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THE RIGHT TO LAND

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The right to land covers a variety of different entitlements and legal issues in different contexts. This guide focuses specifically on indigenous peoples' rights to land, and the legal frameworks designed to protect them.

Introduction

The historical link between indigenous peoples and their traditional lands goes towards defining their identity, preserving their cultural integrity, and their right to decide how they live their lives as a community. Often their subsistence will depend on their local ecology and natural resources inherent in the land. A severance from that environment can threaten their physical integrity and dignity as human beings. This guide examines some of the international principles and legal instruments that relate to indigenous peoples and their right to land.

Legislation/Guidance

(a) An Overview of the Legal Instruments

Broadly speaking the legal framework dealing with indigenous peoples' rights to land includes international human rights instruments, regional conventions, and national legislation.

The starting point is the principle that indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual attachment of the community to its traditional lands.

The International Labour Organisation's Convention 169 on Indigenous and Tribal Peoples ('ILO Convention')¹ and the U.N. Declaration on the Rights of Indigenous Peoples ('DRIP')² codify the principle. The practical application of this principle mainly concerns the lands indigenous peoples currently possess, or of which they have been recently deprived. For example, Article 26(2) DRIP focuses on the right to own, use, develop and control the lands, territories and resources that indigenous peoples possess by reasons of traditional ownership or other traditional occupation or use.

Both the ILO Convention and the DRIP assume that the national legal system is the fundamental framework within which those rights will be given effect. International standards are linked to national practice, by allowing the national context to provide for

¹ Article 13 ILO Convention

² Article 25 DRIP

specific protections based on the particular circumstance prevailing within that jurisdiction.

Therefore, whilst the international framework for the protection of indigenous land rights is a fundamental starting point, one must always look to national law and practice to see how a particular right is dealt with.

(b) Rights over land currently in the possession of indigenous peoples

International instruments generally place an obligation upon the state to delimit, demarcate and title, as property of the relevant indigenous peoples, the land to which they are entitled. A further obligation is to have in place an accompanying process relating to the settlement of disputes arising from competing claims to the land. The ramifications of rights over land that are currently in the possession of indigenous peoples is far from clear. Land demarcation is an accepted and frequently used practice but the DRIP is silent on the point. The ILO Convention however, at article 14(2) sets out an obligation to take necessary steps to identify the lands at issue.

Entitlements to traditionally occupied land and historic claims

Whilst the ILO Convention makes provision for entitlement to the land which indigenous peoples traditionally occupy, it does not directly deal with lands they previously occupied, but were deprived of. Article 14(3) leaves it to national legislation to settle any disputes over past dispossessions which may arise within a particular state.

Furthermore, whilst article 27 and 28 DRIP establish, respectively, the right to an open internal process to address indigenous claims and the right to redress, there is no real consideration of the legal basis to those claims or the mechanisms to deal with the implications for non-indigenous parties.

The central issue here is the right of peoples to regain the lands of which the group was deprived of in the past against its will. In this respect, again, physical and spiritual ties with the land will be seen as the relevant fact, triggering legal claims. Where either the original land or appropriate alternative lands are unavailable, financial compensation should be provided. The appropriateness of alternative lands or monetary compensation must reflect the interest and needs of the people as well as the (non-monetary) significance they attach to the land. This latter significance can present obvious difficulties in quantifying, and is not an easy category of compensation to accommodate within the law.

Natural resources

The tension here is between the right of indigenous peoples to take advantage of the wealth of their land, and the state's role in ownership and development of some of the world's most lucrative commodities. The balance to be struck is between indigenous peoples' property rights and the wider interests of a state to capture and control revenue. In this regard, some human rights instruments expressly view indigenous property rights

as subject to restriction.³ However, where a state's development of natural resources results in a restriction of indigenous property rights, there should be robust safeguards in place. The affected peoples are entitled to effective participation in the process, benefit-sharing and environmental and social impact assessments. International legal instruments are however largely silent on the practical application of this principle.

A further unresolved question is the circumstances in which indigenous peoples will have the right of veto over development projects. Whilst the ILO Convention does not address this matter, article 26(2) DRIP does call on states to consult with the communities in order to obtain prior consent to the investment activities.

(c) Is the law enforceable?

