



INTERNATIONAL
LAND
COALITION

Synthesis Paper
Indigenous peoples'
rights to lands,
territories and
resources

The International Land Coalition (ILC) seeks to secure equitable access to land and resources for the rural poor through advocacy, knowledge management, networking, capacity building, and dialogue. Indigenous peoples comprise more than 370 million people worldwide. It is estimated that they constitute approximately 5 % of the world's population, but make up 15 % of the world's poor and about one-third of the world's 900 million extremely poor rural people (DESA, 2009: 21). Indigenous peoples have strong spiritual, cultural, social and economic relationship with their traditional lands, but their land rights are often the most precarious. Hence, indigenous peoples' issues are of central importance for ILC's mandate.

International framework and jurisprudence

Given the diversity of indigenous peoples, there is international consensus that a universal definition of indigenous peoples is neither necessary nor desirable. Instead, the recommended approach is to identify the peoples concerned in a given country context, based on a flexible combination of subjective and objective criteria, as follows:

- » Descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state boundaries.
- » They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.
- » They have social, cultural and economic conditions that distinguish them from other sections of the national community.
- » They have their status regulated wholly or partially by their own customs or traditions or by special laws or regulations.
- » They identify themselves as indigenous peoples.

These peoples are often known by national or local terms such as adivasis, aboriginals, hill tribes, hunter-gatherers, pastoralists etc., or simply by the name of the specific people (Quechuas, Aymaras, Maasai, San, Batwa etc).

In all parts of the world, there is growing recognition of the importance of protecting indigenous peoples' rights, as an integral element of the promotion of human rights, democracy, good governance, sustainable development and environmental protection. This global commitment was clearly expressed in 2007, when 144 governments voted in favor of the adoption of the UN Declaration on the Rights of Indigenous People (UNDRIP).

The UNDRIP, along with the complementary ILO Convention No. 169, define indigenous peoples' rights to lands, territories and resources under international law. Both instruments are based on the recognition of the particular significance and cultural and spiritual values that indigenous peoples attach to their lands and territories, which go far beyond the simple monetary or productive value. Further, both instruments stipulate that indigenous peoples have the right to determine the priorities and strategies for development and use of their lands, territories and resources. In general, indigenous peoples' rights to land,



This Synthesis Paper refers to a full ILC study, which is available upon request at info@landcoalition.org. The Paper will be presented at the ILC Global Land Forum in Guatemala in March 2013 and at the 12th Session of the UNPFII in May 2013, for further consultations, input and enrichment before finalization.

territories and resources must be understood in the broader context of these peoples' right to self-determination, as well as their rights to property, nondiscrimination, cultural integrity and development.

Key elements of indigenous peoples' rights to lands, territories and resources are:

- » **Rights to territories**, encompassing the total environments of the areas which they occupy or otherwise use, inclusive of natural resources, rivers, lakes and coasts.
- » **Rights to the natural resources** of their territories, including the right to own, use, develop and control these resources. As a basic principle, these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals. In cases where States retain ownership over mineral and sub-surface resources, Convention No. 169 (Article 15.2) stipulates that indigenous peoples have rights to consultation, participation in the benefits of resource exploitation as well as compensation for damages resulting from such exploitation.
- » **Rights to lands, territories and resources based on traditional occupation, ownership or use** meaning that it is *the traditional occupation and use which is the basis for establishing indigenous peoples' land rights, and not the eventual official recognition or registration of that ownership*¹.
- » **Collective rights** to lands, territories and resources as intrinsically linked to their collective rights to self-determination, non-discrimination, cultural integrity and development as distinct peoples.
- » **Right to not be removed from lands or territories**. If relocation is necessary, it should happen only with the **free, prior and informed consent** of the concerned people and with the right to return to traditional lands or territories as soon as the reason for relocation is no longer valid.

