Southeast Asia to ensure that they take urgent steps to reform or reinforce national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries' human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

We therefore recommend the following.

Right to food:

States need to accept that the right to food may be violated when people are denied access to land, fishing or hunting grounds, or are deprived of access to adequate and culturally acceptable food or by the contamination of food and water sources.

States therefore need to take measures to protect people's rights in land and allow land owners to decide on the use of their lands taking into account their own livelihoods and, environments.

Recognising that peoples have diverse cultures and may relate to land in very different ways, States therefore have an obligation to respect collective property rights over lands, territories and resources, the right to culture and the right to self determination (including the right to pursue their own economic, cultural and social development).

States likewise have an obligation to protect certain activities that are essential to obtaining food (e.g. agriculture, hunting, gathering, fishing) and an obligation to provide or ensure a minimum level of essential food that is culturally appropriate.

Land rights:

In reviewing their land tenure regimes, national governments and legislatures need to review and revise or reinforce their national policies and laws on agricultural development and land acquisition to ensure that they respect the rights of indigenous peoples and rural communities and do not facilitate the denial of people's rights to food, to land and to FPIC.

In revising their tenure systems, States should recognise that, while security of tenure is indeed crucial, individual titling, poverty eradication and the creation of a market for land may not be the most appropriate means to achieve it.

Instead, States should, where relevant strengthen, customary land tenure systems and review or reinforce tenancy laws to improve the protection of land users.

Drawing on the lessons learned from decades of agrarian reform, States must pay renewed attention to policies and procedures of land redistribution to ensure that they respect peoples' rights to food, livelihood, cultural identity and self-determination. These reforms must be accompanied by measures to support smallholder farmers, indigenous people, and women to promote food security.

Land development schemes/programmes/mechanisms/projects must be designed in ways that do not lead to evictions, disruptive shifts in

land rights and increased land concentration in the hands of corporations.⁵

While many land development programmes and policies focus on areas considered to be ‘empty’, ‘marginal’ or ‘degraded’, States should recognise that there are few areas truly unoccupied or unclaimed, and that frequently land classified as such is in fact subject to long-standing rights of use, access and management based on custom. Failure to recognise such rights will deprive local communities and indigenous peoples of key resources on which their wealth and livelihoods depend.

Free, Prior and Informed Consent:

States must ensure respect for the right, of those with customary rights to lands and other resources, to give or withhold their Free, Prior and Informed Consent to operations planned on their lands. Such consent should be conveyed through their own freely chosen representative institutions. Any written agreements should be credible, transparent, fully implemented and agreed to by all parties involved.

Where rural communities have individualised rights in land through statutory law, land administration schemes, agrarian reforms and court decisions, all transactions in land should be regulated by impartial State agencies to ensure adherence to the ‘willing buyer/willing seller’ principle.

States must exercise a Human Rights-based Approach (HRBA) to agribusiness expansion, limit the exercise of their power of eminent domain, and only forcibly acquire lands where: there is compelling justification in the national interest;⁶ the gains expected are

⁵ Report of the Special Rapporteur on the Right to Food to the UN General Assembly A/65/281, 11th August 2010.

⁶ With reference to the plans of the Indonesian Government to establish a 1.8 m hectares. palm oil plantation in the centre of Borneo, the UN Committee on the Elimination of Racial Discrimination recommended that: state party should amend its domestic laws, regulations and practices to

proportional to the losses; where sanctioned by previously existing law; where the development option is the least restrictive of human rights and; where such measures do not endanger peoples' very survival.⁷

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the Free, Prior and Informed Consent and after agreement on just and fair compensation and, where possible, with the option of return.

Right to personal integrity and security:

States must ensure that there is rule of law, humane treatment and a peaceful environment in agribusiness development areas, and must secure people against violence and arbitrary arrest and prohibit the use by agribusiness ventures of mercenaries, privately contracted police and para-militaries.

ensure that the concepts of national interest, modernisation and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee's general recommendation No. 23 (1997) on indigenous peoples (UN Doc. CERD/C/IDN/CO/3 15th August 2007).

⁷ According to human rights law, the term 'survival' must be understood as the ability of indigenous peoples 'to preserve, protect and guarantee the special relationship that they have with their territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. That is, the term survival in this context signifies much more than physical survival.' See, inter alia, United Nations Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24th April 2009; Inter-American Court of Human Rights, *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 12th August 2008. Series C No. 185; African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya* (February 2010).

