



STATUS OF INDIGENOUS PEOPLES'

LANDS, TERRITORIES AND RESOURCES IN ASIA

STATUS OF INDIGENOUS PEOPLES' LANDS, TERRITORIES AND RESOURCES IN ASIA

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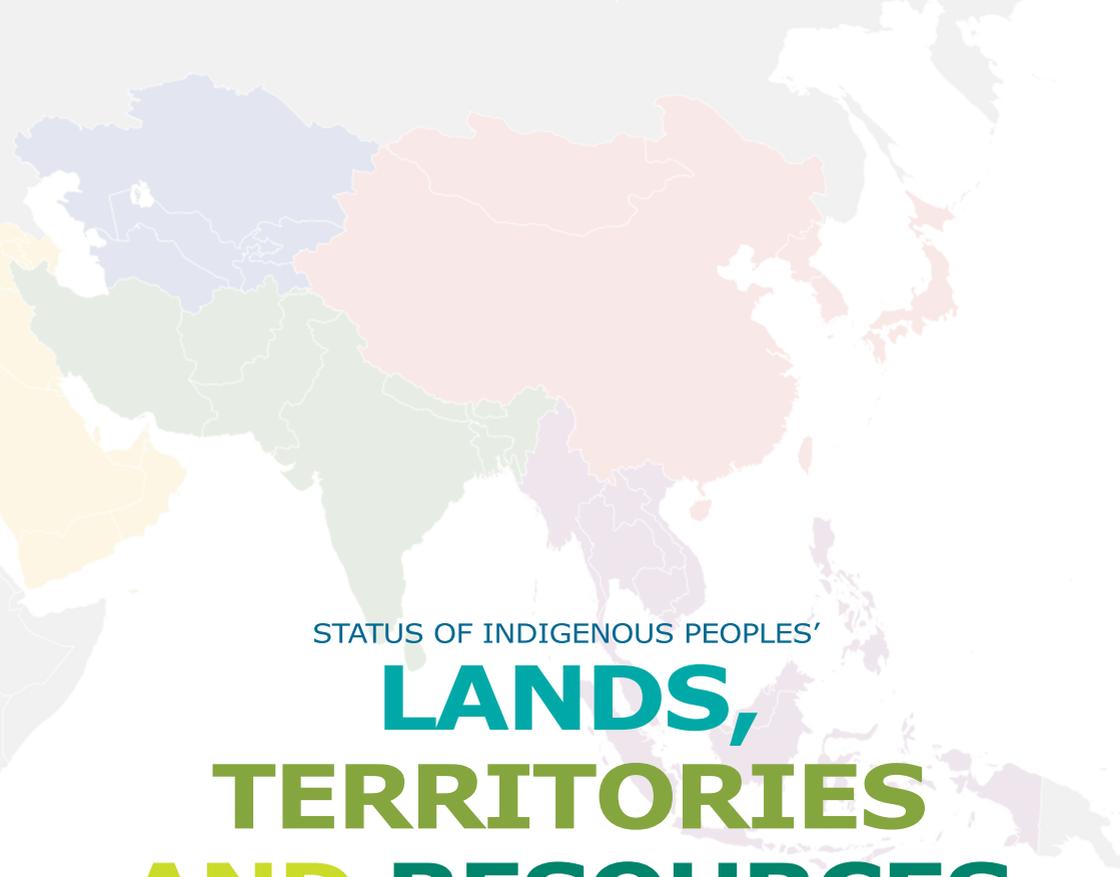
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Gam A. Shimray



Asia Indigenous Peoples Pact

Joan Carling



**Indigenous Peoples Major Group
for Sustainable Development**

Abbreviations

ACWC ASEAN Commission on the Promotion and Protection of the Rights of Women and Children

ADC Autonomous District Council

AIPP Asia Indigenous Peoples Pact

ASEAN The Association of Southeast Asian Nations

CADC Certificate of Ancestral Domain Land Claims

CADT Certificate of Ancestral Domain

CAO Compliance Advisor Ombudsman

CEMA Committee for Ethnic Minorities Affairs

CHT Chittagong Hill Tracts

CLOA Certificate of Land Ownership Award

DAR Department of Agrarian Reform

DEA Department of Economic Affairs

ELC Economic Land Concession

ESCR Economic, Social and Cultural Rights

FPIC Free Prior and Informed Consent

FRA Forest Rights Act

IFC International Finance Corporation

IPs Indigenous Peoples

IPHHRD Indigenous Peoples Human Rights Defenders

IPRA Indigenous Peoples' Rights Act

IWGIA International Work Group for Indigenous Affairs

IWHRD Indigenous Women Human Rights Defenders

JOAS Jaringan Orang Asal Semalaysia

KNU Karen National Union

LTR Land, Territories and Resources

LWT legal wildlife trade

MOHA Ministry of Home Affairs

NCIP National Commission on Indigenous Peoples

NCR Native Customary Rights

NHRI national Human Rights Institutions

NCIPT National Council of Indigenous Peoples in Thailand

NIPT Network of Indigenous Peoples in Thailand

NLUP National Land Use Policy

PESA Panchayats (Extension to the Scheduled Areas)

RFCTLARR Right to Fair Compensation and Transparency
in Land Acquisition and Rehabilitation & Resettlement Act 2013

RRI Resource Rights Institute

UNSRIP United Nations Special Rapporteur on Rights
of Indigenous peoples

SLC Sarawak Land Code of 1958

STs Scheduled Tribes

UNDRIP United Nations Declaration on Rights of Indigenous Peoples

CHAPTER 1

INDIGENOUS PEOPLES IN ASIA¹

Asia has the largest number of indigenous peoples; about 411 million² live in the region. Their share in the national population varies from 0.9 percent in Cambodia to over 37 percent in Nepal³ (see IPs in Asia-table Annex 1 for number of ethnic groups and estimated indigenous peoples' population per country). Indigenous peoples live in virtually all of the region's highly diverse ecosystems. They live in the high mountains of Nepal and the adjacent Tibetan plateau. They live in the coast of Indonesian archipelago or the dry desert of western India. They live in the rainforests of Borneo or the insular Southeast Asia or mainland South Asia. As diverse as the ecosystems they live in, there are diverse cultures and ways of live. Each of the indigenous communities in Asia has their own distinct languages, cultures, livelihood systems, customary laws and customary institutions, which have evolved from their close relationship with their territories.

Indigenous peoples, because of their subordination and distinctiveness from mainstream cultures and polities, have been and still are subjected to gross human rights violations, systematic racism, discrimination, and dispossession⁴. The experiences of indigenous peoples in Asia are very similar to the social and political processes observed by indigenous peoples in other parts of the world. They also share historical experience of political domination, discrimination and exploitation through processes of colonization and nation-state building. Many indigenous peoples are among the most disadvantaged and vulnerable groups of people in the world in terms of human security and attained level of basic needs (DESA 2009: 21-29, also footnote 4). This is largely due to the denial of their rights to lands,

¹ This report covers South East, East and South Asia

² The number of indigenous peoples' population in Asia is a rough estimate from various sources, for detailed country population see annex 1.

³ Indigenous peoples' organizations in Nepal claim a larger figure of more than 50% (IWGIA 2017: 405).

⁴ On human rights violations against indigenous peoples and their situation, many indigenous peoples' organizations as well as international human rights organizations (INGOs) have been documenting and reporting for decades. For reports and publications by some of the INGOs see:

www.iwgia.org; www.forestpeoples.org; <http://minorityrights.org>.

For reports and publications by the indigenous peoples' organizations in Asia see: AIPP: <https://aippnet.org>; Kapaeng Foundation: www.kapaeng.org

territories and resources. They continue to struggle to have their collective rights over their lands, territories and resources; their ways of living, their customary institutions and laws to be respected and recognized by the states.

Status of legal recognition of Indigenous Peoples and their Rights to LTR

Asian governments have used different terminologies for distinct groups of peoples within their countries such as “hill tribes”, “ethnic minorities” “minority nationalities”, “indigenous nationalities” “scheduled tribes”, “Adivasi”, “*Masyarakat Hukum Adat*.” Further, all Asian governments voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly in 2007, with the exception of Bangladesh, which abstained. However, most of these same governments, which recognize the existence of distinct peoples in their countries, have not made diligent political efforts to undertake State obligations to respect the rights of indigenous peoples, as defined in international laws, including UNDRIP. The formal recognition and legal status promulgated by Asian states for indigenous peoples varies from country to country. So far, five countries in Asia, the Philippines, Nepal, Cambodia, Japan and Taiwan⁵ have officially used the term “indigenous peoples”. In the Philippines, the indigenous peoples and their collective and individual rights over ancestral lands and domains are recognized by the government through the comprehensive law known as the Indigenous Peoples’ Rights Act (IPRA). The IPRA uses both the terms “Indigenous Cultural Communities” and “Indigenous Peoples”, while the Constitution refers to “indigenous cultural communities”. In Nepal, indigenous peoples are recognized constitutionally as well as legally, who are officially called “Adivasi Janajati” (indigenous nationalities). However, their collective rights are not recognized. The National Foundation for Development of Indigenous Nationalities Act 2002 defines Adivasi Janajati as a group or community with own mother tongue and traditional customary practices, distinct cultural identity, social structure and oral or written history. [...] The definition more or less incorporates cultural identity rather than political entity of indigenous peoples” (Erni. 2008:411-412).

⁵ Only 14 ethnic groups are officially recognized as Indigenous Peoples. In addition, there are at least nine Ping Pu (“plains or low land”) indigenous peoples who are denied official recognition. In 2016, the President of Taiwan promised Ping Pu plains aborigine groups to help them gain official recognition (IWGIA 2017: 320-321)

In Cambodia, the official term used for indigenous peoples is not a literal translation of “indigenous peoples” into Khmer: *chuncheat daem pheak tech* has been translated as “minority original ethnicity” (Erni 2008:349) or “indigenous ethnic minority” (IWGIA 2016:286). But the fact remains that they are recognized as distinct ethnic groups from the majority Khmer and they can avail of the Land Law, 2001, for the recognition of communal land rights, which applies only to indigenous communities. The Law requires that they are registered as indigenous communities before they can apply for the communal land titles.

