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GLOBAL CATEGORIZATION OF THE WORLD'S INDIGENOUS LAND AND RESOURCES RIGHTS

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CNRS - CREDA

Draft working document

RÉSUMÉ

This working paper describes the process of establishing a global categorization of indigenous land and resources rights. From the analysis of a great variability of legislations regarding indigenous territories, common considered topics are identified, such as land security or the degree of indigenous control over development programs impacting their territories. Using them as analysis axes of the different laws, different classes of land and resources rights are identified, allowing a standardization of the description of the diversity of territorial rights benefiting indigenous peoples around the world.

INTRODUCTION

The situation of indigenous peoples has been on the global agenda for several decades. Although no consensus has been reached about a global definition of either the two concepts, it is commonly admitted that the notion of indigenous peoples differs from the larger class of minorities by a particular relationship to their traditional land and resources. Indigenous territories encompass the land and resources traditionally used by these people, and are deeply involved in their identity building. At the core of indigenous societies, land and resources have economic, political, cultural, and spiritual functions¹. Thus, the maintenance of a certain degree of control over these territories is vital to their physical and cultural survival². The recognition of secure rights over land and resources is essential to the integrity of indigenous societies and their well being.

At the international level, much has been done towards the international recognition of indigenous peoples' inherent rights through norms building and improvement, particularly regarding their territories. Yet, the local endorsement and implementation of these international instruments still depends on States will, and a wide variety of land and resources rights are recognized to indigenous peoples throughout the different regions and states of the world. Building a global overview of the territorial situation of indigenous peoples thus involves developing a categorization able to record and classify this diversity of their officially recognized land and resources rights. As the IUCN system for protected areas³, these categories shall

¹ Deroche, F., 2008. *Les peuples autochtones et leur relation originale à la terre: un questionnement pour l'ordre mondial*. l'Harmattan, Paris, France.

² Daes, E.-I.A., 2001. *Indigenous peoples and their relationship to land*; Daes, E.-I.A., 2004. *Indigenous peoples' permanent sovereignty over natural resources*.

³ Dudley, N., Andalusia (Spain), Consejería de Medio Ambiente, IUCN World Commission on Protected Areas, Fundación Biodiversidad, IUCN--The World Conservation Union, 2008. *Guidelines for applying protected area management categories*. IUCN, Gland, Switzerland.

standardize description of the particular bundle of land and resources rights locally recognized to indigenous peoples.

Through the fine study of international norms and State legislations regarding indigenous territories, the present document aims at building a hierarchized categorization allowing a global overview and comparison of existing rights. First will be presented a review of these laws and a global analysis framework for these rights. Then, a categorization model will be stemmed from the application of this framework to local legislations over indigenous land and resources.

I. DIVERSITY OF INDIGENOUS LAND AND RESOURCES RIGHTS THROUGH THE WORLD

I.1. INTERNATIONAL LAW AND VARIED LOCAL TRANSLATIONS

At international level, the two main normative instruments regarding indigenous peoples rights are the International Labor Organization Convention 169 of 1989 (C169) and the more recent United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007. Both texts recognize the particular relationship linking indigenous peoples to their land and resources, its collective dimension, and affirm a right to property, possession, use and control over their traditional territories. Nevertheless, some differences exist between the two texts, especially concerning development projects affecting indigenous land and land rights security.

When the Declaration forbids any relocation of indigenous peoples from their land or the implementation of development projects affecting their territories without their free, prior and informed consent (art. 10 and 32, respectively), C169 only asks for their consultation without direction on how to deal with the results of these prospects, and displacement of indigenous peoples may occur *when considered necessary as an exceptional measure* (art. 15). Indigenous land and resources rights are thus weaker in C169 than in the Declaration, and States are given a certain degree of freedom in defining the "exceptional measures" justifying the relocation of indigenous peoples, or the process of consultation and its consequences.

Nevertheless, ILO convention 169 is actually the only legally binding international instrument regarding indigenous peoples rights. However, the UN Declaration, resulting from 20 years of direct negotiations between indigenous peoples and States representatives, is closer to indigenous aspirations, albeit accommodated to governments acceptability. Still, neither of these texts are coercive, the former needing state ratification and the later being only declarative. If they give a good insight of expected minima concerning the rights of indigenous peoples, their level of implementation in local and regional legislations is very diverse.

