

# LAND RIGHTS OF INDIGENOUS PEOPLES IN SOUTH-EAST ASIA

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*address issues concerning indigenous land rights in the region, arguing that there is a clear gap between the existing situation and the relevant standards of the international human rights system. After a short overview of the international human rights framework currently binding South-East Asian states, the article analyses issues of indigenous land ownership and control by indigenous peoples over matters affecting their land rights. The article then discusses traditional economic activities, natural resources, indigenous environmental management and finally to issues of relocation and compensation. In each of the aforementioned areas, indigenous land rights are generally non-existent or very weak. Even on occasions when national legislation has recognised strong indigenous land rights, the lack of political motivation to properly enforce these rights impedes their full realisation. The article demonstrates that this inadequacy is inconsistent with international standards on the prohibition of discrimination, protection of minority cultures and more specifically on indigenous land rights, as are recognised in international instruments, interpreted by international bodies and transferred into national practices.]*

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## I INTRODUCTION

Recent reports suggest that indigenous peoples in South-East Asia face serious problems, some of which endanger their very survival in a rapidly changing environment.<sup>1</sup> Despite the gravity of the indigenous peoples' situation, indigenous rights in South-East Asia have attracted relatively little interest from the international legal community. Voices from Australia, New Zealand and North America have been more prominent within the transnational indigenous movement. Although their perspectives have given voice to needs that are similar to those of indigenous peoples in other regions, by virtue of their prominence

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<sup>1</sup> See, eg, Suhas Chakma, 'Behind the Bamboo Curtain: Racism in Asia' in Suhas Chakma and Marianne Jensen (eds), *Racism against Indigenous Peoples* (2001) 176, 180; Christian Ermi (ed), '...Vines That Won't Blind...' *Indigenous Peoples in Asia* (1996) 34-5; Minority Rights Group International (ed), *Forests and Indigenous Peoples of Asia* (1999); Diana Vinding et al (ed), *The Indigenous World 2002-2003* (2003) 8.

they have also muffled the voices of their South-East Asian counterparts. These voices do not pierce the global consciousness with the same force — few Asian groups have had the means to maintain active involvement in the international arena and to put their claims on the international agenda.

At the same time, South-East Asian states consistently abstain from participating in the international human rights fora and monitoring bodies that address indigenous rights issues. For instance, United Nations treaty-based bodies have repeatedly reprimanded South-East Asian states for not submitting the required monitoring reports.<sup>2</sup> Likewise, these states have not been vocal in UN debates on indigenous rights.<sup>3</sup> This reluctance to become more directly involved leads to the limited availability of credible information regarding indigenous peoples' rights, and more importantly, a lack of serious discussion with the states about the situation of indigenous groups in their territories.

This article attempts to shed some light on the situation of indigenous peoples in South-East Asia, namely Burma, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Taiwan, Thailand and Vietnam. Although the broad geographical focus of the article runs the risk of making some generalisations, research has shown that land rights disputes constitute a fundamental concern for all indigenous peoples in the region.

Projects implemented by transnational corporations currently pose the main threat to indigenous land rights and continuing survival on these lands. Developing states generally welcome international corporations and are willing to cooperate with them, even at the expense of the environment and local populations, because they view further involvement with these corporations as a means to advance their own country's economic development. In Asia, the negative effects of such projects are compounded by the complete lack of indigenous recognition and effective participation within such processes. Land use policies are designed to attract development projects and are frequently linked with the assimilation of indigenous communities into the general population.<sup>4</sup>

The article presents a short overview of the international legal protection of indigenous peoples in South-East Asia, which forms the basis of the subsequent analysis. The first part examines issues related to collective land ownership:

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<sup>2</sup> See, eg, Committee on the Elimination of Racial Discrimination ('CERD'), *Summary Record of the 1218<sup>th</sup> Meeting: Philippines*, UN Doc CERD/C/SR.1218 (1997); CERD, *Review of the Implementation of CERD: Lao People's Democratic Republic*, UN Doc A/51/18 (1996) [452]–[455]. See generally Inter-Committee Meeting of Human Rights Treaty Bodies, *Recent Reporting History of States Parties under the Principal International Human Rights Instruments*, UN Doc HRI/GEN/4/Rev.2 (2002) for the status of overdue reports from states parties. Cambodia, Indonesia, Laos, the Philippines and Vietnam each have reports overdue to the CERD.

<sup>3</sup> For example, at the 2001 UN Working Group on the Draft Declaration on Indigenous Peoples held in Geneva, Switzerland, no South-East Asian state took the floor to express their opinion on the draft declaration, although Indonesia, Malaysia, the Philippines, Thailand and Vietnam attended. See also Indigenous Peoples Center for Documentation, Research and Information ('DOCIP'), *Update 44/45* (May/June 2002) <[http://www.docip.org/anglais/update\\_en/up\\_en\\_44\\_45.html#oasa](http://www.docip.org/anglais/update_en/up_en_44_45.html#oasa)> at 1 October 2003; Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2002/98 (2002) [10]–[11].

<sup>4</sup> See UN Centre on Transnational Corporations, *Transnational Investments Report*, UN Doc E/CN.4/Sub.2/1994/40 (1994) [9].

recent changes in the legislation affecting indigenous land issues are an encouraging trend, and have largely followed the standards created by international law. The second part analyses the rights of indigenous peoples to be consulted over matters that affect their land rights. The third section discusses the obstacles indigenous peoples face in performing their traditional activities and using the natural resources of the lands they occupy. Here, issues relating to development and indigenous peoples will be elaborated upon. Finally, the article explores the response of international law to the practices of relocation of indigenous communities.

This article examines current documents of international law to compare the existing South-East Asian realities of indigenous peoples and their lands with international standards. Although these standards have not been wholly embraced by South-East Asian states, they nevertheless form the international legal framework for indigenous protection. It is hoped that the application of such standards to the situation of indigenous peoples of South-East Asia will lead to further positive steps towards improving their standard of living.

## II THE GENERAL FRAMEWORK

The only international instrument which is currently wholly dedicated to the protection of indigenous peoples, the International Labour Organisation's ('ILO') *Convention concerning Indigenous and Tribal Peoples in Independent Countries* has not been ratified by any South-East Asian state.<sup>5</sup> Even though the *Convention* does not bind South-East Asian states, it has served as an important political tool for the development of indigenous rights in the region. As an example, the *Convention* has been used as a model in the drafting of legislation in the region, such as the *Indigenous Peoples' Rights Act 1997* (Philippines)<sup>6</sup> and the new *Land Law 2001* (Cambodia).<sup>7</sup> The Laotian government has expressed interest in *ILO Convention 169* and has initiated a review concerning existing policies on indigenous peoples.<sup>8</sup> Given the interest of South-East Asian states in *ILO Convention 169* and its position as the sole current instrument on indigenous rights, this article compares the situation of South-East Asian indigenous peoples with current international law standards, as set out in the *Convention*.

South-East Asian states are still required to protect indigenous rights under obligations derived from the general human rights instruments to which they are signatories. Instruments containing provisions relevant to indigenous peoples

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<sup>5</sup> Adopted 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*ILO Convention 169*'). The *Convention* has been ratified by 17 countries, mostly in the European and South American region. Likewise, no South-East Asian state has signed the *ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted 26 June 1957, 328 UNTS 248 (entered into force 2 June 1959), which is no longer open to new signatories. Note that this *Convention* has been revised by *ILO Convention 169*.

<sup>6</sup> Republic Act No 8731 ('*Indigenous Peoples' Rights Act*').

<sup>7</sup> Royal Decree No NS/RKM/0801/14 ('*Land Law*').

<sup>8</sup> See ILO, *Recent Developments within the ILO concerning Indigenous and Tribal Peoples* (2001) 9, a report submitted to the UN Working Group on Indigenous Populations at Geneva, Switzerland in July 2001.

include the *International Covenant on Civil and Political Rights*,<sup>9</sup> the *International Covenant on Economic, Social and Cultural Rights*,<sup>10</sup> and the *International Convention for the Elimination of All Forms of Racial Discrimination*.<sup>11</sup> South-East Asian states are also obliged (albeit only politically) to abide by the standards set in the main UN minority instrument, the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.<sup>12</sup> Currently, it is widely accepted that indigenous peoples can use the protection provided by minority instruments without harming their claims as indigenous peoples — minority provisions have been used repeatedly by the UN Human Rights Committee ('HRC') to protect indigenous rights.<sup>13</sup>

Apart from human rights instruments, protection for indigenous land rights is also provided by recent instruments concerned with the environment and development, particularly those adopted at the 1992 UN Conference on Environment and Development ('UNCED') held in Rio de Janeiro, Brazil. These include the *Convention on Biological Diversity*,<sup>14</sup> the *Declaration on Environment and Development*<sup>15</sup> and *Agenda 21*.<sup>16</sup>

### III COLLECTIVE OWNERSHIP AND POSSESSION

Indigenous land ownership has not been secured in most parts of South-East Asia.<sup>17</sup> States in the region have generally reacted in three distinct ways to the concept of indigenous ownership: not recognising ownership by any individual, including indigenous persons; providing limited protection to indigenous land rights; and providing strong protection to indigenous land rights.

An illustrative example of the first category is Vietnam, where art 1 of the *Law on Land 1993* establishes that land is the property of the entire people and is subject to exclusive administration by the state. Nevertheless, a leasehold system which has been in operation since 1986 recognises the rights to inherit, transfer,

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<sup>9</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). The *ICCPR* has been ratified by Cambodia, Laos, the Philippines, Thailand and Vietnam.

<sup>10</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'). The *ICESCR* has been ratified by Cambodia, Laos, the Philippines, Thailand and Vietnam.

<sup>11</sup> Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*Racial Discrimination Convention*').

<sup>12</sup> GA Res 47/135, UN GAOR, 47<sup>th</sup> sess, 92<sup>nd</sup> plen mtg, Annex, UN Doc A/RES/47/135 (1993) ('*Declaration on Minorities*').

<sup>13</sup> See, eg, *Lovelace v Canada*, HRC, Communication No 24/1997, UN Doc CCPR/C/13/D/24/1977 (30 July 1981); *Lubicon Lake Band v Canada*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 May 1990); *Kitok v Sweden*, HRC, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (2 December 1985); *Ilmari Lämsmä v Finland*, HRC, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (26 October 1994); *Hopu v France*, HRC, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 July 1997).

<sup>14</sup> Opened for signature 5 June 1992, 1760 UNTS 79, (entered into force 29 December 1993) preamble, arts 8(j), 17(2), 18(4) ('*CBD*').

<sup>15</sup> UN Doc A/CONF.151/5/Rev.1 (1992).

<sup>16</sup> *Agenda 21* (1992) UN System-Wide Earthwatch <<http://earthwatch.unep.net/agenda21/contents.php>> at 1 October 2003.

<sup>17</sup> Minority Rights Group International, above n 1, 6.

sell, rent or sublet.<sup>18</sup> Accordingly, indigenous individuals can use, but not own the land.<sup>19</sup> Effectively, this system means that that indigenous peoples, as well as non-indigenous peoples, have no real ownership rights.

Where indigenous peoples are not blatantly singled out for discrimination, international law can offer limited assistance in claims for ownership. International instruments do not generally establish distinct standards on property rights; only a few, scattered provisions protect property. One such provision is art 17 of the *Universal Declaration of Human Rights*, which establishes the right of all people to own property, alone and collectively, and the right not to be arbitrarily deprived of one's property.<sup>20</sup> However, the *UDHR* does not offer a route for redress.