In Taiwan, several laws protect the rights of indigenous peoples, including the Constitutional Amendments (2007) on indigenous representation in the Legislative Assembly, protection of language and culture, and the Indigenous Peoples’ Basic Act (2005). The Indigenous Peoples’ Basic Act recognizes indigenous peoples’ rights to land and resources and stipulates for the government to safeguard the status of indigenous peoples and to work towards providing self-rule of each tribe. Unfortunately, serious discrepancies and contradictions in the legislation, coupled with only partial implementation of laws guaranteeing the rights of indigenous peoples have stalled the progress towards self- rule.

In Japan, Ainu people have been recognized as indigenous people of Japan, through the Japanese Parliament Resolution in 2008. The Ainu people’s unique language, religion and culture have been acknowledged. However, the government of Japan does not recognize indigenous peoples in the Ryukyus as indigenous peoples of the country. The government has instead continued to usurp the territorial autonomy of indigenous peoples in the Ryukyus even though that has been granted through national institutions. Though most Asian countries do not accept the concept of indigenous peoples as applying to their countries, several of them recognize distinct cultural or ethnic groups with collective rights. Recognition and special laws are accorded through constitutional laws or special laws or policies or under agreement/treaty. For instance in the Constitution of India, indigenous peoples are addressed as ‘Scheduled Tribes’ (STs). The popular term for India’s indigenous peoples is *Adivasi*, which means “original people” in Sanskrit word. The indigenous peoples of Northeast India prefer to use the English term “indigenous peoples”. The Fifth Schedule (for Central India) and Sixth Schedule (for some areas of Northeast India) of the Indian Constitution recognize indigenous peoples’ rights to land and self-governance.

However such rights are limited to designated geographical areas only. There are several areas with significant scheduled tribe majority populations that have not been included in the Fifth Schedule despite persistent demands for the same.

In Indonesia, recent government Acts and Decrees use the term *Masyarakat Adat* to refer to its indigenous peoples. The Indonesian Constitution uses the term *Kesatuan Masyarakat Hukum Adat*, meaning customary societies or communities who live by customary laws. The most common and accepted term is *Masyarakat Adat*. The second amendment to the Indonesian Constitution recognizes indigenous peoples' rights in article 18b-2. Several other laws and policies implicitly recognize some rights of peoples referred to as *Masyarakat Adat* or *Masyarakat Hukum Adat*, including Act No 5/1960 on Basic Agrarian Regulation, Act No. 39/1999 on Human Rights, Act No. 27/2007 on Management of Coastal and Small Islands and Act No. 32/2010 on Environment. In May 2013, the Constitutional Court affirmed the Constitutional Rights of indigenous peoples to their land and territories, including their collective rights over customary forest (IWGIA 2017:336).

In Malaysia, there are different collective names for indigenous peoples of each region. They are: "*Anak Negeri*" meaning "child of the state" or "native" for Sabah; *Dayaks* and *Orang Ulu* which are translated as "native" or "interior people" for Sarawak and *Orang Asli* meaning "original peoples" or "first peoples" for Peninsula Malaysia. *Orang Asal* is a collective name for all the indigenous peoples of Malaysia used by the peoples themselves. The Federal Constitution of Malaysia, Article 161(A) provides for the recognition of indigenous peoples (called "natives") of the States of Sabah and Sarawak. The legal status of the *Orang Asli* in Peninsular Malaysia, is not defined nor mentioned in the Constitution. They have tenancy rights recognized under common law but no title to their customary lands. In Sabah and Sarawak, their customary land rights and customary Laws are recognized.

In Bangladesh, the government does not recognize legal personality for indigenous peoples in the country. They prefer the term "tribal" or "*upajati*" (in Bangla). The indigenous peoples in the Chittagong Hill Tracts (CHT) are commonly known as "Pahari" meaning "hill people" or *Jumma* from the common tradition of swidden or "*jum*" cultivation. The indigenous peoples in the plains are generally known as *adivasi* meaning indigenous. However in both the CHT and Plains, they increasingly refer to themselves as indigenous

peoples in English or *adivasi* in Bangla⁶. Through the Chittagong Hill Tracts Accord signed in 1997, the CHT has been identified as a tribal area and their cultural rights and traditional governance systems are recognized. Although such rights have not been extended to the indigenous peoples in other regions of the country, the 15th amendment of the Constitution adopted in 2011, mentioned people with distinct ethnic identities other than Bengali population. However this is limited to cultural aspects only.

In Lao PDR, the ethnic groups belonging to the Mon-Khmer, Sino-Tibetan and Hmong-Hmien language groups are considered to be the indigenous peoples of Laos by expert opinion of multilateral institutions, international non-government organizations and academics⁷. They make up the most vulnerable groups in Laos as there is no protection and legal provision recognizing the rights of these indigenous peoples to land, territories and resources. Officially, all ethnic groups have equal status and the Lao government does not recognize the concept of indigenous peoples'. Using these and related terms in Laos is not allowed and "open discussions about indigenous peoples with the government can be sensitive, as the issue is seen as pertaining to special (human) rights" (IWGIA 2017:367). However, currently, the Department of Ethnic Affairs (DEA) under the Ministry of Home Affairs (MOHA) is drafting a decree on ethnic affairs, which is based on the model developed by the Committee for Ethnic Minorities Affairs (CEMA) in Vietnam. If they follow the Vietnamese example, there will be recognition of ethnic minorities but it is unlikely that the government will refer to them as indigenous peoples. In Vietnam, indigenous peoples are officially referred to as "ethnic minorities" in Vietnamese as *dan toc thieuso*, *dan toc it nguoi*. They enjoy constitutionally guaranteed rights to their language and cultural traditions but their customary rights to LTR are not recognized.

The above are some examples of the varying degrees of recognition accorded to the indigenous peoples and their rights to LTR in the region of Asia.

⁶ Recently, Bangladesh government tried to limit the term to "upajati" only while referring to its indigenous peoples. This has been rejected. The Chakma Circle Chief, Raja Barrister Devasish Roy argued that many legal and policy documents of Bangladesh government use the terms "Indigenous", "aboriginal", "adivasi" "ethnic minority", "Hillman/hill people" and/ or "upajati" (subnation/tribe/tribal). If the CHT Ministry wants to establish specific term to refer to the indigenous peoples of Bangladesh, they need to amend the existing laws and enact a new law with free, prior informed consent of CHT Council, three District Councils, three Circle Chiefs and Headmen representatives. See Raja Devasish Roy's letter to the CHT Affairs Ministry "Chakma Circle Chief denounces CHT Ministry's directive on the use of "adivasi" circulated by AIPP. 13 December 2017)

⁷ <https://www.forestpeoples.org/en/topics/african-development-bank-afdb/news/2013/04/experience-asian-indigenous-peoples-finance-lend-0>; IWGIA 2017. The Indigenous World 2017 p.367; McCaskill, D & Kampe, K. (Eds) (1997). Development or Domestication? Indigenous Peoples of Southeast Asia. p.21

CHAPTER 2

INDIGENOUS PEOPLES RELATIONSHIPS TO LANDS, TERRITORIES AND RESOURCES

The lands, territories and resources (LTR) of indigenous peoples in Asia cover vast areas with immense wealth of natural resources, forests, and biological diversity and rich cultural heritage. They have always lived close to the land: forests, hills, wetlands, interior islands, deserts and snows. Indigenous peoples' collective land comprises not only land they directly cultivate or inhabit, but to the broader territory, encompassing the total environments of the areas which they occupy or otherwise use. They mostly live in the remote areas and sparsely populated parts of these countries constantly adapting their culture, means of livelihoods, agriculture, horticulture, forestry and animal husbandry to the specific conditions of their environments. Over time, indigenous peoples developed their own distinct bodies of laws and institutions that regulate and govern all aspects of community life. Vast majority of them are subsistence farmers, shifting cultivators, pastoralists,



 Manipur police stopped representatives from civil society organizations from visiting Nongdam dam.
Photo by Keen Luithui

fisher-folk and some still rely on hunting and gathering. However, conflicting laws in relation to environment protection and land utilization and natural resource management have circumscribed indigenous peoples' livelihood practices. Similar to the situation of other indigenous peoples, disruptive development aggression by both the public sector and private companies are pushing them into destitution⁸.

Indigenous peoples' relationship to land⁹ is significantly different from many other peoples. There are several elements¹⁰ unique to indigenous peoples when it comes to their relationship to land; land is not just an economic resource or the basis of their livelihoods. Their intimate relationships with their lands and territories shape their worldviews and knowledge. These are embodied in their social and cultural practices, traditional institutions, customary law, and livelihoods and land use systems. The social organizations of indigenous peoples reflect how access to land and resources are regulated. A village identifies strongly with its land, and so does a clan or an individual owner of a paddy field, which has been passed down from the ancestors through many generations. Many of the social and cultural activities of a village revolve around land. In rice cultivation for example, they practice labour exchange and share in harvest celebrations and thanksgiving.

Indigenous peoples have a strong spiritual relationship to land, which is not only inhabited by people, plants and animals, but also by spirits. In many indigenous beliefs, the spirits of their ancestors continue to live in their land thus their territories have many sacred places that they visit for special ceremonies (Daes 2001:8; He Hong 210:8). The land is their school and temple. The political dimension is expressed in a strong determination to defend their land and territories. Most importantly land is strongly communal and access and regulation is highly democratic. It is the source of their collective identity as communities and as peoples.