Smallholders and community options:

States must also balance policies and laws which allow corporate investment in land development, with laws and policies which promote indigenous peoples' customary management systems, community-based initiatives and smallholders' participation.

To achieve this balance, States must take measures to ensure that smallholders: capture a fair proportion of the value of their products; are able to represent themselves through their own freely chosen representatives or organisations; are able to organise freely as cooperatives or other farmers' organisations to improve their access to capital, technical assistance and markets and;

are able to choose the terms on which they agree or not to sell their produce to larger enterprises. Effective measures are also needed to identify and prohibit unfair practices and to reinforce the bargaining power of smallholders in order to equalise their relationships with the agribusiness sector. This can be achieved by prohibiting practices that constitute an undue exercise of buyer power and by combating excessive concentration in the food chain and abuses of dominant positions (including through competition regimes sensitive to excessive buyer power and competition authorities with effective complaints mechanisms).

Effective measures are also needed to avoid conditions conducive to debt slavery and other contemporary forms of slavery. Therefore, where companies provide credit, technical assistance and/ or markets for smallholders and workers, whether through contracts or informal arrangements, it is essential that there is full transparency and an absence of coercion in all transactions affecting smallholders and workers.

Workers:

States must improve the protection of local and indigenous agricultural workers by ratifying and fully complying with all ILO conventions and the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers relevant to the agrifood

sector, and seeing these are implemented through national laws and regulations, and by ensuring that legislation sets a minimum wage.

Women:

In accordance with the principles of the Committee on the Elimination of Discrimination against Women (CEDAW), given that women are often disadvantaged in agricultural development schemes, States must take measures to combat discrimination and provide equal opportunities to women and strengthen women's access to, and control over, land while respecting family and other social networks, and cultural diversity and increase their participation in decision-making processes.

Children:

In accordance with the UN Convention on the Rights of the Child, States should adopt measures to ensure that children are; raised in a context of non-discrimination; have their best interests secured; afforded protection and opportunities for development, and; participate in all matters which affect them so that their views are taken into account, in accordance with the General Recommendation of the Committee on the Rights of the Child on indigenous children. States must take urgent action to recognise the rights of, and provide identity and support for, Stateless children born out of wedlock in plantations due to unjust laws which prevent plantations workers to marry.

Dispute Resolution:

Considering that protracted land disputes between expanding agricultural development projects and rural communities and indigenous peoples are prevalent throughout the region, there is an urgent need for strengthened dispute resolution mechanisms in line with international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples.⁸ As recommended

⁸ It is a norm of international law that violations of human rights give rise to a right of reparation for victims, which may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition

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by the UN Permanent Forum on Indigenous Issues, these should be tripartite processes which include indigenous peoples or rural communities, represented through their own freely chosen representative institutions and/or mediators and alternative dispute resolution mechanisms, the companies with which they are in dispute and government agencies with responsibility to regulate land issues.

Access to Justice:

Affected people also need access to justice and States must ensure the integrity and proper functioning of law enforcement agencies, courts and the independence of the judiciary. Due provision needs to be made for indigenous peoples to exercise their customary law, but also have access to effective conflict resolution mechanisms, including local and national courts where needed. States must ensure transparency and access to information, freedom of expression and freedom of assembly.

Impact Assessments:

States must also ensure that companies and investors carry out through public participation, publish and share with implicated parties participatory social and environmental impact assessments taking into account the Akwe:Kon Guidelines of the Convention on Biological Diversity;⁹

States must also strengthen their regulatory and monitoring mechanisms for land investments in agri-business through requiring human rights impact assessments. National Human Rights Institutions should develop robust systems both for assessing

(Theo Van Boven, 1993, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report 1993 in UN doc. E/CN.4/Sub.2/1993/8.

⁹ Akwe: Kon Guidelines available at

<http://www.biodiv.org/doc/publications/akwe-brochureen.pdf>

licences for agribusiness against human rights standards and for exacting sanctions.

Right to Development and Human Rights:

States must ensure that in taking steps to secure people's right to development,¹⁰ they recognise that, in conformity with the 1993 Vienna World Conference on Human Rights, while development facilitates the enjoyment of all human rights, the 'lack of development may not be invoked to justify the abridgement of internationally recognised human rights'.¹¹

Ratification of Human Rights Instruments:

States must ratify all relevant international human rights treaties and relevant optional protocols, and take steps to harmonise them with domestic laws.

Adopted by acclamation in Bali, 1st December 2011

¹⁰ UN Declaration on the Right to Development. UN Doc. A/RES/41/128 4th December 1986.

