

LAND RIGHTS AND MINORITIES

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by Roger Plant

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THE AUTHOR

ROGER PLANT was born in England in 1947 and educated at Oxford University, where he took a postgraduate degree in the economic and social development of Latin America. He is now a writer and consultant on political, human rights and development concerns, specializing in land and labour rights. His books include *Guatemala: Unnatural Disaster* (Latin America Bureau, London, 1978), *Sugar and Modern Slavery* (Zed Books, London, 1987) and *Labour Standards and Structural Adjustment* (ILO, Geneva, 1994). He has written numerous articles for the national press and for specialist and academic journals.

He has acted as a consultant to a wide range of human rights, development and aid donor organisations, and to several United Nations agencies. In the 1980s he assisted the International Labour Organisation in drafting the land rights provisions of its Indigenous and Tribal Peoples' Convention, No. 169. Since 1993 he has coordinated the global Land Rights Project of the International Commission of Jurists.

MINORITY RIGHTS GROUP

is an international non-governmental organization working to secure justice for minorities suffering discrimination and prejudice and to achieve the peaceful coexistence of majority and minority communities.

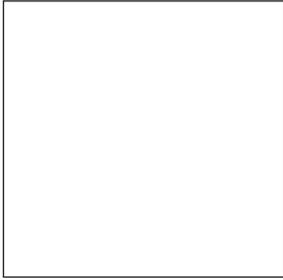
Founded in the 1960s, MRG informs and warns governments, the international community, non-governmental organizations and the wider public about the situation of minorities around the world. This work is based on the publication of well-researched reports, books and papers; direct advocacy on behalf of minority rights in international fora; the development of a global network of like-minded organizations and minority communities to collaborate on these issues; and by the challenging of prejudice and promotion of public understanding through information and education activities.

MRG believes that the best hope for a peaceful world lies in identifying and monitoring conflict between communities, advocating preventive measures to avoid the escalation of conflict and encouraging positive action to build trust between majority and minority communities.

MRG has consultative status with the United Nations Economic and Social Council and has a linked international network of affiliates and partner organizations, as part of its channels for human rights advocacy. Its international headquarters are in London. Legally it is registered both as a charity and as a limited company under United Kingdom law with an International Governing Council.

THE PROCESS

As part of its methodology, MRG conducts regional research, identifies issues and commissions reports based on its findings. Each author is carefully chosen and all scripts are read by no less than eight independent experts who are knowledgeable about the subject matter. These experts are drawn from the minorities about whom the reports are written, and from journalists, academics, researchers and other human rights agencies. Authors are asked to incorporate comments made by these parties. In this way, MRG aims to publish accurate, authoritative, well-balanced reports.



Young herders, Ethiopia
JENNY MATTHEWS/FORMAT

LAND RIGHTS AND MINORITIES

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DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES

The General Assembly, *Reaffirming* that one of the basic aims of the United Nations, as proclaimed in its Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion, *Reaffirming* faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, *Desiring* to promote the realization of principles contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations, *Inspired* by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities, *Considering* that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live, *Emphasizing* that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States, *Considering* that the United Nations has an important role to play regarding the protection of minorities, *Bearing in mind* the work done so far within the United Nations system, in particular the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments on promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities, *Taking into account* the important work which is carried out by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities, *Recognizing* the need to ensure even more effective implementation of international instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities, *Proclaims* this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain

their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group, with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. States belonging to minorities may exercise their rights including those as set forth in this Declaration individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights as set forth in this Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.
2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, including exchange of information and experiences, in order to promote mutual understanding and confidence.

Article 7

States should cooperate in order to promote respect for the rights as set forth in this Declaration.

Article 8

1. Nothing in this Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.
2. The exercise of the rights as set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.
3. Measures taken by States in order to ensure the effective enjoyment of the rights as set forth in this Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.
4. Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The organs and specialized agencies of the United Nations system shall contribute to the full realization of the rights and principles as set forth in this Declaration, within their respective fields of competence.

PREFACE

Minority Rights Group's published research demonstrates that land is among the most critical issues faced both by indigenous peoples, and other disadvantaged groups in different parts of the world. In this report the author makes a descriptive survey of the problems of land rights and traditional land tenure systems faced by groups and it assesses the legal and administrative measures adopted to deal with them. To make such a global survey is in itself a daunting task. At the same time the author introduces a debate on the complex and widely different land claims of indigenous peoples and minorities. MRG will take forward this debate in conferences, seminars, through correspondence and dialogue by encouraging the identification of effective strategies to address the key issues in practical ways.

Roger Plant, the author of this report, has not attempted to be definitive, although he has extensive experience on these issues. This includes acting as a consultant to a wide range of human rights and development non-governmental organisations and advising United Nations agencies that range from the International Labour Organisation (ILO) to the United Nations Centre for Human Rights, and to the International Fund for Agricultural Development. In the 1980s he assisted the ILO in the drafting of the land rights provisions of its Indigenous and Tribal Peoples' Convention, No.169. Roger Plant's original draft of this Land Rights Report contained an even greater wealth of examples, but unfortunately this has had to be cut in places. Where possible, evidence has been removed which can be found elsewhere in recent MRG reports.

At the United Nations the two issues of indigenous peoples and that of minorities have been kept well apart. Why then is MRG dealing with the two in one report? Indigenous peoples have made a concerted and organized effort to assert and protect their land rights, and have established the importance of land as a central theme which is often the basis for the cultural identity of a people. This material and spiritual relationship has raised questions about the current development model which treats land as a commodity to be bought, sold and exploited. This process of development is one in which all people are implicated. The contribution made by indigenous peoples to a rethinking of the place of land in this process is therefore of importance to a wider discussion of land rights. The same development process is linked to the pressures on land which affect many other minorities. Furthermore, the situation is made more complex by the many communities that can be defined as either indigenous or minority groups.

There has been considerable progress achieved in international standards and, to a lesser extent, in domestic law in terms of recognition and protection of indigenous peoples' land rights. An understanding of why this is occurring, the conditions and factors which have contributed to such developments, is useful in assessing whether and to what extent this experience could be of use to minority groups. These international standards have been a result of initiatives undertaken by indigenous peoples, movements to assert and protect their land rights and claims. Governments and international agencies have had to respond to the specific and concerted demands of the peoples directly concerned, and there can be no doubt

that without these campaigners, progress would have been much slower and more modest. The report, however, shows that much remains to be done.

The United Nations 'Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities' contains no specific reference to land concerns. However, there are references in the Declaration which have implications for access to resources and resource management. Article 5.1 states that 'National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities' and Article 5.2 states that 'Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.'

Both these Articles are relevant to the case-study of the Barabaig pastoralists of Tanzania highlighted in the summary profile of this report, who have lost access to their land following a development programme which received financial assistance from a major international Development Agency.

The large numbers of land and resource claims discussed in this report show that land and access to resources are a major source of conflict, which the international community has currently no way of resolving. The integrity of States will be increasingly at risk if existing States and the United Nations cannot derive the appropriate principles and procedural mechanisms for addressing the land and resource claims of those groups. Article 2 of the UN Charter states that the purposes of the United Nations are 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Unless these responsibilities of States towards their peoples are met by States within their current jurisdiction, the rule of law will be undermined, more claims for secession may follow and violence may erupt.

Alan Phillips
Director
July 1994

LAND RIGHTS AND MINORITIES: SCOPE OF THIS REPORT

This report addresses land rights concerns from the particular perspective of minorities. In part it is a descriptive survey, examining problems faced by minority groups with respect to land rights and traditional land tenure systems, and assessing legal and administrative measures adopted in different countries to deal with minorities' land claims. But the report aims to go further and to ask basic questions concerning the importance of land for future international standard-setting on minority rights. There is no reference to land concerns in the 1992 United Nations Declaration on Minority Rights. There are general references to concerns of economic and social rights. Examples are the provision (Article 2.2) that minorities should have the right to participate in economic life, and the somewhat vague provision (Article 4.3) that 'States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.' It has been argued that certain provisions of the Declaration can be construed as recognising basic subsistence rights, in that depriving a group of the basic economic resources necessary to sustain its existence would violate the principles of the Declaration.

Many recent reports published by the Minority Rights Group itself indicate that land is among the foremost problem areas – if not the foremost problem area – now faced by minorities in different parts of the world. This is equally true for the indigenous peoples of the Americas, the forest-dwelling peoples of South and South-East Asia, African pastoralists, the 'northern minorities' of Russia and such groups as the Beduin of the Negev in the Middle East.

Over the next decade, as events of the early 1990s seem to presage, many parts of the world are likely to experience growing ethnic and religious-based conflict within which land and territorial claims of different minority groups are likely to prove a significant factor. Ethnic and religious tensions have already led to the break-up of some nation states. Immense pressures can now be anticipated, in areas including the Indian subcontinent, to a lesser extent other parts of Asia, the republics of the former Soviet Union and some Western industrialised countries. In Canada, in the current political debates concerning the constitutional status of Quebec, for example, land rights of indigenous peoples remain highly controversial issues. National integrity will be increasingly at risk if nation states cannot derive the appropriate principles and procedural mechanisms for addressing the land and resource claims of minorities who are currently in a situation of economic disadvantage.

Given the potential gravity of problems in some regions, it is surprising that the international community has been slow to grapple with the land rights dimensions of emerging conflicts. The absence of anything approaching a set of principles means that the international community has to

adopt an *ad hoc* approach when tensions erupt into armed and ethnic conflict. At the time of writing Bosnia constitutes perhaps the most flagrant example, but there are many other similarly horrendous situations on the horizon. Notably in Africa, land has been a crucial factor behind ethnic tensions in such countries as Ghana, Burundi and Rwanda in the first months of 1994 alone.

Discrimination in land access can be an important factor fuelling ethnic tensions. It happens when a country is subject to conquest by a dominant group which is determined to exercise control over the most fertile lands and likely to secure a labour supply from the weaker groups by depriving them of equal access to the land. The colonial experience in developing countries usually involved white European minorities establishing one legal framework for settler groups and another for indigenous peoples. There have been more recent post-colonial experiences where an economically and politically dominant group has engaged in a clear pattern of discrimination, in both law and practice, against other population groups. In other cases land law and policies have favoured a politically dominant 'indigenous' élite at the expense of other ethnic groups which comprise a significant proportion of the national population. The weaker sectors may have no sense of a special relationship with the land, their major or even only demand being equality of rights with the dominant sector.

The main issue is often one of equal access to the land, particularly in the developing countries where a large proportion of the population depends on land access for subsistence and livelihood. Despite a professed commitment to land reform by governments and international donor agencies, the impetus for redistributive land reforms has been all but lost over the past two decades. In Latin America and parts of Asia and the Middle East there has been a steady trend towards greater rural landlessness, and in many cases a renewed pattern of land concentration. Ethnic or religious minorities comprise a large proportion of the rural landless. Many of them now earn their livelihood as casual labourers or seasonal migrant workers in agriculture. Their main demand is likely to be for access to the land as tenants or small farmers, or at least as regular agricultural workers with a minimum degree of social protection. Such demands are likely to be for affirmative action programmes of land and tenancy reform, perhaps targeted on the particular needs of vulnerable minorities.

Elsewhere customary forms of land tenure and access are now under threat from prevailing development orthodoxies. Throughout Africa, for example, there are strong pressures to replace customary forms of ownership by statutory ones based on private land titling and registration. There are some moves to undercut the powers of local chiefs and to introduce uniform national systems of land law and allocation. Similar pressures can be seen in such South-East Asian countries as Indonesia. These are conflicts between 'traditional' and 'modern' systems of land rights. They can affect more than minorities alone, as in the countries of sub-Saharan Africa, where the majority of the rural population can be affected. In many countries ethnic minorities now see their land security undermined by this trend towards land privatisation. It can be precipi-

tated by government support for large-scale plantation agriculture or timber extraction. Demands of traditional agricultural, nomadic and forest-dwelling communities tend to be for the maintenance of customary rights to the land, perhaps invoking status as indigenous or tribal peoples in support of these claims.

In some cases special status has been recognised under law for vulnerable minorities but the law has been inadequately enforced. There can be loopholes in the law, allowing dispossession and removal from reserve lands in the interests of mineral extraction or economic development. Or widespread encroachment may take place outside the law, accompanied by violence, as in parts of the Latin American Amazon, where the land rights of forest-dwelling Indians are protected by law, and governments are under a legal obligation to demarcate reserve lands. Here the demands are for special state protection for indigenous peoples.

Another category of conflicts relates to restitution claims, when the victims of land expropriation demand either physical restoration of lands from which they claim to have been unlawfully dispossessed, or compensation. Restitution is an issue of immense complexity and political sensitivity, challenging the entire legality of existing land tenure arrangements even when present-day landowners may claim valid legal title. It has been an important element of indigenous land claims, in the United States, Canada, Australia and New Zealand; it has been a burning issue in the Chittagong Hill Tracts of Bangladesh; and it has become a critical issue in post-apartheid South Africa, where black farmers are demanding the restoration of lands from which they were forcibly removed during the apartheid era. Restitution is also likely to become a volatile question in the Israeli-occupied Gaza Strip and West Bank in the context of the Israeli-Palestinian peace negotiations; and it is a highly sensitive issue in the Central and Eastern European countries, where land reform laws provide for restitution to landowners whose properties were expropriated as far back as the late 1940s or even earlier.

In many cases, the principles of land restitution must be considered together with those of decolonisation. In 1980 the UN felt the need to adopt its plan of action for the full implementation of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, urging that:

Member States shall adopt the necessary measures to discourage or prevent the systematic influx of outside immigrants and settlers into Territories under colonial domination, which disrupts the demographic composition of those Territories and may constitute a major obstacle to the genuine exercise of the right to self-determination and independence of the people of those Territories.

More recent examples where colonial occupation has had a devastating impact on the land rights of colonised peoples include East Timor, Tibet and the Western Sahara.

Thus the scope of the problems is immense, and a brief thematic report of this kind can only scratch the surface of the many present-day conflicts involving minority groups. Since the early 1980s land rights have received consider-

able attention in the standard-setting activities of the UN and some UN specialised agencies, and also in national constitutions. The main focus has been on the land and resource rights of indigenous and tribal peoples. An instrument of fundamental importance is the Indigenous and Tribal Peoples Convention, No. 169, adopted by the International Labour Organization (ILO) in 1989. This emphasises the need for special protection of indigenous and tribal land rights by the state, as well as the special relationship between these peoples and their territorial environment. The UN has meanwhile been moving steadily towards the adoption of a Declaration on Indigenous Rights, which attaches similar importance to land rights. While the ILO places emphasis on protection by the state, however, the UN tends to stress the linkage between land rights and political autonomy.

The strong recognition of indigenous land rights under international law, and the absence of recognition of the land rights of minorities, is bound to raise difficult definitional issues. Indeed, the land question is often seen as fundamental to the distinction between the claims of indigenous peoples and minorities. Indigenous peoples and their support groups are concerned that their claims be seen as separate from those of minorities, precisely because they have stronger rights to special protection by, and autonomy against, the state. In the words of one expert:

A clear distinction has been made in human rights law between 'minorities' and 'indigenous peoples'. The crucial factor in the definition of indigenous peoples is their original inhabitation of the land on which, unlike the minorities, they have lived from time immemorial.¹

Indigenous peoples can display some of the characteristics of ethnic, cultural or religious minorities, though they may not be national minorities in the numerical sense. In some cases, they constitute the majority population of the nation states within which they now reside. Their claims arise from the recognition that their special relationship with the environment, and the importance of this relationship for their survival as distinct peoples, sets them aside from the remainder of the population and requires special legal status.

Adequate recognition or protection of the rights of minority groups may not require such special legal status. Land may not be an issue, given that minorities have never enjoyed a special relationship with the land separate from that of national majorities. In economic areas, they may be more concerned with equality of treatment and equal access to resources. But certain minorities may have had a special relationship with the land, requiring special protection, in cases where they cannot easily be seen as indigenous peoples. In such cases they are now likely to seek to identify themselves as indigenous peoples, precisely because of the greater protection offered under emerging international law.

These definitional issues have much practical significance as vulnerable and minority groups seek to define their relationship with the state in a period of volatile economic and political change.

Thus much of this study is concerned with the claims made by diverse minority groups for special treatment

with regard to their land rights, and with the way such claims have been addressed at national and international levels. It begins by examining the evolution and content of recent international and national law concerning the land rights of indigenous and tribal peoples, and it then turns to a review of land rights and land conflicts affecting different categories of minorities in select regions. For reasons of space only a limited number of national cases can be highlighted. The essential aim is to set present-day minority land claims and conflicts in their historical and political context, and to review the policy response. This sets the stage for a final chapter, discussing future prospects for more effective standard-setting and supervisory activities at national and international levels.