Land has an intergenerational dimension as ancestors have passed it down, and it will be passed on again to children. As a result, indigenous communities traditionally have a strong sense of responsibility towards their land.

⁸ See various AIPP publications at: <https://aippnet.org>

⁹ Here land refers to broader territory, encompassing the total environments of the areas in which the indigenous peoples occupy or use including natural resources, rivers, lakes, coasts.

¹⁰ In the report on "Indigenous peoples and their relationship to land", Mrs. Erica-Irene A. Daes, formal Chairperson of the United Nations Working Group on Indigenous Populations identified a number of elements unique to the indigenous peoples such as their profound relationship to the LTR that is collective and has various social, cultural, spiritual, economic and political dimensions and responsibilities. Daes, E. A. (2001). Indigenous peoples and their relationship to land., UN Doc E/CN.4/Sub.2/2001/21

Indigenous Peoples' Customary Laws and Communal Land

Many indigenous societies in Asia (as in other parts of the world) still have their own customary systems for regulating access to and the use and management of land and resources. Most of these systems are community-based, i.e. the right to use and manage land and resources are regulated within a community and not by any higher-level institutions. Diverse customary institutions have managed successfully communal lands through intricate customary laws. Such practices have enabled sustainable use of and equitable access to land and resources, thus providing livelihoods and food security for communities. Collective ownership guarantees access to the land and its resources by community members in accordance with their needs at a given point of time. These needs change according to where people are in their life cycle. For instance young families with many children need more land while elderly persons, with already grown-up children, need less. “A key strength of customary law is that each community’s customs are rooted in and respond to the particular history, values and needs of that community” (Lubansky 2014: 9). However, customary resource rights and customary institutions are eroding due to multiple pressures, including dispossession of lands and territories by government policies and market forces, which favour individual private land ownership. Lack of respect for indigenous peoples’ rights and cultures has led to their discrimination, marginalization and impoverishment. “Many indigenous communities face intractable poverty despite living on resource-rich lands because their rights are not respected and their self-determined development is not supported” (Victoria Tauli-Corpuz)¹¹.

¹¹ The Guardian 2017, ‘Indigenous peoples are the best guardians of world’s biodiversity’. Interview with UN Special Rapporteur Victoria Tauli-Corpuz to mark the International Day of the World’s Indigenous Peoples. <https://www.theguardian.com/environment/andes-to-the-amazon/2017/aug/09/indigenous-peoples-are-the-best-guardians-of-the-worlds-biodiversity>

CHAPTER 3

NATIONAL LAWS AND POLICIES RELATING TO LTR OF IPs

In Asia, only few countries have full legal recognition of indigenous peoples' rights to LTR. In some countries, there is some recognition to LTR, in others recognition is only of individual property. There is a range from full recognition such as the laws in the Philippines to absence of any recognition of rights to LTR, as in Thailand¹².

The table below provides an overview of the range of recognition of indigenous peoples rights to LTR in some Asian countries. Within the limited scope of the report, it is not possible to provide an overview of the laws on LTR rights in all the countries in Asia.

Overview of the range of legal recognition of LTR rights in Asia

Laws	Extent of recognition of LTR
Philippines	
Indigenous Peoples Rights Act (IPRA) 1997	IPRA recognizes indigenous cultural communities or indigenous peoples' ownership to their ancestral territories and provides for titling of ancestral domain. It is one of the few laws for indigenous peoples globally which includes a requirement for Free, Prior and Informed Consent (FPIC)

¹²In Thailand, there is only a weak recognition in the form of Cabinet Resolutions of 2010 "to restore the traditional livelihoods" specific to Chao Ley and Karen peoples and yet to be implemented.

Laws	Extent of recognition of LTR
India	
Fifth Schedule of the Indian Constitution	No tribal land can be bought by non-indigenous persons or outsiders in the areas declared as Fifth Schedule. It provides for establishment of Tribal Advisory Council in the areas that have been declared as Scheduled Areas to advise the state government on issues pertaining to the tribal peoples
Sixth Schedule of the Indian Constitution	Customary rights of indigenous peoples in the autonomous areas are recognized and protected. It provides for creation of Autonomous District Councils (ADC) in the four states: Assam, Mizoram, Meghalaya and Tripura. The ADCs have legislative, executive and judicial powers to manage the autonomous areas.
The Panchayats (Extension to the Scheduled Areas) 1996 (PESA) ¹³ .	PESA bestows primary powers of governance to the Gram Sabha (village assembly) in the Schedule Areas (Fifth Schedule area) including prevention of land alienation and also to restore the illegally alienated land.
Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 also known as Forest Rights Act (FRA)	Forest Rights Act (FRA) recognizes ownership rights, and intellectual property rights of communities including forest governance rights. It is the <i>Gram Sabhas</i> or any traditional village institution with full participation of the women can determine the community and community resource rights along with the authority to protect and manage them

¹³The Panchayats (Extension to the Scheduled Areas) 1996, has been enacted after making suitable changes to the Panchayats Act to transform a system for the general areas of the country to the Scheduled Areas (Fifth Schedule area) having a different socio-economic as well as politico-administrative setting.

Laws	Extent of recognition of LTR
Article 371A of Indian Constitution	This law gives constitutional guarantee to the Naga people of Nagaland state, their rights to customary law, culture, land and resources (ownership of surface and sub-surface resources) and its management, customary institutions, traditional judicial system (criminal and civil disputes can be settled through Naga customary law in the state Court). No Act of Parliament can be made applicable without the approval of Nagaland state Legislative Assembly ¹⁴ .
Indonesia	
Article 18b-2 of Indonesian Constitution, Act No. 5/1960 on Basic Agrarian Regulation, Act N 39/1999 on Human Rights and MPR Decree No. X/2001 on Agrarian Reform, Act No. 27/2007 on Management of Coastal and Small Islands and Act No. 32/2010 on Environment	These laws recognize traditional communities and their customary (<i>adat</i>) rights to land within certain limitations in the Constitution of Indonesia ¹⁵ .

¹⁴ Bijoy, C.R, Gopalakrishnan and Khanna S. (2010).India and the Rights of Indigenous peoples. Asia Indigenous Peoples Pact. 128-129

¹⁵ The right to land is guaranteed by the Constitution and is supported by the Basic Agrarian Law No. 5 of 1960. However, a framework on the recognition of land rights provided in the Basic Agrarian Law "contains only very general provisions on collective rights to land, notably, the collective rights of indigenous peoples to their customary lands" (Saptaningrum in Chao 2013:22). There is no comprehensive law that provides legal recognition to the *Masyarakat Hukum Adat* neither have the government developed implementing regulations to secure indigenous peoples' rights to land.

Laws	Extent of recognition of LTR
Malaysia	
Article 161A(5) of the Federal Constitution	“State laws in Sabah and Sarawak may provide for the reservation of land for indigenous peoples or for giving preferential treatment in regards to the appropriation of land by the state”. (AIPP and UNDP-RIPP, 2007:18)
Land Ordinance 1930.	Sec 15. Recognizes the Native Customary Rights (NCR) but does not recognize land under fallow period.
Burma/Myanmar	
National Land Use Policy (NLUP), 2016	This policy recognizes customary land use rights and land tenure practices of ethnic nationalities.
Cambodia	
Land Law 2001	Recognizes the rights of indigenous peoples to collective or communal land titles

inherent rights of indigenous peoples to self-governance and self-determination, and their rights over their ancestral domains. It created the office of the National Commission on Indigenous Peoples (NCIP) as implementing agency of the IPRA. The primary task of the NCIP is to delineate and issue Certificate of Ancestral Domain / Land Title (CADT/ CALT) to the indigenous clan or community. As of 2015, NCIP has awarded 158 CADTs and 258 CALTs with a total coverage of 4,323,782,722 hectares or 14% of the total land area of the Philippines. There are still 557 pending applications¹⁶. Titling procedures have been criticized for being unnecessarily costly and lengthy, and lacking in cultural sensitivity. Moreover, apart from paltry budgetary allocations for the NCIP (an average of .07% of the national budget, (AIPP 2017:75), there are several conflicting government policies and administrative orders causing further delay in the issuance of CADT/CALT. Various tenurial instruments such as the

¹⁶ AIPP 2017. Indigenous Peoples’ Initiatives for Land Rights Recognition in Asia. P. 76

Certificate of Land Ownership Award (CLOA) or mining permits, logging concession, Industrial Forestry Management Agreement issued by the Philippines government agencies are in conflict with each other (AIPP and IWGIA 2015:15). In the process, indigenous peoples' lands rights and their claim for the Certificate of Ancestral Domain (CADT) are adversely affected. For example, CLOAs issued by the Department of Agrarian Reform (DAR) to non-indigenous persons (non-IPs) inside portions of the Buhid Mangyan's ancestral domain have adversely affected their land rights and their claim for Certificate of Ancestral Domain Land Claims (CADCL) (Gatmaytan 2007:98-101). Furthermore, despite the IPRA, other Philippines state laws such as the National Integrated Protected Area System, Mining Act of 1995 have undermined indigenous peoples' rights to LTR.

In **Cambodia**, through the Land Law of 2001, indigenous communities have rights to be provided with collective communal land titles. However, only 10 indigenous communities have received land titles in the 15 years since the Land Law was enacted (IWGIA 2016:288). The land registration has advanced very slowly. Meanwhile land grabbing continues unabated and the government has continued to issue more economic land concessions (ELC) to private and corporate companies including for agribusiness, mining and logging (ibid 2016:288-289).

In **Malaysia** and Indonesia, like in the Philippines, customary laws are recognized in law as a basis for rights in land. However, these provisions have not been implemented or translated into secure tenure, instead the governments tends to promote individual titles over communal titles. In Malaysia for instance, expansion of large-scale commercial agriculture on native lands in both Sarawak and Sabah has been encouraged and facilitated by the amendment of the laws by the respective states. In Sabah, the state government amended section 76 of the Sabah Land Ordinance and started to issue communal land titles on condition that communities agree to the development

of the land. “The purpose of this move was to assign these lands to large-scale agricultural development projects through joint venture agreements involving communities and government-linked development agencies and/or the private sector”. (Toh in Chao 2013:70).