¹¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993.

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ANNEXES

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ANNEX II: Extracts from the UN Framework

Protect, Respect and Remedy: a Framework for Business and Human Rights

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

Human Rights Council, Eighth Session, Agenda Item 3.
(A/HRC/8/5)

SUMMARY

Responding to the invitation by the Human Rights Council for the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to submit his views and recommendations for its consideration, this report presents a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors. The framework comprises three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.

Extracts

17. Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by states or firms, may be too constrained by the competitive dynamics just described.

Therefore, more coherent and concerted approaches are required. The framework of 'protect, respect, and remedy' can assist all social actors - governments, companies, and civil society - to reduce the adverse human rights consequences of these misalignments.¹

18. Take first the State duty to protect. It has both legal and policy dimensions. As documented in the Special Representative's 2007 report, international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction.² To help States interpret how this duty applies under the core United Nations human rights conventions, the treaty monitoring bodies generally recommend that States take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress.³ States have discretion to decide what measures to take, but the treaty bodies indicate that both regulation and adjudication of corporate activities vis-à-vis human rights are appropriate. They also suggest that the duty applies to the activities of all types of businesses - national and transnational, large and small - and that it applies to all rights private parties are capable of impairing. Regional human rights systems have reached similar conclusions.

19. Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognised basis of

¹ Multi-stakeholder initiatives like the Kimberley Process reflect elements of all three principles; they were discussed at length in last year's report (A/HRC/4/35, paras. 52-61).

² A/HRC/4/35 and A/HRC/4/35/Add.1. Some states hold that this duty is limited to protecting persons who are both within their territory and jurisdiction.

³ A/HRC/4/35/Add.1.

jurisdiction exists,⁴ and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States.⁵ Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.⁶

21. Further refinements of the legal understanding of the State duty to protect by authoritative bodies at national and international levels are highly desirable. But even within existing legal principles, the policy dimensions of the duty to protect require increased attention and more imaginative approaches from States.

22. It is often stressed that governments are the appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. However, the Special Representative's work raises questions about whether governments have got the balance right. His consultations and research, including a questionnaire survey sent to all Member States, indicate that many governments take a narrow approach to managing the business and human rights agenda.⁷ It is often segregated within its own conceptual and (typically weak) institutional box - kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance. This inadequate domestic

⁴ Recognised bases include where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved. See A/HRC/4/35/Add.2.

⁵ The entire human rights regime may be seen to challenge the classical view of non-intervention, but the debate here hinges on what is considered coercive.

⁶ For instance, the Committee on the Elimination of Racial Discrimination recently encouraged a state party to 'take appropriate legislative or administrative measures' to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered in the state party (CERD/C/CAN/CO/18, para. 17).

⁷ ILO Official Bulletin, Series A, No. 3 (2000).

policy coherence is replicated internationally. Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.

23. The corporate responsibility to respect human rights is the second principle. It is recognised in such soft law instruments as the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,⁸ and the OECD Guidelines for Multinational Enterprises.⁹ It is invoked by the largest global business organisations in their submission to the mandate, which states that companies ‘are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent’.¹⁰ It is one of the commitments companies undertake in joining the Global Compact.¹¹ And the Special Representative’s surveys document the fact that companies worldwide increasingly claim they respect human rights.¹²

⁸ ILO Official Bulletin, Series A, No. 3 (2000).

⁹ See Organisation for Economic Co-operation and Development, DAF/FE/IME/WPG(2000)15/ FINAL.

¹⁰ International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development (OECD), ‘Business and Human Rights: The Role of Government in Weak Governance Zones’, December 2006, paragraph 15, available at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>

¹¹ See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html>

¹² A/HRC/4/35/Add.3, A/HRC/4/35/Add.4 and ‘Human Rights Policies of Chinese Companies: Results from a Survey’, available at <http://www.business-humanrights.org/Documents/Ruggie-China-survey-Sep-2007.pdf>

24. To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm. Because companies can affect virtually all internationally recognised rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations.

25. Yet how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required is due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.¹³ The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.

26. Access to remedy is the third principle. Even where institutions operate optimally, disputes over the human rights impact of companies are likely to occur. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped - from the company level up through national and international levels.

THE STATE DUTY TO PROTECT

27. The general nature of the duty to protect is well understood by human rights experts within governments and beyond. What seems

¹³ A traditional definition of due diligence is 'the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation'. Black's Law Dictionary, 8th edition (2006).

less well internalised is the diverse array of policy domains through which States may fulfil this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments - necessitated by the escalating exposure of people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own.