South-East Asian indigenous peoples could potentially use the *Convention on the Prevention and Punishment of the Crime of Genocide* to attempt to secure land rights.<sup>21</sup> The *Genocide Convention* specifies certain acts that fall within the definition of 'genocide', including the act of '[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part'.<sup>22</sup> Arguably, the prohibition on indigenous land ownership impacts critically upon the demographic and social situation of South-East Asian indigenous peoples, undermining their ability to survive. However, the *Genocide Convention* provides that 'genocide means any of the following acts committed with *intent to destroy*' a particular group.<sup>23</sup> It may be difficult to prove that restrictions on indigenous land rights directly intend to destroy indigenous groups. It is interesting to note that the Draft Declaration on the Rights of Indigenous Peoples in its current form provides that indigenous peoples have the right not to be subjected to genocide, which includes '[a]ny action which has the *aim or effect*', rather than the intent, of dispossessing them of their lands or resources, or depriving them of their identity.<sup>24</sup>

*ILO Convention 169* would prove strong legal ammunition for indigenous peoples, had South-East Asian states ratified it. Article 14 recognises 'the rights of ownership and possession of the peoples concerned over the lands that they traditionally occupy.' The provision establishes that land rights may be in the form of ownership or possession and special measures should be taken to safeguard the right of indigenous peoples to their traditional lands, including land which they do not occupy exclusively. Articles 13 and 14 recognise the collective aspects of the relationship of indigenous peoples with the land.

<sup>18</sup> CERD, *Summary Record of the First Part of the 1481<sup>st</sup> Meeting: China, Vietnam*, UN Doc CERD/C/SR.1481 (2001) [11].

<sup>19</sup> *Ibid.*

<sup>20</sup> GA Res 217A(III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN DOC A/RES/217A(III) (1948) ('*UDHR*').

<sup>21</sup> Opened for signature 9 December 1948, 78 UNTS 277 (entered in force 12 January 1951) ('*Genocide Convention*').

<sup>22</sup> *Ibid* art 2(c).

<sup>23</sup> *Ibid* art 2 (emphasis added).

<sup>24</sup> Commission on Human Rights, Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994) art 7(a)-(b) (emphasis added). On the question of possible genocide concerning violations of indigenous lands, see Martin Geer, 'Foreigners in Their Own Land: Cultural Land and Transnational Corporations — Emergent International Rights and Wrongs' (1998) 38 *Virginia Journal of International Law* 331, 359-64.

Nevertheless, whether the rights conferred constitute rights of ownership or possession will be different in each context.

In Thailand, for example, individual ownership is protected, although indigenous peoples may not always be afforded this protection in practice, due to legal restrictions and the lack of citizenship. Lack of collective ownership dilutes the control indigenous communities have over their lands. The population increase, the expansion of commercial farming and plantations, and the migration of lowland Thais into the northern provinces have made problems regarding indigenous land acute.<sup>25</sup> As the ILO has noted, when land held collectively by indigenous and tribal peoples is divided and assigned to third parties, there is a greater propensity for the exercise of indigenous rights to be undermined, generally leading to the partial or total loss of their land.<sup>26</sup>

Arguably, the failure to establish collective indigenous ownership regimes also contravenes art 27 of the *ICCPR*, which provides that states should not deny minorities the right to enjoy their own culture. In 1994, the HRC noted that

[w]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.<sup>27</sup>

The HRC has on numerous occasions included indigenous land rights within the indigenous right to a culture.<sup>28</sup> Since South-East Asian states have signed and ratified the *ICCPR*, the jurisprudence of the HRC provides important support for indigenous claims concerning collective land ownership. Even though the opinions of the HRC do not bind member states, they do offer an interpretation of the provisions of the *Covenant*.

Other South-East Asian states recognise limited usufructuary or possessory rights assigned to indigenous peoples, providing little protection for indigenous land rights. For example, collective land rights are recognised in Indonesia,

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<sup>25</sup> Marcus Colchester (ed), Forest Peoples Program, *A Survey of Indigenous Land Tenure: A Report for the Land Tenure Service of the Food and Agricultural Organisation* (2001) [63].

<sup>26</sup> See Committee of Experts on the Application of Conventions and Recommendations of the ILO ('ILO CEACR'), *Individual Observation concerning ILO Convention No 169, Indigenous and Tribal Peoples, 1989: Peru* (1999), [3]–[6], discussing ILO Governing Body, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Peru of the Indigenous and Tribal People's Convention, 1989 (No 169), Made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP) at the 273<sup>rd</sup> session*, ILO Doc GB.273/14/4 (November 1998).

<sup>27</sup> HRC, 'CCPR General Comment 23: The Rights of Minorities' (adopted 8 April 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) [7].

<sup>28</sup> See, eg, *Kitok v Sweden*, HRC, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (2 December 1985); *Lubicon Lake Band v Canada*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 May 1990); *Ilmari Lämsman v Finland*, HRC, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (26 October 1994); *Jouni Lämsman v Finland*, United Nations HRC, Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (28 August 1995). See also *General Comment 23*, above n 27, [7].

except in state forests. However, effective procedures to guarantee and protect these rights do not exist.<sup>29</sup> Land titles are given only to individuals and even then, the administrative procedures for securing land are deficient. Land ownership is subordinate to state interests. A right of possession applying to customary land is formally recognised, but may be unregistered for lands which overlap other rights and concessions.<sup>30</sup> According to a recent study, this right of possession has never been applied.<sup>31</sup> In state-owned forest lands there can be no proprietary right, whereas customary rights in these areas establish weak forms of usufruct, which are subordinate to the interests of concessionaires. Currently, some indigenous communities are reclaiming land that has been used by companies as forest concessions or other use rights as granted by the government.<sup>32</sup> In addition to this, however, there are a number of community forestry options which, while not recognising the customary rights to 'own' lands, do offer a measure of management authority to communities.

International law requires that indigenous peoples have rights that are equal to non-indigenous individuals. Article 5 of the *Racial Discrimination Convention* clearly establishes non-discrimination concerning 'the right to own property alone as well as in association with others'.<sup>33</sup> Moreover, the CERD's *General Recommendation XXIII* refers to indigenous peoples and encourages states to

recognize and protect the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>34</sup>

Unfortunately, few South-East Asian states have signed the *Racial Discrimination Convention*.<sup>35</sup> Even so, the right not to be discriminated against on the basis of race constitutes a peremptory norm of international law.<sup>36</sup> Therefore, all states must follow a policy of non-discrimination, even where they are not parties to relevant instruments. Hence, when it comes to land rights, South-East Asian states must ensure that indigenous peoples are treated in the same manner as non-indigenous peoples.

In this respect, problems occur with the legal concept of 'native customary rights' which exist in states such as Malaysia. Malaysia consists of several states on the Malayan Peninsula and the two East Malaysian states of Sarawak and

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<sup>29</sup> Marcus Colchester et al, *The Application of FSC Principles 2 and 3 in Indonesia: Obstacles and Possibilities* (2003) [8] Indonesian Forum for the Environment <<http://www.walhi.or.id>> at 1 October 2003. See also Kallie Szczepanski, 'Land Policy and *Adat* Law in Indonesia's Forests' (2002) 11 *Pacific Rim Law and Policy Journal* 231, 240, which notes that while provisions in Indonesian land law recognise some traditional rights of indigenous peoples, they do not provide mechanisms for recognising and registering these rights.

<sup>30</sup> Colchester et al, *The Application of FSC Principles*, above n 29, [8].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Racial Discrimination Convention*, above n 11, art 5(d)(v).

<sup>34</sup> CERD, 'General Recommendation XXIII: Indigenous Peoples', (adopted 18 August 1997), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) [5].

<sup>35</sup> The *Racial Discrimination Convention* has been ratified by Cambodia, Indonesia, Laos, the Philippines, Thailand and Vietnam.

<sup>36</sup> Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997) 130.

Sabah in Borneo, with indigenous peoples living on the Peninsula and in the states in Borneo. They are subject to the differing laws of each state and also experience varying living conditions. In Peninsular Malaysia, the *Aboriginal Peoples Act 1954* does not establish the right of the Orang Asli people in Peninsular Malaysia to own the lands and reserves that they have traditionally occupied.<sup>37</sup> In Sabah and Sarawak, the law recognises that indigenous peoples have native customary rights over the lands they have been occupying and cultivating.<sup>38</sup> Although such rights do not amount to ownership, they form the basis for a flexible arrangement that gives a degree of control to indigenous peoples over their lands.

Even though the recognition of these rights in Sabah and Sarawak is a positive step, it continues the historic patterns of discrimination against indigenous peoples. In the hierarchy of rights to land, native customary rights are still considered to be inferior to the rights of the state; hence, the state can restrict or extinguish them. This unequal treatment of indigenous and non-indigenous land rights contradicts the *Racial Discrimination Convention*. In *Minority Schools in Albania (Advisory Opinion)*,<sup>39</sup> the Permanent Court of International Justice noted that '[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.<sup>40</sup>

In addition, the native customary rights of indigenous peoples recognised in Sabah and Sarawak conflict with the coexisting open system of land ownership, according to which any individual, whether a Sabah resident or foreigner, is able to apply for, and own, land.<sup>41</sup> The dual system for indigenous and non-indigenous land rights leads to confusion, which prompts further abuse of indigenous rights. For example, although the Sabah *Land Ordinance 1930* gives priority to applicants claiming customary rights,<sup>42</sup> in practice their applications are often ignored in favour of applications for the same land made by government authorities, cooperatives, international companies and individual

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<sup>37</sup> Act 134, ss 7–8, 13, which provide that lands exclusively occupied by indigenous peoples are to be declared aboriginal areas or reserves and compulsorily acquired by the state. Indigenous peoples only have a right of occupation in relation to these lands. Ownership rights are not mentioned in the legislation.

<sup>38</sup> See *Land Ordinance 1930* (Sabah, Malaysia) s 15; *Land Code 1958* (Sarawak, Malaysia) s 5. For a discussion of the issues facing indigenous peoples generally, see also 'Malaysia, Plantations: Development Threatens the Survival of Indigenous Dayak Communities in Sarawak' [1998] 4 *Indigenous Affairs* 16; Sabihah Osman, 'Globalization and Democratization: The Response of the Indigenous Peoples of Sarawak' (2000) 21 *Third World Quarterly* 977. For a discussion of how indigenous peoples' associations have contributed to a recognition of their needs and rights by the government, especially in regard to emerging development projects, see Tan Chee-Beng, 'Indigenous People, the State and Ethnogenesis: A Study of the Communal Associations of the "Dayak" Communities in Sarawak, Malaysia' (1997) 28 *Journal of Southeast Asian Studies* 263, 284.

<sup>39</sup> [1935] PCIJ (ser A/B) No 64, 1.

<sup>40</sup> *Ibid* 19. The ICJ affirmed this principle in *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 304–5.

<sup>41</sup> Jannie Lasimbang, 'Juridical Rights of Indigenous Peoples and Their Relations to the State and Non-Indigenous Peoples: The Case of Sabah' in Christian Erni (ed), '*...Vines That Won't Blind...*' *Indigenous Peoples in Asia* (1996) 109, 111.