Oil palm
plantation in
Sarawak, Malaysia.
Photo by: Christian Erni

In **India**, in the last two decades, significant laws pertaining to the recognition of indigenous peoples' rights have been enacted such as the Panchayats (Extension to the Scheduled Areas) 1996 (PESA), the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 also known as the Forest Rights Act (FRA), the Right to Fair Compensation and Transparency in Land Acquisition and Rehabilitation & Resettlement Act 2013 (RFCTLARR). The PESA is directed primarily at promoting village level democracy through the Panchayati Raj (a three tier local government body) institutions for the Scheduled Areas (Fifth Schedule area). The PESA recognizes the rights of indigenous peoples to their lands and resources and decision-making processes regarding development activities. However, the enforcement of this statute has been hampered considerably as its implementation depended on amendment of the Panchayati Raj legislations made at the state level.

The FRA recognizes indigenous peoples' rights to land and resources, and to protect and manage their customary forests across the country. It is a major initiative to recognize the rights, which have been denied to the indigenous and forest-dependent communities by the forest laws thus far. The FRA became fully operational with the notification of its rules in 2008 to strengthen its implementation. However, violations of compliance with the FRA have taken place. Since 2009, over 250,000 hectares of forest have been diverted, ignoring the required consent by the Gram Sabha and recognition of forest rights (Bijoy and Srivastav 2017:18).

The RFCTLARR is seen as pro-people. It replaces the Land Acquisition Act 1894 and requires that "Unless 70% of the total local population gives their consent the government cannot acquire even an inch of the indigenous land" (AIPP 2017:35). Attempts have already been made to do away with this important provision including the mandatory social impact assessment. Along with the national laws, there are various state laws that affect the rights of indigenous peoples over their LTR. For example, the Odisha Land Grabbing (prohibition) Act 2015 will have adverse impacts on indigenous communities by criminalizing occupation of land without legal documents (patta), whereas in general, patta is not needed on their customary lands. This also contradicts the FRA.

In **Jharkhand**, in November 2016, the state assembly passed amendments to two land acts: the Chotanagpur Tenancy (TNC) Act of 1908 and the Santhal Pargana Tenancy (SPT) Act of 1949. The Bills are pending approval by the President of India. The two Acts provide safeguards to the indigenous communities by prohibiting the transfer of their lands to non-tribals and stipulating restrictions on their use. Despite poor implementation, these Acts have to some extent protected the indigenous communities from being dispossessed or at least they could seek the court's intervention. If the Bills are approved, they will further open up rampant alienation of indigenous communities' lands for commercial use. Passing of the Bills have been resisted so far, through mass protests in different districts of the state. The state responded with brutality through police firing against the protesters in three different incidents, killing 8 persons. (IWGIA 2017:386)

In **Myanmar**, the National Land Use Policy (NLUP), a landmark reform policy, was adopted by the Parliament in January 2016. The NLUP includes a chapter on "Land Use Rights of Ethnic Nationalities" referring

to the customary land tenure rights of ethnic nationalities and land-use mapping. The document also mentions Free, Prior, Informed Consent (FPIC) as a means of addressing “land monopolization and speculation” (IWGIA.2017: 376). It establishes a process for recognition of the rights of indigenous communities and not just individuals.



**Myanmar Kayah
community mapping.**
Photo by: Christian Erni

Recognition of LTR rights and Peace Process: the case of Myanmar

Land has been identified as a key issue to be resolved in the recent national peace process of the 21st Century Panglong¹⁷. The different ethnic nationalities that are negotiating want a federal structure for Burma and devolution of power and control over LTR to the federal states. Some of the armed groups negotiating with the Myanmar government such as the Karen National Union (KNU), Kayah National Progressive Party are developing their own land policies.

¹⁷The Union Peace Conference -21st Century Panglong has been organized by the government of Myanmar twice - August 2016 and May 2017 in Nay Pyi Taw. The conference name “21st Century Panglong” refers to the historic Panglong conference of 1947 in which an agreement on a formula for federalism, recognizing the principle of “full autonomy in internal administration for Frontier Areas” was signed between pre-independence interim government and leaders of Shan, Kachin and Chin. (Panglong is a Shan town). The 21st century Panglong conference has a similar intention to have consultations with all the ethnic groups of Myanmar for “peace, national reconciliation, and the emergence of a democratic federal Union”. <http://www.mizzima.com/news-opinion/second-panglong-conference-sees-significant-breakthroughs>; <https://frontiermyanmar.net/en/panglong-then-and-now-and-the-promise-of-peace>

Going to Court: Litigation as a means to Assert Indigenous Peoples' Rights

In recent years, substantial jurisprudence has emerged from constitutional courts to strengthen human rights protections for indigenous communities and their rights to customary lands. Absence of law enforcement and irregularities in the implementation of existing legislation, lack of consultation and consent has led to the proliferation of human rights abuses and land conflicts over LTR between indigenous communities, corporations and various state agencies. As a last resort, indigenous peoples have gone to court, not only to assert their statutory rights but also because states are not respecting and protecting customary laws. The following section presents some of the court cases seeking recourse to land conflicts in Asia.

The Indian Forest Rights Act of 2006 is hailed as a progressive piece of legislation aimed at undoing the “historic injustice” committed against the forest dwelling tribal peoples and other traditional forest dwellers. The FRA stipulates free, prior and informed consent by the Gram Sabha before any diversions of the forest areas are made for purposes such as mining or infrastructure projects. Since its enactment in January 31, 2012, a total of 3,168,478 claims have been filed across the country under the FRA. Out of the total claims, 1,472,672 were rejected. In many of the rejected cases, the claimants were denied a proper hearing both at the Sub-Divisional and District Level Committees. As of June 2016, out of 4,182,646 claims filed, the government rejected 60% or 2,502,723 of the claims (AIPP 2017:38). Despite the stringent provisions provided in the Fifth and Sixth Schedules to the Constitution of India, in Jharkhand state alone, as of January 2016, there were 4,219 cases pending with Schedule Area Regulation courts against land alienation from tribals to non-tribals (IWGIA 2017:388). The number of claims filed shows the extent to which tribal peoples are losing their LTR despite the existing laws. Ownership rights to land being cultivated by indigenous communities and forest dwellers, including the responsibilities and authority for sustainable use and conservation of biodiversity are being violated.

Indonesia's Constitutional Court ruling 24/200, in 2003, recognized the *kesatuan masyarakat hukum adat* (meaning customary law societies/communities who live by law) as having legal standing and eligible petitioners.

Accordingly, the Court accepted petitions from two indigenous communities together with AMAN¹⁸ as a supporting organization for review of provisions in the Forestry Laws 41/1999. One of the articles in this Law claimed that the customary forests (*hutan adat*) are part of state forests covering about 65% of Indonesia. In May 16, 2013, the Constitutional Court issued its decision No. 35/PUU-X/2012 (MK 35), recognizing indigenous peoples as legal subjects and people with rights over land, territories and natural resources, including customary forests (AIPP 2017: 45). This is a landmark decision, which declared that the state must return customary forests to indigenous peoples, opening a window of opportunity to potentially secure at least 40 million hectares of customary territory (RRI Sept 2017). Challenges still remain for implementing this decision on the ground, as regulations have to be formulated and issued at the provincial or district level including required budgets, and above all, political will of the local governments and leaders. AMAN and its members are lobbying provincial and district governments to issue such regulations in support of MK 35 (AIPP 2017: 53). In another case, indigenous peoples filed a petition requesting the Constitutional Court to grant their demands and review some of the provisions in the Law on Prevention and Eradication of Forest Degradation and Forestry Law as it has become a source of criminalization and violence against indigenous communities. On December 10, 2015, the Court granted indigenous peoples and other forest dependent communities permission to collect forest products for non-commercial purposes. However the demand to review criminalization was rejected (IWGIA 2016:266). There are thousands of cases filed in the District Courts against private companies which have acquired land without free, prior and informed consent. According to the National Land Agency, there were around 8,000 land conflicts in Indonesia in 2012 (Saptaningrum in Chao 2013: 22). “The National Human Rights Commission of Indonesia (Komnas HAM) has recorded an increase in complaints against companies since 2010, as well as an increase in land conflicts between individuals/communities and companies, in particular large-scale plantation operators” (Ibid:22).[] “In most cases, lack of respect for and implementation of FPIC has been a root cause of ensuing land conflicts” (Ibid: 23). Some of

¹⁸ AMAN (Aliansi Masyarakat Adat Nusantara), also known as the Indigenous Peoples' Alliance of the Archipelago, is a national alliance of indigenous peoples with more than 2000 indigenous communities in Indonesia.

the lawsuits filed in the last two years include the lawsuit filed by Talonang indigenous peoples against PT. Pulau Sumbawa Agro at the Sumbawa District Court, and the lawsuit by Semunying Jaya indigenous peoples against PT. Ledo Lestari in West Kalimantan. The judges dismissed the cases on the grounds that they were unclear. (IWGIA 2017:341). In the judges' legal consideration, the indigenous peoples have no legal status in the form of a local regulation or decree from the relevant Ministries that would recognize their existence as indigenous peoples.