50. The human rights regime rests upon the bedrock role of States. That is why the duty to protect is a core principle of the business and human rights framework. But meeting business and human rights challenges also requires the active participation of business directly.

THE CORPORATE RESPONSIBILITY TO RESPECT

51. When it comes to the role companies themselves must play, the main focus in the debate has been on identifying a limited set of rights for which they may bear responsibility. For example, the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights generated intense discussions about whether its list of rights was too long or too short, and why some rights were included and others not. At the same time, the norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of 'primary' versus 'secondary' obligations and 'corporate sphere of influence'. This formula emphasises precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.

54. In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in

actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate.¹⁴

55. The corporate responsibility to respect exists independently of States' duties. Therefore, there is no need for the slippery distinction between 'primary' State and 'secondary' corporate obligations - which in any event would invite endless strategic gaming on the ground about who is responsible for what. Furthermore, because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. Finally, 'doing no harm' is not merely a passive responsibility for firms but may entail positive steps - for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.

73. The corporate responsibility to respect human rights includes avoiding complicity. The concept has legal and non-legal pedigrees, and the implications of both are important for companies. Complicity refers to indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-State actors. Due diligence can help a company avoid complicity.

ACCESS TO REMEDIES

82. Effective grievance mechanisms play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect. State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress

¹⁴ There are situations where national laws and international standards conflict. Further guidance for companies needs to be developed, but companies serious about seeking to resolve the dilemma are finding ways to honour the spirit of international standards.

abuses. Equally, the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available. Providing access to remedy does not presume that all allegations represent real abuses or bona fide complaints.

83. Expectations for States to take concrete steps to adjudicate corporate-related human rights harm are expanding. Treaty bodies increasingly recommend that States investigate and punish human rights abuse by corporations and provide access to redress for such abuse when it affects persons within their jurisdiction.¹⁵ Redress could include compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies. As discussed earlier, regulators are also using new tools to hold corporations accountable under both civil and criminal law, focused on failures in organisational culture.

84. Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Yet they are also important in societies with well-functioning rule of law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse.

91. States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States

¹⁵ For instance, the Committee on the Rights of the Child increasingly recommends that states parties comply with article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which requires them to take measures, where appropriate and, subject to national law, to establish criminal, civil or administrative liability of legal persons for treaty offences. See A/HRC/4/35/Add.1, para. 64.

should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations.

92. Non-judicial mechanisms to address alleged breaches of human rights standards should meet certain principles to be credible and effective. Based on a year of multi-stakeholder and bilateral consultations related to the mandate,¹⁶ the Special Representative believes that, at a minimum, such mechanisms must be:

(a) Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;

(b) Accessible: a mechanism must be publicised to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;

(c) Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

(d) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;

¹⁶ The process involved experts from all stakeholder groups and regions. These principles, based on more specific guidance developed for companies, apply across non-judicial mechanisms of different kinds. See http://www.business-humanrights.org/Links/Repository/308254/link_page_view

(e) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognised human rights standards;

(f) Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

V. CONCLUSION

104. The current debate on the business and human rights agenda originated in the 1990s, as liberalisation, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally. Many countries, including in the developing world, have been able to take advantage of this new economic landscape to increase prosperity and reduce poverty. But as has happened throughout history, rapid market expansion has also created governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences. The area of business and human rights is one such domain.

105. In fact, progress has been made in the past decade, at least in some industries and by growing numbers of firms. The Special Representative's 2007 report detailed novel multi-stakeholder initiatives, public-private hybrids combining mandatory with voluntary measures, and industry and company self-regulation. All have their strengths and shortcomings, but few would have been conceivable a mere decade ago. Likewise, there is an expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts. Governments have adopted a variety of measures, albeit gingerly to date, to promote a corporate culture respectful of human rights.

Fragments of international institutional provisions exist with similar aims.

106. Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing. And that is what the framework of ‘protect, respect and remedy’ is intended to help achieve.

107. The United Nations is not a centralised command-and-control system that can impose its will on the world - indeed it has no ‘will’ apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations. The Human Rights Council can make a singular contribution to closing the governance gaps in business and human rights by supporting this framework, inviting its further elaboration, and fostering its uptake by all relevant social actors.