<sup>42</sup> Section 13 provides that upon receipt of any application for land, the Collector of Land Revenue must publish a notice calling upon any claimants to native customary rights to make a statement of claim on the land.



entrepreneurs.<sup>43</sup> Furthermore, native customary rights do not establish collective ownership and ignore the fallow period of five to ten years, which is intrinsic to the shifting cultivation system.<sup>44</sup>

However, several recent Malaysian cases have confirmed that indigenous land rights may prevail over other interests. *Adong bin Kuwau v Kerajaan Negeri Johor* was a landmark case for indigenous rights in Malaysia.<sup>45</sup> In that case the High Court of Malaysia held that the Jakun tribe had a proprietary 'right to continue to live on their lands as their forefathers had lived'.<sup>46</sup> In other words, the Court held that Malaysian indigenous peoples have the right to live on their lands and cannot be excluded from the protection afforded to them by the common law.<sup>47</sup> In a subsequent case, *Nor Anak Nyawai v Borneo Pulp Plantation*,<sup>48</sup> the High Court confirmed that 'the common law respects the pre-existing rights under native law or custom'<sup>49</sup> and held that 'the plaintiffs are entitled to exercise native customary rights over the disputed area' to the exclusion of all others.<sup>50</sup> Moreover, the Court recognised that native customary rights existed long before any modern-day legislation, and thus legislation is only relevant in determining to what extent customary rights have been extinguished.<sup>51</sup> As such, the High Court held that native customary rights of the Ibans to their settlement, farmland and primary forest had not been abolished by any legislation and that, therefore, these rights still exist today.<sup>52</sup>

In April 2002, the High Court held in *Sagong bin Tasi v Kerajaan Negeri Selango* that the Temuans constituted an 'aboriginal society' whose land rights had been violated.<sup>53</sup> Here, the state evicted the Temuans from the lands on which they resided and then offered them only minimal compensation. The Temuans

<sup>43</sup> Lasimbang, above n 41, 109, 111–12.

<sup>44</sup> In this particular form of agriculture, an area of land is cleared and burned, and then cultivated for approximately five years. The area is then allowed to go fallow or uncultivated. A fresh area is chosen and the process is repeated. This practice is also known as 'slash-and-burn' agriculture.

<sup>45</sup> [1997] 1 Malayan Law Journal 418.

<sup>46</sup> Ibid 419. Mokhtar Sidin JCA cited with approval the Canadian case of *Calder v A-G (British Columbia)* [1973] SCR 313, [26] (Judson J). *Adong bin Kuwau v Kerajaan Negeri Johor* was confirmed in *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 Malayan Law Journal 158.

<sup>47</sup> For further analysis of the case see Ramy Bulan, 'Native Title as a Proprietary Right under the Constitution in Peninsula Malaysia: A Step in the Right Direction?' (2001) 9 *Asia Pacific Law Review* 83.

<sup>48</sup> [2001] 6 Malayan Law Journal 241.

<sup>49</sup> Ibid 245. Note that the court acknowledged that such rights may be diminished by 'clear and unambiguous words in a legislation': *ibid*.

<sup>50</sup> Ibid 299.

<sup>51</sup> Ibid 299.

<sup>52</sup> The main proof that the indigenous community brought before the High Court was a mapping of the area they claimed to be theirs. In October 2001, the Sarawak legislature enacted the *Land Surveyors Ordinance 2001* (Sarawak, Malaysia) to criminalise community mapping. The *Ordinance* makes it illegal for anyone except licensed surveyors to make maps which delimit the boundaries of any land (including state land) and land held under native customary rights. The *Ordinance* has been denounced by local NGOs who have called for the restrictive sections to be repealed: see, eg, Meena Raman, Jok Jau and Harlan Thompson (Sahabat Alam Malaysia), 'New Law Will Make Community Mapping Illegal' (Press Release, 31 October 2001) <<http://www.earthisland.org/borneo/news/articles/011013article.html>> at 1 October 2003.

<sup>53</sup> [2002] 2 Malayan Law Journal 591, 605.

were found to have ‘an interest in land and not merely an [sic] usufructuary right’, and added that their right is acquired automatically by law, is not based in any document of title, does not require conduct by any other person to complete it, and does not depend upon a state declaration.<sup>54</sup> The native title and interest in the land can only be extinguished by clear and plain legislation or by an executive act with appropriate compensation.<sup>55</sup> These judicial successes have been very positive steps. The Malaysian example suggests that weak protection of indigenous land rights by legislation can be strengthened if followed by clear and assertive case law on the matter.

Problems with the realisation of provisions favouring indigenous land rights also exist in states that provide strong protection for indigenous land rights. In 1997, the Philippines introduced the *Indigenous Peoples’ Rights Act*, which was based on *ILO Convention 169*. The *Indigenous Peoples’ Rights Act* provides indigenous peoples with a wide range of rights over ancestral domains: indigenous peoples have the right to ownership over their lands and resources, the right to occupy and develop their lands, the right to oppose displacement, and the right to regulate the entry of migrants.<sup>56</sup> In 1998, the constitutionality of the *Indigenous Peoples’ Rights Act* was brought into question.<sup>57</sup> The basis of the claim was that the legislation contradicted the Regalian doctrine under which the state has full ownership of the public domain and natural resources,<sup>58</sup> and that the granting of indigenous rights on those territories amounted to an unlawful deprivation of the state’s ownership over these lands.<sup>59</sup> In an extraordinary decision, the case was dismissed owing to the rules of civil procedure, due to an even split in the court, which was maintained after a redeliberation.<sup>60</sup> The main argument in favour of the constitutionality of the *Indigenous Peoples’ Rights Act* was that indigenous land rights predated the acquisition of sovereignty by Spain and were private property rights that were never a part of the state’s public domain; therefore, those lands were not affected by the Regalian doctrine.<sup>61</sup>

The *Indigenous Peoples’ Rights Act* has been a major breakthrough for the protection of indigenous peoples. Nevertheless, it has also been the subject of criticism. Apart from minor problems related to its language, which is one alien to indigenous communities,<sup>62</sup> the main criticism lies in its poor implementation. Despite its adoption in 1997, the government has yet to allocate funds for its

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<sup>54</sup> Ibid 611.

<sup>55</sup> Ibid.

<sup>56</sup> *Indigenous Peoples’ Rights Act*, Republic Act No 8731, s 7.

<sup>57</sup> *Cruz v Secretary of the Environment and Natural Resources*, GR No 135385 (Unreported, Supreme Court of the Philippines, Davide CJ, Bellosillo, Melo, Quisumbing, Pardo, Buena, Gonzaga-Reyes, Ynares-Santiago and de Leon JJ, 6 December 2000) (‘*Cruz*’).

<sup>58</sup> *Constitution of Republic of the Philippines 1987* art XII(2).

<sup>59</sup> *Cruz*, GR No 135385 (Unreported, Supreme Court of the Philippines, Davide CJ, Bellosillo, Melo, Quisumbing, Pardo, Buena, Gonzaga-Reyes, Ynares-Santiago and de Leon JJ, 6 December 2000).

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> See Dario Novellino, ‘The Ominous Switch: From Indigenous Forest Management to Conservation — The Case of the Batak on Palawan Island, the Philippines’ in Marcus Colchester and Christian Erni (eds), *Indigenous Peoples and Protected Areas in South and Southeast Asia* (1999) 250, 274–5, which notes that definitions and terms used in the legislation do not have equivalent words in the indigenous languages, nor do concepts concerning land correspond with indigenous peoples’ own ways of regulating land use.

operation, and subsequent policies have contradicted the *Act* altogether.<sup>63</sup> It is necessary to adopt a comprehensive plan for its implementation, with allocated funds and mechanisms to review and monitor the existing system.

Similar problems exist in relation to the implementation of the Cambodian *Land Law*, though it is another example of positive changes in the region. After defining lands of indigenous communities as lands where indigenous communities have established their residences and carry out traditional agriculture, as well as lands reserved ‘for the shifting of cultivation which is required by the agricultural methods [indigenous peoples] practice and which are recognized by the administrative authorities’,<sup>64</sup> the law provides a wide range of rights.

Following the spirit of *ILO Convention 169*, art 26 of the Cambodian *Land Law* proclaims that ownership of indigenous lands ‘is granted by the State to the indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owner’.<sup>65</sup> The recognition of collective ownership is a very significant move forwards, even though the law allows for a possible transfer of part of the indigenous land to an individual.

The Cambodian *Land Law* also provides for the demarcation of indigenous lands ‘according to the factual situation as asserted by the communities in accordance with their neighbours and as prescribed by procedures in [the national laws]’.<sup>66</sup> Demarcation is encouraged by international law: art 14(2) of *ILO Convention 169* urges governments to ‘take steps as necessary to identify the lands which the peoples concerned traditionally occupy’. Further, the importance of demarcation has also been noted by the Inter-American Commission on Human Rights in its *Report on Brazil*<sup>67</sup> and the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*.<sup>68</sup> In addition, the Cambodian *Land Law* recognises the indigenous dependency on shifting cultivation<sup>69</sup> and addresses crucial issues of land tenure.<sup>70</sup> The legislation also puts a stop to the arbitrary invasion by private companies of indigenous lands: ‘[n]o authority outside the community may acquire any rights to immovable properties belonging to an indigenous community’.<sup>71</sup>

<sup>63</sup> Rodolfo Stavenhagen, Special Rapporteur, UN Commission on Human Rights: Mission to the Philippines, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc E/CN.4/2003/90/Add.3 (2003) [12]–[25].

<sup>64</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 25.

<sup>65</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 26.

<sup>66</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 25.

<sup>67</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Brazil*, OAS Doc OAE/Ser.L/V/II.97 (29 September 1997) ch VI, [82].

<sup>68</sup> (2001) 79 Inter-Am Ct HR (ser C) (‘*Awes Tingni*’). For a general discussion of the case see Patrick Macklem and Ed Morgan, ‘Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awes Tingni v Republic of Nicaragua*’ (2000) 22 *Human Rights Quarterly* 569.

<sup>69</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 25.

<sup>70</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 23.

<sup>71</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 28.

Nevertheless, the law has certain shortcomings, the most important of which is its paternalistic tone. Indigenous rights are ‘granted’ rather than ‘recognised’;<sup>72</sup> individual ownership is established for the purposes of facilitating the ‘social evolution of members of indigenous communities and in order to allow such members to freely leave the group or to be relieved from its constraints’.<sup>73</sup> The law seems to assume the eventual ‘development’ or integration of indigenous peoples, upon which special land rights, such as collective rights, covered in the law, may no longer be applicable. Also, indigenous control over their lands is restricted: ‘the community does not have the right to dispose any collective ownership that is State public property to any person or group’.<sup>74</sup> Moreover, indigenous rights to management can be restricted depending on the general laws of the state, national interests or a national emergency.<sup>75</sup>

National interest in the form of the state’s economic development is widely used to restrict indigenous land ownership. The effects of development projects on South-East Asian indigenous peoples will be discussed below. It suffices to note that such projects often result in the loss of land due to logging, mining and other exploitative activities, or public infrastructure programs pursued by the national government, such as the construction of dams and roads.