The ILO Convention is an international treaty, and as such is part of the wider network of international law obligations pertaining to states. Like other treaties, its direct and immediate application is limited to those states that have signed and ratified the text of the convention. However, it is important to note that whilst the terms of the ILO Convention will be binding on a state within the framework of international law upon ratification, the extent to which its content will be applied and enforceable domestically within each ratifying state will still depend on national constitutional arrangements and domestic legislation.

The DRIP is by contrast a declaration of the UN General Assembly. UN Declarations do not in their own right constitute legally binding instruments under international law. Although they are not considered legal instruments in the conventional sense, UN Declarations remain a powerful statement of principle reflecting international norms. Their persuasive force is evident in that they sometimes form part of a court's judicial reasoning in different jurisdictions across the world.

Both the ILO Convention and the DRIP are part of the protective framework that international law is increasingly constructing around the rights of indigenous peoples, and their terms and principles should be invoked wherever possible in conjunction with the applicable domestic law and procedure in any action to realise the rights they are intended to ensure.

(d) Potential remedies/actions under the law

The enforceability and/or persuasive relevance of the ILO Convention and the DRIP will differ substantially between jurisdictions and different legal traditions. Any applicant for relief intending to rely on the provisions of the ILO Convention should first ensure that the national jurisdiction within which they intend to bring their action has ratified the treaty. Detailed consideration should then be given to how ratified international treaties are

³ Article 21 American Convention of Human Rights (ACHR)

incorporated within that particular jurisdiction and its applicable laws, and how the law might be used to found a claim. The particular remedies and/or claims that indigenous groups in pursuit of their rights might contemplate could include;

- (i) Interim injunctions/relief: The ILO Convention makes no express provision for immediate, injunctive relief, that is to say an action to put an immediate, albeit temporary halt to any potentially destructive interference with the land itself. National legislation would have to be considered.
- (ii) Claims against international entities threatening local land rights: The ILO Convention is intended to create obligations upon states to safeguard the rights of their own indigenous communities in so far as they fall within their purview, and is not drafted to address a state's responsibility to ensure that private actors subject to their jurisdiction respect the rights of indigenous peoples internationally and extraterritorially. Where an indigenous group contemplates bringing a claim against a foreign multinational in its country of incorporation, a considered take on national law and any relevant provisions, such as human rights, corporate governance and corporate liability both civil and criminal, would have to be undertaken in order to assess how that claim might be grounded in domestic law. It is worth noting that the ILO Convention and the DRIP may have some persuasive force in this regard and due consideration should be given to how their provisions might be cited.

Development implications of legislation and/or guidance

Effective and secure control over land and its productive resources is critical to the ability of rural indigenous communities to sustain a livelihood and control their own economic welfare. In a very real sense, a lack of access to land is strongly related to issues of poverty and entrenched inequality.

International standards on the rights of indigenous peoples have influenced the work of human rights institutions and other international bodies including financial institutions such as the World Bank, who finance development projects. World Bank funded projects must comply with strict sustainable development criteria, which take into account their impact on indigenous peoples. Furthermore, at the national level, indigenous rights' complaints are being processed before national and regional courts, contributing to domestic jurisprudence, international law and civil society awareness.

As land becomes increasingly scarce, recent years have seen an increase in demand for land in the developing world from agribusiness, investment funds and government agencies interested in acquiring long-term rights over large areas of farmland. This trend has been driven by concerns over food and energy security and private sector expectations of increasing returns from agriculture. Whilst some see this trend as an opportunity for development for indigenous peoples in developing countries, others have raised concern about the loss of local rights to land, water and other natural resources and

threats to local food security. The principles set out in international instruments can assist in ensuring rights of indigenous peoples are protected.

Practical challenges for NGOs

The challenges for NGOs tackling such issues is to understand and appreciate, first, the expansive concept of indigenous property rights, and second, how such rights are affected in the relevant region. A historical context is imperative in understanding the present-day threats.

NGOs must aim to identify applicable instruments and what stage/process is relevant to the country/region. For example the particular national context may involve:

- Rights over land that have been taken from indigenous peoples;
- Protecting lands in the possession of indigenous peoples;
- Meaningful consultation where land is to be used and/or developed; or
- Overseeing the process of regaining land rights or the provision of monetary or non-monetary compensation.