INDIGENOUS AND TRIBAL LAND RIGHTS: BASIC APPROACHES

While there is no established definition of minorities in international law, much of the existing literature on minorities includes groups that can also be referred to as indigenous or tribal peoples. One prominent international lawyer has posed the question whether there is a distinction between ‘minorities’ and ‘indigenous peoples’, bearing in mind the definitional difficulties.² Any definition of indigenous peoples, however loosely worded, has to exclude certain minority groups. But equally, many of the estimated 5,000 to 8,000 peoples identified in ethnic terms throughout the world can be candidates for the status of indigenous peoples – even more so if one adds the concept of ‘tribal’ peoples, which can be subject to wide interpretations.

Another international lawyer has attempted to draw distinctions between substantive issues facing indigenous peoples or minorities, and problems of implementation:

The issues of self-determination, the treatment of minorities, and the status of indigenous populations are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are the same – they must be. It is problems of implementation of principles and standards which vary, simply because the facts will vary...the problems of the Lapps, the Inuit, Australian Aboriginals, the Welsh, the Quebecois, the Palestinians, and so forth, are the same in principle but different in practice.³

There is, then, a danger of getting into a definitional and perhaps also a policy mire. A view repeatedly expressed by indigenous peoples and their support groups is that the status and claims of indigenous peoples, in particular with regard to land and resource rights, set them apart from other minorities. But if the very definition of indigenous peoples is so flexible, it may be hard in practice to determine of what the differences consist. Thus it is important to assess the manner in which the land and other rights of indigenous peoples have been dealt with in international law, and also to establish some typology of indigenous peoples and their land claims.

Historical overview

The land and territorial claims of indigenous peoples may be rooted far back in history, way before the establishment of the modern nation state. Their demands are usually underpinned by the notion that indigenous peoples have special claims to the land, first because their unique relationship with the land and environment is necessary for their survival as culturally distinct peoples, and second because their rights over lands and resources may never have been ceded to the state.

The distinction between claims based on need and claims based on historical rights is of obvious importance. The

former set of claims, which require positive measures of protection by the state, will be examined in detail below. In developing countries they concern mainly the protection of indigenous and tribal forest-dwellers whose traditional lands have come under severe pressure from logging, mineral extraction, ranching, hydro-electric and other programmes. The land rights of many such hitherto isolated groups have, at least until recently, not been governed by any legal regime.

The latter set of claims, based on legal rights that may have preceded the modern nation state, tends to raise more complex questions. Colonial powers used a range of legal and administrative devices to deal with the land rights of colonised peoples. In the United States and Canada the British colonial government entered into treaty relationships with indigenous nations, respecting the concept of indigenous sovereignty over lands and resources but also providing for the cession of certain rights under negotiated treaties. In the Indian subcontinent the British imposed such tenure regimes as the *zamindari* system in certain regions, allowing for the creation of new feudal overlords, while elsewhere they provided for special protection for tribal peoples through appointed chiefs. Protective tribal land rights systems were developed, involving restrictions on land use and land alienation, together with restrictions on the right of outsiders to enter protected areas. The tenure regime was a combination of customary law and codified law for the protection of indigenous or tribal land rights. Controversial issues in Asia today often concern the status of the protective laws inherited from the colonial period, and the powers of post-independence governments to carry out land settlement programmes in formerly protected areas.

In Africa the colonial experience varied considerably, depending on the extent of white agricultural settlement. In the settler economies the pattern was to have a dual system of land rights, with colonial settlers enjoying private and registered landownership under European models, while African farmers were generally prevented from holding private land title. Colonial policies professed to maintain traditional African tenure arrangements under chief and headman systems, though in many cases the systems of land administration were again a colonial creation. In the settler economies Africans were legally confined to tribal reserves, where a fiction of communal landownership was maintained even amid a widespread pattern of land transfers and private landownership recognised among the African farmers.

In Latin America many indigenous communities can claim land titles dating back to the Spanish colonial period. Many indigenous communities managed to register their lands after the 18th Century. After independence in the early 19th Century, constitutional and agrarian law of the new republics had a strong emphasis on individual property rights. By the mid 19th Century the civil codes adopted in almost every country reflected the prevailing secular attitudes and systems of private and commercial law in which the function of government was to regulate private transactions. The liberal tradition placed emphasis on the registration of private title and provided for the abolition of communal land arrangements.

The 1910-20 Mexican Revolution introduced a new legal tradition based on the principles of equitable land distribution, recognition of communal and inalienable forms of landownership, the 'social function of property' and limitations on private landownership, with absolute title to the land vested in the state. Under Mexico's 1917 constitution all land was owned by the nation, which had the right to transmit this land to individuals and to constitute private property. The constitution empowered the federal government to restore alienated land to the indigenous peasantry, either through donation or through restitution where *comuneros* could prove valid title.

The special status of 'indigenous communities', based on ancient title or historical possession, is now recognised in the laws of many Latin American countries, but there has been continuing pressure to break up the communities, despite the legislative protection, and few efforts to make them viable economic entities. More recently, national laws and policies have continued to recognise the existence of separate indigenous communities in areas of peasant agriculture as inalienable and imprescriptible lands, and in certain cases to provide for their increase through agrarian reform. This was the case with the Colombian agrarian reform laws of 1961 and 1968, the Peruvian law of 1969 and the Ecuadorian law of 1973.

International law and indigenous land rights

ILO Convention No. 107

The first international legal instrument to codify the rights of indigenous and tribal peoples was the International Labour Organisation's Convention No. 107 of 1957, concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. Four articles of this ILO Convention deal with land rights.

Article 11 stipulates that 'the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised'. Article 12 contains safeguards against removal from these lands, though with loopholes. When removal is necessary as an exceptional measure, populations are to be provided with lands of quality at least equal to that of the lands previously occupied. Where the populations concerned prefer, compensation may be paid with appropriate guarantees.

Article 13 provides that procedures for the transmission of rights of ownership and use of land established by the customs of the populations concerned shall be respected 'within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development'. Furthermore:

Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14 is concerned with equal opportunity for indigenous and tribal peoples within the framework of national agrarian programmes. Such programmes are to secure for the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to provision of land and of the means required to promote the development of the lands which these populations already possess.

The ILO's Convention No. 107 distinguished between two categories of 'tribal and semi-tribal' populations, only one of which was defined as specifically indigenous. The Convention was to apply, first, to:

Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations

and, second, to:

Members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which... live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

To which population groups, and in which regions, would such provisions potentially apply? Convention No. 107 was open to ratification by states until 1989, when it was replaced by the ILO's new Indigenous and Tribal Peoples Convention. In the approximately three decades it was in force, Convention No. 107 received 27 ratifications, 14 of them from Latin America and the Caribbean. In their subsequent reports under the Convention, Latin American states considered both forest-dwelling Indians and sedentary indigenous agriculturalists as covered by its provisions. In the Asian region, India ratified in 1958 and Pakistan in 1960, while Bangladesh accepted an earlier ratification after 1972. There were four ratifications from Africa, though no African country submitted a substantive report recognising obligations to any tribal group under the Convention.

The UN Working Group On Indigenous Peoples

While the ILO has considered the two categories of 'indigenous' and 'tribal' together in its normative activities, the UN has been more specifically concerned with the category of 'indigenous' peoples. The UN has also had to grapple with difficult definitional concerns, in particular since its Working Group on Indigenous Populations was established in 1982. This Working Group has been attended by an increasingly large number and diverse group of ethnic minorities from all parts of the world. An important aspect of its activities is standard-setting, in the form of a Draft Declaration on Indigenous Rights which was in late stages of preparation at the time of writing. Land rights is one of the key issues covered, but as the discussion on land rights has been linked to politically sensitive issues of

autonomy and self-determination, definitional issues have also been important. Some Asian governments have insisted that their tribal minorities, though covered by the ILO's 1957 Convention, cannot be covered by a UN standard-setting instrument dealing with indigenous peoples.

The basic UN human rights instruments (including the Universal Declaration of Human Rights, and the 1966 UN Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, contain no specific mention of indigenous peoples, though they mention the term 'peoples'.⁴ The UN began to address indigenous concerns in earnest in 1971, when its Economic and Social Council authorised the Sub-Commission to 'make a complete and comprehensive study of the problem of discrimination against indigenous populations and to suggest the necessary national and international measures for eliminating such discrimination'.⁵ A comprehensive study was prepared between 1973 and 1985 by Special Rapporteur José Martínez Cobo.⁶ Considerable attention was paid to definition; and a lengthy chapter of the final study dealt with the right of ownership, with particular reference to land.

Mr Martínez Cobo's study never attempted to reach a rigid definition of indigenous populations, submitting 'only tentative concepts and criteria for placing on the table as merely preliminary and provisional efforts on the basis of what are felt to be relevant criteria'. Nevertheless, the ideas put forward related more to land and territorial concerns than to any other issue.⁷

ILO Convention No. 169 of 1989

By the mid-1980s, as indigenous peoples increasingly pressed their claims before the UN and other international fora, the ILO realised that its 1957 Convention was out of tune with present-day realities and the aspirations of many indigenous peoples. A new Indigenous and Tribal Peoples Convention, No. 169, adopted in June 1989.

The new Convention retains a basic distinction between tribal peoples and peoples regarded as indigenous on the other. It contains the new provision that 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.' The emphasis on integrationism is altogether removed and replaced by provisions that recognise the right of these peoples to exercise control over their own development and institutions.

Revision of the land rights provisions aroused considerable controversy. There were discussions as to the notion of indigenous territories, as to whether the lands should without exception be considered inalienable and as to the degree of safeguards against removals.

The ILO's Convention No. 169 now has seven separate articles on land. The first (Article 13) deals with the concept of land in its application. The collective aspects of the relationship between indigenous peoples and their lands or territories are to be respected; and the use of the term 'lands' is to include the total environment of the areas which the peoples use or occupy.

Article 14 deals with the concept of ownership and possession and with measures for its effective protection.

Apart from recognition of rights of ownership and possession over lands traditionally occupied, measures are to be taken to safeguard the rights of the peoples concerned over the lands to which they have traditionally had access for their subsistence and traditional activities; particular attention is to be paid to the situation of nomadic peoples and shifting cultivators. Governments are to identify lands traditionally occupied, to guarantee effective protection of rights of ownership and possession and to establish adequate procedures within the national legal system to resolve land claims.

Article 15 deals with resource rights and management. Resource rights pertaining to the lands are to be specially safeguarded, including the right to participate in use, management and conservation. Where the state retains the right to mineral, subsurface or other resources, there are to be consultative procedures before exploration or exploitation programmes can be undertaken or permitted. The peoples concerned are to participate wherever possible in the benefits of such activities, and to receive fair compensation for any damages.

Article 16 deals with removals from traditional lands and compensation. Removals should occur only in exceptional circumstances, with the free and informed consent of the people concerned and only following legally established procedures providing the opportunity for effective representation. They should be temporary wherever possible. If not, the peoples should be provided with lands of quality and legal status equal to those previously occupied.

Article 17 deals with procedures for the transmission of land rights. Customary procedures shall be respected. There is no outright provision against alienation, but the peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their community.

Article 18 requires the establishment by law of penalties for unauthorised intrusion upon or use of the lands of the peoples concerned, and measures by governments to prevent such offences. Article 19 retains the provisions of the earlier Convention regarding at least equal treatment for indigenous and tribal peoples under national agrarian programmes.

By April 1994 Convention No. 169 had been ratified by seven countries: Bolivia, Colombia, Costa Rica, Mexico, Norway, Paraguay and Peru. A number of other Latin American states have announced their intention to ratify the new instruments and it has been keenly debated in others and in the Philippines in the Asian region. Ethnic minorities in Russia have also urged ratification.

The UN Working Group: recent developments

Since 1985 the UN Working Group has emphasised the preparation of a Draft Declaration of Principles on Indigenous Rights, as the first step towards a new UN Convention. Recent drafts include demands for self-determination in economic and political affairs and full indigenous control over traditional territories including surface and subsurface rights, inland and coastal waters, and renewable and non-renewable resources.

In recent drafts the substantive provisions concerning land rights appear not to be significantly different from those in the ILO's Convention No. 169. But they have explicitly addressed the issue of indigenous self-determination, stressing that by virtue of this right indigenous peoples freely determine their relationship with the states in which they live. Indigenous peoples should also have the collective right to autonomy in matters relating to their own internal affairs, the right to decide upon the structures and membership of their autonomous institutions, and the right to determine the membership of the indigenous peoples concerned for these purposes. They should also have the right to claim that states honour treaties and other agreements concluded with them, and to submit any disputes in this matter to competent national or international bodies.

International financial institutions: towards a new policy approach

The growing international momentum for the protection of indigenous and tribal land rights has had an impact on the policies of the international financial institutions, whose past approaches to infrastructural development have been widely criticised for their devastating impact on traditional land security. In 1982 the World Bank issued an Operational Manual Statement (OMS 2:34) concerning tribal peoples in its projects, focusing on tribal groups considered to be relatively isolated and less acculturated. As a general policy, the World Bank would not assist projects that knowingly involved encroachment on traditional territories used or occupied by tribal people unless adequate safeguards were provided. Development projects having tribal people in their zone of influence would require a tribal component or parallel programme, including the recognition, demarcation and protection of tribal areas containing the resources required to sustain the tribal people's traditional livelihood.

A new Operational Directive on indigenous peoples (No. 4.20) was issued by the World Bank in 1991. The new directive adopts a broader definition than its predecessor, covering various social groups with a 'social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process'. It is observed that indigenous peoples engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market-oriented activities. A main feature of this directive is the requirement for an indigenous peoples' development plan, which should be adopted with the informed participation of indigenous people before project appraisal. The plan should include land tenure elements under the following principles. When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure system of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the state, and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term renewable rights of custodianship and use to indigenous peoples. These steps should be taken before

the initiation of other planning steps that may be contingent on recognised land titles.

Tribal land rights are also covered in the World Bank's guidelines and procedures for *involuntary resettlement*. An Operational Directive on involuntary resettlement was issued in 1990. It identifies indigenous people among the vulnerable groups at particular risk, stressing that resettlement plans must include land allocation or culturally acceptable alternative income-earning strategies. Resettlement plans should review the main land tenure and transfer systems, including common property and non-title-based usufruct systems. The objective is to treat customary and formal rights as equally as possible in devising compensation rules and procedures.

The principles and guidelines adopted by the Asian and Inter-American Development Banks are largely similar to those of the World Bank. A 1990 strategy document of the Inter-American Development Bank recognises the

principle that in general the IDB will not support projects that involve unnecessary or avoidable encroachment onto territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement, and unless it is assured that the executing agencies have the capabilities of implementing effective measures to safeguard tribal populations and their lands.

It again identifies the need for measures to protect indigenous territories, including demarcation and titling of tribal lands. Since 1991 the IDB has taken a leading role in setting up a regional fund for the development of indigenous peoples of the Amazon, a major priority of which is to be land titling and demarcation programmes.

New guidelines for social analysis of development projects were issued by the Asian Development Bank in 1991. They contain a specific section on ethnic minorities, observing that the interaction between ethnic majorities and minorities has frequently seen the systematic impoverishment of the latter. The Bank recognises 'its own responsibility in ensuring that its investment funds do not become the unintended vehicle for the infringement of basic human rights', and 'accepts the standards as laid down by the appropriate international bodies' with particular reference to the ILO's Convention No. 169.⁸ The ADB's guidelines use the terminology of minorities, rather than that of 'indigenous' or 'tribal' which might prove more controversial in the context of certain Asian countries. They also show that an instrument like the ILO's Convention No. 169 can have influence beyond ratifying States alone, if it is incorporated within the official policy of one of the major international financial institutions.

International law and practice: outstanding issues and problems

Within the UN and its specialised agencies, some parallel but rather different processes have been under way since the mid-1980s. Internationally, there has been a growing consciousness that indigenous and tribal peoples, as vulnerable groups enjoying a special relationship with the environment, deserve special treatment by the state. The momentum has been reflected in the standard-setting of the

UN and the ILO, and also in the attention given to indigenous land rights in a number of national constitutions.

Problems arise partly from definitional issues and partly from the fact that the claims and practical concerns of indigenous and tribal peoples can be very different in different parts of the world.

The tendency is often to attach considerable importance to self-identification as indigenous or tribal peoples. But arguably a range of ethnic-minority groups will then be encouraged to claim for themselves the status of 'indigenous' or 'tribal', mainly because of the advantages deriving from this status under existing international law. And while there may be greater international consensus as to the main definitional characteristics of 'indigenous' peoples, the concept of 'tribal' peoples is bound to prove a more debatable issue. Under the ILO's Convention No. 169 the only defining characteristics of tribal peoples are that their social, economic and cultural conditions distinguish them from other sections of the national community, and that their status is regulated by their own customs or traditions or by special laws or regulations.

Perhaps the most important contribution of the 'indigenous and tribal paradigm', is to open up new ways of looking at land rights apart from those of equality of treatment and access, placing emphasis on their special relationship with the land. States have a clear obligation to recognise the prior ownership of these peoples of their traditional lands, to render this ownership effective and to establish adequate claims procedures in the event of disputes.