#### IV CONSULTATION AND PARTICIPATION

A right to negotiate and participate in decision-making is of paramount importance to indigenous peoples, since it is linked to fundamental principles of law, which include democracy, constitutionalism, the rule of law and the protection of sub-national groups.<sup>76</sup> Indigenous participation is especially important in South-East Asia to assist in reducing the negative effects of development projects.<sup>77</sup> However, states consider it an obstacle to their plans and refuse to implement procedures that would allow for such participation. Aggressive development is often followed by militarisation, in an attempt to exclude any opportunity indigenous peoples may have to make their views heard about the future of their lands.<sup>78</sup> In South-East Asia, the intense resistance from indigenous communities towards projects proposed by transnational corporations, or even those of international organisations, often results in armed conflict, displacement and further rights violations.<sup>79</sup>

In Sarawak, Malaysia, an area with one of the highest rates of logging in the world, indigenous peoples seldom enjoy the massive wealth accompanying exportation; instead they suffer from the destruction of their homes and

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<sup>72</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 26.

<sup>73</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 26.

<sup>74</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 26.

<sup>75</sup> *Land Law*, Royal Decree No NS/RKM/0801/14, art 26. The *Law on Environmental Protection and Natural Resource Management 1996* (Cambodia) could be used to justify restrictions on indigenous rights.

<sup>76</sup> See *Reference Re Secession of Québec* [1998] 2 SCR 217, [90]–[91].

<sup>77</sup> See UN Centre on Transnational Corporations, above n 4, [17]–[26].

<sup>78</sup> See Diana Vinding et al, above n 1, 237. An example of this is the Cordillera region in the Philippines in the early 1990s, an area that is rich in natural resources.

<sup>79</sup> See UN Centre on Transnational Corporations, above n 4, [12].

livelihoods.<sup>80</sup> When they protest, they are detained without trial and harassed by the police.<sup>81</sup> The construction of the Bakun hydro-electric power plant in Sarawak is estimated to generate Malaysia's most expensive electricity, mainly by flooding many kilometres of land. This is where indigenous peoples live and it provides an important source of livelihood to them, as it is rich in biodiversity and home to many endangered species. The decision to construct the dam was made without the consultation or participation of the indigenous community in the region, even though the dam will displace more than 10 000 indigenous people.<sup>82</sup>

Elsewhere in Malaysia, indigenous peoples' rights to consultation are also ignored. In Sabah, the government has reserved 12 per cent of the land exclusively for plantations. Although s 6 of the *Forest Enactment 1968 [No 2]* (Sabah, Malaysia) provides that notices must be posted where reserves are gazetted to ensure that objections can be filed and heard, this procedure is rarely followed.<sup>83</sup> Moreover, the government dismisses any claims indigenous communities have to these lands when it reserves them for plantations without prior consultation, even though consultation is required by the Sabah *Land Ordinance*.<sup>84</sup> In Peninsular Malaysia, the Orang Asli are also unable to participate in matters that affect their lands.<sup>85</sup>

In the neighbouring Philippines, indigenous opinions concerning development plans are also disregarded, even though the *Indigenous Peoples' Rights Act* requires indigenous peoples' 'free and prior informed consent' on projects affecting them.<sup>86</sup> This requirement is violated with impunity.<sup>87</sup> Although the *Act* allows for the issue of certificates that prove ancestral land claims or domain claims, if indigenous peoples have not secured such certificates, they are automatically excluded from the provisions of 'free and prior informed consent'.<sup>88</sup> This omission is used as a convenient way to disregard indigenous opinions regarding development plans. In the Cordillera central mountain range, the *Electric Power Industry Reform Act 2001* set the foundations for the construction of four large dams.<sup>89</sup> This and other development projects continue to ignore the negative reactions of indigenous peoples. The *National Integrated Protected Areas System Act 1992* and the *Mining Act 1995* refer to the need to

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<sup>80</sup> Minority Rights Group International, *World Directory of Minorities* (2<sup>nd</sup> ed, 1997) 631.

<sup>81</sup> Anderson Mutang Urud, Sarawak Peoples Campaign, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 25 July 2001; UN, 'Commission on Human Rights Concludes Debate on Indigenous Issues, Takes Up Report of Subcommission on Protection of Human Rights' (Press Release, 14 April 2000). See generally Sarawak Peoples' Campaign <<http://www.vcn.bc.ca/spc/>> at 1 October 2003.

<sup>82</sup> Mutang Urud, above n 81.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Land Ordinance 1930* (Sabah, Malaysia) s 13. See also Chakma, above n 1, 192.

<sup>85</sup> See, eg, Save Our Sungai Selangor <<http://www.sos-selangor.org/index.htm>> at 1 October 2003.

<sup>86</sup> See, eg, *Indigenous Peoples' Rights Act*, Republic Act No 8731, s 35.

<sup>87</sup> Joan Carling, Cordillera Peoples Alliance, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 27 July 2001).

<sup>88</sup> *Ibid.*

<sup>89</sup> Republic Act No 9136 (Philippines).

involve indigenous peoples in the processes of implementation,<sup>90</sup> but these requirements have not been applied in practice.<sup>91</sup>

In Indonesia, indigenous participation in land issues is also limited. A system of village administration imposed in 1979, which deprives communities of representative institutions, continues today despite having been formally abolished in 1999.<sup>92</sup> Consequently, indigenous peoples have no representative institutions with legal personality and cannot sign contracts with forest management companies or pursue actions in the courts on behalf of community members. Concessionaires commonly retain elements of State security services to resolve disputes and enforce their management regimes. Customary rights were further restricted by the *Basic Forestry Law 41 of 1999*, which did not recognise indigenous rights to free and informed consent regarding logging and plantation operations on indigenous lands.<sup>93</sup> However, wide-reaching reforms are under way and recent local laws provide for the possibility of a measure of self-governance by customary institutions.<sup>94</sup>

International law establishes the right of every citizen to take part in the conduct of public affairs on the basis of equality and in circumstances in which persons 'are able to develop and express their identities as members of different communities within larger societies'.<sup>95</sup> Although groups do not have an unconditional right to choose the modalities of their participation in the conduct of public affairs,<sup>96</sup> in General Comment 23 the HRC emphasised the importance of *effective* participation of members of minorities in decisions that affect them.<sup>97</sup> Effective participation is also encouraged in minority instruments, such as the *Declaration on Minorities*.<sup>98</sup>

A state's denial of the ability of indigenous participation in this sense is also a violation of art 5(c) of the *Racial Discrimination Convention*.

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<sup>90</sup> *National Integrated Protected Areas System Act 1992*, Republic Act No 7686 (Philippines) s 13; *Mining Act 1995*, Republic Act No 7942 (Philippines) ss 4, 16.

<sup>91</sup> See Human Rights Watch, *The Philippines: Human Rights and Forest Management in the 1990s* (1996), ch V. See also Survival International, *Mountains of Gold: The Mining Threat to Tribal Peoples in the Philippines* (1996) 4. For the destruction caused by the enactment of certain legislation, see Victoria Tauli-Corpuz, 'The Resistance of the Indigenous Peoples in Asia against Racism and Racial Discrimination' [2001] 1 *Indigenous Affairs* 43, 46.

<sup>92</sup> See *Local Administration Law 5 of 1979* (Indonesia), which was repealed by the *Regional Autonomy Act 22 of 1999* (Indonesia). See also Colchester et al, *The Application of FSC Principles*, above n 29, 178.

<sup>93</sup> Colchester et al, *The Application of FSC Principles*, above n 29, 10, 150. See also Asian Development Bank, *Indigenous Peoples/Ethnic Minorities and Poverty Reduction: Indonesia* (June 2002) 17.

<sup>94</sup> Colchester et al, *The Application of FSC Principles*, above n 29, 150; Szczepanski, above n 29, 245–6.

<sup>95</sup> ICCPR, above n 9, arts 25–7.

<sup>96</sup> *Mikmaq Tribal Society v Canada*, HRC, Communication No 205/1980, UN Doc CCPR/C/OP/1 (29 July 1984).

<sup>97</sup> See HRC, 'General Comment 23', above n 27, [7].

<sup>98</sup> Article 2(3). At the European level, see Commission on Security and Cooperation in Europe ('CSCE'), *Helsinki Decisions* (Helsinki, Finland, 10 July 1992) VI(29) <<http://www.osce.org/docs/english/1990-1999/summits/hels92e.htm>> at 1 October 2003, where the participating states agreed that 'CSCE commitments regarding human rights and fundamental freedoms apply fully and without discrimination' to persons belonging to indigenous populations. A High Commissioner on National Minorities and Council of Europe was also established: at II. See also the *Framework Convention for National Minorities*, opened for signature 1 February 1995, ETS 157 (entered into force 1 February 1998).

In *General Recommendation XXIII*, the CERD stressed the importance of ensuring that ‘members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent’.<sup>99</sup> The CERD called on states to ‘recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources’.<sup>100</sup> ‘Control’ in these circumstances would include consultation and negotiation.<sup>101</sup> The CERD has also repeatedly expressed its concern about the lack of effective indigenous participation in the formulation of Australia’s *Native Title Amendment Act 1998* (Cth).<sup>102</sup> In its *Concluding Observations* on Australia’s report, the Committee reiterated in 2000

its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5(c) of the *Convention* and *General Recommendation XXIII* of the Committee, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples.<sup>103</sup>

*ILO Convention 169* requires governments to consult indigenous populations ‘through appropriate procedures and in particular through their representative institutions’<sup>104</sup> regarding matters that affect them. It also recognises the right of indigenous peoples to decide upon their own priorities for development, which includes development affecting their lands.<sup>105</sup> The Draft Declaration on the Rights of Indigenous Peoples further emphasises indigenous rights to participation and consultation.<sup>106</sup>

The Inter-American system has also stressed the importance of consultation with, and participation of, indigenous people in matters that affect their lands in *Awes Tingni*. In 1998, the Inter-American Commission on Human Rights found that Nicaragua had violated the rights of the Awes Tingni to property, by granting a concession to a company to carry out road construction work and logging without the consent of the Awes Tingni community.<sup>107</sup> The subsequent failure by the government to resolve the situation led to a decision by the Inter-American Court of Human Rights in 2001, which confirmed the existence of the indigenous land rights in question, including the right of participation in matters affecting land rights and the requirement of the consultation with the Awes Tigni

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<sup>99</sup> ‘General Recommendation XXIII’, above n 34, [4].

<sup>100</sup> *Ibid* [5].

<sup>101</sup> *Ibid*.

<sup>102</sup> See, eg, CERD, *Decisions Adopted by the Committee at Its 53<sup>rd</sup> Session: Decision 1 on Australia*, UN Doc A/53/18 (1998) [22]; CERD, *Decisions Adopted by the Committee at Its 54<sup>th</sup> Session: Decision 2 on Australia*, UN Doc A/54/18 (1999) [21]; CERD, *Decisions Adopted by the Committee at Its 55<sup>th</sup> Session: Decision 2 on Australia*, UN Doc A/54/18 (1999) [23].

<sup>103</sup> CERD, *Concluding Observations by the CERD: Australia*, UN Doc CERD/C/304/Add.101 (2000) [9]. See also CERD, *Concluding Observations by the CERD: Botswana*, UN Doc A/57/18 (2002) [304].

<sup>104</sup> *ILO Convention 169*, above n 5, art 6(1)(a).

<sup>105</sup> *Ibid* art 7(1).