It is states' duty to ensure not only adequate recognition but also **effective protection** of indigenous peoples' land and resource rights. This will in most cases require a combined set of procedures and mechanisms, including identification, demarcation, titling or other legal recognition along with adequate access to justice and penalties for unauthorized intrusion. Further, States have a **duty to consult indigenous peoples in order to obtain their free, prior and informed consent**, prior to approval of any projects affecting their lands, territories or resources, particularly in the context of resource exploration and exploitation.

Beyond UNDRIP and ILO Convention No. 169, these rights are reflected and underpinned in other international and regional human rights instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of all forms of Racial Discrimination, ILO Convention No. 111 on discrimination in employment and occupation, the Convention on Biological Diversity, the American Convention on Human Rights and the African Charter on Human and Peoples Rights. All of these instruments have proved to be useful when indigenous peoples make use of international and regional human rights mechanisms to assert their rights to lands, territories and resources.

For example, the Inter-American Court of Human Rights has concluded that: 1) traditional possession of their lands entitles indigenous people to demand official recognition and registration of property title; 2) members of indigenous peoples who have unwillingly left


1 ILO, 2013: Handbook for ILO Tripartite Constituents: Understanding ILO Convention No. 169, 2013, International Labour Office, Geneva

their traditional lands, or lost possession thereof, maintain property rights thereto, and 3) members of indigenous peoples who have unwillingly lost possession of their lands are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights².

Likewise, in the ground-breaking Endorois case, the African Commission on Human and Peoples Rights affirmed the rights of the Endorois over their traditional lands, concluding that forced eviction of the Endorois from their ancestral lands interfered with their rights to religious freedom, property, culture, development and to freely dispose of wealth and natural resources³.

Regional challenges and opportunities

The situation of indigenous peoples varies greatly across regions and countries:

In **Africa**, only few countries have elaborated legislation or policies to protect indigenous peoples and *in particular laws concerning land and land-related issues, do not provide any specific recognition or protection of the livelihood and needs of indigenous populations*⁴. In general, the low-impact subsistence strategies of indigenous pastoralists and hunter-gatherer communities in Africa make the land and resources they have traditionally occupied and used appear available for other intensive use and make them particularly vulnerable to encroachment and dispossession⁵. For example, indigenous peoples' occupation of forests in the Congo Basin has rarely been recognized, which explains the fact that they rarely, if ever, have land titles.

The **Asia** region presents a mixed picture with some countries recognizing indigenous peoples as distinct collective rights-holders while others deny their mere existence. Across the board, indigenous peoples in Asia *face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression. Today these groups are among the most discriminated against, socially and economically marginalized, and politically subordinated parts of the societies of their respective countries*⁶. Further, traditional land use and livelihood practices, such as shifting cultivation or hunting and fishing, are criminalized in many countries and economic and commercial pressures on land and resources result in massive land grabbing.

Latin America is the region where most progress has been made with regards to constitutional and legal recognition of indigenous peoples' rights. This has paved the way for comprehensive programs to map, demarcate and title indigenous lands and territories. In some countries, the recognition of indigenous territories provides for a consolidation of indigenous governance- and resource management institutions and some countries have included the indigenous development concept of *'buen vivir'* (good living) in legislation and policies. However, in most countries, the main challenge is the actual implementation of progressive laws and policies, which explains the persistent patterns of exclusion, marginalization and poverty. In particular, implementation of the States' duty to consult is



2 Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, para. 128.

3 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, 276/3003 (4 February 2010).

4 Albert K. Barume: Land Rights of Indigenous Peoples in Africa, IWGIA, Copenhagen, 2010

5 Feiring & Stidsen: Indigenous Peoples and Climate Change in Africa: Traditional Knowledge and Adaptation Strategies. 2013

6 UN Doc. A/HRC/15/37/Add.1: 213

a major challenge, particularly in the context of natural resource exploitation, hydro-electric plants, establishment of national parks and other mega-projects.