ANNEX III: Press Release

28th November 2011

‘Agribusiness and Human Rights in Southeast Asia Workshop brings together Human Rights Commissioners, indigenous peoples’ representatives, academics and NGOs from across the world’

A landmark workshop, ‘Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform’, is taking place at the Santika Hotel, Kuta, Bali, from today until 1 December 2011, convened by the Indonesian National Commission on Human Rights (Komnas HAM) and supporting NGOs SawitWatch and Forest Peoples Programme. The event will be attended by over 60 participants, from the National Human Rights Commissions of the Southeast Asian region, the ASEAN Intergovernmental Human Rights Commission, notable academics, representatives of indigenous peoples, as well as members of supportive national and international NGOs.

Nur Kholis, Deputy Chairperson of the Indonesian National Human Rights Commission (Komnas HAM), said,

‘We are taking this initiative in collaboration with the other human rights commissioners of Southeast Asia as a way of ensuring a more balanced approach to development based on respect for peoples’ rights, with an emphasis on the need to secure livelihoods and the right to food.’

The meeting will focus on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of the rapid expansion of agribusiness, notably the palm oil sector, while recognising the right to development and the need to improve the welfare and situation of rural people. Statements will be made by the UN Special Rapporteur on the Right to Food, Olivier De

Schutter, and Justice Raja Devasish Roy, Member of the UN Permanent Forum on Indigenous Issues (UNFPII).

Norman Jiwan, Head of Mitigation for the palm oil monitoring NGO, SawitWatch, said,

‘Our studies show that where rights are poorly respected, protected palm oil tends to expand at the expense of indigenous peoples, the rural poor, women, migrants and workers. It is imperative that States take stronger measures to secure favourable outcomes for people.’

While broad-based business can, under the right circumstances, provide skills, opportunities and improved livelihoods for indigenous peoples and rural communities, un-transparent deals, exploitative working conditions, poor safety standards, displacement and tenure insecurity can also severely undermine their human rights. The growing role and impact of the corporate sector, both within countries and across borders, has placed the issues of business and human rights firmly on the agenda of the United Nations and regional human rights bodies.

Marcus Colchester, Director of the international human rights group Forest Peoples Programme, said,

‘While businesses themselves need to adopt responsible policies, legal frameworks also need to be strengthened to oblige their compliance with international human rights norms.’

The three related objectives of the meeting are to:

1. Lay the basis for the development of a regional human rights standards for agricultural expansion in Southeast Asia with particular reference to palm oil. This will be based on international human rights standards and the ICC Edinburgh Declaration.¹

¹ Available at
<http://scottishhumanrights.com/international/biennial/edinburghdec>

2. Identify opportunities to use plural legal approaches to secure the rights, especially in land, of indigenous peoples and other customary law communities.
3. Build mutual understanding between Human Rights Commissioners, regional lawyers, human rights activists and supportive NGOs, in support of the work of the Asia Pacific Forum for National Human Rights Institutions.

Jannie Lasimbang, Commissioner on the Malaysian National Human Rights Commission (SUHAKAM), said,

‘The Conference will contribute towards strengthening the work of National Human Rights Institutions and others in fulfilling human rights, particularly for indigenous communities, and those who are affected by the entry of business interests that do not recognise customary rights to land.’

An important new study being launched at the workshop is also expected to be a major talking point: *‘Divers Paths to Justice - Legal pluralism and the rights of indigenous peoples in Southeast Asia’* reveals that the majority of Southeast Asian countries already have plural legal systems and to some extent custom is recognised as a source of rights in the laws of a number of them through their constitutions and other laws. National and international courts have affirmed indigenous peoples’ customary rights in land. And all these countries have endorsed and ratified key international human rights laws and treaties. Thus the basis for securing indigenous peoples’ rights through a revalidation of customary law exists. The study makes clear that ‘legal pluralism’ is not an arcane field of analysis for academics but lies at the heart of indigenous peoples’ struggles for the recognition of their rights.

An expected outcome of the workshop will be a *Bali Declaration on Agribusiness and Human Rights in Southeast Asia* which will encourage governments and legislatures in the Southeast Asia region to ensure that they take urgent steps to reform national laws and

policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries' human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

Dr. Nirun Phithakwatchara, National Human Rights Commissioner of Thailand, said,

'In order to achieve the goal of social justice, it is critical that community rights be widely mainstreamed and deeply enrooted as a way forward towards the creation of politics firmly rooted in democracy.'