<sup>106</sup> See especially Draft Declaration on the Rights of Indigenous Peoples, above n 24, arts 19–20, 23.

<sup>107</sup> See *Mayagna (Sumo) Awes Tingni Community v Nicaragua (Preliminary Objections)* (2000) 66 Inter-Am Ct HR (ser C) [22].

indigenous peoples.<sup>108</sup> Other international bodies that have commented favourably on indigenous participation in these decisions include the UN at the UNCED in Rio de Janeiro, 1992;<sup>109</sup> the European Community;<sup>110</sup> and several international agencies working in sectors such as hydropower, forestry and conservation.<sup>111</sup>

A number of international monetary organisations involved in projects in South-East Asia have been paying close attention to the recent effects of their policies on indigenous rights. After years of criticism, the World Bank revised its former policy towards certain tribal groups affected by development projects, to extend the definition of indigenous peoples to which the policy applied. The revised policy places particular emphasis on the right of indigenous peoples to participate in, and benefit from, development projects.<sup>112</sup> Similarly, the Asian Development Bank has adopted a policy to ensure that the welfare and interests of indigenous peoples are not adversely affected by the bank's operations and any assistance it provides to countries in the region.<sup>113</sup>

Consultation that is not in good faith or does not intend to address the concerns of the indigenous community falls below the existing standards.<sup>114</sup> The duty to consult entails more than mere information sharing, and can take several forms, including: discussions or meetings with local leaders, individuals, local organisations or communities; establishment of a local advisory board; indigenous membership on a protected area management board; informed involvement in the development of management plans; active participation in the development of management plans and local authorisation of the establishment of protected areas, management plans, policies, and regulations.<sup>115</sup> The duty may also include exchanges of information and opinions related to specific proposals, development and negotiation of consultation protocols, site visits to explain the nature of the proposals, and the undertaking of traditional use studies. Effective consultations would involve entire communities rather than special groups within the indigenous community. National policies concerning formal consultation

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<sup>108</sup> *Awat Tingni (Judgment)* (2001) 79 Inter-Am Ct HR (ser C) [164].

<sup>109</sup> UN System-Wide Earthwatch, *Agenda 21* (1992) ch 26 <<http://earthwatch.unep.net/agenda21/contents.php>> at 1 October 2003.

<sup>110</sup> European Community, *Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States*, Council Resolution No 13461, 2141<sup>st</sup> mtg, 30 November 1998.

<sup>111</sup> See, eg, International Tropical Timber Organization, *Guidelines for the Sustainable Management of Natural Tropical Forests* (1992); World Bank Operational Manual, *Operational Directive 4.20: Indigenous Peoples* (September 2001); World Conservation Union, World Commission on Protected Areas and World Wide Fund for Nature, *Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas* (1997) <<http://www.iucn.org/themes/pmns/indigenous/indigneousguidelinesiucn.html>> at 1 October 2003.

<sup>112</sup> See World Bank Operational Manual, *Operational Directive 4.20: Indigenous Peoples* (September 2001). The operational directive is currently under revision. Two documents have been drafted with the intention of replacing the current policy: World Bank, *Draft Operational Policies 4.10: Indigenous Peoples* (2001); World Bank, *Draft Bank Procedures 4.10: Indigenous Peoples* (2001). A guidebook for World Bank staff concerning the implementation of the policy towards indigenous peoples is also being prepared.

<sup>113</sup> Asian Development Bank, *Policy on Indigenous Peoples* (1998).

<sup>114</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [168] (Lamer CJ; Cory and Major JJ concurring).

<sup>115</sup> Stan Stevens (ed), *Conservation through Cultural Survival: Indigenous Peoples and Protected Areas* (1997) 274.



institutions and procedures for indigenous participation must demonstrate the flexibility and willingness to adjust to local cultural and political conditions.<sup>116</sup>

## V TRADITIONAL ACTIVITIES AND NATURAL RESOURCES

Current international law standards protect indigenous traditional activities. The HRC has proclaimed that a violation of the indigenous right to engage in traditional economic activities amounts to a violation of the rights of indigenous peoples to enjoy their culture.<sup>117</sup> Generally, while the regulation of a financial or economic activity is a matter for the state, the HRC has repeated that if the activity regulated is ‘an essential element in the culture of an ethnic community’,<sup>118</sup> the regulation may violate the *ICCPR*.<sup>119</sup> With regard to traditional activities such as hunting and fishing, the HRC has suggested that equal rights afforded to indigenous and non-indigenous persons may have adverse consequences on the traditional rights of the former.<sup>120</sup> Consequently, it recommended that customary rights of indigenous peoples be afforded full protection.<sup>121</sup> In 2000, the HRC repeated that

in many areas native title rights and interests remain unresolved [and] in order to secure the rights of its indigenous population under article 27 ... the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ... [S]ecuring continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, [are rights] that must be protected under article 27.<sup>122</sup>

Article 14(1) of *ILO Convention 169* follows this approach, urging states to take measures to safeguard indigenous peoples’ rights to use lands which they may not exclusively occupy, but to which they have traditionally had access for their subsistence and traditional activities. Particular reference in the provision is made to the situation of nomadic peoples and shifting cultivators. The Draft Declaration on the Rights of Indigenous Peoples includes even wider protection of indigenous rights to traditional activities.<sup>123</sup>

The above standards are widely ignored in South-East Asia. Instead, indigenous peoples currently face severe restrictions in the exercise of their traditional activities, mainly because of the exploitation of rich natural resources by the state and transnational corporations. South-East Asian states have repeatedly stressed the value of economic development as a priority over human rights. For example, in 2002, in reply to concerns expressed by the HRC, a Vietnamese delegate stated ‘[t]he human rights obligations under the [*ICCPR*

<sup>116</sup> Ibid 174–5.

<sup>117</sup> *Lubicon Lake Band v Canada*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) [32.2].

<sup>118</sup> *Kitok v Sweden*, HRC, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (1985) [9.2].

<sup>119</sup> See *ICCPR*, above n 9, art 27.

<sup>120</sup> HRC, *Concluding Observations of the Human Rights Committee: Sweden*, UN Doc CCPR/C/Add.58 (1995) [18].

<sup>121</sup> Ibid [26].

<sup>122</sup> HRC, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000) [508]–[510].

<sup>123</sup> Draft Declaration on the Rights of Indigenous Peoples, above n 24, arts 26, 30.

are] universal, but they [exist] alongside the collective right to self-determination and the right to determine a country's process of development'.<sup>124</sup>

Recent observations by the HRC concerning Vietnam confirmed that agricultural activities by the Montagnards indigenous peoples in Vietnam, were being constrained.<sup>125</sup> Similar observations had previously been made with regard to indigenous peoples in Cambodia.<sup>126</sup> The perfunctory attitude towards indigenous traditional activities is not restricted to these two South-East Asian states. In Thailand, since the *National Parks Act 1961* handed control over to the central Royal Forestry Department, the local struggle for control over traditional resources has been undermined by its characterisation as a struggle against the government.<sup>127</sup>

In the Philippines, according to s 56 of the *Indigenous Peoples' Rights Act*, existing property rights over land prevail over competing indigenous land claims or rights. Thus, leases for logging and mining continue to exist even on recognised indigenous lands.<sup>128</sup> Other laws also restrict the traditional rights of indigenous peoples. The *National Integrated Protected Areas System Act 1992* legitimises the turning of indigenous lands into national parks and reserves for the sake of ecotourism.<sup>129</sup> The traditional activities of indigenous peoples in the area, such as roaming the forest and harvesting products to sell in the lowlands, are now regarded as illegal activities. The *Mining Act 1995* (Phillipines)<sup>130</sup> was introduced following pressure from the World Bank and various seminars by the UN Development Program. The *Act* liberalised mineral exploitation in areas in which mining activity was previously prohibited and provided attractive incentives for international enterprises. Since the *Mining Act* was passed, foreign investors have expressed intense interest in mining projects. Indigenous peoples, together with local communities and churches, are strongly opposed to the *Mining Act*, because it leads to the loss of agricultural lands and water sources as well as environmental degradation and pollution.

In Indonesia, indigenous communities are not entitled to reject the imposition of logging or other forms of state-sanctioned land use on their territory, even though such activities have catastrophic effects on their lives.<sup>131</sup> For example, Kalimantan, the Indonesian-controlled territory of the island of Borneo, represents one of the most important sources of tropical hardwood in the world with businesses and transmigrants dominating the timber, mining and gas industries. This has resulted in the relocation of indigenous peoples into the

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<sup>124</sup> HRC, *Summary Record of the 2020<sup>th</sup> Meeting: Viet Nam*, UN Doc CCPR/C/SR.2020 (2002) [6].

<sup>125</sup> HRC, *Concluding Observations of the Human Rights Committee: Viet Nam*, UN Doc CCPR/CO/75/VNM (2002) [19].

<sup>126</sup> HRC, *Concluding Observations of the Human Rights Committee: Cambodia*, UN Doc CCPR/C/79/Add.108 (1999) [19].

<sup>127</sup> Diana Vinding et al, above n 1, 258.

<sup>128</sup> Novellino, above n 62, 278.

<sup>129</sup> Republic Act No 7686 (Philippines). See, eg, s 4, which defines 'protected landscapes/seascapes' as 'areas of national significance ... providing opportunities for public enjoyment through recreation and tourism within the normal lifestyle and economic activity of these areas'.

<sup>130</sup> Republic Act No 7942.

<sup>131</sup> Diana Vinding et al, above n 1, 248–9; Colchester et al, *The Application of FSC Principles*, above n 29, 135.

mountains of Borneo. Despite a ban on the export of raw logs and the introduction of a National Forestry Action program, logging has continued in Kalimantan as well as across Indonesia. Consequently, land disputes among tribal peoples, the state and private logging interests have become frequent and intense.<sup>132</sup>

In Cambodia, after a specific expression of concern by the CERD in 1998 about Cambodian highland peoples and the violations of their rights by logging and industrial concessions,<sup>133</sup> some measures have been taken to protect indigenous land rights. In a resolution concerning the situation of human rights in Cambodia,<sup>134</sup> the UN General Assembly welcomed the measures taken by the government to eliminate illicit logging that 'has seriously threatened full enjoyment of economic, social and cultural rights by many Cambodians, including indigenous people'.<sup>135</sup> In April 2001, Cambodia ordered a temporary suspension of the felling of all trees in forest concessions from which people collect resin because of the lack of a sustainable development management plan.<sup>136</sup> Also, in 2002, the newly established Department of Ethnic Minorities' Development began to address threats to indigenous lands and forests from commercial plantations, logging and immigration, and a draft policy on indigenous peoples has been revived.<sup>137</sup> However, problems continue to exist. Recently, fears have been raised with respect to the negative impacts of the Yali Falls Dam in Vietnam on the resources and traditional activities of indigenous communities in Cambodia, including unnatural surges and dramatic fluctuations in the river's water level, leading to the loss of fishing equipment and the drowning of humans and animals.<sup>138</sup>

In the past, both Vietnam and Laos have insisted on policies that eradicate all traditional indigenous forms.<sup>139</sup> Although Laos has scarcely changed over the last few decades, there have been recent attempts at economic development. Much of the state's resources are in areas inhabited by indigenous peoples and there is speculation that these people will suffer the same damage to their lands and environment as those faced by their neighbours.<sup>140</sup>

Across South-East Asia, and in other parts of the world, transnational corporations are at liberty to extract natural resources in areas populated by indigenous peoples through methods that would never be permitted under laws in their own countries.<sup>141</sup> Natural resources in the areas where indigenous peoples live suffer severe damage from large scale mining operations, the construction of

<sup>132</sup> Gerard Clarke, 'From Ethnocide to Ethnodevelopment? Ethnic Minorities and Indigenous Peoples in Southeast Asia' (2001) 22 *Third World Quarterly* 413, 424–5.