NGOs and international development agencies can:

- Support policy reform and encourage debate in line with international standards;
- Support the efforts of indigenous peoples to secure existing rights over land and pursue restitution where appropriate;
- Share knowledge and information about international experience and law;
- Review lending conditions of governmental development funds and contracts with private investors;
- Ensure international rules establish robust safeguards (which are backed by effective monitoring and enforcement);
- Monitor closely the trend of long-term leases and acquisitions by developed world entities in the developing world's agricultural sectors. Spread awareness and understanding of the implications of this phenomenon.

Conclusions

The above overview of particular issues relating to indigenous people's right to land illustrates the complexity of the issue. The right to land is an important and emotive issue. Not only do indigenous people live on, and make their living from the land, they maintain strong spiritual links and frame their identity around it. To attain sustainable development, there must be a careful and evolving balance of social, environmental and economic considerations. NGOs and other development agencies can play a significant contributing role by engaging with the host governments, private sector and civil society to ensure indigenous property rights are protected and respected.

Annex I:

A Summary of International Instruments relating to Indigenous Property Rights and the Right to Land

<i>International Instrument</i>	<i>Relevant articles</i>	<i>Summary</i>
UN Declaration on the Rights of Indigenous Peoples⁴	Articles 3-7, 8(2), 10, 11(2), 28	The Declaration sets out the collective and individual rights of indigenous peoples and emphasises their rights to maintain their culture, identity, and territories. It can be used as a framework for implementing other international human rights and environmental agreement such as the Convention on Biological Diversity, ⁵ United Nations Framework Convention on Climate Change (UNFCCC) ⁶ , and International Covenant on Economic, Social and Cultural rights (CESCR) ⁷ .
Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples⁸	Article XVIII	Article XVIII in particular relates to traditional forms of ownership and rights to land, territories and resources. The article recognises the right to legal recognition, inter alia, of indigenous lands which indigenous peoples have historically occupied or have historically had access to for their traditional activities and livelihood. This article also includes the right to restitution of lands that have been confiscated or otherwise occupied.
Council Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States	Article 5 and 6.	This resolution provides guidelines for the European Union in supporting indigenous peoples. It calls for the support of partnerships with indigenous peoples, especially in the management of natural resources. It also encourages enhancing the right to self-development.

⁴ (2007) A/RES/61/265

⁵ A copy of which can be found at the following link: <http://www.cbd.int/convention/text/>. The CBD entered into force on 29 December 1993. It has 3 main objectives: (1) The conservation of biological diversity, (2) The sustainable use of the components of biological diversity, and (3) The fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

⁶ <http://unfccc.int/2860.php>

⁷ <http://www2.ohchr.org/english/law/cescr.htm>

⁸ OEA/Ser.L./V/II.110 Doc.22 (1 March 2001); <http://www.cidh.oas.org/indigenas/indigenas.en.01/index.htm>

UN Convention to Combat Desertification ⁹	Articles 2, 3(a), and 17(c)	This convention seeks to combat desertification and mitigate the effects of drought in partnership with local communities and to build a spirit of international partnerships for the sustainable use of natural resources.
Vienna Declaration and Programme of Action ¹⁰	Article 31	This declaration recommended a permanent forum on indigenous issues within the UN framework. Article 31 calls on member states to ensure full and free participation of indigenous peoples in all aspects of society.
Convention on Biological Diversity ¹¹	Articles 8(j), 10(c), 26.3, 26.4, 26.6	This convention contains provisions for the preservation and maintenance of indigenous and local knowledge and lifestyles and for the protection of customary use of biological resources in accordance with traditional practices. There are also provisions for empowerment of communities through recognition of territories.
UN Framework Convention on Climate Change		This convention includes provisions recognising the effects of climate change on indigenous peoples living in highly variable environments. Indigenous peoples should be empowered to participate in FCCC activities.
Rio Declaration of Environment and Development and Agenda 21 ¹²		This declaration acknowledges the relationship between indigenous peoples and their lands. Self-management over resources and lands may be needed. States should recognise indigenous peoples' identity, culture, etc., and enable their participation in sustainable development.
International Labour Organisation Convention Concerning Indigenous and		The ILO Convention is the first convention to address the <i>sui generis</i> obligation to secure indigenous peoples' rights in lands and natural resources. Through broad

⁹ (1994) A/AC.241/27; A copy of which can be found at the following link:
<http://www.unccd.int/main.php>

¹⁰ (1993) A/Conf.157/24; A copy of which can be found at the following link:
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