Some of the key challenges shared across regions are:

- » Non-recognition of indigenous peoples as collective rights-holders
- » Continuing loss of lands, territories and resources due to commercial pressures, establishment of conservation areas and criminalization of indigenous peoples' traditional livelihood activities.
- » Non-implementation of constitutional, legislative and policy provisions concerning indigenous peoples' rights
- » Overlapping and contradictory laws and regulations, distortion of operational guidelines and excessive bureaucratic and administrative requirements for recognition of rights
- » Political repression, militarization, persecution and extra-judicial killings of indigenous land rights activists
- » Limited data and weak monitoring of indigenous peoples' access and control over lands, territories and resources.
- » Some of the opportunities are:
 - » Strong or emerging indigenous peoples organizations
 - » Progressive legislative and policy developments with possibilities for supporting implementation and scaling-up of good practices
 - » Increased jurisprudence of national courts as well as regional and international human rights mechanisms to guide implementation processes
 - » Soft law commitments of international financing institutions, UN agencies, bilateral donors and sectoral policies (e.g. in the context of REDD+), which provide leverage for advocacy and promotion of indigenous peoples' rights. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries comprise a specific section on 'indigenous peoples and other communities with customary tenure systems' and carry a potential for can promoting and advocating for indigenous peoples' rights, in line with UNDRIP and other international instruments.

Indigenous women's rights to lands and resources

Indigenous women have a close relationship with their land, and play a key role as primary food providers and custodians of language, culture and knowledge. When land is lost, or degrading, women's daily life is highly impacted; they are psychologically as well as socially under huge pressure, and their dignity and status in society is threatened.

In many indigenous cultures, men and women have distinct and complementary roles and responsibilities. In cases where, for example, customary inheritance rights prevent women from owning lands, UNDRIP specifically states that all rights under the Declaration apply equally to men and women. Hence, as a general principle, indigenous customs cannot be justified if these are against women's rights. Both the collective and individual aspects of indigenous peoples' rights have to be taken into account in a mutually

supportive way. Indigenous women largely see themselves as part of communities, and their well-being as strongly inter-linked with the overall situation of their communities. Thus, while indigenous women are particularly vulnerable to loss or degradation of community land, and also often subjects to gender-based discrimination, the solution to securing their land rights is not necessarily promotion of individual land rights for women. Rather than seeing indigenous women's rights as purely individual and contradictory to collective rights, the complementarity between individual and collective rights – as complementary equality provisions- needs to be highlighted and promoted. Hence, equality should be respected, also in decision-making within customary institutions, and indigenous women should take the lead in necessary changes. There are two factors that make this approach feasible: 1) the flexibility and adaptability that often characterizes customary law, as customary practices change over time in interaction with other societal changes, and 2) the emergence of indigenous women's organizations all over the world

Recommendations for ILC engagement on indigenous issues

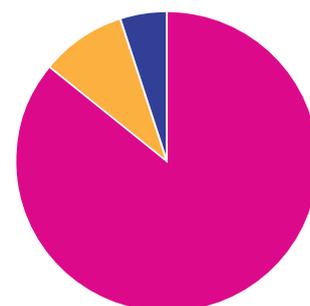
ILC is a unique network of 120 highly diverse members, working on a wide range of land-related issues at global, regional and country levels. This multi-faceted and multi-level action positions ILC in a dynamic manner, and adds strength to the advocacy of individual members.

A detailed analysis of ILC's work, shows a considerable overlap between indigenous issues and thematic priorities such as the commons, rangelands, collective land governance, commercial pressures on lands etc. Further, much of ILC's work with pastoralists in Africa, peasants in the Andean region and ethnic communities in Asia address or involve indigenous peoples. Indigenous peoples are mentioned significantly in the ILC Strategic Framework 2011-2015, but the ILC has not yet identified indigenous peoples as a specific category of collective rights-holders and has not applied a systematic focus on indigenous issues. Therefore, it is not possible to directly correlate ILC knowledge outcomes and experiences with the promotion of indigenous peoples' rights.