<sup>133</sup> CERD, *Concluding Observations of the CERD: Cambodia*, UN Doc CERD/C/304/Add.54 (1998) [13].

<sup>134</sup> *Situation of Human Rights in Cambodia*, GA Res 55/95, UN GAOR, 55<sup>th</sup> sess, 81<sup>st</sup> plen mtg, Agenda Item 114(b), UN DOC A/RES/55/95 (2001) [2].

<sup>135</sup> *Ibid* [28]. See also Commission on Human Rights, *Situation of Human Rights in Cambodia*, UN Doc E/CN.4/RES/2000/79 (2000) [23].

<sup>136</sup> Anti-Racism Information Centre, *Report on Cambodia* (2002) 1.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Ibid* 2.

<sup>139</sup> Michael Bengwayan, Minority Rights Group International, *Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia* (2003) 9.

<sup>140</sup> Minority Rights Group International, above n 80, 627.

<sup>141</sup> See Geer, above n 24, 335–6.

large hydroelectric dams, oil and natural gas extraction, deforestation, over-fishing and the conversion of land to industrial plantations for export crops or agribusinesses (the last of these, to add to which, use toxic chemical inputs and undertake field trials of genetically-modified seeds).

Even though there are few studies on the impact of modern forestry practices on indigenous peoples,<sup>142</sup> anthropologists insist that logging, the associated transition towards agriculture and the increase in infectious diseases, cause a considerable increase in mortality and significantly affects the health of indigenous peoples in the region.<sup>143</sup> In Sarawak, for example, intensive logging of primary forests has caused a marked decline in game, due to the direct disturbance to habitats and increased hunting pressure along access roads and skid trails.<sup>144</sup> This has led to the decline in the Dayak peoples' protein intake.<sup>145</sup> Logging also increased soil erosion and the turbidity of rivers, causing fish stocks to crash, which had further negative effects on the Dayak peoples' diet.<sup>146</sup> Pools of standing waters lead to an increase in mosquito infestations, which coupled with the increased rates of migration, resulted in a high incidence of malaria and dengue fever.<sup>147</sup> In addition, the increase in prostitution and exploitative relationships in logging camps and nearby towns has led to sexual infections.<sup>148</sup> Development projects have other particularly negative consequences on indigenous women: working opportunities are lower and women whose husbands work in logging or plantations lose control over their lands. Development projects also have negative effects on indigenous men: men working in such projects are usually employed in low-paid, short-term, arduous and dangerous occupations, and like their non-indigenous colleagues, will as a result be exposed to a high risk of accidents at work.<sup>149</sup> In general, these projects create a dependency upon forest authorities which fosters the development of detrimental and abusive relationships between indigenous people and officials, shifting the power away from indigenous peoples to a political or industry elite that operates in the region.<sup>150</sup>

The issue of whether indigenous peoples can claim rights over the natural resources of lands they occupy remains unresolved in international law. The use of natural resources continues to be one of the most controversial issues in international law, mainly because of the pivotal economic repercussions that

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<sup>142</sup> Marcus Colchester, 'Forest Industries, Indigenous Peoples and Human Rights' (Paper presented at a workshop on 'Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights', Geneva, Switzerland, 5–7 December 2001) 14.

<sup>143</sup> John Early and Thomas Headland, *Population Dynamics of a Philippine Rain Forest People: The San Ildefonso Agta* (1998) 42–3, 101–4.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> World Rainforest Movement and Forests Monitor, *High Stakes: The Need to Control Transnational Logging Companies — A Malaysian Case Study* (1998) pt III <<http://www.forestsmoitor.org/reports/highstakes/title.htm>> at 1 October 2003.

<sup>148</sup> Colchester, 'Forest Industries and Indigenous Peoples', above n 142, 14.

<sup>149</sup> For example, in 2001, 40 timber industry workers were killed and more than a further 1000 injured: see 'Fatality Rate in Timber Industry Alarming', *Sarawak Tribune* (Kuching, Malaysia) 16 November 2001, cited in Colchester, 'Forest Industries and Indigenous Peoples', above n 142, 15.

<sup>150</sup> Colchester, 'Forest Industries and Indigenous Peoples', above n 142, 14.

arise. Common art 1(2) of the *ICCPR* and the *ICESCR* provides that '[a]ll peoples may ... freely dispose of their natural wealth and resources ... [i]n no case may a people be deprived of its own means of subsistence.'<sup>151</sup> Further, art 47 of the *ICCPR* gives peoples the right 'to enjoy and utilize fully and freely their natural wealth and resources'. International law does not define 'peoples'. Indigenous peoples insist that they fall within this category, but some states insist they do not.

Nevertheless, the HRC has indicated that indigenous peoples fall within the scope of arts 1(2) and 47. In its comments concerning the latest periodical reports from Australia, Canada and Mexico, the HRC dealt with indigenous peoples' right to natural resources, in the context of their right to self-determination, as enshrined in common art 1 of the *ICCPR* and *ICESCR*.<sup>152</sup> Traditionally however, in cases concerning the negative effects of multinational companies on indigenous rights, the HRC has sidestepped the controversial issue of indigenous rights to natural resources and has used the 'safer' rights to traditional activities and minority culture. In *Lubicon Lake Band v Canada*, the HRC found that a Canadian government lease over Native American land that was to be used for commercial timber activities would violate art 27 of the *ICCPR*, as it would destroy the traditional life of the Lubicon Lake Band.<sup>153</sup> Furthermore, although no violation was found in *Jouni Länsman v Finland*, the HRC warned that any future mining activities on a large scale 'may constitute a violation of the authors' right under article 27, particularly the right to enjoy their culture'.<sup>154</sup> In *Hopu v France*, by comparison, the HRC held that the construction of a hotel located on indigenous ancestral grounds would violate the right to family and privacy,<sup>155</sup> as it would destroy the traditional owners' ancestral burial grounds, which play an important role in a person's identity.<sup>156</sup>

*ILO Convention 169* is helpful as it provides a realistic approach concerning indigenous peoples' rights to natural resources. Article 15(1) of *ILO Convention 169* recognises that governments often retain some of the natural resources for their exclusive ownership, but provides indigenous peoples with rights 'to the natural resources pertaining to their lands ... includ[ing] the right of these peoples to participate in the use, management and conservation of these resources'. Article 15(2) clarifies that where states retain ownership, governments must establish procedures for consultation before approving or undertaking exploration and exploitation programs for resources on the relevant land. Thus, whilst recognising the principle of state sovereignty over resources,

<sup>151</sup> *ICCPR*, above n 9, art 1(2); *ICESCR*, above n 10, art 1(2) (emphasis added).

<sup>152</sup> See HRC, *Concluding Observations of the HRC: Australia*, above n 122, [9]; HRC, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc CCPR/C/79/Add.105 (1999) [8]; HRC, *Concluding Observations of the Human Rights Committee: Mexico*, UN Doc CCPR/C/79/Add.109 (1999) [19].

<sup>153</sup> *Lubicon Lake Band v Canada*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) [32.2].

<sup>154</sup> *Jouni Länsman v Finland*, HRC, Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (1995) [9.8].

<sup>155</sup> *Hopu v France*, HRC, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (1997) [11]. France has made a reservation to art 27 and consequently no finding was possible on this ground.

<sup>156</sup> *Ibid* [5]–[6].

the provision also recognises the need for prior consultation with indigenous peoples. In a 1999 case against Bolivia, the ILO Governing Body held that states

undertake to ensure that the indigenous communities concerned are consulted promptly and adequately on the extent and implications of exploration and exploitation activities, whether these are mining, petroleum or forestry activities.<sup>157</sup>

The ILO Governing Body suggested that ‘environmental, cultural, social and spiritual impact studies’, undertaken jointly with indigenous peoples,<sup>158</sup> should take place before any exploration and exploitation of natural resources in areas they traditionally occupy.<sup>159</sup> The ILO CEACR has also commented in several of its observations on projects that had negative impacts on indigenous peoples.

It seems ironic that South-East Asian states justify the catastrophic effects of development projects on their indigenous peoples in the name of the greater good that economic development will bring. Colchester believes that there is currently ‘widespread evidence that land and resource mobilisation has actually increased poverty, landlessness and environmental damage in indigenous areas’.<sup>160</sup> Even conservation, particularly as based on Western models, pays more attention to the wildlife than to indigenous peoples. Also, such programs push indigenous groups away from the protected areas, since most of them exclude local residents and entrust the areas to state agencies.

Notwithstanding all these negative consequences of modern practices on populations and environment, South-East Asian governments refuse to allow indigenous practices, which have a far smaller impact on natural resources. For example, the practice of indigenous shifting cultivation is regarded as unacceptable, because it is environmentally destructive. As a result, indigenous peoples are pushed to engage in fixed cultivation.<sup>161</sup> The Vietnamese delegation stated in a CERD meeting in 2001 that although certain land in mountainous regions was allotted to ethnic groups

[u]nfortunately the mountain peoples employed traditional cultivation methods and burned the forests, thereby causing major environmental disasters in the form of floods affecting millions of people living downstream along the Mekong river. The Government was therefore endeavouring to persuade ethnic groups to adopt a settled method of cultivation, even though the latter would require large-scale investment from the Government so as to ensure adequate water supplies for rice-growing.<sup>162</sup>

Indigenous forest management is not recognised as a viable practice for wildlife and environmental conservation. In Thailand, for example, indigenous rights to the management of their traditional lands and resources are denied.

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<sup>157</sup> ILO Governing Body, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Bolivia of the Indigenous and Tribal People’s Convention*, 1989 (No. 169), *Made under Article 24 of the ILO Constitution by the Bolivian Central of Workers (COB) at the 274<sup>th</sup> Session*, ILO Doc GB.274/16/7 (March 1999), [38].

<sup>158</sup> *Ibid* [39], [44].

<sup>159</sup> *Ibid* [39].

<sup>160</sup> Colchester et al, *Indigenous Land Tenure Survey*, above n 25, 60.

<sup>161</sup> Clarke, above n 132, 424–5.

<sup>162</sup> CERD, *Summary Record of the First Part of the 1481<sup>st</sup> Meeting: China, Viet Nam*, UN Doc CERD/C/SR.1481 (2001) [11].