INDIGENOUS LAND RIGHTS IN THE AMERICAS AND AUSTRALASIA

This and the following chapters pursue a regional approach, aiming to identify critical issues of land claims and land conflict in different regions of the world, and then to illustrate these issues with country case examples. The main concerns are to identify the nature of land claims being made by minorities and to assess the law and policy response of states to these claims.

Land Conflict In Latin America

In Central and South America the major vulnerable minorities can be defined unambiguously as indigenous peoples. Though racial minorities are to be found in many countries, such as blacks in Brazil and elsewhere, the main focus of recent attention has been on indigenous peoples.

Throughout Latin America the past decade has seen a marked resurgence of activity by indigenous peoples and their support groups in defence of their land rights. These pressures have had at least some impact on state law and policies. Since the late 1980s countries including Bolivia, Brazil, Colombia and Paraguay have adopted new constitutions or indigenous legislation, providing special protection for indigenous lands and requiring the demarcation of territorial areas traditionally occupied by them. The most significant developments have concerned the land rights of forest-dwelling Indians, notably in the Amazon region. However, the vast majority of Latin American Indians are *not* forest-dwellers but, rather, highland-dwellers who earn their livelihood from subsistence agriculture and comprise a large proportion of the rural population in such countries as Bolivia, Ecuador, Guatemala, Mexico and Peru.

For the future, a critical issue will be the manner in which the land claims of indigenous peasants are addressed. In the past, the status of these 'indigenous communities' has been regulated by special laws which recognise the communal nature of their landholdings and provide for restrictions on the alienation to outsiders of communal lands. In practice, however, their lands have suffered persistent encroachment, and perhaps the majority of these Indians are either landless or near-landless. State policies have generally discriminated against communal indigenous agriculture, doing little or nothing to enable it to survive. The general abandonment of indigenous communities, and government failure to protect them against violent encroachment on their traditional lands, has left a volatile social legacy. A recent example was in the southern Mexican state of Chiapas, where a militant indigenous movement resorted to armed rebellion in January 1994.

Protecting the land rights of forest-dwellers

The land rights of Latin America's vulnerable forest-dwellers have aroused considerable international attention; and the plight of such groups as the Brazilian and Venezuelan Yanomami, devastated by mineral and ranching activities, is widely known. Human rights and environmental lobbies have come together, demanding the demarcation of traditional Indian lands within the Amazon region. International financial institutions among others have insisted upon such demarcation as a precondition for the disbursement of further loans. While much remains to be done, combined national and international pressures are beginning to have tangible effect.

Many Latin American countries now have special legislation relating to indigenous forest-dwellers and their land rights. In several countries of the Amazon Basin laws for the demarcation and protection of indigenous lands date back to the 1950s and 1960s. In other countries it was only in the late 1980s that governments began to adopt special legislation.

An earlier tendency was to provide for special reserved areas for indigenous forest-dwellers, under the administration of state or private agencies, with no legal recognition of their land or territorial rights as such. Policies were paternalistic, though perhaps based on an integrationist philosophy. An example was Brazil, where the 1967 constitution provided that the lands inhabited by forest-dwelling aboriginals were inalienable, and that indigenous peoples should enjoy permanent possession with the right to exclusive resource use. But indigenous peoples were considered by law to be minors, legally incompetent to exercise rights of ownership until their 'emancipation' from tutelage, and indigenous lands were held in trust by the state. At the same time Brazil's 1973 Indian Statute provided that all native land was to be administratively demarcated within a five-year period.

In many countries there has been a recent trend towards recognising full indigenous ownership of forest lands, though with restrictions on their alienation. The main issues at stake have been the extent of ownership and control, and the capacity of indigenous peoples to manage their own resources and to control or prevent private or state logging, ranching or extractive activities within them.

Peru in the mid-1970s was among the first countries to undertake large-scale titling of indigenous forest lands, recognising full rights of communal ownership. Under its 1974 Native Communities Act, indigenous communities were recognised as legal entities enabled to petition for communal and inalienable land titles. Encroachers were to be removed from lands that lie within the native community areas, though with compensation for improvements made on the land. Under this Act free access was nevertheless to be permitted for oil and mineral exploitation in forest regions. By the mid-1980s the government of Peru claimed that approximately half of the native communities in the affected areas had received land titles. The above rights were recognised in Peru's 1979 constitution, and many national non-governmental organisations have been able to assist indigenous groups in demarcation and titling. There have been substantial problems, however, in particular the continuation of illegal logging. The

technical and legal criteria utilised in determining the boundaries of native communities have been widely criticised, in that lands claimed by indigenous groups have been officially declared unoccupied, and indigenous peoples have demanded the right to conduct their own demarcation in accordance with traditional practices.

During the 1980s large-scale titling of forest lands in indigenous communities also took place in Colombia. The government recognised the territorial rights of Indian groups over approximately half of its Amazon area, or some 70,000 square miles. The legal entity in which these rights are vested is the *resguardo*, involving rights of self-government. The *resguardo* is a concept of Spanish colonial origins, roughly akin to that of the *comunidades indígenas* in the remaining Andean countries. Until recently it applied only to the lands of Indians outside the forest areas who could base their claims on ancient title.

Colombia's 1991 constitution recognised the concept of territorial rights for indigenous peoples, together with the rights to self-government and management of their internal resources. Indigenous territories are now recognised as territorial entities on an equal footing with departments, districts and municipal areas. All are to enjoy autonomy for the management of their internal affairs, including the rights to govern themselves with their own authorities and to administer resources and taxes. Indigenous territories are to be governed by councils created and regulated in accordance with customary law.

In Bolivia land rights in all regions have until recently been governed by the 1953 Agrarian Reform Law, which, while providing for communal forms of ownership, has been most applicable to highland regions. The majority of lowland Indian communities were unable to secure collective title to their lands, owing to the complexity of the administrative procedures involved. Since 1988, a series of legal and administrative measures have been adopted with regard to land rights in forest regions. A resolution enacted in 1989 affirmed the need to recognise and assign territories for indigenous peoples living in the Amazon and the eastern lowlands. It considered as indigenous territory the areas traditionally occupied by them, and prohibited the allocation of land and specified areas for purposes of colonisation, ranching or forestry exploitation. A five-year 'ecological pause' was also declared in 1990 to allow for a review of policies and programmes that could have a potentially adverse impact on the environment. A number of presidential decrees adopted in 1990 recognised the ownership of specific areas of land by different forest-dwelling groups in eastern regions. These measures were adopted in response to significant mobilisation by indigenous peoples' organisations.

The Indian campesinos

Most of Latin America's Indians are small peasant farmers on usually tiny plots of land, sometimes held under a special legal status as 'indigenous communities', and increasingly the landless peasants who provide the cheap labour for large commercial farms. In countries such as Chile and Colombia they are small minorities. In other Central American and Andean countries they may comprise a rural majority or near-majority.

State policies towards this category of Indians, comprising many millions, have vacillated. There have in the past been attempts to abolish their special land status, yet no government has taken effective measures to make their lands agriculturally viable, or to protect them against violent encroachment. *De facto* discrimination is flagrant throughout the continent. In the 1960s and 1970s, when land reform was seen as a significant policy instrument in Latin America, there were some attempts to increase the size of indigenous communal land areas, within the framework of national agrarian reform. But indigenous peasants derived few benefits from the land reform programmes implemented. They tended rather to be the victims of agrarian policies, which aimed to stimulate the commercial and export sectors of agriculture and provided little support for the communal and subsistence sectors. In such countries as Bolivia, Ecuador, Guatemala and Peru indigenous peasants have increasingly been compelled to earn their livelihood as day labourers in commercial agriculture or seasonal migrant workers.

There was a marked rise in land conflicts between indigenous communities and outside encroachers in the 1970s and 1980s, and by the mid-1980s the violence surrounding these conflicts was arousing widespread concern. In some countries there has been a continued trend towards recognising special status for indigenous lands. In Argentina, for example, a federal Act of 1985 provides that indigenous communities should receive sufficient land for their needs. In principle, the lands adjudicated are to be unseizable. In Guatemala the 1985 constitution for the first time contains a special section on the need to protect indigenous communities and their lands, though these articles of the constitution have as yet to be regulated by law.

Mexico: the end of special protection?

The land reforms enacted in Mexico after its 1910-20 Revolution had a significant impact on law and policy towards indigenous land rights elsewhere in Latin America. The 1917 constitution empowered the federal government to restore alienated land to the indigenous peasantry through donation or restitution. Ceilings were placed on the size of individual landholdings, and expropriated estate lands were to be redistributed to the peasantry in the form of inalienable common lands (*ejidos*). Under the land reform programme, land rights could also be given to the *comunidad indígena*, which vests inalienable and imprescriptible land rights in the indigenous community. Unlike the *ejido*, the *comunidad* was based on the principle of restitution, restoring to indigenous communities lands of which they were dispossessed during the pre-revolutionary period.

The combined *ejido* and *comunidad* forms of landholding became the predominant system of land tenure in Mexico, accounting for some 60 per cent of all agricultural lands. However, the government's credit and investment policies have generally favoured the large-farm sector, in particular in the north of the country where sizeable commercial farms have developed in violation of the land reform laws. In the southern states of Chiapas, Guerrero and Oaxaca, where the bulk of the indigenous population is concentrated, there have been long-standing conflicts between

the *comunidades indígenas* and encroaching private farmers or non-indigenous *ejidatarios*.

Some states were barely affected by the land reforms at all. In Chiapas, though indigenous groups have pursued claims before the courts for the restitution of traditional *comunidades*, and have on occasions been able to obtain presidential decrees recognising the legitimacy of such claims, landowner groups have been able to resist the claims with the connivance of local authorities. Servile labour systems, with indigenous *peónes 'acasillados'* working as tied labourers on commercial plantations, were widespread as recently as the mid-1980s.

In other states the land reform programme proceeded in fits and starts, depending on the degree of indigenous peasant militancy. Land redistribution programmes were intensified in the 1930s, though the 1940s saw reconsolidation of private property and the formation of new large estates in excess of the legal limits. More recently, there was widespread peasant mobilisation throughout the country in the early 1970s, as indigenous peoples made concerted efforts to press for the restitution of communal lands in the southern states. Sporadic mobilisation also took place in northern regions, leading President Luis Echevarría to enact the last major series of land expropriations towards the end of his period of government in 1976.

Widespread land invasions continued during the government of President José López Portillo, between 1976 and 1982. By the beginning of the López Portillo government, there were estimated to be no less than 3 million separate land claims lodged by peasant farmers organised in some 60,000 agrarian committees. An official report in 1979 recognised the existence of presidential land reform resolutions affecting 7.6 million hectares which were still to be implemented.

In the 1980s, as Mexico embarked on a radical structural adjustment programme in response to a growing debt crisis, and as the government aimed to 'liberalise' its land tenure regime in the context of the North American Free Trade Agreement negotiations, there were growing pressures to reform the *ejido* system. It was seen by proponents of structural reforms as a constraint on improved productivity. The passage of these reforms led to bitter divisions among peasant and rural workers' organisations. Advocates of the reforms argued that the existing land tenure system led to distortions in investment and production decisions, that existing land reform legislation constrained investment because of the continuing threat of expropriation, and that restrictions on land use by private farmers prevented them from altering patterns of land use or crop cultivation in response to market signals. Opponents of the reforms argued that the *ejido* sector had performed poorly in the past because of the failure of previous governments to enact land reform with sufficient vigour and because of unequal access between the ejidal and private sectors to credits and other inputs. They expressed fears that enactment of the reforms would lead to a massive sale of *ejido* lands, precipitating an exodus of peasant families from the subsistence sector and adding greatly to urban and rural unemployment.

The land tenure reforms were enacted with the 1991 reforms to the Mexican constitution and further consoli-

dated with the passage of the new 1992 Agrarian Law. They bring a formal end to the process of land redistribution; and they give *ejidatarios* the option of either becoming full private owners of their individual plots or remaining within the communal system. *Ejidatarios* are now free under law to rent their land, to hire labour and to conclude contracts or joint venture arrangements with both national and foreign business partners. National and foreign corporate entities may also own and operate agricultural, livestock and forest lands within prescribed limits.

The recent indigenous rebellion in Chiapas was sparked off at least in part by the failure to redress long-standing land claims, and by the widespread belief that the land tenure reforms represent a new offensive against traditional land security. The recent outburst of indigenous unrest took most international analysts in Mexico by surprise. Yet there has been a persistent pattern of indigenous support for insurrectionary movements in all countries where indigenous peoples have been unable to press peacefully for improved land security, mainly in Guatemala and Peru but to a lesser extent in Bolivia and Ecuador. What remains unclear is the extent to which indigenous peoples now demand a separate legal status, together with the restitution as indigenous communities of the lands of which they have been dispossessed, rather than the genuine equality of land rights which would enable them to survive in today's market-oriented environment. In either case a commitment to land reform is essential, but the planning of future land reforms needs to comprehend the nature and aspirations of Latin America's indigenous movement.

The future challenge

In Latin America the main challenge for the future lies in the agricultural areas where the bulk of the continent's Indians live in conditions of extreme poverty. State policies continue to favour land privatisation, with scant regard for the traditional relationship between indigenous peoples and their environment. Indigenous peoples in Guatemala, Mexico and Peru have shown their capacity to resist, but their demands and aspirations are not always clear. They want more land and genuine equality in access to land. But do they still want an altogether separate status, with restrictions on their capacity to participate in the market? This question has to be addressed as a matter of urgency by policy researchers and by the indigenous peoples themselves.

Indigenous land claims in Australia and Canada

In several of the industrialised countries there have been important developments over the past decade with regard to the recognition of indigenous land rights. A landmark case was the so-called Mabo case in Australia, where a legal decision in 1992 recognised the native land title of indigenous Aborigines of the Torres Strait islands, and defined conditions for the extinguishment of Aboriginal title. In Canada substantial land areas of the Arctic North have now been vested in indigenous peoples. And recent

law and policy developments in Scandinavia have permitted Saami peoples to exercise greater control over their land and natural resource management.

In these cases, few if any problems arise with regard to the definition of indigenous land claimants. They are clearly indigenous minorities, who generally aim to preserve their traditional lifestyles in accordance with traditional land tenure arrangements, and who have been subject to colonial domination over a lengthy period. Yet there are differences in the nature of the claims and in the way they are dealt with under national legal procedures. Some cases are clearly based on historical title and treaty rights, as recognised under the early colonial period. Others are based on the concept of immemorial possession.

Recent examples from Australia and Canada illustrate the different issues and approaches within these developed countries. Of these, the Mabo case in Australia has been discussed in detail in a recent MRG report.⁹ The case resulted in the Australian High Court accepting that the acquisition of British sovereignty did not automatically extinguish indigenous land titles; and it led to intense national controversy within Australia between mineral interests and Aboriginal groups.

Canada: specific and comprehensive claims

In Canada law and policy have distinguished between different categories of Indians and their land claims. Since the mid-1970s the main distinction has been between 'specific claims', dealing with problems arising from previous agreements including Indian treaties, and 'comprehensive claims', based on traditional land use by Indians who did not sign treaties and have not been displaced from their traditional lands.

Historically, the surrender of Indian land rights occurred under British sovereignty through the process of treaty-making, which culminated in the land cession treaty of 1921. Land cession treaties covered approximately one-third of contemporary Canada. At the same time the British government pursued reservation policies, setting aside land areas for the exclusive use of specific Indian groups.

In the 1960s the Canadian government pursued policies of overt assimilation. Parliament unilaterally abrogated existing treaty rights, including the hunting and fishing rights thereby guaranteed. A government white paper issued in 1969 asserted that special laws for native peoples were inherently discriminatory, that the reserve system should be dismantled and that it should not respect surrendered treaty rights. The reaction of indigenous peoples was uniformly hostile, leading to the withdrawal of the white paper and eventually to a new set of policies. The government agreed to supply funds for the researching of indigenous land claims, which were to gather momentum.

A watershed was the Calder case of 1973, concerning the claims of Nishga Indians to their ancestral territory in British Columbia. In its judgment the Supreme Court accepted that Indians had prior claims to the land which had not been extinguished by conquest. In the aftermath of this case, the government declared a new claims policy, recognising its obligations both to comply with the terms

of earlier treaties and to negotiate settlements where aboriginal title had not been extinguished by treaty.

Canadian government policy has since been to distinguish between specific and comprehensive claims. The former tend to relate to alleged irregularities in the context of earlier treaty land cessions, and have for the most part led to monetary compensation. Between 1974 and the end of 1992 a total of approximately 160 million Canadian dollars was agreed in compensation.