NOTES TO EDITORS

'Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform' Workshop is taking place at Hotel Santika Premiere Beach Resort Bali, Jalan Kartika Plaza, P.O. Box 1008, Tuban, Kuta – Bali, Indonesia. Tel. (62-361) 751267, Fax. (62-361) 751260, 761889. Two Press Conferences will be held on 28th November at 12–1pm, and on 1st December at 1-2pm, at the Hotel Santika Premiere Beach Resort Bali. For further details please contact Norman Jiwan, Mobile: +62 81315613536, E-Mail: norman@sawitwatch.or.id

Contact persons at the Workshop:

Nur Kholis, Komnas HAM. Mobile: +62 8127107577. E-mail: nurkholis70@yahoo.com

Norman Jiwan, Mobile: +62 81315613536, E-Mail: norman@sawitwatch.or.id

Andrie Djailani, Mobile: +62 81281923923. E-mail: andri.djailani@komnasham.go.id

Workshop Organising Bodies:

- Indonesian National Commission on Human Rights (Komnas HAM): Jl. Latuhjarhary No. 4B, Menteng, Jakarta Pusat 10310. Tel: +62 213925230, ext. 208. Fax: +62 213925227.

*Human Rights and Agribusiness:
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and Legal Reform*

- SawitWatch: Taman Bogor Baru Blok C1 No 10, Kel Tegalega, Kec Bogor Tengah, Indonesia, Tel/fax: +62 251 8311841, E-mail: info@sawitwatch.or.id Website: www.sawitwatch.or.id
- Forest Peoples Programme: 1c Fossey Business Centre, Stratford Road, Moreton-in-Marsh, England, GL56 9NQ Tel: + 44 1608 652893, Fax: + 44 1608 652878, E-mail: marcus@forestpeoples.org Website: www.forestpeoples.org

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Asia Indigenous Peoples Pact (AIPP): 108, Moo 5, T. Sanpranate, A. Sansai, Chiang Mai, 50210. Thailand. Tel: +66 (0)53 380 168, Fax: +66 (0)53 380752. E-Mail: aippmail@aippnet.org Website: <http://www.aippnet.org>

Forest Peoples Programme: 1c Fossey Business Centre, Stratford Road, Moreton-in-Marsh, GL56 9NQ, England. Tel: + 44 1608 652893, Fax: +44 1608 652878. E-mail: marcus@forestpeoples.org, sophie@forestpeoples.org Website: www.forestpeoples.org

SawitWatch: Taman Bogor Baru Blok C1 No 10, Kel Tegalega, Kec Bogor Tengah, Indonesia. Tel/fax: +62 251 8311841, E-mail: info@sawitwatch.or.id Website: www.sawitwatch.or.id

RECOFTC - The Center for People and Forests: P.O.Box 1111, Kasetsart University, Bangkok 10903, Thailand. Tel: +66 (0)2 940 5700, Email: prabha.chandran@recoftc.org Website: www.recoftc.org

With support from the Rights and Resources Initiative: 1238 Wisconsin Avenue NW, Suite 300, Washington, DC 20007, USA. Tel: +1 202 4703900. Email: info@rightsandresources.org Website: www.rightsandresources.org

ANNEX IV: List of Participants

Indonesia	Abdon Nababan	AMAN
Thailand	Bernice Aquino	Asian Indigenous Peoples Pact (AIPP)
Cambodia	Chor Chanthya	Cambodian Center for Human Rights (CCHR)
Cambodia	Seng Sreypheap	Cambodian Center for Human Rights (CCHR) Chairperson of National Human Rights Commission
Thailand	Amara Pongsapich	of Thailand Community Legal Education Center (CLEC)
Cambodia	Seng Maly	Community Legal Education Center (CLEC)
Cambodia	Ny Sophorneary	consultant
Thailand	Jonas Dallinger	Epistema
Indonesia	Mumu Muhajir	Epistema-HuMa
Indonesia	Andiko	FOKER LSM Papua
Indonesia	Septer Manufandu	Forest Peoples Programme (FPP)
UK	Marcus Colchester	Forest Peoples Programme (FPP)
France	Sophie Chao	Forest Peoples Programme (FPP)
UK	Fergus MacKay	Forest Peoples Programme (FPP)
Malaysia	Theiva Lingam	Friends of the Earth (FoE) Malaysia
Thailand	Prasert Trakansuphakorn	Indigenous Knowledge and Peoples (IKAP)
Thailand	Nutdanai Trakansuphakon	Indigenous Knowledge and Peoples (IKAP)