Although inhabited and cultivated by the indigenous peoples, lands in the highland areas of Thailand have been declared protected areas and consequently fall under the jurisdiction of the Royal Forest Department. Official responsibility for these areas is vested in this agency rather than in the indigenous peoples living there.<sup>163</sup> Indigenous peoples of the highlands are viewed as ‘forest destroyers’. Nevertheless, recent attempts have been made, through public fora and the dissemination of information, to explain the principles on which traditional practices are based and to assist in addressing these stereotypes. In Cambodia, the indigenous management of natural resources attracted attention in 2002, after advocacy campaigns were launched by representatives and activists to protect indigenous rights to collect natural resources, such as resin and non-timber forest products and to establish associations for the protection of community forests and fisheries.<sup>164</sup> These policy changes are consistent with the *CBD*, a binding treaty with 187 states parties. Article 8(j) of the *CBD* protects indigenous traditional knowledge and intellectual property rights, whereas art 10(c) protects and encourages the ‘customary use of biological resources in accordance with traditional cultural practices.’ Arguably, these articles require the recognition of indigenous lands and control within the context of respect for indigenous self-determination and self-government.<sup>165</sup>

## VI RELOCATION

The need to ‘eradicate’ shifting cultivation, the system by which indigenous peoples manage their land, has been used to justify the forced resettlement of indigenous peoples throughout the region.<sup>166</sup> Therefore, relocation is an acute problem for indigenous peoples in South-East Asia. Often, development or environmental conservation programs result in the resettlement of South-East Asian communities.<sup>167</sup> In other cases, where indigenous lands are declared national parks or watershed reserves, given that they cannot be titled, indigenous communities living in these areas are displaced.<sup>168</sup>

<sup>163</sup> See generally Pinkaew Laungamsri, ‘The Ambiguity of “Watershed”: The Politics of People and Conservation in Northern Thailand — A Case Study of the Chom Thong Conflict’ in Marcus Colchester and Christian Erni (eds), *Indigenous Peoples and Protected Areas in South and Southeast Asia* (1999) 108.

<sup>164</sup> Anti-Racism Information Centre, *Report on Cambodia* (2002) 2.

<sup>165</sup> UN Environment Program, Workshop on Traditional Knowledge and Biological Diversity, *Convention on Biological Diversity, Traditional Knowledge and Biological Diversity*, UN Doc UNEP/CBD/TKBD/1/2 (1997) [99].

<sup>166</sup> Indigenous peoples living in Malaysia and the Philippines have reported forced relocations: see Windel Bolinget, Secretary-General, Cordillera Peoples Alliance, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 21–25 July 2001 <<http://www.ohchr.org/news/statements/bolinget.doc>> at 1 October 2003; Ofelia Davi, Siocon Federation of Subanon Tribal Councils in Siocon, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 21–25 July 2001 <<http://www.ohchr.org/news/statements/davi.doc>> at 1 October 2003. See also Stavenhagen, above n 63, [32].

<sup>167</sup> See, eg, Vang Pobzeb, Lao Human Rights Council, Unrepresented Nations and Peoples Organisation, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 24 July 2001.

<sup>168</sup> David Daoas, ‘The Rights of Cultural Communities in the Philippines’ in Christian Erni (ed), ‘...Vines That Won’t Blind...’ *Indigenous Peoples in Asia* (1996) 97, 102–3.

In Taiwan, the state has occupied a large portion of indigenous land, apparently for development purposes.<sup>169</sup> In Vietnam, the resettlement of Kinh farmers from the impoverished provinces of the north throughout Dak Lak and the Central Highlands has diluted the region's minority cultures and forced their assimilation into the Kinh society.<sup>170</sup> Certain programs implemented by the Department of Fixed Agriculture and Sedentarisation facilitate the relocation of ethnic minorities;<sup>171</sup> Montagnard villages were forcibly removed from water sources and prime agricultural areas to allow Vietnamese settlements and logging operations.<sup>172</sup>

In Malaysia, s 12 of the *Aboriginal Peoples Act* grants the state the authority to order any community to leave their land, even without compensation.<sup>173</sup> Due to 'development' efforts, the Orang Asli have been relocated to smaller, often infertile lands with minimal compensation.<sup>174</sup> In truth, authorities have no duty to compensate or to relocate indigenous peoples or to allocate alternative land. On several occasions, the Malaysian state has split the Orang Asli through relocation; in this way, their bargaining power has significantly decreased.<sup>175</sup>

Spontaneous migration or government transmigration programs, in which non-indigenous peoples belonging to the dominant community and loyal to the state are relocated to regions inhabited by indigenous peoples, have caused a dramatic increase in the numbers of settlers in indigenous areas.<sup>176</sup> Vietnam admitted to the CERD that two such programs have been implemented

to encourage lowlanders to go to mountain regions. Lowlanders were reluctant to leave the comforts of the towns in the delta and so the Government was investing

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<sup>169</sup> Mao Lung Chang, 'The Differences between the Legal Status of the Indigenous and the Non-Indigenous Peoples in Taiwan' in Christian Erni (ed), *'...Vines That Won't Blind...'* *Indigenous Peoples in Asia* (1996) 167, 168.

<sup>170</sup> Clarke, above n 132, 415. See also 'Forests, People and Policies in the Central Highlands of Vietnam' [2000] 4 *Indigenous Affairs* 56, 58; CERD, *Concluding Observations of the CERD: Vietnam*, UN Doc CERD/C/59/Misc.21/Rev.3 (2001) [14].

<sup>171</sup> See, eg, 'Program 327' implemented in 1992 (known as the 'Re-greening of the Barren Hills Program') and the 'Five Million Hectare Reforestation Program' implemented in 1998, which aim to improve the productivity of barren land. See *Decree No 327 of 1992* (Vietnam), preamble, which provides for the 'regreening of the major part of the degraded hills' within the following 10–15 years.

<sup>172</sup> Erica-Irene Daes, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Commission on Human Rights, *Indigenous People and Their Relationship to Land: Second Working Paper*, UN Doc E/CN.4/Sub.2/1999/18 (1999). See also Human Rights Watch, *Repression of Montagnards: Conflicts over Land and Religion in Vietnam's Central Highlands* (2002) <<http://hrw.org/reports/2002/vietnam/>> at 1 October 2003.

<sup>173</sup> The legislation specifies that if land in an aboriginal area or reserve is disposed of, or if rights granted in respect of these lands are revoked, the relevant authority may grant such compensation as, in its opinion, is appropriate.

<sup>174</sup> See generally Anna Pellegrino et al, 'The Sungai Selangor Dam Project: A Post EIA on the Relocation of the Orang Asli' (Paper presented at the Malayan University and Danish University Consortium for Environment and Development, Bangi, Malaysia, 18 January – 6 February 2002) <[http://www.its.dtu.dk/proj/arne\\_w/joint02/selangor.doc](http://www.its.dtu.dk/proj/arne_w/joint02/selangor.doc)> at 1 October 2003.

<sup>175</sup> See Friends of the Earth, *The Bakun Hep: Impacts on the Indigenous People* (1996) <<http://www.foe.co.uk/pubsinfo/briefings/html/19971215150020.html>> at 1 October 2003; Chakma, above n 1, 189.

<sup>176</sup> Erni, above n 1, 33.



heavily in infrastructure in the mountain regions and in promoting individual initiative there.<sup>177</sup>

In Indonesia, transmigration has led to the spread of poverty, the displacement and forced assimilation of indigenous peoples, deforestation and soil erosion, the destruction of local economies, and the wide use of force to tackle violence between indigenous peoples and new settlers. Yet Indonesia continues its aggressive policy of transmigration to consolidate Javanese domination.<sup>178</sup> Burma also continues the policy of internal displacement, resulting in tens of thousands of displaced persons in 2001 alone. Special 'development programs' promote 'Burmanisation policies' by breaking up minority and indigenous communities and forcibly relocating them to new settlement towns.<sup>179</sup> Many indigenous persons have fled Burma as refugees and undocumented migrants.<sup>180</sup>

Similarly, Laos also relocates farmers to indigenous lands. Since 2000, the government has implemented an Agricultural Development Master Plan, whereby slash-and-burn policies will be eradicated after farmers are given additional land.<sup>181</sup> This translates into the large-scale relocation of shifting cultivators to lands where many indigenous peoples live. These relocations have negative effects on the ecosystem and lead to the further impoverishment of indigenous peoples, as well as further migration. Another policy of consolidating villages, also leads to the relocation of indigenous peoples. The new policy declares that there should be no less than 50 families in each village. The government maintains that this is essential so that the expense-capita of development initiatives, such as roads, schools and health centres, can be reduced. This policy means that many indigenous peoples will have to move to other villages.<sup>182</sup> Forced removals have tremendous consequences for the physical and cultural survival of indigenous groups and render indigenous peoples 'internally displaced persons'.<sup>183</sup> The right to property for international displaced persons is protected by international law; however, restitution of property lost due to displacement, and compensation for this loss, are not fully-recognised rights in international law and must be addressed by an international instrument.<sup>184</sup>

<sup>177</sup> CERD, *Summary Record of the First Part of the 1481<sup>st</sup> Meeting: China, Viet Nam*, UN Doc CERD/C/SR.1481 (2001) [12].

<sup>178</sup> Chakma, above n 1, 193.

<sup>179</sup> Clarke, above n 132, 422.

<sup>180</sup> Anti-Racism Information Centre, *Report on Burma* (2002).

<sup>181</sup> Anti-Racism Information Centre, *Report on Laos* (2002).

<sup>182</sup> Ibid.

<sup>183</sup> Internally displaced persons have been defined as '[p]ersons that have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country': Francis Deng, *Comprehensive Study on the Human Rights Issues Related to Internally Displaced Persons Prepared Pursuant to Commission on Human Rights Resolution 1992/73*, UN Doc E/CN.4/1993/35 (1993) [34].

<sup>184</sup> Francis Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, UN Doc E/CN.4/1996/52/Add.2 (1995) [284]. On the issue of internally displaced persons generally, see Nils Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11 *International Journal of Refugee Law* 451; Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18 *Netherlands Quarterly of Human Rights* 215.

Currently, no international instrument explicitly protects against forced displacement and relocation. Nevertheless, the right not to be internally displaced falls within freedom of movement and the right to choose one's residence, as guaranteed in art 13(1) of the *UDHR* and art 12(1) of the *ICCPR*.<sup>185</sup> Although freedom of movement and residence are subject to restrictions that 'are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized',<sup>186</sup> such limitation clauses must be interpreted restrictively. It is doubtful whether the development of the economic life of the state constitutes an adequate reason to bring about such negative changes to a group's life. The UN Security Council has affirmed 'the right of refugees and displaced persons to return to their homes',<sup>187</sup> whereas the CERD has repeatedly asked states about their policies concerning the seizing of indigenous lands and subsequent relocation of indigenous peoples.<sup>188</sup>

Recently, international bodies have emphasised the need to address cases of internal displacement. The *Vienna Declaration and Programme of Action* called upon states to give special attention and find lasting solutions to the problems of internally displaced persons.<sup>189</sup> Moreover, in 1994, the HRC Sub-Commission on the Prevention on Discrimination and Protection of Minorities expressed its concern over the growing number of internally displaced persons and affirmed 'the right of persons to remain in peace in their own homes, on their own lands and in their own countries'.<sup>190</sup> Several regional initiatives in Africa, Europe and Latin America have also expressed concern about internally displaced persons.<sup>191</sup>

In 1998, the UN established principles concerning internal displacement.<sup>192</sup> These principles provide that every person should have the right to be protected against arbitrary displacement from his or her place of habitual residence<sup>193</sup> and

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<sup>185</sup> The right to movement is also guaranteed in the *American Declaration of the Rights and Duties of Man*, Organization of American States Resolution XXX, adopted by the Ninth International Conference of American States, OAS Doc OEA/Ser.L.V/II.82 Doc.6 Rev.1 (1948) art VIII; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 144, art 22(1) (entered into force 18 July 1978); *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto*, opened for signature 16 September 1963, ETS 46, art 2(1) (entered into force 2 May 1968); *African Charter on Human and Peoples' Rights*, adopted 27 June 1981, 21 ILM 58 (1982), art 12(1) (entered into force 21 October 1986).