In Malaysia, most of the cases involve the acquisition of, or entry into customary lands by corporations and government entities, almost always without the knowledge or consent of indigenous communities. In 2013, Sarawak recorded over 200 cases of this nature, a similar number in Sabah and substantial number in Peninsular Malaysia. (Toh in Chao 2013: 82). The following case in Sabah was settled through third party mediation in 2016. This is the longest Native Customary Rights (NCR) case between the NCR holders against the palm oil developer. In March 2016, the Sabah High Court settled a landmark agreement between the indigenous Dusun and sungai peoples of Tongod district and Genting plantations. The case concerns a large-scale palm oil development on community lands in central Sabah, which dragged on since 1997 and has been in the courts since 2002. The palm oil companies secured their permits without recognizing the Dusun and Sungai peoples' land rights and without their free, prior and informed consent (FPIC). The companies ignored the indigenous communities' objections and bulldozed the communities' forests and farmlands. They gradually expanded their operations, squeezing communities into a narrow settlement strip along the roadsides. With support from pro bono lawyers, PACOS community support group, JOAS, the Malaysian national indigenous peoples' organization, and strong mobilization among the communities themselves, they challenged the companies, the State Government and the lands office for the illegal take-over of their customary lands. The plaintiffs successfully used their distinct folklore, oral history, and ways of life as living evidence of their continuous occupation. Community maps supported their testimonies. The court finally upheld the indigenous communities' native customary rights (NCR) to the disputed land. It was a significant victory for the Orang Asal in Malaysia as this settlement acknowledges Orang Asal's rights to their NCR¹⁹. While a number of victories were gained on land

¹⁹ "Longest NCR case settled". March 23, 2016, <http://www.theborneopost.com/2016/03/23/longest-ncr-case-settled/>

rights related cases there were also extremely disappointing decisions such as the majority decision of the Federal Court on 20 December 2016, on the Sarawak government's appeal in the case brought by TR Sandah. "It ruled that the customary practice of indigenous peoples do not have the force of law because -even if shown to exist- it did not fall within the definition of customary laws under the Sarawak Land Ordinance. The Federal Court's decision will have major implications for large tracts of customary lands and forests currently occupied by the indigenous peoples of Malaysia" (IWGIA 2017:348). For some of the other key cases in Malaysia, see annex II.

Besides litigation in the courts, indigenous peoples have used other strategies. In Cambodia, the indigenous peoples' rights movements deployed a new strategy for stopping or at least slowing down, the rampant land grabbing that has marked so much of northeastern Cambodia since the 1990s. Instead of appealing to the unresponsive national government to implement its already adopted laws and policies, they looked for remedy from the financiers who were underwriting the companies that were grabbing their land. In this case, the financier was the International Finance Corporation (IFC), the private sector financing arm of the World Bank, which has adopted environmental and social safeguard policies. In February 2014, a complaint on behalf of 17 indigenous villages was filed with the IFC's Compliance Advisor Ombudsman (CAO) with regard to the IFC's financing of the Hoang Anh Gia Lai (HAGL). The HAGL is a rubber plantation company based in Vietnam, which has been responsible for taking tens of thousands of hectares of indigenous lands and forests in Ratnakiri province. By late 2015, the combined economic land concessions (ELCs) claimed by HAGL and its subsidiaries amounted to almost 80,000 ha (8 times the official ELC limit). In Sept 2015, the CAO facilitated negotiations between HAGL, the indigenous communities and their NGO representatives that resulted in satisfactory agreement. The HAGL agreed to facilitate the communal land title processes for 11 of the affected communities, and provide other remedies for the disruption caused by its development activities in Ratnakiri province. (IWGIA 2016:288). The strategy to approach the finance chain resulted in a better outcome compared to many other similar situations of indigenous territories in Cambodia. The case highlights the complexity of corporate financing and State weaknesses in regard to communal land rights despite the 2001 Land Law.

National Human Rights Institutions (NHRIs) addressing human rights violations on the land rights of Indigenous Peoples

There is no regional mechanism yet in Asia through which indigenous peoples human rights violations could be addressed. However there are NHRIs, which are increasingly addressing violations of the land rights of indigenous peoples. Indigenous communities and human rights organizations have used NHRIs as a channel for filing complaints. In Malaysia, between 2005 and 2010, the National Human Rights Commission of Malaysia (SUHAKAM) received over 1,100 complaints alleging various forms of human rights violations to NCR lands. Sabah had the highest number at 814, followed by Sarawak 229, and Peninsular Malaysia 45 (IWGIA 2012:291-92). In 2011, SUHAKAM launched its first national enquiry on land rights of Orang Asal. The Commission made significant recommendations based on the UNDRIP, including FPIC to improve the current status of land rights for indigenous peoples in Malaysia. Similarly, the National Human Rights Commission of Indonesia (Komnas HAM) conducted its first national enquiry into the violation of indigenous peoples' land rights in 2014. The Komnas HAM collected around 140 formal complaints from seven regional hearings that highlighted the issue of unauthorized land grabbing by big timber companies who have major interests in the opening of forests for oil palm plantations. Numerous companies were operating without permits using the police to brutalize and intimidate the indigenous communities. Moreover the government has not registered the various indigenous peoples living in the forest. (AIPP 2017:46). The Commission made various recommendations, including the licensing system for natural resource exploitation based on FPIC principles.

Given the overall regional trend encouraging substantial investment in large-scale land development, and non-implementation of existing laws and policies, the 7th Regional Conference on Human Rights and Agribusiness in South East Asia²⁰ issued a resolution calling for a range of measures aimed at securing real change in land tenure recognition and security. The resolution calls for accessible mechanisms to map and register customary lands, to provide clarity of ownership, for business models of plantations to stop pressures on communities to surrender their lands, both by promoting alternative production models and alternative financing models.

²⁰ Press Release. Pontianak Statement. 24 October 2017.

<http://www.forestpeoples.org/sites/default/files/documents/PONTIANAK%20STATEMENT%20ON%20HUMAN%20RIGHTS%20AND%20AGRIBUSINESS%20IN%20SOUTHEAST%20ASIA%20final%20with%20recs.pdf>

CHAPTER 4

INITIATIVES BY INDIGENOUS PEOPLES FOR PROTECTION AND SECURING OF LTR

Following sustained struggles to retain their autonomy and to control over their lands and territories, there have been significant achievements in terms of developing constitutional provisions, national laws and policies to recognize and promote the rights of indigenous peoples including their rights to LTR. Nevertheless, the land situation for indigenous peoples remains dismal, owing to the absence of precise legal regulations affirming indigenous peoples' customary rights over their LTR coupled with the lack of adequate consultation about major development projects taking place in their territories. Moreover, international standards and convention that the respective countries have ratified are often not implemented and national laws are not harmonized with international instruments. Government policies supporting the practice of large-scale land acquisition by private sector entities for plantations and other forms of agribusiness activities and for extractive industries on indigenous territories have concomitantly led to an increase in land conflicts.

Indigenous peoples and LTR demarcation

One of the initiatives indigenous peoples have taken up is participatory and community led mapping, to assert their rights and protect their lands and territories. Community mapping is emerging as an increasingly important tool to self-demarcate and to claim land in the Philippines, Indonesia, Thailand, Cambodia, Malaysia and India. In Malaysia, indigenous peoples have used mapping as an effective evidence tool in the NCR claims in the court. In the Philippines, in 2001, the Tabanua indigenous community of Palawan (the first-ever ancestral waters claim) obtained the Certificate of Ancestral Title (CADT) for 22,284 hectares of land and marine waters after persistent struggle. In their claim they produced a map and ancestral land management plan for the recognition and maintenance of a Community

Conserved Area in Coron and Dalian islands. Since then with support from indigenous support organizations such as PAFID²¹ at least ten land titles and nearly 250,000 hectares of traditional land have been mapped and surveyed (AIPP 2017:83). As of 2015, PAFID also assisted 145 indigenous communities in using participatory 3-dimensional modeling (P3DMs)²². P3DM has been used not only to delineate the boundaries of their domain but also to define their own management zones, generate their own spatial information and present their own ancestral land from their own unique perspective (Ibid:83). In the lobby against the Sagittarius Mining Inc. (SMI) operation in the B'laan ancestral domain in South Cotabato, indigenous communities used P3DM successfully to generate critical data to counter the SMI experts' arguments in the review of the environmental impact assessment of the mining operations (ibid:84).

In Thailand, where most of the indigenous communities live in the protected forests and most vulnerable to being evicted, they used P3DMs (at times succeeded), to negotiate with the sub-district and forest officials for possible collaborative management of the forests so they can continue to occupy and use their lands which have become protected areas.

In Indonesia, in the absence of a national mechanism to identify and map indigenous communities' territories, *Aliansi Masyarakat Adat Nusantara* (AMAN) along with several NGOs set up the Indigenous Territory Registration body (BRWA) in 2011. So far, there is no official data about the existence of indigenous peoples and customary lands in Indonesia. The Ministry of Forestry claims 187 million hectares as state forest out of 191 million hectares of the total forest area of the country (AIPP 2017:47). Since 2012, AMAN has been submitting data and information about the existence of indigenous peoples and customary territories to the government. As of November 2016, BRWA has registered as many as 703 maps²³ of indigenous territories covering a total area of 8.3 million hectares (IWGIA 2017:339).

²¹ Philippine Association for Intercultural Development (PAFID) an NGO, which is actively providing mapping, services to indigenous communities in the Philippines.

²² Participatory 3D modelling (P3DM) is a community-based mapping method which integrates local spatial knowledge with data on elevation of the land and depth of the sea to produce stand-alone, scaled and geo-referenced relief models.

²³ The finalized maps consist of general as well as specific information on indigenous territories, land usage, profiles of the indigenous communities including their history, tenure system, governance customary laws (AIPP 2017:49).



**Indonesia-Central
Sulawesi community
mapping.**

Photo by: Christian Erni

Despite continued lobbying and meetings with the government and even after the introduction of the one map policy through Presidential Decree No. 9 of 2015 as a solution to overlapping land claims, there has been no significant policy response from the ministries and agencies receiving the maps (ibid:339). Meanwhile, AMAN decided in 2014, for each local chapter to map customary lands of at least two indigenous communities. AMAN has 110 local chapters thus by the end of 2017 about 220 customary areas (around 2.2 million hectares) would have been delineated (AIPP 2017:49). In Burma, indigenous communities are mapping their ancestral territories in Shan, Chin, Karen and Karenni states with the help of civil society organizations such as POINT, KARUNA, Chin Human Rights Organization.