¹¹ (1993) 1760 UNTS 79; 31 ILM 818

¹²(1992) A/CONF.151/26 (Vol. I) a copy of which can be found at the following link:
<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> ; See also UN Division for Sustainable Development: <http://www.un.org/esa/dsd/agenda21/>

Tribal Peoples in Independent Countries (ILO No. 169) ¹³		directives, it outlines member states' obligations in protecting the rights of indigenous peoples. Part II, articles 13-15 address protections for land territories. Article 14 recognises property and natural resource ownership in lands which indigenous people have traditionally occupied. Article 15 recognises indigenous peoples' ownership of interests in natural resources and requires states to protect these interests.
Convention on Rights of the Child ¹⁴	Articles 1-4	An article 1 to 4 contains regulations on the non-discrimination of children, protects the broadcasting of media to minority languages, protects the right to education, cultural identity and language. Children of indigenous original shall not be denied the right to their own culture.
Final Act of the Conference on Security and Cooperation in Europe/Helsinki Final Act/Helsinki Accords ¹⁵	Article 20(1), 21.	Covers third generation rights for individuals and peoples. Treaty. Article 20(1) guarantees the right to existence and the inalienable right to self determination. Article 21 protects the rights of people to their wealth and natural resources and prohibits dispossession without adequate compensation. This instrument also addresses the importance of people's dominion over property and natural resources in terms of the ability to develop, although it does not address the idea of environmental rights as a means of protecting cultural identity.
International Covenant on Civil and Political Rights ¹⁶	Article 1, 27.	The ICCPR is a treaty based convention enforcing the monitoring and review of convention obligations by states. Article 1 grants all people the right to self-determination and the freedom to dispose of their natural resources. Article 27 provides for collective rights and provides that a People may not be deprived from their own means of subsistence.

¹³ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> ; See generally the ILO website: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>

¹⁴ (1989) A/44/49; <http://www.unicef.org/crc/>

¹⁵ (1982) OAU Doc. CAB/LEG/67/3 rev.5

¹⁶ (1966) G.A. Res. 2200A (XXI) 21 U.N. GAOR Supp. (No. 16) , U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171; <http://www2.ohchr.org/english/law/ccpr.htm>

		Part IV empowers the Human Rights Committee (HRC) to monitor and ensure state compliance with the covenant. The ICCPR First Optional Protocol gives HRC the competence to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of state violation of the Covenant. However, general comments made by the HRC are not binding. It is an official interpretation of a norm which binds all parties to the ICCPR.
International Covenant on Economic, Social and Cultural Rights¹⁷		This covenant details the rights enumerated in the Universal Declaration on Human Rights and has provisions collective rights. It also addresses second generation rights, including the rights of a people to pursue their economic, social and cultural development. These secondary rights are closely associated with indigenous peoples' relationships with the environment.
Resolution on Permanent Sovereignty over Natural Resources¹⁸		This resolution, in particular article 4 – 6, reflects a formal recognition of the interconnectedness among a peoples' culture, its natural environment, and self-determination. States should recognise rights of people to sovereignty over natural resources as it affects their economic independence.
World Bank Operational Directive 4.20: Indigenous Peoples		This directive recognises that development can threaten indigenous peoples' cultural identity. The main objective of the directive is to ensure that indigenous peoples are not adversely affected by World Bank development projects. The Bank is directed to address indigenous peoples' issues based on their informed participation. The directive includes a provision that all World Bank development plans contain an assessment of the legal status of the indigenous peoples that might be impacted by the project and whether the legal system will actually protect them. Where a legal system is deemed weak, the provisions suggest that the Bank should work to

¹⁷ (1966) G.A. Res. 2200A (XXI) 21 U.N. GAOR Supp (No. 16) at 49 U.N. Doc. A/6316 993

¹⁸ (1973) G.A. Res. 1803 (XVII), U.N. doc. A/5217 (1962), 17 U.N. GAOR Supp. (No. 17) at 15.

		strengthen or establish legal recognition of the customary or traditional land tenure systems of indigenous peoples.
The African Charter on Human and Peoples' Rights		The African Charter on Human and Peoples' Rights (ACHPR) deals with the plight of indigenous communities in the region. The ACHPR set up a working group on Indigenous Populations/Communities in Africa in 2000, tasked with conducting a preliminary investigation in this matter. The resulting report confirmed the existence of indigenous communities in Africa, expressing their special attachment to and use of traditional land, as well as experience of subjugation, marginalisation and dispossession.