To date, only 22 countries have ratified C169⁴, and the fuzziness of some of its articles leaves flexibility in interpretation by governments. Even if bound by the same obligations, Norway considered for a long time the usufruct of land held in trust by the government a sufficient territorial right for Sapmi, when Columbia gives territorial autonomy to its *resguardos indigenas* which are inalienable and imprescriptible collective property of indigenous peoples. In other cases, international norms may substantially influence the conception of state

⁴ Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela

laws independently from explicit endorsement of these norms : Cambodia's Land Law of 2001 was directly inspired by ILO convention 169 recommendation while the country didn't ratify the text⁵. Thus, state legislations prevail international norms, and a global analysis of indigenous land and resource rights has to be made at local level.

I.2. GLOBAL FRAMEWORK FOR LEGISLATION ANALYSIS

Despite their very diverse modalities, legislations regarding indigenous land, resources and territorial rights deal with key topics, that are also approached in international norms and indigenous grievances :

- *Natures of recognized rights*

Indigenous territorial rights can be either recognized as full property, or as temporary or permanent use right over land held in trust by a third party, in most cases the State. Such usufructs can be exclusive to indigenous peoples or shared with non-indigenous groups. Property rights generally induce exclusivity for the group of people or individuals to which it is recognized. In both cases indigenous peoples may have the right to control the access to their territories. These property and usufruct rights are generally restricted to surface land and resources, States keeping ownership of sub-surface resources in most cases.

- *Level of land security*

Land security is a central issue for indigenous peoples as they often face land dispossession or eviction, even when benefiting from officially recognized territorial rights. Considering the central importance of traditional land and resources within indigenous societies, such a loss may have considerable impact on their cultural survival and well being.

Loss of indigenous land may happen through unilateral extinction of land rights by the State which can keep priority in land management, or through irreversible land transfer to non-indigenous people when allowed. History has shown that alienability of indigenous land threatens land security, especially when titles are individualized : US General Allotment Act (1887) and New Zealand Native and Acts (1865) reforms led in both case to a loss of two thirds of initial indigenous territories in a few decades⁶.

Clauses of imprescriptibility, inalienability and un-mortgageability protect indigenous land and resources rights in a number of countries, as New Caledonia, Australia, or 12 countries in Latin America. Some other proceed to a liberalization of indigenous land and resources rights, as Peru whose 1993 constitutional reform deleted the inalienable status of indigenous lands.

- *Control over resource extraction and development projects*

Indigenous land and resources rights are recognized within States frontiers. Thus, development projects can impact their territories, especially when it comes to resource extraction within indigenous lands, as subsurface generally stays state property.

In such cases, depending on legislations, the project can either need indigenous Free Prior and Informed Consent (FPIC) before implementation, need simple information and consultation of impacted peoples without explicit need of consent, or be unilaterally decided and implemented by the State. Even when consent is needed, indigenous peoples can rarely oppose State

⁵ Xanthaki, A., 2003. *Land rights of indigenous peoples in South-East Asia*. Melb. J. Int'l L. 4, 467.

⁶ Göcke, K., 2013. *Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level*. Goettingen Journal of International Law 5.

development projects and this process is more of a right of negotiation over the implementation of the projects, its consequences and the share of benefits

- *Self determination and territorial autonomy*

Some governments decentralize their political, administrative, economic and/or administrative powers, giving degrees of sovereignty to indigenous peoples within their territories. The notion of autonomy here encompasses powers allowing a better territorial security and a certain level of indigenous self-decision in the political, cultural and/or economic spheres.

These common themes to the different legislations will thus be used to analyze and compare the laws on indigenous land and resources rights (see Table 1 below).

Country	Law	Nature	Exclusivity	Land security	Control over resources	Territorial Autonomy
Australia	Native Title Act, 1993	Usufruct	Yes or No	Prescriptible	Consultation	
India	Constitution 1949, art. 244	Usufruct	No	Prescriptible	None	
Malaysia	Aboriginal People Act, 1954	Usufruct	Yes	Prescriptible	Consultation	
Brazil	Constitution 1988, art. 231	Usufruct	Yes Access control	Inalienable Imprescriptible	Consent (FPIC)	
Russia	Federal Law, 2001	Usufruct	Yes Access Control	Inalienable Imprescriptible	Consent (FPIC)	
USA	Indian Reorganization Act, 1934	Usufruct	Yes	Inalienable Imprescriptible	Consent (FPIC)	Tribal sovereignty
Peru	Constitution, 1993 (art. 88, 89)	Property	Yes	Alienable	Consent (FPIC)	
Cambodia	Land Law, 2001	Property	Yes	Alienable	Consultation	
Australia	Aboriginal Land Rights (NT) Act, 1976	Property	Yes Access Control	Inalienable Imprescriptible	Consent (FPIC)	
New Caledonia	Accords de Nouméa, 1998	Property	Yes	Inalienable Imprescriptible	Consent (FPIC)	
Nicaragua	Constitution, 1987 Law 445, 2003	Property	Yes Access Control	Inalienable Imprescriptible	Consent (FPIC)	Autonomous regions RAAS, RAAN
Nunavut	Nunavut Land Claim Agreement, 1993	Property	Yes	Inalienable Imprescriptible	Consent (FPIC)	Inuit majority in local government