Besides being a useful tool for advocacy and to claim back their land, the process of inclusive and rights-based approach to community mapping has been empowering to the indigenous communities in many ways: 1) it creates unity among the community behind territorial defense, 2) it helps inter-generational transfer of knowledge about their territory and 3) though territorial demarcation may sometimes lead to conflicts, in most cases it helps to find a lasting solution to existing boundary conflicts.

Land Rights Now Campaign

Since the worldwide launch of the “Global Call to Action on Indigenous and Community Land Rights Campaign” on 2 March 2016, many indigenous peoples’ organizations and other civil society organizations in Asia have joined the Campaign for the recognition and protection of indigenous peoples and local communities’ collective land rights. Asia regional campaign was launched in Yangon on 12 March 2016 participated by 60 indigenous delegates from 12 countries. During the launch, Joan Carling, former Secretary General of the Asia Indigenous Peoples Pact (AIPP) stated, “This campaign is our collective struggle to demand our collective land rights. It is a mobilization of global efforts and energies to demand the land rights of 370 million indigenous peoples in the world, which are largely consisting of indigenous peoples in Asia”. She added “The Sustainable Development Goals will never be achieved without the recognition of indigenous peoples’ collective land rights and their crucial roles and contribution for the sustainability of our mother earth”²⁴.

The Campaign has been launched nationally in Cambodia, India, Indonesia, Myanmar, Malaysia, Philippines, and Thailand, joined by around 200 indigenous peoples’ organizations, networks and civil society organizations.

As part of the Campaign, a series of activities are being carried out, with each country defining their own focus. For instance in Malaysia, JOAS plans to map out Orang Asal territories and consolidate the results into a national database to support the campaign (AIPP 2017:64). In India, the main activities are community mapping for the recognition of community land rights, capacity building and advocacy for the proper implementation of the Forest Rights Act, 2006. In Cambodia, the Campaign’s “Policy Asks” has been translated into Khmer and video clip on rights have been produced by the indigenous youth. They have organized community exchange and mutual learning programmes (ibid:27).

²⁴<http://iphndefenders.net/asia-regional-launch-global-call-action-indigenous-community-land-rights/>

CHAPTER 5

LAND-BASED LIVELIHOODS AND THE CONSEQUENCES OF DISPOSSESSION

Livelihoods of indigenous peoples across Asia are rapidly changing because of the economic developments taking place in the region. The unprecedented economic growth experienced by the region allowed many of the countries to move out of low-income status, but the economic growth is largely concentrated in urban areas. According to the community forestry review of RECOFTC in 2013, “poverty rates remain higher in rural areas and tend to be highest in regions with dense forests”, (RECOFTC 2013:2). These are where most indigenous communities live, with increased domestic and international investments in agro-industrial crops and minerals, driving their expansion into densely forested regions and having serious implications on indigenous communities. Subsistence lands are being converted into large-scale, capital-intensive cash crop plantations. Multiple government policies including land concessions for plantations or resource extraction, eviction from protected forests and conservation areas, denial of access to forests and other natural resources and land alienation have further impoverished indigenous peoples, who continue to make up the majority of the rural poor. Consequently, increasing numbers of indigenous peoples are migrating to the urban areas to look for jobs, access health care and education. Their land-based livelihoods are also changing because of the above-mentioned reasons and compounded by the prohibition of livelihood practices such as rotational farming or shifting cultivation. Some indigenous families have gained from the economic growth. “Generally, livelihoods in indigenous communities have become more diversified, partly out of necessity, partly out of choice. Scarcity of land is one of the main external driving forces behind current livelihood changes. [] Restrictive laws

and policies, population pressures and, partly market integration lead to a reduction of land available for shifting cultivation and other forms of land use (e.g. raising cattle). Another main driving force of change is market integration as indigenous farmers are seizing new opportunities to increase their income and improve their living conditions. Furthermore, education and mainstream media bring about changes in views and values thus livelihood preferences above all among the youth” (Erni 2015:16). For centuries, indigenous communities have combined subsistence with market-oriented production in a so-called dual economy, like in the combination of rice shifting cultivation and rubber (Dove 2011: 149f). This has allowed for a high level of flexibility and livelihood security for households. There are numerous examples of innovative practices, such as combining shifting cultivation with new agroforestry practices, (fruit and cashew and orchards in Cambodia, rubber gardens in Indonesia) growing high-value cash crops in shifting cultivation fields (vegetable, herbs, ginger, turmeric in India, Bangladesh)” (ibid:21-22). When farmers have sufficient land and secure tenure, they can further enhance innovation and diversification and market access can improve food security and overall wellbeing of the community. But there are many indigenous farmers who have suffered because they have been resettled, have sold off or been tricked out of their land because of poverty, like in Laos and Cambodia. They became seasonal farmers or landless labourers, and eventually they lose their food security.

Shifting cultivation remains an important land use system in the region despite government policies and programmes to eliminate it. Outright banning of shifting cultivation and resettling indigenous communities from the highlands to lowland areas (Laos PDR); creation of permanent, fixed cultivation followed by sedentarization of the population and resettling shifting cultivators to new villages where they grow subsistence and cash crops (Vietnam); establishment of national parks, protected areas, forest reserve and restrictions in the name of environment, (Thailand) and government policies favouring large-extractive industries, large hydropower and agribusiness on one hand and strict nature conservation on the other hand have left many indigenous

communities in desperate situations. All these policies have adversely affected food security for the indigenous communities.



Indigenous peoples' land use practices and biodiversity

Indigenous peoples' close dependence on natural resources has evolved sound systems of managing natural resources. Territories of indigenous peoples often coincide with areas of high biological diversity; most of the biodiversity hotspots are to be found in the indigenous territories.²⁵ They employ low impact land use and resource management practices that are conducive to the maintenance of biodiversity. For example extensive land use systems like long fallow shifting cultivation and the intermittent use of secondary forests for agriculture purposes have shown to have a higher biodiversity than other forms of agricultural land use. Moreover, indigenous communities have customary resource management systems that are aimed at preserving not just the resource base of their livelihoods but also biodiversity. For indigenous communities, forests are an important source of food. Research findings presented in a seminar on the relationship of the forest with wild food diversity and quantity found that indigenous communities procure nutritious food from the forest areas. "The availability of food is tied to the

²⁵ See Local Biodiversity Outlooks

survival and health of natural forest and biodiversity as well as the protection of tribal rights to collect minor forest produce”. However these are adversely affected by the increasing depletion of natural forest and their replacement with man-made tree plantations”. (Bharat Dogra Dec.14. 2017). For good practices in conservation and natural resource management through traditional knowledge see Annex 3 –Sasi-traditional knowledge-nrm]

Indigenous peoples’ livelihood practice of shifting cultivation has been blamed for the deforestation of the region. The actual culprits are the large-scale agribusiness and extractive industries that are scourging the land and resources, polluting indigenous territories with uncontrolled use of chemicals and pesticides²⁶.

Shifting cultivation and food security

Case studies from seven countries²⁷ including Bangladesh, Cambodia, India, Indonesia, Lao PDR, Nepal and Thailand highlight that shifting cultivation continues to be an important livelihood system for the indigenous communities (except for *Tharus* in Nepal who have been forced to discontinue the practice after being resettled outside their ancestral land in a national park). This research, jointly commissioned by AIPP, FAO and IWGIA focusing on good practices as well as policy constraints in relation to land tenure and other collective rights of indigenous peoples “illustrate how shifting cultivation was and still remains a suitable and for some communities indispensable form of land use in upland areas in Asia, and that it can continue to be managed sustainably from the viewpoints of both natural resource management and household food security under conditions of sufficient and legally recognized access to land” (Erni 2015: viii).

Shifting cultivation is more than just farming, “it is also a form of landscape management that is closely connected to the culture and the way of life of the communities practicing it [...] it is providing sustainable livelihood and food security” (ibid:26). Shifting cultivation has proved to be sustainable method of farming that protects and contributes to the conservation of biodiversity when it is practiced with sufficient fallow period. It has fostered biodiversity in secondary forests.

²⁶ See various AIPP publications at: <https://aippnet.org>

²⁷ Erni, C. (Ed). (2015). Shifting Cultivation, Livelihood and Food Security. New and Old Challenges for Indigenous Peoples in Asia

Securing indigenous land rights is increasingly recognized as an urgent global priority. It is “a low-cost strategy to reduce forest carbon emissions; a means to reduce financial risk to investments and secure a sustainable supply of commodities; and a basic human right of the people whose lives and livelihoods rely on local resources.” (RRI and TEBTEBBA 2014: 1)

However, poverty, land loss and pressure on resources can force indigenous peoples to overuse their resources and to over exploit wildlife for the global wildlife trade.²⁸ A recent report on combatting illegal wildlife trade (IWT) in the Mekong region highlighted: “This region has high levels of rural poverty and inequality and is experiencing rapid and intensifying economic development and escalating movement of people and goods. These are major risk factors for IWT.”²⁹ But with secure rights over their territories and thus secure livelihoods, biodiversity can be well preserved on indigenous peoples’ lands. A research by Resource Rights Institute has shown that in areas where indigenous peoples have tenure rights, their areas are better conserved³⁰.