<sup>186</sup> *ICCPR*, above n 9, art 12(3).

<sup>187</sup> *Resolution 876*, SC Res 876, UN SCOR, 48<sup>th</sup> sess, 3295<sup>th</sup> mtg, UN Doc S/RES/876 (1993) [5].

<sup>188</sup> Most recently, see CERD, *Concluding Observations of the CERD: Costa Rica*, UN Doc CERD/C/60/CO/3 (20 March 2002) [11].

<sup>189</sup> (Adopted by the World Conference on Human Rights, Vienna, Austria, 25 June 1993) UN Doc A/CONF.157/23 (1993) [23].

<sup>190</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46<sup>th</sup> Session*, UN Docs E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56 (1994) [1].

<sup>191</sup> The Permanent Consultation on Internal Displacement in the Americas, the Organisation for Security and Cooperation in Europe and the African Union have repeatedly expressed their concern about internally displaced persons.

<sup>192</sup> UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (1998).

<sup>193</sup> *Ibid* principle 6(1).

note that the prohibition of arbitrary displacement includes cases of large-scale development projects, which are not justified by compelling and overriding public interests.<sup>194</sup> Authorities must ensure that all other feasible alternatives are explored and that displacement lasts no longer than is required.<sup>195</sup> The free and informed consent of those displaced should also be sought.<sup>196</sup> The principles include a special mention to the obligation of states to protect against the displacement of indigenous peoples and other groups who are especially dependent or attached to their lands.<sup>197</sup>

Article 16 of *ILO Convention 169* prohibits relocation of indigenous peoples, but provides that it may take place where it is considered necessary as an exceptional measure. The decision on whether the measure is necessary will probably be made by the state, but as mentioned previously, the free and informed consent of the group in question is required. When the consent of indigenous peoples cannot be obtained, 'such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide for the effective representation of the people concerned'. Article 16 prescribes that indigenous peoples should 'where possible' have the option to return, 'as soon as the conditions for relocation have ceased to exist'. Where return is not possible, a right exists to lands of 'at least' equal quality and legal status to the former lands, or to compensation in kind or in money.

## VII RESTITUTION AND COMPENSATION

Reparations are measures to relieve the suffering and afford justice to victims of human rights violations, which include restitution and compensation. Current international law does not provide solid protection for the right to reparation. Nevertheless, the right to be awarded an effective remedy is a well-established right that could be used as a legal basis in cases of reparation.<sup>198</sup> During the last decade, several international bodies have focused on reparations for human rights violations. A UN study on reparations by Theo van Boven noted that restitution should be provided to return the victim to the situation they were in prior to the human rights violations and 'requires, inter alia, restoration of liberty, citizenship or residence, employment or property'.<sup>199</sup> In the landmark case *Velásquez Rodríguez v Honduras (Compensatory Damages)*,<sup>200</sup> the Inter-American Court on Human Rights held that '[r]eparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation'.<sup>201</sup>

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<sup>194</sup> Ibid principle 6(2).

<sup>195</sup> Ibid principle 7(1).

<sup>196</sup> Ibid principle 7(3)(c).

<sup>197</sup> Ibid principle 9.

<sup>198</sup> See *UDHR*, above n 20, art 8; *ICCPR*, above n 9, art 2(3); *Racial Discrimination Convention*, above n 11, art 6.

<sup>199</sup> Theo van Boven, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Commission on Human Rights, *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1993) UN Doc. E/CN.4/Sub.2/1993/8 [137]–[138].

<sup>200</sup> (1989) 7 Inter-Am Ct HCR (ser C).

<sup>201</sup> Ibid [26].

The HRC, among other bodies, has repeatedly called for reparation for violations of human rights as recognised in the *ICCPR*.<sup>202</sup>

The general principle of restitution also applies to violations of indigenous land rights. Van Boven suggests that with respect to indigenous peoples, provisions should be made to allow groups of victims to claim damages collectively, and receive collective reparation accordingly.<sup>203</sup> Van Boven also notes the growing trend in international law to emphasise the protection of collective rights, recognising the right to compensation for damages caused by exploration and exploitation programs on indigenous lands, as well as compensation for relocation.<sup>204</sup>

International and national judicial bodies, when assessing reparations for interference with property, examine compensation.<sup>205</sup> Pursuant to the non-discriminatory principle, indigenous peoples should have at least the same right to compensation as the rest of the population. In *General Recommendation XXIII*, the CERD recognised the right to just, fair and prompt compensation for violations of indigenous land rights.<sup>206</sup> *ILO Convention 169* establishes that in the case of relocation, both with and without the consent, of indigenous peoples, they have the right

- 1 to return to their traditional lands once the reason of their relocation no longer persists;
- 2 to acquire lands of equal quality and legal status, unless they express their preference to compensation; and
- 3 full compensation for any loss or injury resulting from relocation.<sup>207</sup>

The Draft Declaration of the Rights of Indigenous Peoples also recognises the right of indigenous peoples to just and fair compensation.<sup>208</sup> Leading cases in Australia<sup>209</sup> and Canada<sup>210</sup> have affirmed the right of indigenous peoples to compensation when their land rights have been legally restricted. Yet the reality in South-East Asia is very different. South-East Asian indigenous peoples are seldom compensated for the loss of their lands and traditional activities or for damage resulting from relocation. States seem reluctant to agree on specific standards that would apply in cases of compensation.

There is some debate about who bears the duty to compensate indigenous peoples, resting on an uncertainty as to whether the state or the transnational organisations should be responsible for violations of indigenous land rights committed whilst engaging in projects. In 2001, indigenous representatives reported to the UN Working Group on Indigenous Populations that major mining

<sup>202</sup> See, eg, HRC, *Concluding Observations of the HRC: Peru*, UN Doc CCPR/C/79/Add.67 (1996); HRC, *Concluding Observations of the HRC: Nigeria*, UN Doc CCPR/C/79/Add.65 (1996).

<sup>203</sup> van Boven, above n 199, [14].

<sup>204</sup> *Ibid* [17], in reference to *ILO Convention 169*, above n 5, arts 15(2), 16(4)–(5).

<sup>205</sup> See also David Anderson, 'Compensation for Interference with Property' (1999) 6 *European Human Rights Law Review* 534, 555–7.

<sup>206</sup> CERD, 'General Recommendation XXIII' above n 34, [5].

<sup>207</sup> *ILO Convention 169*, above n 5, art 16.

<sup>208</sup> Draft Declaration on the Rights of Indigenous Peoples, above n 24, arts 21, 27, 30.

<sup>209</sup> See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 112 (Deane and Gaudron JJ).

<sup>210</sup> See *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [203] (Lamer CJ; Cory and Major JJ concurring); *R v Sparrow* [1990] 1 SCR 1075, [50] (Dickson CJ and La Forest J).

companies denied compensation to victims of disasters caused by their activities.<sup>211</sup>

The responsibility of transnational, and international, organisations is not the focus of this research. It is sufficient to note that their responsibility for human rights abuses, including those committed against indigenous peoples, is still an unresolved matter of international law. The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* urges transnational corporations to respect the human rights of persons living within the states they operate as well as the social and cultural policies in place in these countries.<sup>212</sup> However, such a responsibility does not detract from the principal responsibility of the state where transnational corporations operate. As the prime guarantor of the human rights of the persons living in its territory, the state must ensure that compensation is accorded when land rights are violated. Unfortunately, this obligation is often ignored.

### VIII CONCLUSIONS

The analysis of land rights of South-East Asian indigenous peoples reveals a clear gap between the existing situation and the standards of international law. The international legal obligations of South-East Asian nations towards indigenous peoples are limited, since the states have not signed or ratified several human rights instruments. Moreover, these nations fall short even of the minimum obligations they have undertaken. Consistent patterns of discrimination have also emerged with respect to all aspects of indigenous land rights. Indigenous land ownership is usually subordinate to other rights and inferior to the land ownership claims of non-indigenous individuals. Indigenous possession is disregarded for other interests and indigenous views on matters that affect their lands are widely ignored. Traditional indigenous activities are considered unproductive and policies have been applied to eliminate them. The exploitation of natural resources in indigenous lands frequently prevails over indigenous survival. Indigenous management of natural resources and the environment is widely viewed as destructive or useless. Unfortunately, this is a common narrative for indigenous peoples all over the world; yet, the poverty and acute vulnerability of indigenous peoples in South-East Asia further reduces their control over their lands and increases the negative effects of such violations.<sup>213</sup>

The most significant threat to indigenous land rights continues to be the development projects undertaken on the lands they occupy. Even though the

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<sup>211</sup> Joan Carling, Cordillera Peoples Alliance, Statement made at the UN Working Group on Indigenous Populations, Geneva, Switzerland, 27 July 2001, referring to Lepanto Consolidated Mining Company and Philex Mining Corporation.

<sup>212</sup> Sub-Commission on the Promotion and Protection of Human Rights, UN Commission on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) arts 1, 10. For a commentary on the *Norms* see Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003).

<sup>213</sup> The CERD has recognised that poverty is a factor that impedes the implementation of the Convention, although governments may introduce reforms in various areas: see, eg, CERD, *Concluding Observations of the CERD: Philippines*, UN Doc CERD/C/304/Add.34 (1997) [3].

protection afforded by international law in this area has gradually increased, the ambiguity of standards of protection (especially when it comes to the economic obligations of states), existing confusion over who bears the duty, the lack of comprehensive knowledge of the effects of such projects and the ongoing desire of South-East Asian states to continue such projects at any cost, all weaken the protection given to indigenous peoples. The 'greater good' of the whole population of the states is used as the main justification for these activities, but experience and research do not support this claim. Moreover, the non-ratification of international instruments prevents the dissemination of information about the situation of indigenous land rights. Non-ratification also impedes further discussions in an international arena, which would put pressure on the states. At the same time, international law does not offer elaborate standards on possible remedies for violations of indigenous land rights, as discussions on collective reparation and compensation for human rights violations are a relatively new topic in the human rights discourse.

Even in this bleak reality, evidence exists of changing attitudes and an evolving climate in the discourse of indigenous land rights, which should not be overlooked. Intensified indigenous activism is pushing for the implementation of international standards. Several South-East Asian states have recently ratified international human rights instruments or expressed their desire to do so; the monitoring process of these is expected to push for indigenous land rights. Most importantly, several South-East Asian states have recently demonstrated their willingness to improve the situation of indigenous peoples. New legislation in Cambodia and the Philippines abides by international standards and provides indigenous peoples with a wide range of land rights. Other countries, such as Indonesia and Laos, have also demonstrated their interest in complying with international standards. This is an extremely positive result, although implementation remains very slow. This sluggishness is demonstrated by the lack of practical measures to enforce positive provisions for indigenous protection, legislation that contradicts favourable provisions in other domestic laws, limited information provided to indigenous communities about these new measures, and dependence on local authorities. All of these factors indicate a lack of political motivation and obstruct the improvement of indigenous land rights. It is hoped that the increasing activism of local indigenous peoples and the progressive unveiling of their situation at the international level will lead to the gradual improvement of indigenous land rights in South-East Asia.