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and Legal Reform*

	Kittisak Rattanakrangsri	Indigenous Peoples' Foundation for Education and Environment (IPF)
Thailand	Nur Kholis	Komnas HAM
Indonesia	Sastra Manjani	Komnas HAM
Indonesia	Elvansuri	Komnas HAM
Indonesia	Andrie Djailani	Komnas HAM
Indonesia	Masduki Ahmad	Komnas HAM
Indonesia	Johan Efendi	Komnas HAM
Indonesia	Johana Nunik	Komnas HAM
Indonesia	Nanda Dwi	Komnas HAM
Indonesia	Adi Abdilah	Komnas HAM
Indonesia	Nining	Komnas HAM
Indonesia	Sri Nurfathya	Komnas HAM
Indonesia	Noer Fauzi	Lead facilitator
Indonesia	Rachman	
	Poowadol	National Human Rights Commission of Thailand
Thailand	Weerawedphisai	
Malaysia	Thomas Jalong	National Indigenous Forum
	Loretta Ann P. Rosales	Philippines National Human Rights Commission
Philippines	Jacqueline B. Veloria Mejia	Philippines National Human Rights Commission
Philippines		
Indonesia	Andi Muttaqien	Pilnet
		RECOFTC - The Center for People and Forests
Thailand	Tint Lwin Thuang	RECOFTC – The Center for People and Forests
Cambodia	Sokhannaro Hep	Samdhana Institute
Philippines	Jo Villanueva	
Indonesia	Nonette Royo	Samdhana Institute/facilitator
Indonesia	Edisutrisno	Sawit Watch
Indonesia	Elsa Susanti	Sawit Watch

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and Legal Reform*

Indonesia	Norman Jiwan	Sawit Watch
Indonesia	Intan Cinditiara	Sawit Watch
	Ratri	Sawit Watch
Indonesia	Kusumohartono	
	Vinna Saprina	Sawit Watch
Indonesia	Mulianti	
	Nurhanudin	Sawit Watch
Indonesia	Achmad	
Malaysia	Jannie Lasimbang	SUHAKAM
Malaysia	James Nayagam	SUHAKAM
Philippines	Jennifer Corpuz	TebTebba
	Nirun	Thailand National Human
Thailand	Phithakwatchara	Rights Commission
		Thailand National Human
Thailand	Ekachai Pinkaew	Rights Commission
	Sebastiao Dias	Timor Leste
Timor-Leste	Ximenes	Ombudsman/Provedor
		Timor-Leste Human Rights
Timor-Leste	Rosalina Pires	Officer
		United Nations Permanent
		Forum on Indigenous Issues
Bangladesh	Devasish Roy	(UNPFII)
		United Nations Special
	Oliver De Schutter	Rapporteur on the Right to
Belgium		Food
Malaysia	Ramy Bulan	University of Malaya
	Berry Nahdian	
Indonesia	Furqon	WALHI
Indonesia	Wayan Swardhana	WALHI
USA	Amity Doolittle	Yale University

ANNEX V: About the Partners

Komnas HAM (Indonesian National Human Rights Commission)

Komnas HAM is an independent institution at equal level with other State institutions and which hold the functions of carrying out research, education and information gathering and sharing, monitoring and mediation of human rights. Komnas HAM aims to develop conditions conducive to the implementation of human rights in accordance with Pancasila, the Charter of the United Nations and the Universal Declaration of Human Rights. Komnas HAM's mandate is to enhance the protection and implementation of human rights for the personal development and participation of all Indonesians in all dimensions of life as human beings. For more information please visit www.komnasham.go.id.

Forest Peoples Programme (FPP)

FPP works with forest peoples in South America, Africa, and Asia, to help them secure their rights, build up their own organisations and negotiate with governments and companies as to how economic development and conservation are best achieved on their lands. The vision of the organisation is that forests be owned and controlled by forest peoples in ways that ensure sustainable livelihoods, equity and well-being based on respect for their rights, knowledge, cultures and identities. FPP has also done extensive work in Southeast Asia on legal pluralism and the opportunities and challenges experienced by indigenous peoples and local communities as a result of plural legal regimes. In addition, FPP is also engaged in research, advocacy and fieldwork related to oil palm expansion in Southeast Asia and its socio-cultural, economic and environmental impacts. For more information please visit www.forestpeoples.org.