The experience with comprehensive claims has proved far more significant. The new policies were declared when the Canadian government was concerned to increase its exploration for oil, gas and other mineral resources in the vast northern region and sensed the need to settle land and territorial claims with the indigenous peoples. The first major claim to be settled was the 1975 James Bay and Northern Quebec Agreement, under which the traditional hunting and fishing lands of several thousand Cree and Inuit Indians were to be affected by a large hydroelectric project. It was agreed that the Indians would receive a total of \$225 million as partial compensation for the extinguishment of their aboriginal title.¹⁰ A land area was set aside for the exclusive use and occupancy of the beneficiaries, and additional lands were set aside for their hunting, fishing and trapping. However, the agreement stipulated that the government of Quebec, several corporations and other duly authorised persons would have a right to develop resources in these lands.¹¹

Under the 1984 Western Arctic Claim, the Inuvialuit people were granted full surface and subsurface rights to a portion of the lands for which they received title. Access for development of subsurface resources was guaranteed as regards Inuvialuit lands where there were existing hydrocarbon or mining rights, or where the Inuvialuit did not own the subsurface. However, the Inuvialuit had the right to negotiate 'participation agreements' with prospective developers.¹²

The most recent of the comprehensive agreements, the Gwich'in Land Claim Settlement, dates from December 1992. The Gwich'in peoples, part of the Dene Assembly of the Northwest Territory, submitted their claim after rejecting an earlier agreement with the federal government that involved the extinguishment of native land rights. The 1992 settlement provides the Gwich'in with title to over 20,000 square kilometres of land in the Northwest Territory, as well as subsurface rights to more than 6,000 square kilometres. They are also entitled to a share of annual royalties from resource use within the Northwest Territory, and to equal representation on the boards responsible for land, water and wildlife management.

The concept of comprehensive claims in Canada is potentially far-reaching, embracing issues of self-government as well as land and resource ownership and management. While only four such claims had been settled by early 1993, a total of 46 claims had been submitted of which several are currently under negotiation. In some provinces, notably British Columbia, current claims affect most of the territorial area.

LAND RIGHTS AND ETHNIC MINORITIES IN ASIA

Critical issues

In a number of Asian countries the land rights of certain minorities enjoy special protection under the law. In India, Bangladesh and Malaysia protective regimes for vulnerable groups variously denominated as indigenous or tribal date back to the British colonial period. In the Philippines, by contrast, the land rights of certain cultural minorities have only recently enjoyed special constitutional protection. The legal concept of 'ancestral domain' in the Philippines and the procedures by which the claims to ancestral lands should be recognised have been keenly debated. In Indonesia, where traditional island lands are under severe threat from logging, human rights and environmental NGOs have attempted to secure greater protection under law for forest-dwellers and shifting cultivators, so far without success. In Vietnam recent attention has been given to the land and resource rights of identified ethnic minorities.

There has been a noticeable reluctance in much of Asia to recognise the concept of 'special' land and resource rights for indigenous or tribal peoples, granting them a separate legal status or a degree of autonomy. The very concept of 'indigenous peoples' is not easily applicable to a continent where there have been widespread demographic movements over history. At the same time, particularly if one uses ILO Convention No. 169's criterion of self-definition, there are less difficulties in identifying culturally separate tribal peoples who have historically held a special relationship with their lands or other natural resources. A source of debate today in many Asian countries is the extent to which lands and resources can be held and managed in accordance with the customary law of these peoples, and the manner in which customary law can be reconciled with national statutory laws.

Many of the vulnerable minorities in South and South-East Asia are traditional forest-dwellers whose subsistence depends on the forest and its produce but who have never enjoyed legal rights over forest lands. The need for environmentally sustainable approaches to forest management, based on recognition of customary rights, is increasingly recognised in the context of rapid depletion of Asia's forest resources. Environmental pressure from the outside, whether governmental or non-governmental, has often been more concerned with improved legal mechanisms for shared resource management than with explicit recognition of tribal land rights.

Where special land status has been recognised, it tends to be the result of the colonial legacy. Thus it is important to examine this legacy before reviewing law and policy approaches and emerging conflicts.

The British colonial experience

In today's Bangladesh, India, Malaysia and Pakistan, certain lands were reserved for the exclusive use of indigenous or tribal peoples during the British colonial period. While these land rights are still invoked today, involving serious conflict between tribal peoples and outsiders, and the government in certain cases, the nature and extent of these historically determined rights remain a source of legal and political controversy.

In Bangladesh the Chittagong Hills Tracts (CHT) area was administered separately during the colonial era under the Chittagong Hill Tracts Regulation of 1900, which provided for limited self-government by the tribal people. Under a further 1935 Act the CHT was declared a 'totally excluded area', and special permits were required for non-tribals wishing to enter the area. Since the end of the colonial era in 1947 successive governments have adopted measures to erode the special tribal status of the CHT, and to pave the way for settlement there by non-tribal Bengalis. During the period of Pakistan government (1947-71) the special status of the CHT was abolished by law in 1964, and restrictions on non-tribal immigration were terminated. After the creation of the new state of Bangladesh in 1971 settler programmes were promoted by the government to ease population pressures elsewhere. By the early 1980s official programmes were aiming to settle up to 300,000 outsiders in the CHT.

In India as a whole, colonial policies were mixed. In some cases policy was to protect tribal lands from alienation, by preventing non-tribals from having access to such traditional areas. In the tribal areas of north-eastern India, for example, plains-dwellers were not allowed to acquire land in the hills, and indigenous systems of land tenure were retained virtually unchanged. The 1935 Government of India Act provided for 'excluded areas' as backward regions inhabited by tribal populations.¹³

Other British policies eroded traditional tribal rights to the land. The Indian Forest Act of 1927 established the three categories of reserve forests, protected forests and village forests, and provided penalties for anyone who should exploit forest lands or produce in contravention of its provisions. No person could claim a right to private property in forest lands on the grounds of domicile or ancestral occupation. The Act provided a mechanism for claiming common land as government land. Where private property rights were claimed, the government could still invoke the Land Acquisition Act and other laws to acquire the land for public purposes.

In Malaysia, British law and policy established a separate legal status for the 'Orang Asli' aboriginal peoples of peninsular Malaysia and the indigenous peoples of Sarawak and Sabah on the island of Borneo. In peninsular Malaysia policies emphasised settlement of the Orang Asli in aboriginal reserves. An Aboriginal Tribes Enactment of 1939 provided for the declaration of any area of land as an aboriginal reserve. No land within such a reserve was to be declared a Malay reservation. The aboriginal reserve could, however, be alienated or leased for mining, constituted a reserved forest or permit temporary occupation. The concept of aboriginal reserves was retained in a subsequent act of 1954.

In Sarawak a special protective status for 'Dayaks' was first developed during the 'Brooke Raj' regime that preceded formal British rule, and retained with some modifications under colonial rule. A 1920 Land Order divided Sarawak lands between Native Areas, to be inhabited only by indigenous peoples, and Mixed Areas in which other races could hold rights. A subsequent Land Settlement Order of 1933 provided for boundaries to be drawn around 'longhouses', within which indigenous communities would have exclusive rights to establish customary tenure, and for the appointment of village councils with the responsibility for resolving tenure disputes. A 1939 administrative circular then proposed the classification of land use into protective forest, productive forest and agricultural land.¹⁴ District Officers were to survey the areas over which indigenous communities had acquired or could acquire customary rights in accordance with native *adat* law, and these areas were to become Native Communal Reserves. After 1946 the British administration enacted its Land Ordinance recognising the five categories of Mixed Zone Land, Native Areas Land, Native Customary Land, Reserved Land and Interior Area Land.

Adat law In Dutch Indonesia

In Indonesia landownership during the Dutch colonial period was regulated along racial lines. Lands appropriated by Dutch colonists were subject to European agrarian law, with rights of private ownership as defined by the civil code. In contrast, the rights of native Indonesians were governed by customary *adat* rules and procedures. In the later colonial period, the basic legal instrument was the Agrarian Law of 1870, together with its ancillary and implementing regulations. Rights held under the civil code were similar to fee-simple ownership in British and United States law. The 1870 law guaranteed existing customary rights to the land, though affirming that all land including that held by natives was state land. It then became necessary to distinguish between 'free' land that was free of native rights and 'unfree' land subject to native rights. *Adat* rights were not normally considered absolute rights of ownership, unless officially registered. Nevertheless, all *adat* lands to which specific claims were not made were subject to alienation. Moreover, despite the basic 'dualism' of Dutch approaches to land rights, it became possible for native Indonesians to obtain individual titles under European law.

In Java the 1865 forestry laws declared all unclaimed and forest lands the domain of the state. Outside Java the colonial government began to pay greater attention to the Outer Islands by the end of the 19th Century. Scholars often referred to as the 'Adat Law School' had a significant impact on law and policy in the late colonial period. They opposed the introduction of a codified Western legal system and advocated social evolution through the growth of stable *adat* communities, in particular in the Outer Islands. The emphasis on *adat* law was reflected in judicial administration. Native courts were established, to be governed by their own codes of procedure. To an extent the concept of *adat* in national law represented the colonial creation of a system of legal pluralism through the study of disparate customs, most of which had never been codified in themselves. There were long-standing conflicts

between the advocates of legal pluralism and the 'unificationists' who considered such pluralism inappropriate for a modern state. Moreover, there were problems with an approach which gave more attention to some customary systems than to others. For the most part, modern legal documents that refer to the validity of *adat* law do not consider the land tenure systems of shifting cultivators.

Sources of conflict: post-independence law and policy approaches

Bangladesh: Chittagong Hill Tracts

In Bangladesh after 1971 settler programmes in the Chittagong Hill Tracts (CHT) were officially promoted to ease population pressures in other regions. While no proper agrarian census exists for the CHT region as yet, Bengali immigration has radically transformed the patterns of land tenure, with non-indigenous settlers now occupying most of the more fertile lands. Government policies have until recently made no effort to protect the land rights of tribals. In the early 1980s the deputy commissioners in the three CHT districts received specific instructions from the national government to make lands available for outside settlement.

A very large-scale hydro-electric project also had a devastating impact on tribal land security. Between 1959 and 1963, during the Pakistan period, the construction of a dam near the village of Kaptai submerged almost 40 per cent of prime agricultural land in the CHT. The government has estimated that up to 100,000 tribals were displaced by this project. While a minority received financial compensation, over half were reportedly left with none. No provision was made for the tribal families who had practised shifting cultivation in the hilly regions flooded by the project.

In the late 1980s the Bangladesh government took formal steps to re-evaluate its policies towards the CHT. It created a National Committee in 1987 to examine the root causes of the conflict and formulate recommendations. The committee recommended a cadastral survey of landholding and ownership in the CHT and resettlement of approximately 30,000 landless tribals displaced by the Kaptai dam. Tribal opposition groups meanwhile demanded constitutional amendments which would prevent anyone from other parts of Bangladesh from settling down and buying or settling land in the CHT and would restrict outsiders from entering the area without permission.

There is no ready solution in sight. The number of non-tribal immigrants is now perhaps 40 per cent of the total population, and much of the best land is in their possession. Tribal militants continue to demand the expulsion of these settlers and the restoration of lost lands to traditional owners. In May 1991 a non-governmental Chittagong Hill Tracts Commission investigated the current land tenure situation in some depth.¹⁵ As the commission observed, the return of Bengali settlers to the plains outside the CHT should be seen as the ideal solution but is unlikely to happen because almost half the population in the CHT are new Bengali settlers. It recommended, however, that no further settlement in the CHT be permitted, that a neutral expert body should examine the legality of

title to lands in the CHT and that jurisdiction over land matters should be vested in an autonomous CHT government.

The fundamental issues in the CHT concern autonomy over a contiguous land area, traditionally occupied on an exclusive basis by tribal peoples whose historical land rights were recognised in earlier national laws. Bangladesh has ratified the earlier ILO Convention No. 107 on indigenous and tribal rights, though not the revised Convention No. 169. An adequate legal framework for the recognition of tribal land rights today, and for dealing with past claims to restitution and compensation, will be essential for any negotiated settlement.

India: Scheduled Castes And Tribes

In India affirmative action programmes on behalf of tribal and other disadvantaged minorities are authorised by constitutional provisions. Article 46 of the Indian constitution provides that the state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes. Land rights, however, are almost exclusively a matter of individual state jurisdiction. The role of the federal government is limited to establishing broad principles of property rights and their limitations in constitutional law, and to providing broad directives of agrarian policy in national planning instruments. The constitution provides for some directive principles of state policy, namely that ownership and control of material resources of production in the community are so distributed as best to serve the common good, and that operation of the economic system does not result in concentration of wealth and means of production to the common detriment. The constitution, as amended in the 1970s, also clarifies that no state measures to acquire, extinguish or modify property rights can be challenged by reference to the fundamental right of property. Land rights, as other property rights, are thus considered legal rather than fundamental rights.

Land concentration, landlessness and rural labour abuse in India are integrally related to the caste system. Apart from tribals, the majority of the landless are the estimated 100 million members of the Scheduled Castes, otherwise known as the 'untouchables' or Harijans. In recent years the question of land rights has been addressed extensively in the reports of the Commissioner on Scheduled Castes and Scheduled Tribes. This official has no statutory powers, being responsible only for reviewing government policy towards the Scheduled Castes and Tribes, and formulating recommendations. Yet the commissioner's reports after the mid-1980s were highly critical of the general failure of policies to redress the land problems of these vulnerable minorities. The 1986-7 report observes that atrocities against the Scheduled Castes and Tribes have acquired more of an economic dimension, and that alienation of their lands has continued unabated. While they are constitutionally entitled to receive priority treatment in land reform, economic development programmes have not been matched by a concerted effort to protect these groups against land alienation or provide them with the lands necessary for their subsistence. While all Indian

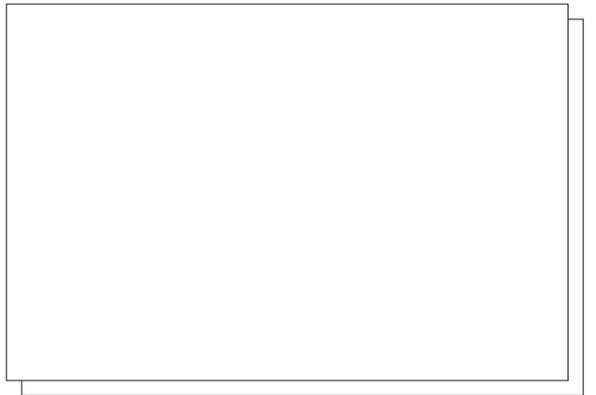
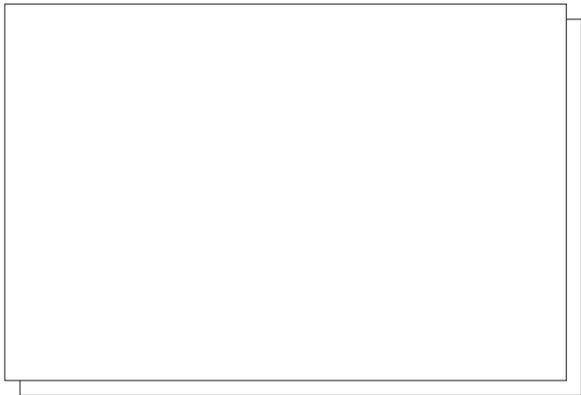
states can claim to have allocated surplus lands to the Scheduled Castes and Tribes, they still constitute over 50 per cent of the landless and also comprise the bulk of bonded labourers. The commissioner advocates a drastic reduction of the present ceiling on land tenure and more stringent application of the existing laws on land alienation and restoration. The report for 1987-9 contains a detailed account of land evictions and non-implementation of ceiling laws and urges a reappraisal of policy.

India's designated forest areas are inhabited mainly by an estimated 50 million tribal people. By the mid-1970s state forest departments were managing some 75 million hectares of forest land, almost one-quarter of the national territory. The rapid rate of deforestation, involving the loss of over a million hectares of forest annually, then led to the enactment of the Forest Conservation Act of 1980, which prohibited any state government or other authority from 'de-reserving' reserve forest or using forest land for any non-forest purpose without prior central government approval. The Act was further strengthened in 1988, when states were prohibited from assigning leases to any authority or non-governmental agency without central government approval.

Since independence the notion of special protection for the land and other rights of tribals has been retained. The 1950 constitution provides for the notification of Scheduled Tribes and their protection by special laws. However, federal legislation does not provide for uniform rights of landownership for tribals throughout the country. Legislation has been passed in a number of states declaring that tribal lands either are inalienable or can only be transferred to non-tribals with permission. Some states have also enacted laws for restoring to tribal peoples lands previously alienated to non-tribals, or for debt redemption.

Serious land conflicts involving widespread eviction have continued to occur. The former Commissioner for Scheduled Castes and Scheduled Tribes was also highly critical of the forestry laws in themselves, arguing that they were in breach of the Indian constitution. In several cases the original inhabitants were deemed to be encroachers without any enquiry, as soon as the forests had been taken over by the state. The commissioner's minimal recommendation was that the people should at least be given full rights over minor forest produce. Beyond that, the present law-and-order approach should be abandoned for good. The government should make a commitment that no action be taken against the people in respect of the land under cultivation until a final action plan had been prepared on the basis of mutual understanding. All cases pending in the courts should be withdrawn, with tribal people granted full authority with regard to the management of their own forest resources.