Land loss and the fate of indigenous women

Indigenous women bear a heavy brunt of land loss and denial of access to forests and other natural resources. They have close relationships with the land as primary providers of food for the family and the community. Although women and men are both involved in agriculture and other productive work, in general, women make up the main labour force in the farm work. For instance in Nepal “where indigenous peoples constitute at least 38% of the population, women account for 66% of the agricultural labour force but own only an estimated 8% of the land” (Feng 2011:15, quoted in Feiring 2013:68). Traditionally, indigenous women have had equal access to and control over collective land and natural resources, and some indigenous communities in South and Southeast Asia have land ownership rights, similar to indigenous women in other parts of the world. They have conserved and propagated many varieties of seeds as well as developed

²⁸ Engaging Communities in Combatting Illegal Wildlife Trade: Lessons from Southeast Asia

²⁹ Engaging Communities in Combatting Illegal Wildlife Trade: LESSONS FROM SOUTHEAST ASIA, https://www.iucn.org/sites/dev/les/be_hanoi_communique.pdf

³⁰ RRI and TEBTEBBA 2014. Recognizing Indigenous and Community Rights. Priority Steps to Advance Development and Mitigate Climate Change

detailed knowledge about the forest products they collect and use. Therefore they are the keepers of very varied knowledge systems, including ecosystems management and technologies, locally adapted seed varieties and medicinal plants. For example, Karen women in Thailand continue to grow at least 40 different food varieties in their swidden fields (Indigenous Knowledge and Peoples Network 2006:53). Given the close links between their daily lives and environment, indigenous women play crucial roles in the management and conservation of natural resources and biodiversity (AIPP 2012:61). However their role and contributions to the sustainable development are undermined by land and forest loss and diminishing control over shared resources resulting from government sponsored development projects. Their role of transmitting crucial knowledge about natural resource management and conservation of biodiversity to the younger generation has been compromised.

The loss of access to resources increases indigenous women's economical dependence on men, which weakens their status in society. At the same time, the burden to take care of and provide for the children continues to rest on their shoulders. Their role in ensuring food security is seriously threatened, while increased resources scarcity, environmental hazards, disasters also impact on their reproductive health. And as indigenous women are forced to seek other livelihoods away from their community, they become more vulnerable to sexual and other forms of violence. The stories documented by AIPP from the indigenous women of Cambodia, India and Indonesia showed that in all the cases, it is the indigenous women who experienced the tremendous impact of dispossession and displacement from their land. For instance, some villages of Jharkhand state in India and Preah Vihar in Cambodia, the adivasi and Kui women respectively, experienced similar situations. "Almost entire communities were forcibly transformed economically, from land owners and self-sufficient forest gatherers and farmers to low-paid factory workers on the subsistence level" (AIPP 2015:7). They could not go to gather herbs in the forest or tend to their livestock or go in the farms or collect clean water due to harassment by the company security forces (ibid:7)³¹.

³¹ For more information on the situation of indigenous women see various AIPP publications at: <https://aippnet.org/publication/>

What future for indigenous youth?

The general trend among the indigenous youth is that they are getting uprooted at a young age from their homes for schooling in the urban centers and towns. And then because of inadequate higher educational infrastructure and for job opportunities, a large number of indigenous youth move to the cities and metros. In this process they lose out on inter-generational transfer of indigenous knowledge and values that they could have from their parents and elders. Prevailing conflicts in some places such as Assam, Nagaland, Manipur states in the Northeast region of India, push the youth to leave, to try to make a living elsewhere. Life prospects for youth has become very complex because there are few job options at home and it is difficult to make a living, when people expect more and are also exposed to other values, including consumerism.

Despite all the difficulties confronting the youth in particular and indigenous communities in general, because of their strong connection to their land, strong customary institutions and culture, including the youth diaspora, the connections they have with their homes and home villages, and their lands and territories continue to be very important. Even if they live far away in the big cities, they always come home for the important events as members of the community. They need their village; otherwise they lose their identity. This is true for the Tangkhul Naga from Northeast India: the Diasporas bring up their children speaking their mother tongue. If their people were not in control of their territories and villages where they can return to and bring their kids home, they would have given up and their kids would speak the languages of others where they grow up. But among the Tangkhul, for example, because their home villages are there, they have their identity, they bring up their children in their own culture and language and that's why they maintain their identity even in the cities. Controls over the LTR are important not just for the people in the village who depend for their livelihood but for the identity of the indigenous peoples as such, wherever they live, it's a cultural survival.

Recommendations

1. Implement laws and regulations that recognize the collective rights of indigenous peoples to their LTR. In countries where such legislation does not exist, States should enact laws and policies to protect and accord legal recognition of indigenous peoples' collective rights to the LTR.
2. Governments should implement international standards and conventions, and harmonize national laws with international laws, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).
3. Governments should in consultation with indigenous peoples, develop accessible mechanisms to delineate, map and register customary lands, to provide clarity of ownership.
4. Land tenure reform should be based on an understanding and acceptance of legal pluralism that will reconcile customary laws, national laws and international human rights laws.
5. Before starting any projects, the government concerned, companies and other relevant parties should commit to and adhere to the principle and right to Free, Prior, Informed Consent (FPIC) of indigenous peoples in any actions that may impact their lives, rights and interests. Government should not grant or lease land until and unless FPIC has been obtained from the indigenous communities.
6. Concerned government agencies, UN agencies, regional bodies such as ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and NGOs should ensure participation of indigenous women, youth and indigenous persons with disabilities in all decision making processes of projects that may affect them and the life of the community.
7. Government and civil society organizations (CSOs) should organize joint workshops on FPIC (jointly among, government agencies and private sector actors) to increase awareness on the human rights based approach to the rights of indigenous peoples to LTR.
8. Governments should formulate rules and regulations for the implementation of laws concerning legal recognition of indigenous peoples and their rights to LTR. Required budgets should be allocated to train and build the capacity of the local government agencies for the proper implementation these laws and policies.

9. Governments and donor organizations should allocate funds to train and build the capacity of indigenous communities to make their own community maps and monitoring systems.
10. Government and other concerned agencies or entities should acknowledge the existence of legal pluralism especially in land relations and accord equal recognition and respect to the customary laws as it is to the national laws.
11. Government and policy advisors should respect the livelihood strategies of indigenous communities such as shifting cultivation, which is an indispensable form of land use in upland Asia. Take into account sustainable methods that have nurtured biodiversity in secondary forests.

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ANNEX I

INDIGENOUS PEOPLES IN ASIA

COUNTRY	COMMON EXTERNAL DESIGNATIONS	NUMBER OF ETHNIC GROUPS	ESTIMATED TOTAL POPULATION AND % OF NATIONAL POPULATION
Bangladesh	Pahari, Jumma, Adivasi, Tribal	4554	1,586,141 1.8%.
Burma/ Myanmar	Ethnic Minorities	135	14.4 - 19.2 mio 30 - 40%
Cambodia	Indigenous Minorities	24	170,000 1.3%
China	Ethnic Minorities	Ca. 400 (grouped into 55 officially recognized "ethnic minorities")	111,964,901 8.4%
India	Scheduled Tribes, Adivasi	705 ethnic groups recognized as "Scheduled Tribes"	104 million 8.6%
Indonesia	Masyarakat Adat	over 700	Ca. 78 mio 30%
Japan	Indigenous Peoples	Ainu people are officially recognised as indigenous people. Ryukans are not recognised as an indigenous people	Ainu: 16, 996 Ryukans: 1.4 mio (1%)
Laos	Ethnic Minorities	ca. 200 (49 officially recognized "ethnic minorities")	2.3 - 4.6 mio 35-70%

COUNTRY	COMMON EXTERNAL DESIGNATIONS	NUMBER OF ETHNIC GROUPS	ESTIMATED TOTAL POPULATION AND % OF NATIONAL POPULATION
Malaysia	Orang Asli, Natives, Orang Asal	86	3.724 mio 13.8%
Nepal	Adivasi, Janajati, Indigenous Nationalities	over 80 (59 recognized “Indigenous Nationalities”)	10.6 mio 37.1%
Pakistan	Adi vaas, Tribal People	over 20	35 - 42 mio 21 - 25%
Philippines	Indigenous Cultural Communities/ Indigenous Peoples	110 officially recognized Indigenous Peoples	10-20 mio 10-20%
Taiwan	Indigenous Peoples	23 (14 officially recognized)	534,561 (2013) 2.28%
Thailand	Ethnic Minorities, Hill Tribes, Hill/ Mountain People	over 25 (10 officially recognized “hill tribes”)	923,257 1.34%
Vietnam	Ethnic Minorities	over 90 (53 officially recognized “ethnic minorities”)	12.3 million 13.23%

This table has been adapted from the Asia Indigenous Peoples’ Pact (AIPP) briefing paper “Who We Are Indigenous Peoples in Asia”. AIPP 2010 and updated the figures from the sources mentioned in the endnotes.

ⁱ Indigenous peoples in the country claim their population is about 5 million.

International Work Group on Indigenous Affairs (IWGIA), 2017. The Indigenous World 2017:396

ⁱⁱ AIPP 2016. Indigenous Peoples’ Initiative for Land Rights Recognition in Asia 2016.p.18

ⁱⁱⁱ Ibid.

^{iv} According to 2010 national census, IWGIA 2017:311

^v 2011 national census

^{vi} According to the last national census of 2010, the total population was 237.64 million, thus the estimated 30% indigenous would number 78 million.

^{vii} IWGIA 2017. The Indigenous World 2017:304

^{viii} Estimates between 35 and 70% of the national population of at present 6.5 million

^{ix} Currently the national population is estimated to be 31.6 million (in the 2010 census it was 28.334 million)

^x Indigenous peoples’ organizations claim a larger figure of more than 50% of the country’s total population. IWGIA 2017:405.