At the national and regional levels, many ILC members are working to promote indigenous peoples' rights and this is well-reflected in Regional Declarations and National Engagement Strategies. A recent membership survey shows overwhelming support and interest for the ILC to work more directly on these issues. This leads to three major conclusions:

- » There is, within the ILC, an underutilized potential for supporting indigenous peoples' land and resource rights more systematically, and building alliances between indigenous peoples and others working on land issues;
- » There is a risk of going below international standards if ILC does not apply a more systematic and explicit approach to indigenous peoples' rights to lands, territories and resources.

Membership Survey:
is it relevant for ILC to
have a specific focus on
indigenous issues?



86% yes

9%no response

5% no

- » The adoption of a more systematic approach to indigenous peoples' rights to lands, territories and resources will strengthen the members' individual engagement on indigenous issues and strengthen ILC as a network.

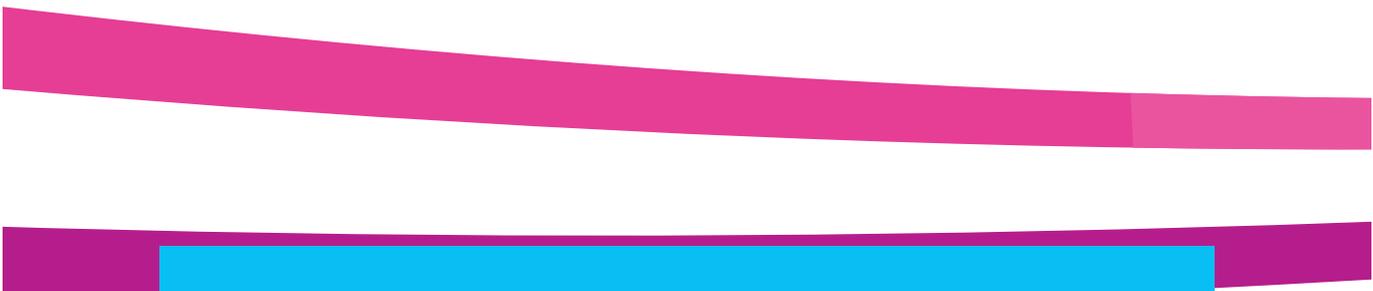
Consequently, the following three overall recommendations are put forward for the consideration of ILC:

- » Adopt a specific policy commitment, recognizing indigenous people' rights to lands, territories and resources as enshrined in the UN Declaration on the Rights of Indigenous Peoples
- » Mainstream the support for indigenous peoples within ILC programmatic areas
- » Develop a targeted thematic initiative in support of indigenous peoples' rights to land, territories and resources

This approach will constitute 1) a guarantee against undermining indigenous peoples' rights 2) a precondition for advocating and promoting indigenous peoples' rights, and 3) a starting point for building alliances and network . Further, it will capitalize on the work done by ILC members already engaged with indigenous peoples and add value to this work as a global action network; ensure coherence and maximize use and impact of ILC interventions, knowledge products and experiences with regards to indigenous peoples; position ILC as a strategic and visible actor for promotion of indigenous peoples' rights; address existing gaps in terms of knowledge, capacity and implementation, and; avoid duplication and ensure complementarity and synergies with other actors;

Key operational steps will be to:

- » Include an overall principle on indigenous peoples' rights under the ILC Land governance principles, to be discussed and adopted at the Global Land Forum 2013.
- » Establish a thematic working group within ILC network for knowledge and experience-sharing, planning and monitoring of mainstreaming efforts
- » Identify areas of relevance and entry points under each of the four strategic objectives of ILC Strategic Framework 2011-15 (country-level interventions; regional and international processes; monitoring and land –related knowledge, and; strengthening of ILC)
- » Elaborate a thematic initiative in consultation with indigenous peoples' representative institutions and the ILC thematic group. Such an initiative could comprise components concerning research and documentation; capacity-building; monitoring; pilot country-level interventions, and; establishment of consultative mechanisms with indigenous peoples.



Our Mission

A global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing, and capacity building.

Our Vision

Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity, and inclusion.



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