In December 1988 the Indian government adopted a new resolution on its forest policy explicitly recognising the existence of customary rights in forest areas and stressing that rights and concessions enjoyed by tribals and others living within and near forests should be protected. All agencies responsible for forest management were to associate tribal people closely in the 'protection, regeneration and development of forests' and to provide gainful employment for people living in and around the forest. As illegal cutting and removal by contractors were identified



Main picture: Aboriginal Australians, PENNY TWEEDIE/PANOS

Far left: Ethiopian, JENNY MATTHEWS/FORMAT

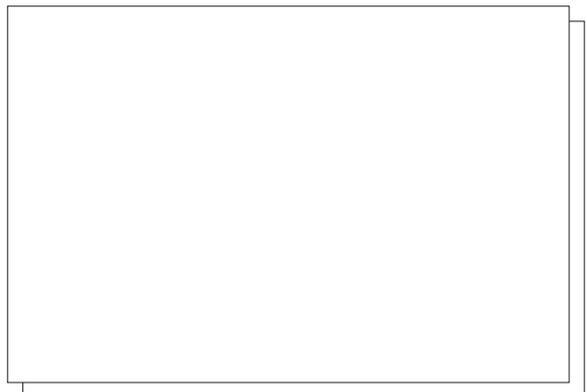
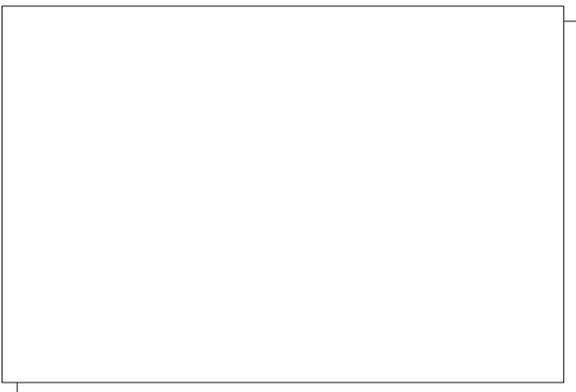
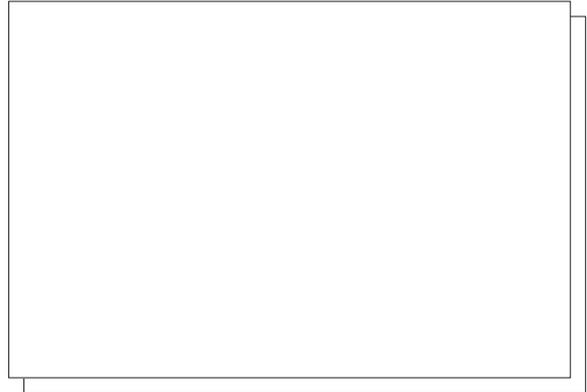
2nd left: Maya – Guatemala, JORGEN SCHYTTE/STILL

3rd left: Palestinian – Hebron, West Bank, BILLIE RAFAELI

Bottom: Roma – Romania, JEREMY HARTLEY/PANOS

Middle, below: Dayak – Indonesia, CHARLY FLYN/PANOS

Below: Nenet – Siberia B&C ALEXANDER



as a major cause of forest degradation, contractors were to be replaced by such institutions as tribal and labour cooperatives. However, as was later clarified, no ownership or lease rights over forest lands were to be given to the beneficiaries or voluntary agencies involved, nor was forest land to be assigned in contravention of the provisions of the 1980 Forest Conservation Act.

While many development projects have displaced or threatened to displace tribals, the most controversial has been the envisaged large hydro-electric scheme in western India, the Sardar Sarovar Dam and Power Project, involving the involuntary resettlement of many thousands of tribals. Concerns have been expressed that the government's compensation plans would benefit only those with registered legal rights to the land, leaving out a far larger number of displaced persons who have occupied their land under customary arrangements. As India has ratified the ILO's Convention No. 107, the case has received regular attention from the ILO's supervisory bodies. It has recently been heavily criticised by an independent review undertaken on behalf of the World Bank. The Indian government stated subsequently that it would proceed with the project without World Bank funding.

Indonesia: *adat* law and forest-dwelling communities

In Indonesia land conflicts are growing between tribal minorities, the state and private logging contractors, in particular as large-scale logging extends to the larger Outer Islands. It has been estimated that some three-quarters of all Indonesian land is now classified as forest, with the land rights vested exclusively in government forest departments, even though traditional occupiers can make claims on the basis of *adat* customary law. The Basic Forestry Law of 1967 governs land use and land rights on state forest lands. It grants broad authority to forestry officials to make regulations relating to forest lands and land rights within them. Forestry officers also have policing powers to detain persons suspected of violating forest laws.

Legal controversy has arisen over the relationship between *adat* customary rights to the land and statutory land rights recognised in national agrarian law. After independence the Basic Agrarian Law (BAL) of 1960 revoked many of the earlier Dutch laws and established a new set of principles concerning land rights. The dual system, between Western and *adat* rights, was abolished, and all rights in land were now converted into a single unified system based on *adat* law, though modified by the principles enshrined in the BAL itself. All land rights were to have a social function, preventing excessive control. Both the maximum and minimum size of individual or corporate lands were to be regulated, with land areas in excess of this ceiling redistributed in accordance with need. Land owned under any type of right could be acquired in the public interest upon payment of compensation. The original intention was to carry out systematic surveying, mapping and registration throughout Indonesia, to facilitate the recording of rights and the issuance of land titles. In practice, large-scale land registration has not taken place, and many indigenous communities in the Outer Islands have never been informed about the need to regis-

ter. Problems were compounded by forestry laws and policies which seemed to conflict with the provisions of the BAL and provided little scope for forest-dwelling peoples to register claims to their traditional lands.

In practice, forest management outside Java has been mainly in the hands of private concessionaires. There are now over 500 concessions to private companies in the Outer Islands, with an average size of about 100,000 hectares.¹⁶ Given the rapid pace of deforestation, some UN and other donor agencies have urged greater attention to customary land rights, advocating community-based strategies for the mapping of *adat* land rights and borders. Indonesian NGOs have also documented cases of land eviction throughout Indonesia and pointed to the increased frequency and intensity of such cases of land conflict over the past decade.¹⁷ One for example has urged the adoption of a Basic Act to recognise the concept of indigenous rights to the land and related natural resources.¹⁸

A recent report by the Ministry of Forestry, issued within the framework of a UN Food and Agriculture Organisation technical cooperation programme, has now emphasised the need to address the legal and practical relationships between forest concessionaires, the state and traditional communities.¹⁹ It proposes alternative mechanisms to delineate customary or communal areas and provide traditional occupants with a stake in forest management. These include leasehold or 'stewardship' arrangements, promotion of cooperatives and provision of special beneficiary status for traditional forest-dwelling communities.

Malaysia: Orang Asli and Dayaks

The adverse impact of logging on the land rights of traditional Dayak forest-dwellers in Sarawak, Malaysia, has received widespread international publicity. Policies towards the Orang Asli communities of peninsular Malaysia, and towards the Dayak and 'Anak Negeri' of Sarawak and Sabah respectively, need to be considered separately in that the federal government can exercise less control over the latter.

Under Malaysia's federal system of government, both land rights and forest management come under jurisdiction of the individual states. The status of indigenous peoples is nevertheless constitutionally recognised, and special provisions cover the rights of these peoples over their traditional lands. Two main ethnic groups enjoy special status under law: the Malay peoples, who form the dominant racial group in the whole of Malaysia; and the indigenous peoples of Sabah and Sarawak, subdivided into several different tribal groups. The Orang Asli of peninsular Malaysia do not now benefit from this special status, though reservations are set aside for them. While political power has been dominated since independence by the Malays, special provisions have been enacted to protect their lands against alienation to non-Malay peoples. The concept of Malay reserve land was introduced during the colonial government, allowing for coexistence between Islamic forms of property ownership and freehold and leasehold systems based on British land law.

The Orang Asli, the traditional forest-dwellers of peninsular Malaysia, account today for only some one per cent of the Malaysian population and do not enjoy clearly defined legal privileges. Government policies towards them have been based on the notion of protective custody, through settlement in special aboriginal reserves.

In Sarawak the land law currently in force is the 1958 Sarawak Land Code, as amended. It recognises all rights over land created before 1958, including those acquired according to native customs, and distinguishes between private and state-owned lands. The Land Code is complemented by forestry legislation, the main instrument being the 1954 Forests Ordinance. Forest lands are now divided into permanent Forest Reserves, Protected Forests and Communal Forests, subject to gazettelement, though pre-existing rights may be admitted at the time of gazettelement.

Problems in law have derived from the fact that relatively few of the native communities live in the Native Area Land, designated for their exclusive use. The vast majority live in the designated Interior Land Area, comprising almost three-quarters of the state's land area. These are the lands most affected by the logging concessions, and to which traditional inhabitants are now claiming native customary rights (NCR). The status of these claims is the main issue of legal and political controversy. The 1958 Land Code is itself fraught with ambiguities. It recognises all NCRs established before 1958 by a range of methods including the felling of virgin jungle and other land cultivation; but traditional patterns of land use, including hunting and shifting agriculture, are apparently not covered by the law.

In Sarawak it has been estimated that by the mid-1980s some 60 per cent of the forest area was under concession to logging companies.²⁰ Both national and international groups concerned with environmental protection and indigenous rights have taken up the cause of the tribal peoples, urging that all existing timber licences which encroach on customary lands should be suspended until the issue of customary land rights is resolved.

Malaysian NGOs have been pressing for law reform and revised implementation of existing laws in the search for solutions to the conflict. One has observed that there is no comprehensive formal record which sufficiently recognises existing boundaries of customary land and forest belonging to each native community.²¹ This NGO recommends that the government should conduct a comprehensive exercise to record these unrecorded boundaries and give effective protection to native rights. There should be formal recognition of customary land and forest rights, together with conditions specifying that the land and forest cannot be logged or sold. It also proposes that the land should be inalienable, with ownership based on a communal title.

Vietnam: land rights and hilltribes

Land rights for ethnic-minority groups including hilltribes people have become an important issue in the socialist countries of East and South-East Asia within the framework of agrarian reform and partial decollectivisation. In

Vietnam, over 50 different ethnic groups accounting for over 8 million people altogether comprise some 12 to 14 per cent of the national population. The majority reside in the forest and forest-border regions of western Vietnam where as many as 3 million people have traditionally lived predominantly by shifting cultivation. Other ethnic-minority groups have lived mainly from sedentary agriculture, as crop cultivators and livestock producers. While land policy in North Vietnam was based on state and cooperative farming between 1954 and the late 1970s, since 1980 the unified Vietnamese republic has accepted a gradual transition towards individual land use rights which may potentially undermine the land security of ethnic minorities. In 1982 new legislation permitted individual land leases on forest lands.²²

A new Land Law was adopted in Vietnam in 1988. It retains the principle that only the state has the power to allocate land. The mortgaging and sale of land are prohibited, though farmers are given the right to the transfer, concession and sale of the fruits of their labour and the results of their investment. Legal rights to the use of land are secured through the issuance of a land tenure certificate. As one analyst has observed, the new land tenure system opens up possibilities for ethnic families but also creates problems for them.²³ Because of the emphasis on individual tenure for groups with a communal tradition, they are likely to become landless unless special provisions are made. Also, migratory swidden cultivators may be prejudiced by the new law and policies.

Certain recent policy declarations in Vietnam are directed at the ethnic-minority groups. A resolution issued in November 1989 stresses the importance of ethnic minorities for the development of the country, affirming that the land use of state farms should be controlled and land not yet reclaimed should be given back to ethnic people. In April 1990 the Council of Ministers adopted a resolution outlining in more detail the role and responsibilities of ethnic-minority groups in land and forest management. While ethnic minorities could control marketing and production in their settlement areas, the main objective appeared to be the promotion of fixed cultivation and settlement and gradual elimination of rotating agriculture and nomadic ways of life.

The Philippines

The subject of ancestral lands and domain in the Philippines has been discussed in detail in a recent MRG report.²⁴ Considerable attention has been given to the land and resource rights of indigenous and other ethnic minorities, in particular since the overthrow of the Marcos regime. The 1987 constitution recognises the concept of ancestral lands and domain, closely relating it to that of autonomy for certain minority groups and providing for the creation of autonomous regions in Muslim Mindanao and the Cordillera region of Luzon Island. Ancestral lands are also covered by the 1988 Comprehensive Agrarian Reform Law.

Although the concept and extent of ancestral domain remain controversial issues, the Philippines has gone further than any other Asian country in linking the concepts of ancestral domain, special land rights and autonomy. It

remains to be seen whether the new government headed by President Ramos will give these issues the necessary priority in the 1990s.

Summary And Future Challenges

No Asian country has so far ratified the ILO's Convention No. 169. Despite a history of legislated special protection for certain ethnic minorities, there has been a tendency to centralise power over lands and forests, to the detriment of ethnic minorities. Some ethnic groups are striving for a high degree of autonomy over their traditional lands, others for a more limited devolution of rights over lands and forests. The Philippine model goes further than the other Asian countries in recognising the principles of indigenous land rights and ancestral domain. But it is beset with difficulties, as indigenous claims have to be reconciled with those of existing holders of private land title. There are growing perceptions that centralised systems of forest management have proved environmentally destructive as well as prejudicial to the land security of traditional forest occupants. While accepting the need to control indiscriminate logging, governments have opposed traditional systems of swidden agriculture and chosen to maintain a degree of control rather than to devolve extensive rights to forest-dwellers and other ethnic minorities. Rather than dwell on the 'indigenous paradigm' (of dubious value in the Asian context), the challenge is to work for the codification and better understanding of customary rights at the local level. This is of major importance if threatened ethnic minorities are to be empowered to resist pressures for land privatisation, transmigration and internal colonisation in a continent where person-land ratios are highly unfavourable.



MINORITY LAND RIGHTS IN AFRICA

Critical issues

Throughout Africa there has been understandable reluctance to entertain the notion of special rights or protection through the criteria of ethnic or cultural characteristics. The main concern has been to build modern nation states through more uniform land systems. Moreover, the concept of special protection can easily be associated in the African context with the discriminatory racial policies of colonial regimes, with their restrictions on land alienation and sale in black 'communal' areas and tribal reserves. It can be argued furthermore that the diverse customary tenure regimes allow for the necessary protection, in accordance with the social and cultural characteristics of each ethnic group. Problems are most likely to arise when there are concerted attempts to impose private land titling and registration, undermining the traditional land security of pastoralists and other vulnerable groups.

The issues have certainly arisen. The Namibian 1991 land conference, recognising that increasing land pressures in communal areas posed a threat to disadvantaged groups, resolved that groups including the San bushmen should receive special protection of their land rights. The World Bank's appraisal of its activities for indigenous peoples clearly considers African pastoralists as covered by its Operational Directive, and recent Bank projects have recognised the need for special treatment of their land rights in law and practice. There is a growth of policy research and networking activities on pastoral land tenure which is certain to reinforce demands for special protection.

Ethiopia: ethnic decentralisation and land conflict

A possibly exceptional situation is Ethiopia, where since the overthrow of the Dergue regime in May 1991 the transitional government has pursued policies of administrative decentralisation along ethnic lines. The socialist Dergue regime undertook radical land reform after 1975. All customary and other land rights were extinguished under the 1975 land reform law and vested in the state. Peasant associations were established, empowered to collect taxes and to ensure quota deliveries to the agricultural marketing board. While the reforms were originally based on 'land for the tiller' principles, policies later emphasised forced collectivisation on state farms. In the 1980s policies included coercive resettlement and villagisation programmes, involving widespread removal of farmers from their traditional areas. As one writer observes, the resettlement programme was launched with the stated intention of moving the victims of drought to richer areas of south and south-western Ethiopia, but it was received with hostility from all sectors of society.²⁵ The programme involved complete insecurity of land tenure, as the land was repeatedly reallocated in order to accommodate new claimants.

The post-1991 government has so far refrained from announcing a comprehensive new land policy, stating that

this can only take place following a new constitution and democratic elections. In late 1993 it nevertheless announced that land would remain under state ownership. Resettlement has ceased, but the fate of over half a million resettled people remains uncertain.

In the context of the present decentralisation policies, a recent report has observed that 'the land rights of ethnic and religious minorities present complex and potentially explosive issues'. In much of the country, pre-revolutionary land tenure systems were the result of conquest, land alienation and settlement by northern groups. This system then collapsed with the revolution, leaving a variety of inter-ethnic tensions.²⁶

Recently in Ethiopia widespread concerns have been expressed that the new policies may lead to conflict between the ethnically predominant groups and ethnic and religious minorities in the new administrative areas, and also prevent the government from alleviating poverty in the over-populated and desertified northern regions through settlement programmes in the lesser populated and more fertile southern zones.