^{xi} According to the 2015 census, the population of the Philippines was 100,981,437

^{xii} 14 officially recognized as indigenous peoples. In addition, there are at least nine Ping Pu (“plains or low land”) indigenous peoples who are denied official recognition. IWGIA 2017:320

^{xiii} 68.86 million national population; the indigenous peoples of the South and Northeast are not included in this data

^{xiv} IWGIA 2017:360

ANNEX II

Landmark cases in Peninsular Malaysia, and in the High Court of Sabah and Sarawak^{xiv}

Landmark cases in Peninsular Malaysia

In the primary landmark case of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1997), new judicial concepts were introduced, in particular, that of native title. The judge laid down his understanding of native title by drawing upon precedents in the United States, Canada and Australia (specifically the Calder and Mabo cases respectively), stating that “it is the right of the native to continue to live on their land as their forefathers had done”, a right “acquired in law” and not based on any document or title. This also meant “future generations of the aboriginal people would be entitled to this right of their forefathers”. Specifically, he defined this “right over the land” to include: “the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.”

The judge ruled that compensation had to be given not just for rubber and fruit trees, but “for what is above the land over which the plaintiffs have a right”, that is compensation “for the loss of livelihood and hunting ground”. These, he established, were protected under Article 13 of the Federal Constitution (concerned with proprietary rights to land) and could not be excluded by the Act. Compensation was thus given for five types of deprivation: of heritage land, of freedom of inhabitation or movement, of produce of the forest, of future living for the plaintiffs and their immediate families, and of future living for their living descendants. Compensation was valued at MYR 26.5 million for 53,273 acres of land. When this was reviewed in the Court of Appeal, the presiding judges upheld the decision, and reaffirmed that “deprivation of livelihood may amount to deprivation of life itself and that state action which produced such a consequence may be impugned on well-established grounds”. The Federal Court affirmed this judgment.

Landmark case in the High Court of Sabah and Sarawak

A landmark case in Sarawak, *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* has challenged the limitations in the interpretation of native customary lands under the Sarawak Land Code (SLC) of 1958. The SLC limits the recognition of native customary lands or “native customary rights” (NCR) to a strict legal definition, as “land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958 and still subsist as such”. NCR in this statutory sense is “created” when land is planted with at least 20 fruit trees per acre, or where land has been continuously occupied or built upon for three years. There are several other conditions to be met in addition to the above. However, these claims are only applicable if the NCR land was created prior to 1st January 1958. Effectively, no new NCR can be created after this cut-off date except with a permit from the Superintendent of the Lands and Surveys under section 10 of the SLC.

The plaintiffs were residents of Rumah Luang and Rumah Nor, both Iban longhouses along the Sekabai River in Bintulu. The headman, Nor anak Nyawai, asserted that the companies had trespassed onto their ancestral lands. According to the plaintiffs, the Superintendent of Lands and Survey Department had issued a provisional lease that enabled Borneo Pulp Plantations Sdn Bhd and its sub-contractor Borneo Pulp & Paper Sdn Bhd to clear land for an industrial tree plantation as part of a concession of 300,000 ha. The plaintiffs said they had opened up this land and could prove that they had continuously occupied it for generations.

In the 2001 ruling, the High Court of Sabah and Sarawak recognised that the community had native customary rights over their farmland, and also fallows, and reserves of old growth forest according to traditional resource management practices. The ruling essentially set a precedent by recognising *temuda*, *pemakai menoa* and *pulau galau*^{xiv} as forms of native customary rights over land, and not just in the strict sense of the SLC 1958. The judgment confirmed that common law respected the pre-existing rights of indigenous groups under native law and custom.

In 2005, their victory was partially overturned in State Appeals Court due to “lack of evidence of occupation of the disputed area”. Confusingly, all their

lands outside the disputed area were still considered by the court to be valid native customary rights lands. In 2008, the Federal court declined to hear the case. This means that questions of native customary land rights continue to be decided arbitrarily, on a case-by-case basis. Though many High Court decisions since 2008 have chosen to uphold native land rights as defined in the Rumah Nor 2001 decision, hundreds of indigenous communities across Sarawak and Sabah continue to suffer the same loss of land as in the Rumah Nor case, as common law on native law and customs remains in the realm of the courts, and have not been incorporated into the relevant State laws.

However, the findings of Rumah Nor has been significant. In a recent June 2013 case heard by the Court of Appeal by the Sarawak State government against the judgment where the judge had ruled in favour of plaintiffs that they were rightful owners of NCR land that was issued by the state government to the Kanowit Timber Company, including their *pemakai menoa area*. The appeal against this decision by the State government was dismissed, affirming that *pemakai menoa* is part of NCR land. Despite this the State government has not recognised the *pemakai menoa* in the perimeter surveys to award Native Communal Reserve (also NCR) to longhouse communities.

ANNEX III

Sasi, a traditional knowledge system as a philosophy and concept for the conservation and natural resource management practiced by Haruku indigenous community in Indonesia^{xiv}

Sasi is a traditional knowledge, conservation system and natural resource management concept, as well as methodology and philosophy, practiced by Haruku indigenous community in Indonesia since the 1600s to manage various matters related to their community life, lands, territories and resources. It has been used, and proven particularly effective, in regulating matters that affects the community and finding solutions collectively and constructively, including positive measures for vulnerable groups within the community such as women, widows, children particularly orphans

and resolving or preventing conflicts including related to land and natural resources within the community or with external actors.

Sasi has been applied by Haruku community for more than 400 years to overcome various challenges, among others: excessive usage and exploitation of natural resources; destruction of community life and ancestral territory including their sea territory by various factors such as top-down national development policies and approach, private company activities; and assert collective rights to self-governance and own decision-making processes in relation to natural resource management system whereby particular needs of vulnerable groups are effectively taken into account. Effectiveness of Sasi also contributed to the change in the mind-set of general public that indigenous peoples and their traditional knowledge on land management system are backward or primitive.

Once a (potential) problem affecting territory, natural resources and sustainable life of the community has been identified in the village meeting, the community collectively discussed and set up solutions to address it and/or rules to prevent its (re-) occurrence, according to customary laws and values. The community members then authorized the Kewang (the indigenous institution assigned to govern and monitor implementation of the knowledge) to implement and monitor the situation. The Kewang members consist of persons with integrity, knowledge and commitment to carry out the tasks assigned to them.

In the context of Sasi, to address above-mentioned challenges, the following regulations have been put in place:

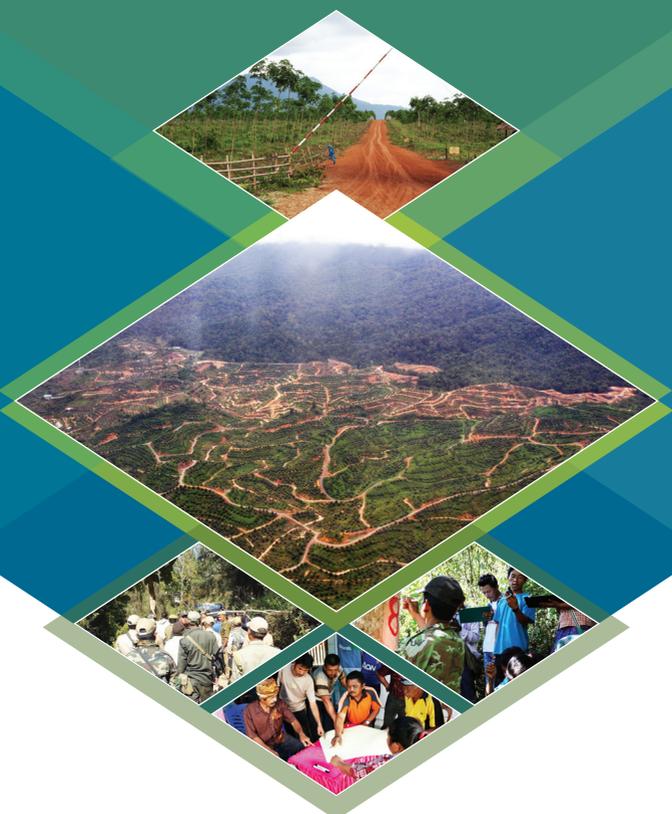
- a) Specifying prohibition on certain natural resources that can be collected at certain point of time;
- b) Control usage of community lands;
- c) Governing equal, transparent and sustainable distribution of goods, resources and harvests obtained from community lands, forests and water; and
- d) Strengthen unity of the community and its collective actions against external intervention affecting their territory.

In 1998, under the leadership of Kewang, using Sasi, the Haruku community succeeded in driving out one of the biggest mining company in Indonesia, PT. Aneka Tambang, from their territory. The Sasi has contributed to the effective implementation of customary laws and traditional knowledge

governing sustainable use of natural resources and lands owned by the community. It has guided the community to consolidate community values and standardize governance mechanisms and management of land and resources, and to address the needs of the community as a whole as well as those of the vulnerable, and to successfully protect the community territory through collective and united action. Haruku community has produced model cases of effective self-governance and collective decision-making processes particularly in relation to their territories and natural resources. The neighbouring communities, general public and relevant government actors among others have increasingly recognized effectiveness of Sasi.

The Sasi system is applied collectively as agreed towards certain areas or natural resource with specific time frame ranging from three months to one year or more led by Kewang. This includes implementation of the agreed sanctions to the violators of Sasi and equal sharing of the harvested natural resources with priority given to vulnerable groups within the community such as elderly, women and children particularly widows and orphans.

Each member of the community supports the implementation of the decisions made as a collective entity. The community's involvement in the administration and monitoring of the Sasi implementation together with the Kewang, helps strengthen the unity of the community and maintain respect towards Sasi as a customary rule for the community. Thus the power rests collectively within the community and not on one person or a group of persons. This ensures transparency and accountability towards each other as a responsible member of the community. It also ensures that Sasi system (and other customary laws and values) remains alive in the community and to be inherited by the future generations. In Haruku, knowledge transfer is done through various activities, such as story telling by community elders; opinion writing by children in the community on Sasi and environmental issues they have been facing. They establish community-based eco-tourism and conservation areas as a place for community members and outsiders to learn the important values of ancestral territory, natural resources and environment and to raise awareness on the challenges faced by the community including the challenges brought about by climate change.



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