Sawit Watch

Sawit Watch was set up in 1998 and since then, has built a network of over 130 members and local contacts working with dozens of local communities in Sumatra, Kalimantan and Sulawesi. The mandate of Sawit Watch is to support local communities who have lost their forests and livelihoods due to large-scale oil palm expansion, and to support those in forestlands who continue to resist this development. Through this mandate, Sawit Watch works towards the conservation and restoration of Indonesia's forests and promoting the best deals possible for those communities who choose to live within oil palm plantations. In addition to community awareness raising activities, they are involved in assisting communities secure their land rights and sustain their traditional community (*adat*) laws. Sawit Watch also assists communities in developing or maintaining economically, socially and ecologically sustainable land and forest management. For more information please visit www.sawitwatch.or.id.

Samdhana Institute

The Samdhana Institute was formed by a group of individuals, activists, conservationists and development practitioners. The 64 Fellows of Samdhana Institute work towards building the capacity of local communities through coaching, mentoring, and strategy-building. The Samdhana Institute operates in two offices - the Regional Office based in Cagayan de Oro City, Philippines and the Indonesia Office based in Bogor, Indonesia. Samdhana funds communities and grassroots organisations to strengthen community-based natural resource management, build their institutions and leadership, and resolve environmental conflicts through mediation. For more information, please visit samdhana.org.

RECOFTC – The Center for People and Forests

RECOFTC occupies a unique space in the world of community forestry in Asia and the Pacific as the only international, not-for-profit organisation that specialises in capacity building and devolved forest management from the grassroots to the highest levels. Starting out as a learning organisation in 1987, the Center has actively supported the development of community forestry institutions, policies and programmes in the region. Over the years, RECOFTC's work has evolved through four thematic areas of engagement: expanding community forestry; people, forests and climate change; transforming conflict and securing local livelihoods. RECOFTC's approach is guided by principles of clear and strong rights, good governance and fair benefits for the millions of forest dependent people. RECOFTC pursues its goals through an active network of communities, partners, donors, NGOs and government institutions at the local and international levels. Their offices are in Thailand, Vietnam, Indonesia and Cambodia. For more information please visit www.recoftc.org.

Rights and Resources Initiative (RRI)

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organisations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally. The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalisation by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organisation based in Washington, D.C. For more information please visit www.rightsandresources.org.

ANNEX VI: About the Editors

Marcus Colchester



Marcus Colchester is English and received his doctorate in Social Anthropology from the University of Oxford. He is Director of the Forest Peoples Programme. Marcus has over 30 years' experience working with forest peoples in the humid tropics. His expertise is in indigenous peoples, social and political ecology, standard setting, human rights, environment, development land tenure, policy reform and advocacy, FPIC and conflict resolution. He has served on several committees of the Roundtable on Sustainable Palm Oil. Marcus has worked intensively on logging, plantations, palm oil, extractive industries, dams, colonisation and protected areas.

Sophie Marie Hélène Chao



Born in 1987, Sophie Chao is French and Chinese. She received her BA in Oriental Studies and her MSc in Social Anthropology from the University of Oxford. After working as a consultant at UNESCO, Sophie became Assistant to the Director of the Forest Peoples Programme in 2011. Her fieldwork, research and advocacy are on the oil palm sector and RSPO standards, international human rights jurisdiction, and agribusiness and human rights with a regional focus on Southeast Asia.

Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform

While the expansion of agribusiness can, under the right circumstances, provide skills, opportunities and improved livelihoods for individuals and communities, untransparent deals, exploitative working conditions, poor safety standards, forced displacement and tenurial insecurity can also severely undermine these communities' human rights. The growing role and impact of the corporate sector, both within countries and across borders, has placed the issues of business and human rights firmly on the agenda of the United Nations and regional human rights bodies.

This publication documents the proceedings of a four day conference on 'Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform' (Bali, 28th November – 1st December 2011), convened by the Indonesian Government's National Human Rights Commission (KOMNASHAM). This high level meeting brought together the heads of National Human Rights Commissions of the South East Asian region, notable academics, NGOs and indigenous peoples' organisations with the purpose of developing a regional standard on human rights and agribusiness development.

The *Bali Declaration on Human Rights and Agribusiness* adopted by acclamation at the end of the conference, reminds companies of their legal obligation to fulfil their responsibilities to respect human rights and calls on States to protect the rights of their citizens, including indigenous peoples, in the face of unprecedented pressure by agribusinesses. This joint statement of the Southeast Asian Human Rights Commissions, IPOs and NGOs calls on both States and businesses to recognise the rights of indigenous peoples and local communities in the face of large-scale agribusiness expansion, and oil palm in particular.

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