Africa's colonial legacy

It is important to understand the colonial legacy of discrimination in Africa. In the French and Belgian colonies early policies were overtly assimilationist and countenanced no legal rights outside those covered by European civil code traditions. The basic approach was to recognise in law only individual forms of landownership, proclaiming that African occupiers of land had no rights without title registration, that all unregistered land was state-owned and could form the subject of concessions. However by the mid-1950s African customary land rights became more explicitly recognised. In contrast, British policy from the outset was to recognise 'communal' tenures in law, granting to traditional chiefs the powers to allocate land and adjudicate on claims. Even so, individual users were prevented by law from selling or mortgaging their land.

There were major differences between policies in settler countries and non-settler and trust territories. In such settler countries as Kenya and Southern Rhodesia (Zimbabwe) only towards the end of the colonial era were African farmers permitted to register their land as individual and transferable private property. Before that time the position in British law was that Africans were mere tenants-at-will of the Crown on the reserves. However, an anomalous situation developed in which the law was not reflected in reality. Land transactions took place among African farmers and between Africans and settlers, and the more entrepreneurial African tribesmen increased their demands for individual land titles and evidence of the sales that had taken place. In Kenya the first response was to undertake registration, land consolidation and enclosure within reserves if all the residents within a village area requested this. In 1961 all restrictions on the African purchase of lands within the European reserves were abrogated.

In Southern Rhodesia a 1951 Act provided transferable though not inheritable farming and grazing rights for a limited number of individual farmers. The right of land

allocation was also removed from traditional chiefs and vested in district commissioners. In the 1950s British policy in this colony was to create a new category of African so-called 'master farmers' who were to be provided with individual tenurial rights.

In the British colonies with less white settlement, there was less need to seek legal justifications for African dispossession. For the most part, policy involved indirect rule through the protection or artificial promotion of traditional chiefs in whom ownership and control of the land were vested. As in the settler economies, there were restrictions on the alienation of lands from Africans to non-Africans, and a general determination to prevent the emergence of a land market among African farmers.

Challenging minority land rights: South Africa

In South Africa the legal basis of rights to the land has become a keen area of controversy. The land debate intensified early in 1991, when the Nationalist government introduced legislation aimed at repealing all statutory measures regulating rights to the land on a racial basis. The government proposals, which aimed only to repeal the laws without addressing practical inequalities resulting from past application, were widely rejected by the African National Congress (ANC) and other opposition groups. The latter insisted that land law and policies must address the question of land claims and restitution for the many blacks who were unlawfully dispossessed by apartheid policies, and that future land law must be based on new principles of equity, restricting and limiting the strong ownership rights of white farmers.

Land rights were arguably the most difficult of the issues negotiated in the transition to majority rule. As support for land nationalisation fell within the ANC, there was concern to examine the nature of competing claims to specific lands, or to the land in general, as a basis for future policy determination. There has been a spate of literature on the economic and legal dimensions of land rights.

The racial land laws, dating from 1913, formed the economic underpinning of the apartheid system. With regard to rural areas, the original instrument was the Native Land Act (Black Land Act) of 1913, which provided for physical segregation between black and non-black landholdings. It prohibited each racial group from entering into any agreement for the purchase, hire or other acquisition of land allocated to the other. The lands identified as owned or occupied by blacks were listed in a schedule to the Act. The Development Trust and Land Act of 1936 then identified certain lands to be 'released' for black occupation, expanding the reserve areas that had been scheduled in the 1913 Act. The net result was to restrict the blacks to less than 15 per cent of the total land area, reserving the remaining land for exclusive white occupation.

Most of the land set aside for blacks has been legally owned by the state or the self-governing 'Bantustan' states. White lands have been held under individual forms of ownership. Conflicts in the white reserve areas have been of two major kinds. First there is the question of

'black spots', where black individuals and communities obtained freehold titles to the lands, usually before the passage of the 1913 Act. Up to half a million blacks were later forcibly removed from these areas between the early 1960s and the mid-1980s. In certain cases title-holders were able to press their claims effectively before the courts, and public pressure terminated the removals in 1985. But there is a legacy of hundreds of thousands of victims of such removals, demanding restitution.

The second group of conflicts, numerically much larger, has involved tenants and sharecroppers on the white-owned farms. The 1913 and 1936 Acts prohibited black tenancy and squatting on white lands. However, the laws were resisted not only by the traditional tenants but by many white farmers. Tenancy was seen as mutually convenient in that it guaranteed a secure labour supply and the draught animals to carry out the agricultural work. But by technically illegalising a widespread labour system, the law served to deprive tenants of legal recourse against abusive treatment and conditions or arbitrary eviction when owners chose to sell their properties or to mechanise farm practices. Before the 1940s the government was reluctant to take effective measures against such labour tenancies, despite legal powers to do so, probably because of difficulties in ensuring white farmer cooperation. But from the 1950s a series of new laws was enacted facilitating the removal of tenants and squatters.

In the regions with more capital-intensive agriculture, traditional tenancies rapidly gave way to wage labour systems. In other areas, however, black tenancies on white farms are estimated to have increased by some two million between 1950 and 1980. There was a violent process of land eviction and tenant resistance throughout the 1980s in the more 'feudal' areas of the Transvaal, northern Natal and parts of Orange Free State. These included individual and mass evictions, the latter where large forestry companies bought up lands that used to be individual white farms, and innumerable cases of assault or murder by white farmers.

Recent legal literature has examined the principles and procedures by which such problems can be addressed. A common theme is that existing law lacks legitimacy, and South African legal scholars sometimes distinguish between the crisis of legitimacy deriving from the apartheid system in itself and the broader failure of agrarian law to build on customary and traditional land tenure arrangements. These scholars generally advocate a more functional concept of landownership, with restrictions on private rights and safeguards for tenancy rights, similar to the concept of the social function of property that has influenced past agrarian law in Latin America.

Issues of equity were barely addressed in recent government land reform proposals. In its February 1991 white paper on land reform, the government announced its decision to repeal, finally and unconditionally; the Black Land Acts of 1913 and 1936, the Group Areas Act of 1966, the Black Communities Development Act of 1984 and all other provisions regulating the acquisition and exercise of land rights according to membership of population groups. It also announced a series of complementary measures, including abolition of restrictive measures in the 'Bantustan' self-governing territories, government

support to broaden access to land rights for the whole population amendments to the 'tribal' land system, enabling tribal communities to enter the property market in their own right when land had been made accessible to all, and new land use policies, to ensure conservation and protection of environment and resources.

One crucial issue side-stepped in the white paper and supporting legislation was that of land restitution. The government was of the opinion that a programme for the restoration of land to previously dispossessed individuals and communities would not be feasible. Apart from the vast potential for conflict in such a programme, overlapping and contradictory claims to such land would make implementation difficult, if not impossible. The ANC countered that no attempted land reform could ever hope to win legitimacy or credibility until the government committed itself to restoration of land to victims of forced removal.

An interim constitution for a post-apartheid South Africa was adopted in late 1993. While enshrining generally strong protection for existing property rights, it contained a separate article covering the restitution of land rights, with a proposed Act of Parliament to deal with land claims. A person or community shall be entitled to claim restitution of a right in land from the state, if dispossessed of such right at any time after a date to be fixed by the Act but not earlier than 1913, and if such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination. A Commission on Restitution of Land Rights was also to be established.

Pastoral land tenure

Pastoralists have been the main victims of land settlement and registration policies in Africa. In recent years, however, it has been increasingly recognised that the social and economic problems of transhumant pastoralists have increased as a result of schemes and policies which show little understanding of their traditional land rights.

In Kenya, for example, the special needs of pastoralists and the question of transhumance were not taken into account in colonial land allocations. Traditional rights of passage along transhumant routes were no longer recognised in law. Such groups as the Maasai were confined to reserve lands demarcated on the basis of areas occupied during the wet season, and thereby lost much of their traditional land. There was intense conflict between pastoralists and settlers in the late colonial period, and the more entrepreneurial Maasai were encouraged to enclose grazing land in individual ranches.

National law and policies after independence reformed the legal basis of tenure among Maasai pastoralists. The Land (Group Representatives) Act of 1968 adapted registration programmes to what were seen as the particular needs of pastoral communities. This law aimed essentially to create group ranches as corporate entities. The legislation reflected the concerns of the Kenyan government, supported by international donors, to commercialise livestock production. There has been a trend in recent years towards subdivision of group ranches and the individualisation of tenure in Maasailand.

In Tanzania, as elsewhere in East Africa, land use and planning policies pursued in recent decades have led to substantial alienation of traditional pastoral areas. Maasai communities have been affected by the expansion of cereal production, as private and parastatal companies have sought titling of so-called 'vacant' lands, but a greater threat has come from wildlife conservation programmes within their traditional habitat. There are now several national parks and game reserves, which, together with the Ngorongoro Conservation Area, account for over 10,000 square miles. Further proposals have been made for the extension of existing parks and the creation of 'buffer zones' to separate human settlements from the parks. And new conservation regulations may make it more difficult for pastoralists to claim customary rights.

One pastoral group in particular has attempted to pursue its traditional land claims through the judicial machinery. This is the Barabaig pastoralists of the Hanang district of Arusha region, who have suffered substantial alienation since these lands were allocated to state farms for cereal production. The plight of the Barabaig has attracted much international attention from human rights organisations. At the national level, the Barabaig case has been taken up by a non-governmental Legal Aid Committee.

The Barabaig have occupied the plains surrounding Mount Hanang for at least 150 years. Loss of access to the more fertile and wetter areas taken up by outsiders for crop cultivation has increasingly compelled the Barabaig to break their traditional rotation system and often to migrate from the area. The pressure on Barabaig lands increased dramatically in the late 1960s when the government introduced mechanised wheat farming through a large parastatal organisation with extensive financial and technical assistance from Canada. The project is estimated to have entailed the loss of a full third of Barabaig grazing land, invariably the land with the most agricultural potential.

Initial attempts by the Barabaig to pursue their claims through the courts met with little success. In 1985 one village challenged the alienation of its traditional lands on the grounds that the lands had earlier been allocated to it by the district council. An initial decision in the village's favour was overruled on appeal. Recent litigation now undertaken by the Legal Aid Committee on the Barabaig behalf concerns the broader issue of customary title. In July 1989 the Prime Minister issued a government notice extinguishing customary rights in the Barabaig lands under parastatal occupancy. A case is now up before the Supreme Court challenging the constitutional legality of this government notice.

In other pastoral areas of Tanzania, where large-scale alienation has not so far occurred, use of the legal machinery seems to offer scope for protecting pastoral lands. After surveying, mapping and registering their lands, pastoral communities can now obtain a 'granted right of occupancy'. Under the provisions of the 1982 Local Government and Cooperative laws, they are entitled to make by-laws based on customary tenure rules. Thus NGOs have developed programmes of legal assistance for pastoral communities, assisting village councils to secure rights of occupancy.

Future challenges

Until not so long ago Africa was considered different from the other developing regions in that the land reserve was abundant, there was no real pressure on the agricultural land, and no significant external pressure existed to reform customary tenure arrangements. All this is now changing in the light of demographic trends and Africa's structural crisis since the early 1980s. Land is now the single most important policy issue throughout the continent and the source of growing conflicts everywhere. The focus on land titling and registration, and the generalised emphasis on market forces, is accelerating expulsion from the land and fuelling ethnic tensions.

Throughout Africa a difficult balance has to be drawn between equality of rights and respect for customary systems of land allocation and use. One clear illustration of this is gender rights to the land. The importance of women's role in African agriculture is widely accepted. They account for almost three-quarters of food production, and there are estimated to be more women than men active in agriculture. Even under traditional systems of patrilineal inheritance, however, women may suffer from a basic insecurity of land use rights, in that they are allocated land only for as long as they are married to a lineage member. Even so, customary tenure regimes generally provided women with effective land security. Tenure reforms since independence, and particularly land registration programmes, have prejudiced women's land security. The result of modern legislation and land titling programmes has been to deny women their traditional right to a plot of land given by their husband. And the spread of cash crops results in the loss of both incomes and inheritance.

Attempts to develop uniform systems of land tenure, even if based on customary law, have involved similar discrimination. Even in cases where women do secure legal title, this may provide no effective protection if there are conflicts with principles of customary law. Thus the African experience provides a caution against an uncritical acceptance of customary law, if it is at variance with basic principles of equality and human rights.



PRIVATISATION AND RESTITUTION IN RUSSIA AND EASTERN EUROPE

Russia and the former Soviet republics

Land rights, either for ethnic minorities or for the rural population at large, have become a sensitive political issue in Russia and the former Soviet republics. In the early stages of privatisation, land conflicts of different dimensions are already appearing throughout Russia. Many of these have to be seen through an 'ethnic lens', but it is important to distinguish between the manner in which diverse claims have been and may be made, and the basic principles underlying the claims. First, there are minorities that were deported *en bloc* from their traditional areas of habitation during the Communist era, and which may now be making claims for repatriation and land restitution. Second, there are the specific claims and problems of the northern minorities of the Arctic region and of other nomadic peoples from the Siberian and Far Eastern regions. Land rights issues for Russian minorities can be examined from the perspectives of restitution and compensation for the victims of past removals, autonomy, and special protection by the state for identified indigenous minorities.

Third, there are the massive land problems caused by the break-up of the Soviet Union for an estimated 60 million minority peoples outside their traditional homeland, including some 25 million Russians. The collapse of the former Soviet Union has served to 'internationalise' certain minority issues – for example, the plight of the Meshketian Turks, exiled to Uzbekistan and Kazakhstan and now seeking either to return to their homeland in Georgia or to be resettled in Azerbaijan or Turkey. In some cases the Russian government can take domestic measures to alleviate tensions, as when Russian factory workers in Estonia are offered agricultural land in Russia. In other cases, a solution can only be negotiated bilaterally between the new states concerned.

General principles

In March 1990, at the end of the Communist era, the Soviet government adopted its 'Fundamental Principles of the Legislation of the USSR and the Union Republics Respecting Land'. Within these broad principles, the land use of national or ethnic minorities was seen as meriting special treatment. Land types were divided into seven categories, including agricultural, forestry and reserve land; the land of populated areas, whether cities, villages or rural areas; and lands designated for special purposes including defence and nature reserves. However, 'Special rules may be laid down by the legislation of the Union and Autonomous Republics for the use of the above categories of land in areas where national or ethnic minorities live and carry out economic activity.'

The Soviets of People's Deputies were vested with powers to expropriate land parcels or to grant them for possession and use of citizens, collective farms, state farms and other

enterprises or institutions. However:

In areas where small national or ethnic minorities live and carry out an economic activity, the granting and expropriation for purposes other than these activities shall take place according to the results of a referendum carried out among these national or ethnic minorities, with the agreement of the competent Soviets of People's Deputies.

The competence of Union and Autonomous Republics regarding the settlement of land relations included 'the definition of borders and territories where national or ethnic minorities live and work and which are governed by special laws pertaining to the land, with the agreement of the local Soviets of People's Deputies'.

Following the break-up of the Soviet Union there is some likelihood that specific claims and concerns of minorities will be ignored in the context of the general trend towards agricultural privatisation. The trend is towards greater recognition of individual rights of land use, though the moves towards full privatisation of landownership have been gradual and tentative. By 1993 evolving Russian land law allowed for private ownership of land with a right to bequeath, but with restricted rights of sale. A presidential decree issued in December 1991, and the recommendations issued by the Ministry of Agriculture the following month, governed the reorganisation of collective and state farms. All collective and state farms had to decide explicitly whether to retain their current forms of organisation or whether to register new structures by early 1993.²⁷

The main emphasis of present policies appears to be on farm enterprise restructuring, allowing for different options of land use and organisation, but based on decisions taken by existing occupants of state and collective farms. Unlike the recent situation in the Baltic republics and some Central and Eastern European countries, state policies have apparently not addressed prior claims to the land by persons affected by forced collectivisation or relocation.

The development of small-scale peasant farming has been slow to date. By May 1993 only some 1.5 million peasant farmers were working on just over half a million peasant farms throughout the former Soviet Union, half of these in the Russian Federation. Powerful vested interests, lobbying for the preservation of the large farm structure, were largely instrumental in holding back the implementation of the 1990 Land Decree by simply transforming the majority of collective and state farms into joint-stock companies often controlled by former directors of these farms. However, it is precisely these powerful vested interests that the Decree on the Regulation of Land Relations and the Development of Agrarian Reform in Russia of October 1993 has aimed to break up.

Russia's northern minorities

Concerns are now being expressed at the implications for the land security of traditional minorities, with at least one Russian journalist warning that a free land market may be disastrous for the northern minorities, who must be protected by special land rights including the lifelong possession of ancestral lands.²⁸

The situation of Russia's northern minorities is the subject of a recent MRG report.²⁹ Security of land rights is now the major demand expressed by these minority groups, who have been formulating their demands, many of them land related, through newly formed representative organisations since the late 1980s. The recommendations in Nikolai Vakhin's MRG report – reportedly echoing the demands of the new organisations – are for the 'reserved territory' approach in the form of biosphere parks within Russia established for the exclusive use of these peoples. It is also argued that the environmental damage inflicted through past industrial development and resource extraction should be acknowledged by the state, and the principle of compensation accepted.

Deported peoples

Any hopes that the collapse of the Soviet Union would deliver swift justice to its previously deported peoples appear to have dissipated. Leaders of the successor states now appear unable or unwilling to resolve the complex issues of these 'punished' nations. Indeed, the Soviet break-up has added new complications to these already sensitive situations. For example, although some quarter of a million Crimean Tatars have recently returned to their homeland on the Black Sea, they now find themselves embroiled in a struggle for sovereignty over the peninsula between Russia and the Ukraine.

The deported peoples by no means represent a homogeneous grouping. Five nations – the Balkars, Chechens, Ingush, Kalmyk and Karachai peoples – had their traditional lands partly restored to them in the 1950s.³⁰ Another six – the Crimean Tatars, Greeks, Koreans, Kurds, Meshketian Turks and Volga Germans – were identified in the nationalities policy adopted by the Soviet Communist Party in 1989.³¹ A third grouping – including the Poles, Vepsy and Romanies – were never formally included in Soviet lists of deported peoples, although articles on their deportations did appear at times in the Soviet press.³²

Even peoples in the first group were not always allowed to return to their former areas of settlement. Most of them had the borders of their homeland significantly changed. Of the second group, neither the Crimean Tatars nor the Volga Germans have succeeded in restoring their autonomy. And although most of the Tatars have now returned to the Crimea, only a minority have been able to purchase housing or land. The Germans, along with the Greeks, Poles, Koreans and Turks, are increasingly resorting to emigration, although both the German and Polish governments have donated large sums to establish national settlements in the former Soviet Union to prevent wholesale immigration. Neither the Kurds, whose homeland is an enclave in Azerbaijan between the disputed territory of Nagorno-Karabakh and Armenia, nor the Meshketians, who were deported from the Georgian-Turkish border area, can expect resettlement in the near future.

In July 1992 a meeting of the heads of the Commonwealth of Independent States passed a law on their deported peoples, designed to coordinate a restitution of their rights.³³ However, given local opposition to

the re-creation of former autonomous areas, the optimum short-term solution appears to be the establishment of national units based on settlements or villages in traditional homelands and in areas of deportation. These were widespread in the Soviet Union until the mid-1930s, and would allow purchase of land by national minorities under current land reform programmes.

Problems of definition

Since the early 1990s the Russian government has accepted the need to provide special protection for the land rights of certain minority groups. A number of draft laws were prepared upon the initiative of the Committee of the Supreme Soviet of the Russian Federation, and in particular at the instigation of Siberian and indigenous members of local and central soviets.

One such draft, the 'Foundations of the Legal Status of Indigenous Peoples of the Russian North', was prepared in 1993 and subsequently adopted by the Assembly of Deputies. Certain principles contained within the draft were also submitted to the Constitutional Council in the form of amendments to the Russian constitution. They accepted *inter alia*: that indigenous peoples of the North required special protection to preserve their traditional ways of life; that indigenous peoples should have the right to territories of priority nature management; that these territories should not be subject to withdrawal and to industrial development; that indigenous peoples should have exclusive rights to collective and individual exploitation of regenerating natural resources, together with preferential rights to hunting and fishing areas and deer pastures in places of traditional residence and territories of traditional nature management; and that these territories could be allocated to individual communities on the basis of secure land tenure for a lifetime.

Enterprises and organisations which caused damage to indigenous lands and natural resources and environment on the territories of traditional nature management should pay appropriate compensation to bodies of local self-government or individuals and undertake measures to regenerate these natural resources.

The potential beneficiaries of such legislation appear to be defined with some arbitrariness. For almost 70 years the Soviet Union and then the Russian government have retained the notion that there are exactly 26 'minor nationalities' as originally defined in the 1925 list of such minority groups of the North. However, there are at least 21 additional cultural groups that follow similar lifestyles and face similar economic and cultural problems. These have not so far been recognised officially by the state as they are considered to be a part of larger populations.

The Baltic States and Eastern Europe

Since the early 1990s the majority of former Communist countries of Europe have adopted new land laws, paving the way for privatisation of cooperative and collective lands. Little attempt has been made to give special treatment to potentially disadvantaged minorities such as Romanies or 'Gypsies'. However, there is a danger that law and policy approaches will lead to discrimination in

land access against national minorities; for example, Russian emigrants and their descendants in the Baltic countries. For the most part, the approaches have been based on the principle of restitution for landowners whose former lands were expropriated without compensation during the era of forced collectivisation. In some cases, notably in the Baltic states, the emphasis has been on physical restitution of the lands to which previous landowners lost rights during collectivisation without the payment of compensation. In other cases, restitution may involve the payment of compensation rather than physical restoration of the land.

In Latvia the present approach has been based on the restoration of rights enjoyed before 1940. The land reform process commenced in 1990, when a law on land reform in rural areas was adopted by Parliament. The first stage was to provide land use rights for farmers, and in rural areas the land privatisation programme got under way in mid-1992. The 1937 civil code again entered into force in 1992, and a new law concerning rural land privatisation was adopted in July of the same year.³⁴ Its basic objective was to renew land-ownership rights to former landowners who possessed them on 21 July 1940 or to their heirs, and to deliver land into the possession of Latvian citizens in exchange for compensation. A 1940 declaration on land nationalisation³⁵ was considered null and void.

The 1992 Latvian legislation gives some consideration to the claims of present land users, but only for a limited period. Where land has been granted to another physical person prior to a request for renewal of landownership, then it remains state property, but the physical person retains land utilisation rights for a maximum 5-year period.

The impact of these legislative reforms remains uncertain. One source observes that as a result of the first stage of land reform 52,600 peasant farms and 103,500 small farms were formed, but that one-quarter of Latvian land remained in the use of different kinds of large farms.³⁶ Another source notes that 6,500 Latvian citizens and approximately 1,000 former Latvian citizens now resident abroad had expressed a wish to restore their property by the expiry of the application period in June 1991.³⁷ The implications were that about a third of all land would be given back to former owners. The rest would remain the property of large farms, former collective farms and state farms, now transformed into joint-stock companies.

A similar emphasis on restitution can be seen in the land reform law and policies of Bulgaria, the Czech Republic, Hungary and Romania since 1990. In Bulgaria, though virtually all land was owned by the state during the Communist era, private plot holders cultivated some 13 per cent of arable land by the late 1980s and accounted for approximately one-quarter of agricultural output. A Law for Agricultural Land Ownership and Use was adopted in February 1991, aiming to restore land to its prior owners as defined by the 1946 Agrarian Reform Law, or to their heirs. Land-ownership was to be limited to 20 hectares in areas of intensive agriculture, 30 hectares in mountainous areas. The law accepted that prior owners might not have their exact land returned, but could receive plots of equivalent size and quality to avoid excessive fragmentation.

In practice the restitution process has proceeded only slowly in Bulgaria, with less than 10 per cent of eligible land restored by the end of 1992. By June 1993 decisions still affected only just over 15 per cent of land subject to restitution. Yet the government still expressed hopes that half the eligible land would be restored by the end of 1993.

A particular problem in Bulgaria has related to the forced assimilation policy of the Zhivkov regime which began in late 1984, and led to the mass emigration of ethnic Turks, predominantly skilled farmers, to Turkey in 1989. Many ethnic Turks, especially those who had actively opposed assimilation, were summarily expelled and obliged to leave their houses and property behind. Others who left voluntarily had to sell property at reduced rates in order to obtain passports to leave the country. Technically leaving on tourist passports with 3-month visas, many were informed by the authorities that they could reclaim their property if they returned within five years. Of approximately 350,000 ethnic Turks who left in 1989, over 130,000 had returned by January 1990 due to the unfavourable economic climate in Turkey and to the subsequent changes in Bulgaria after the fall of the Zhivkov regime. Some returned to find their homes destroyed. In August 1991 the Minister of Justice announced compensation plans for those who returned to find that their property had been confiscated or destroyed.

An MRG affiliate in Bulgaria has affirmed that the restitution-based approach could have a negative impact on the land security and employment of minority groups.³⁸ In Bulgaria a proportionately larger share of such minorities as Muslims and ethnic Turks than of other ethnic groups reside in rural areas, depending on agriculture for their subsistence. In some parts of the country, during the collectivisation era, these minorities performed the bulk of farm labour. While current laws envisage that state and community lands should be made available to these groups, they could nevertheless be prejudiced by privatisation policies which give primary emphasis to historical restitution. Moreover, Gypsies in particular did not own land prior to 1944. Those Gypsies who remained in their traditional villages used to enjoy a greater degree of land security than other ethnic minorities. However, these traditional land rights are again under threat from privatisation. Notably in southern Bulgaria, falling crop prices have combined with the restitution process to result in growing rural poverty and mass unemployment for ethnic Turks and Gypsies. Many of the minorities who in recent times lived and worked the land now find themselves unable to afford it; in some areas unemployment levels had reached as high as 80 per cent by mid-1992, and whole villages had been abandoned.

LAND RIGHTS AND OCCUPIED TERRITORY: THE PALESTINIANS

Regional context and historical background

The Middle East, like developing regions elsewhere bears the mark of its colonial legacy. Its population groups divided by colonial borders have been the target of endless deportations and evacuations. Some of these groups, including the Armenians and Kurds, can be defined clearly as ethnic or national minorities. Others can be defined as religious minorities, such as the Shi'a groups straddling the Iraq and Iran borders. In several Middle Eastern countries, including the Gulf states, Iraq, Jordan and Yemen, significant numbers of 'tribal' peoples practise customary forms of tenure. In such countries as Egypt, Iran, Iraq, Syria and Turkey land reforms and their reversals have had a far-reaching impact on the local population. Conflicts over land and other economic resources have often been the basis for ethnic, religious or tribally based strife.

This section focuses on the situation of the Palestinians in Israel and the Israeli Occupied Territories, illustrating the grievances and complexities arising from unlawful territorial occupation. It also considers the land claims of Arab minorities within the state of Israel, and the manner in which they have been addressed.

For the Palestinians, land rights concerns have three distinct dimensions. One is the broader political and territorial claims, for return of the Occupied Territories of the Gaza Strip and the West Bank of Jordan and establishment of a Palestinian homeland. The second is the restitution for land of refugees forced to leave their land in 1948. Another is the demand for equal treatment with Jewish settlers with regard to land rights and use in Israel itself and in the Occupied Territories. The following discussion is concerned only with the latter issue, examining the principles behind Israeli policies, the legislative and administrative measures so far adopted and the demands now being formulated by Palestinian Arabs and their support groups.

The historical and political background has been succinctly described in an MRG report.³⁹ After 1949 the Israeli government transferred most Arab land within the new state into Jewish control; and, while much land-ownership changed hands in the early years, the expropriation of Arab lands has been a continuing process. As the MRG report has observed: 'Without two thirds of their lands but with a fourfold increase in numbers since 1948, the Palestinian Israelis have rapidly changed from a peasantry into a rural proletariat.'

The Occupied Territories

After the June 1967 Arab-Israeli War, the West Bank and the Gaza Strip came under control of the Israeli armed forces. The territory captured by Israel has been recognised by the entire international community bar Israel

itself as 'occupied', and therefore protected by the 1949 Fourth Geneva Convention. According to this Convention: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

The Occupied Territories have since been subject to Israeli military rule, administered through a series of military orders, many of which remained secret at the time of writing. In the words of town planner Anthony Coon: 'The alienation of land from Palestinians in the West Bank and its transfer to agencies of the state of Israel has been a policy of all governments of Israel since 1967.'⁴⁰ In Coon's estimate, over 40 per cent of Palestinian lands had been seized by the Israeli authorities by the mid-1980s. If one includes the additional areas subject to blanket restrictions on use and access, the figure exceeds 50 per cent. Seized land has never reverted to Palestinian ownership, and further seizures have taken place under a number of pretexts. Coon estimates that ownership of about 60 per cent of the West Bank had been seized by mid-1991, with a substantial additional area subject to blanket restrictions on use and access falling short of outright expropriation.

Palestinian lawyer Raja Shehadeh has identified four separate legislative stages since 1967 whereby the Israeli military authorities progressively seized Palestinian lands for alleged 'military purposes' or for the purposes of Jewish settlement.⁴¹ Under the first stage, 1967-71, the military government was given full control of all transactions in immovable property, together with the power to expropriate land. The second stage, 1971-9, placed emphasis on facilitating Jewish settlement on the West Bank, with further amendments to the land law enabling the acquisition of land by non-Jordanians through means other than expropriation and seizure. The third stage, 1979-81, was characterised by an increased influx of Israeli citizens on the West Bank, involving the extension of Israeli civil and local government law to Jewish settlers on the West Bank and excluding settlers from jurisdiction of West Bank courts. The fourth stage, from 1981 onwards, involved the further extension of Israeli law to the Jewish settlements and legal and administrative separation of Jews and Palestinians in the occupied areas. There were increased measures to restrict land use for Palestinians, notably through the withholding of building permits in Arab areas.

According to the West Bank-based human rights organisation *Al Haq*, four basic methods have been used since 1967 to acquire Palestinian land in the Occupied Territories. The first was to seize the land for 'military purposes', although much of the land taken was reportedly used for non-military purposes. The second, used more extensively since 1979, has been to declare non-registered property state land. The last two methods are to seize land as 'abandoned' property or to expropriate it for 'public purposes'.

Human rights organisations have also detected a dramatic increase in Israeli acquisition of Palestinian land on the West Bank and in the Gaza Strip since early 1990. As *Al Haq* has observed, this increase in illegal land acquisition and settlement has accompanied the most significant rise in Jewish immigration since the first few years of Israel's history.⁴² Land registration records in the Occupied Territories have been closed to the public since 1967,

making it virtually impossible to assess the full extent of land acquisition.

Continuing policies of land seizure have constituted clear discrimination against Palestinians and their land rights, providing perhaps the greatest obstacle to a negotiated settlement. As Anthony Coon has written:

The colonisation programme requires the progressive seizure of ever more land; the prevention of Palestinian development almost everywhere will allow an indefinite programme of land seizure and almost unlimited colonisation...This is intended to prevent the emergence of a Palestinian state and ultimately enable annexation of the whole of the West Bank by Israel.

In September 1993 the Israeli government and the PLO signed a Declaration of Principles on Interim Self-Government Arrangements for the Occupied Territories. The aim was to establish an Interim Self-Government Authority for a transitional period not exceeding five years, leading to a permanent settlement based on UN Security Council Resolutions 242 and 338. While the issue of the Jewish settlements was eventually to be addressed in the permanent status negotiations, it was excluded from the powers of the interim Palestinian authority.

It remains an open question whether and how the issues of Palestinian land rights, and the resolution of conflicts between the claims of the former Palestinian lands-owners and Jewish settlers, will be addressed in future negotiations. But failure to address these issues in the early stages may make conflict resolution more difficult in the long term. Raja Shehadeh comments:

The international community can also assist in encouraging legal processes that allow the questions of land ownership and zoning in the occupied territories to be opened up once again for challenge with the hope that a more equitable division of the land will prevail...Because of the limited legislative authority allowed to the Palestinian Council under the Declaration of Principles and the exclusion of jurisdiction over any matter that affects settlements or Israelis, the future Palestinian Council will not be able to...resume the land registration process. Certainly not in the entire territory beyond the land already under Palestinian control. Perhaps it is in this vital and fundamental area that the international community could play a role. Perhaps a legal mechanism can be found where nominated experts from outside the area could arbitrate the question of legal ownership and consider whose claims to the land under the law as it existed at the beginning of the occupation is the better claim.⁴³

Arab land rights in Israel

While world attention has been focused on the rights of Palestinians in the Occupied Territories, the situation of the Arab minority in Israel itself has received less publicity. Yet an estimated 17 per cent of the citizens of Israel are Palestinian Arabs, who have suffered persistent erosion of their land rights since 1948. They are based in

three main geographical areas: Galilee in northern Israel, the Arab 'triangle' to the north-west of the occupied West Bank, and the Negev desert in the south, traditionally inhabited by beduin nomads.

The extensive loss of Arab lands can be dated back to the creation of the state of Israel in 1948. As the Arab Association for Human Rights has reported, according to an Israeli source between 369 and 374 villages, 171 of these in Galilee, were demolished or depopulated by the end of the 1948 war.⁴⁴ This represented some 45 per cent of all Arab settlements in pre-war Palestine, whose land was then given to Jewish settlers to farm. The pre-war population of approximately 1.4 million Palestinians plummeted drastically to 156,000 within the borders of the newly created state of Israel. Almost 800,000 fled to neighbouring Arab countries, while some 81,000 became internally displaced persons forced to flee their homes but remaining within the borders of the state. The internal refugees have been prevented from returning to their original homes.

The primary legal basis for the expropriation of Arab lands was the 1950 Law of Absentees' Property. Under the law persons who had left for a place outside Palestine before September 1948, or for a place in Palestine 'held at the time by forces which sought to prevent the establishment of the state of Israel or which fought against its establishment', ceased to have legal ownership of any property situated in the state of Israel. Other legislation inherited from the British Mandate was also utilised to justify the extensive expropriation of formerly Arab-held lands. Altogether an estimated 93 per cent of land within Israel is now vested in the state as property of the Jewish people.

A particular concern has been the fate of some 50,000 Palestinians who reside in over 120 officially unrecognised villages in Israel. These villages either existed long before the creation of the state of Israel, or were established near the original areas of habitation following evacuation and demolition during the 1948 war. They have been denied inclusion in any official map since 1948, on the grounds that the lands on which they were built have been designated as agricultural areas. While several government committees were established to investigate the problems of the unrecognised villages in the 1970s and 1980s, a 1986 report recommended firmer policies against them, including the accelerated demolition of houses. Government policy has since been to persuade these villagers to move to government-planned settlements.

Arab residents from the unrecognised villages have begun to organise in new pressure groups to resist demolition orders and strive to have their villages officially recognised. In December 1988, for example, the 'Association of Forty' was established to represent unrecognised villages in the Nazareth and Galilee regions, aiming to fight for recognition, the advancement of basic services and raising the level of services to Arab residents. Several villages have since been recognised by the Israeli government, but a new wave of Jewish immigration from the former Soviet Union has placed renewed pressure on Arab lands.

A report published by MRG in 1990 has examined the land claims and conflicts affecting the beduin minorities of the Negev region.⁴⁵ As its author, Penny Maddrell, indicates, contemporary problems of the beduin can be traced

in part to the failure to register their traditional lands during the period of British rule in Palestine, when the registration of all other lands was virtually completed. Like other Palestinians, large numbers of the beduin either fled or were expelled from the country during the 1948 war. Those who remained were confined to closed military areas, which facilitated expropriation of their lands by the state. Even where beduin lands had been registered, as in Galilee, this did not prevent mass expropriation.

After military government was lifted in 1966, Israel made promises to address beduin land claims. A claims procedure was established, and it appears that monetary compensation was obtained, but attempts to reclaim the land itself were uniformly unsuccessful. Legal procedures were overwhelmingly biased against the beduin.

As in so many developing countries, the thrust of state policies since the mid-1960s has been to sedentarise nomadic groups. In Israel, however, the emphasis has been on planned urban settlements. Access to new agricultural and pasture lands has been limited, with leases granted on a short-term basis that provides no land security or incentives for long-term sustainable development. Thus a wish repeatedly expressed by beduin communities is for land and water to set up agricultural villages as an alternative to the planned settlements.

Beduin demands now being voiced concern first recognition of historical land rights, and second equality of treatment with Jewish communities in access to land and resources. As a general principle, they claim rights over lands owned before 1948. However, most beduin would be prepared to accept title to smaller parcels of land, as long as they were sufficient to support an agricultural livelihood. In addition, they demand equality of treatment with regard to freehold title or the issuance of long-term leases, together with irrigation water quotas equal to those received by Jewish Israeli farmers. Other concerns include the right to engage in agricultural enterprise on equal terms with Jewish Israelis and to build homes on their own land or the land on to which they have been forcibly removed.



CONCLUSIONS

This report has aimed to provide an introductory survey of land rights issues affecting different minorities, drawing on available literature as well as on the author's personal experience. It cannot pretend to offer a comprehensive treatment of a complex issue that has in fact received little thematic attention from either human rights or development organisations. In specific example cases, the main emphasis has been on the law and policy framework for the recognition of minority land rights, and the available procedures through which different categories of minorities may formulate land claims.

As the study has sought to demonstrate, land can be a key issue behind minority claims for protection in many parts of the world. In some cases there are long-standing grievances, with minorities claiming the right to restoration of lands of which they were dispossessed several decades or even centuries ago. In other cases, demands may be for a special protected status that will avert further dispossession today. In yet other cases, where there is evidence of blatant discrimination in patterns of land access and use, demands may be rather for genuine equality of rights with dominant majorities.

The main concern of this report has been with the land rights of vulnerable minorities, whose land security has been undermined by political or economic circumstances. They may have lost their lands through foreign occupation, when the laws and institutions of the occupying power have discriminated against them in law and practice; through nationalisation, either the outright nationalisation of all lands, or the nationalisation of forests that have provided the traditional source of livelihood for many minority peoples; through colonisation and resettlement programmes; or through mineral, hydroelectric and logging programmes that have led to their displacement; or they may have been the victims of wider economic forces, which have encouraged land commoditisation without effective protection for the economically weaker sectors of society.

Throughout the analysis much emphasis has been given to the land claims of indigenous and tribal peoples, to national and international standards and to mechanisms for dispute resolution on their behalf. Considerable headway has been made over the past decade, but there are a number of outstanding problem areas. The underlying premise is that indigenous and tribal peoples are entitled to special protection of their land and related resource rights, under special laws and regulations that distinguish them from the remainder of national population groups. In practice this has usually involved a private property regime for other groups and a common property regime for indigenous and tribal peoples, with restrictions or outright prohibition on their right to alienate or mortgage lands. 'Reservation' policies, under which sizeable land and territorial areas are demarcated for the exclusive use of indigenous peoples, have so far been pursued most effectively in Latin American rainforests or in such regions as the Canadian Arctic.

Indigenous land claims can be based far back in history, as

demands for the restitution of lands lost through conquest and colonisation, or at least for compensation through fair claims procedures. But what are the implications of restitution principles for present-day law and policy approaches? They involved complex legal procedures, assessing the validity of age-old written titles or treaties. The restitution of indigenous lands has been constitutionally enshrined in Latin America, for example after the Mexican and Bolivian revolutions, but it played little effective part in land redistribution. Restitution claims have surfaced more recently in Eastern Europe and Southern Africa, in the first case because acts of land dispossession during the communist era have been ruled illegal, and a mechanism was required for redistributing land under a private property regime; in the second case, because the validity of land evictions and purchase under the apartheid regime is being questioned, and a mechanism is needed to address the claims of the black victims of dispossession. In addition, in Australia recent court rulings, rejecting the earlier doctrine of the extinguishment of native title, could lay the ground for a complex array of restitution claims.

In theory, the indigenous revival and the evolving international law of indigenous rights could have serious implications for approaches to land rights throughout the world. The mainly Latin American countries that have already ratified the ILO's Convention No. 169 have pledged themselves to some far-reaching principles, recognising the collective aspects of indigenous peoples' relationship with their lands and territories, specially safeguarding their land and resource rights, establishing penalties for unauthorised intrusion on indigenous lands, and establishing adequate penalties within the national legal system to deal with land claims by the peoples concerned. Yet such principles are difficult to reconcile with predominant market paradigms, which seek essentially to encourage the privatisation and commoditisation of agricultural land.

Overall, there has been a marked global trend in recent years towards land privatisation, in particular of agricultural land, where private ownership is seen as necessary for greater productivity. While lip-service is still paid to land reform as a policy instrument, the global impetus for redistributive land reform has effectively halted. Most development policy analysts tend to stress the need for 'clarity' of property rights, usually with an emphasis on programmes of private land registration to this effect. Simply put, the implications are that land rights should be regulated by market principles, with exceptions made for indigenous and tribal peoples. At the same time, there has been a growing concern to safeguard especially the rights of indigenous and tribal peoples within this market environment.

The challenge is to address the land claims of the many millions of indigenous and tribal landless throughout the world, who have long been integrated on an unequal and exploitative basis within national society. In Latin America sporadic efforts over recent decades to maintain or even expand the traditional indigenous communities have failed, first because governments have been unable or unwilling to prevent external encroachments on their lands, and second because economic policies have favoured large-scale commercial agriculture with a concomitant need for cheap indigenous seasonal labour. The indigenous communities have thus become small and eco-

nomically unviable units, acting mainly as a labour reserve. The experience of the South African bantustans is not so very different.

This report has addressed – albeit briefly – the distinctions sometimes drawn between indigenous, tribal and other minority peoples throughout the world. This is an issue of huge complexity, hardly resolved by current international law, and where widely different views are expressed by governments, lawyers, anthropologists and policy-makers. While this author cannot claim to provide an answer, it is important to reflect on the implications for future work on land rights and minorities in the broadest sense.

In some cases, there are obvious distinctions between indigenous and non-indigenous minorities. Some ethnic minorities, for example, are the descendants of indentured labourers or others who migrated across national frontiers. But in Asia the concept of indigenous remains controversial. In law the tendency is often to refer to 'tribal' peoples. In many cases, Asian 'tribal' peoples are formulating their land claims by the same criteria as the indigenous peoples of the Americas, demanding the maintenance or restoration of a special status that was accorded to them during the earlier colonial period. As we have seen, however, it was a historical accident that the land rights of some tribal peoples were specially protected during earlier times, while others were not. And the concept of special or separate land rights for particular minority groups, as the study has argued, can constitute obvious discrimination in certain circumstances. This has clearly been the case with the white minority regimes in Southern Africa, where land rights were allocated along strictly racial lines in conditions of flagrant inequality. There are other cases where ownership of much national land has been restricted by law to one ethnic group, providing a potential basis for severe inter-ethnic tensions.

This raises difficult questions, if the land rights of minorities are to be addressed as a thematic concern. In many cases the claims tend to be 'backward-looking', demanding the restitution of lands to which these peoples have a historical legal claim, and challenging the validity of subsequent laws that have served to dispossess them of their traditional lands. In some countries these claims have given rise to complex negotiations over shared land use and shared benefits from resource extraction. The concept of land rights for certain minorities can also be seen as a challenge to prevailing notions of land tenure and use, particularly the notion of land as a private and alienable commodity. This is more of a 'forward-looking' approach, seeking alternative and environmentally sustainable forms of land use and management, based on traditional practices. Again the indigenous and tribal paradigm can be of clear importance, though the claims may be based not so much on historical rights as on present-day need. Attempts to provide special status for certain 'tribal' minorities in accordance with perceived traditional land tenure practices, restricting their capacity to interact with wider ethnic communities, can still be beset with difficulties. In many cases there is a mixture of private and communal forms of tenure, and land tenure practices are constantly evolving. Throughout Africa, for example, there are vibrant debates as to the extent to which land policies

should now be based on traditional forms of tenure, maintaining the traditional land allocation powers of chiefs and headmen.

In all cases, however, the premise behind special land rights for indigenous and tribal peoples is the right 'to be different' from the remainder of national society, taking account both of historical factors and of a special relationship with lands, territories and the surrounding environment. Indigenous claims may be only part of the broader claims for political and cultural self-determination, but control over lands is a prerequisite for the realisation of these broader claims.

The distinctions drawn between indigenous or tribal peoples and other vulnerable minorities can sometimes become blurred. Landless indigenous peoples may actually identify themselves with other landless, rather than as a separate ethnic group requiring separate treatment. Conversely, there can be a tendency for a wide range of ethnic, national and religious minorities to identify themselves as indigenous peoples, precisely because of the success of indigenous movements in having their land rights specially recognised under international and national law.

An important issue is the relationship between the land rights of minorities and equality of rights, including equal rights to the land. In some cases – perhaps most notably in Latin America – formal equality of rights has generated flagrant *de facto* inequalities. In other cases – notably in Southern Africa and the Israeli-occupied territories – inequality of land rights has generated equally flagrant *de facto* inequalities. These are cases of blatant discrimination, the legacy of which now has to be addressed through affirmative action policies and programmes. Burning questions are those of land restitution and the extent to which future governments should recognise the claims of the present-day landowners and occupiers who have benefited from racial discrimination in the past. In Eastern Europe different issues are raised by restitution. Evolving laws and policies, based on the long-standing claims of private landowners before the collectivisation era, threaten to prejudice the land security of disadvantaged ethnic minorities with no prior claims to the land.

There can be no easy answer to these questions. In some cases, the most vulnerable minorities are in danger of extinction if their claims to special protection are not met. In others, stronger minorities are pursuing their land claims with increasing vigour, forcing the state to establish mechanisms to deal with them. The time has surely come to grapple with these issues more effectively at the international level, to assist in arbitration on a complex array of claims.

RECOMMENDATIONS

MRG has published this report, not in the expectation that definitive solutions can be found at this stage, but rather to highlight the diverse issues involved and to stimulate discussion among the key actors at both national and international levels. The author has raised a number of concerns which need to be taken into account in any future research and advocacy work on the land rights of indigenous peoples and other minority groups. These include definitional problems, striking the balance between equality of rights and special protection, reconciling the competing claims of previous and present-day occupants of the land, and different conceptions of land rights at a time of growing land commoditisation worldwide.

On the basis of the author's review, MRG makes the following recommendations for future action.

Evolving international law: definitional and general policy concerns

1. In future standard-setting or advocacy work on minorities, the international community faces a dilemma. There is a growing body of protection for the land and related resource rights of indigenous and tribal peoples, but no reference to land concerns in international law relating to minorities. Overall, the rights of indigenous or tribal peoples and other minorities are treated separately in international law, even though the basic distinctions between these groups are sometimes questioned by international legal experts. If the concept of minorities is not actually defined in current international law, and 'self-identification' is to be an important criterion in determining which peoples are to be considered as 'indigenous' or 'tribal', then the implications are that minorities will increasingly seek to define themselves as indigenous or tribal whenever they have major grievances concerning land rights.

Land rights of indigenous and tribal peoples

International standard setting and application

1. It is in the area of indigenous and tribal land rights that significant progress has now been made in the framing of international standards. The ILO's Convention No. 169 has established some far-reaching principles concerning the special importance for the cultures and spiritual values of the peoples concerned of their relationship with their lands and territories, as well as procedural aspects for recognising their rights of land ownership and pursuing their land claims. While the ILO Convention has aimed at minimum standards, capable of ratification by States at the present time, the United Nations (UN) now has the opportunity to adopt a new instrument reflecting the concerns of the many hundreds of indigenous peoples who have participated in the drafting process. The UN Declaration on the Rights of Indigenous Peoples,

which is still in draft form at the time of publication, should be framed in such a way as to reflect the goals and aspirations of the indigenous peoples who participated in its drafting.

2. In the meantime, the wider ratification of the ILO's Convention No. 169 is strongly urged. Its provisions on land rights in particular provide far greater security for indigenous and tribal peoples than is the case under most national laws and policies. NGOs should closely monitor the application of its provisions, even in States that have not ratified the Convention, using this as a tool for more systematic advocacy on land rights.

National action

3. *Demarcation of indigenous lands* In many national situations, and particularly in Latin America, we have seen that existing laws provide for the identification, demarcation and titling of indigenous lands. Yet demarcation of specially protected areas for indigenous peoples has not been completed due to financial and other constraints. This has facilitated the access of non-indigenous interests within these areas, often accompanied by a process of violent eviction. NGOs have an important role, to assist vulnerable indigenous peoples to carry out their own land demarcation in collaboration with government agencies. The necessary financial support should be facilitated to this effect.

4. *Indigenous land rights and land reform* In many other national situations, indigenous peoples have lost their traditional lands and the means of subsistence. Their principal demands are for access to more land, either through a restitution process or through affirmative action programmes which will provide them with more equal access to land. Under such land reform programmes, the key question is how to provide a special protective status for indigenous lands, while at the same time enabling indigenous communities to develop their lands productively and to survive within the wider market economy. There is a challenge for indigenous peoples themselves, to find the appropriate balance between special protection with full respect for their traditional institutions, and insertion on their own terms within the wider national economy. But there is also a challenge for governments and donor agencies, to find the mechanisms for enabling the economic development of indigenous communities without imposing market principles that undermine indigenous land security.

International action: international financial institutions and donor agencies

5. International financial institutions and donor agencies have a major responsibility, to ensure that their development assistance programmes do not undermine indigenous land security, but instead enable indigenous peoples to manage their lands and related natural resources on their own terms. The spiritual relationship of indigenous peoples to their land, opposed to the concept of land as a marketable commodity, should always be taken into account. Development projects undertaken in areas of traditional indigenous

occupation should always be identified, devised and implemented with the participation and consent of the peoples concerned. As required under the ILO's Convention No. 169 and the World Bank's Operational Directive (No. 4.20), impact assessment studies of development projects should always be undertaken prior to their implementation.

Land rights and broader minorities

6. As the report has aimed to demonstrate, a large number of minorities throughout the world could claim the status of indigenous and tribal peoples, and could formulate their land claims accordingly. But other minorities are clearly not indigenous, for example the descendants of immigrant or indentured workers. Many of these have traditionally depended on land access for their survival, and may find their land security threatened by current processes of economic and social reform including land privatisation. In such cases, procedures are needed to ensure that vulnerable minorities receive fair and equal treatment under land reform and privatisation programmes.

NOTES

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**For full details contact:
Minority Rights Group
379 Brixton Road
London SW9 7DE
UK**

**Telephone: +44 (0) 71-978 9498
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