Table 1: Sample of indigenous land and resources rights analysis grid
(grey cells are for weaker rights regarding rights security, when white stands for stronger ones)

As can be seen in Table 1, some bundle of rights seems intrinsically linked. Low level of land security doesn't allow a high level of control over resources : as both land and resources rights often come together, prescription of land rights generally leads to an extinction of resources rights, and development project on indigenous land may lead to an extinction of their land right. Territorial autonomy comes with secured land rights and a high level of control over resources. These associated groups of rights help identifying classes for a global categorization of indigenous territorial rights, that can be hierarchized along the level of rights security and indigenous self-determination they provide.

II. GLOBAL CATEGORIZATION OF INDIGENOUS TERRITORIAL RIGHTS

Indigenous land and resources rights across the world can be divided in six global categories, allowing a standardization of description of the bundle of rights recognized to indigenous territories across the world. The framework proposed below describes the different categories identified along their global trends. Some legislation may naturally fall in a category when in other cases the attribution of one or the other will be less obvious. The categories are presented in hierarchical order along the level of rights security and indigenous self-determination they provide, in a descending order (I being the highest and VI being the lowest).

Category Ia: Property with territorial autonomy

Category Ia indigenous territorial rights are held on a full property basis of surface land and resources, that can be extended to sub-surface resources in some cases. They benefit of a certain degree of economic, political, cultural, legal or administrative autonomy, allowing indigenous self-determination within its borders. Thus, State decisions affecting those territories shall get indigenous peoples approval before implementation.

Greenland is an autonomous country within the kingdom of Denmark. The island has progressively been given increasing autonomy from Denmark, first with the 1979 home rule leading to the its decentralization, and lately by the 2008 Self-Government Act, giving the Greenlandic government responsibility for policing, judicial system, mineral resources activities, etc. Greenlandic Inuits being the majority of the local population and government (89% of the 55 000 inhabitants), Greenland can be considered as an autonomous indigenous territory.

Category Ib: Usufruct with territorial autonomy

Category Ib indigenous territorial rights are held in trust from a third party, generally the states, which keeps ownership official of land and resources. These territorial units benefit from a certain degree of economic, political, cultural, legal or administrative autonomy, allowing indigenous self-determination within its borders. Thus, States shall obtain indigenous peoples consent before implementation of any project affecting their territories.

Indian reservations within the United States of America are land managed by Native American Tribes, but held in trust by the United States Department of the Interior's Bureau of Indian Affairs. Tribal sovereignty is recognized to First Nations, allowing tribal councils to have jurisdiction over reservations. Indigenous peoples thus have authority over economic development, with negotiation rights on leases for timber harvesting and mining.

Category II: Protected property

Category II indigenous territorial rights are full property regimes over land and resources that may be extended to sub-surface resources in some cases. These territories are

intended to stay at indigenous peoples' disposal as they are protected from alienation and extinction. Any activities that may affect them need indigenous approval before implementation.

The 1998 Noumea Accords recognizes the territorial dependence of Kanak identity in New Caledonia. They recognize customary property rights over lands to indigenous groups. These territories are inalienable, untransferable, imperceptible and indivisible. Kanaks can lease their land to companies and benefit from their activities.

Category III: Protected usufruct

Category III indigenous territorial rights are held in trust from a third party, generally the states, which keeps ownership official of land and resources. These territorial units are set aside by states for the benefit of indigenous peoples as they are inalienable and imprescriptible. Activities affecting them shall obtain indigenous peoples' approval before implementation.

The Brazilian constitution of 1988 recognizes land rights to indigenous peoples over the land and resources necessary to their physical and cultural reproduction. They consist of an exclusive and permanent usufruct, inalienable and imprescriptible. Resource exploitation within these Indian territories need consultation and agreement of national congress and local populations before implementation.

Category IV: Liberal Property

Category IV indigenous territorial rights are full property rights over land and natural resources that can be transferred to non-indigenous on a voluntary basis. When such transfer occurs, alienated land will no longer benefit from the eventual particular status given to indigenous lands, such as needed consent before development project implementation.

Articles 23 to 28 of Cambodia land law (2001) recognize collective property titles over the traditional land and resources of "indigenous minority peoples". On a voluntary basis, indigenous peoples can leave the group benefiting from such collective ownership and get an adequate share of the land used by the community as an individual ownership. Then, this property will be transferable to non-indigenous.

Category V: Preferential usufruct

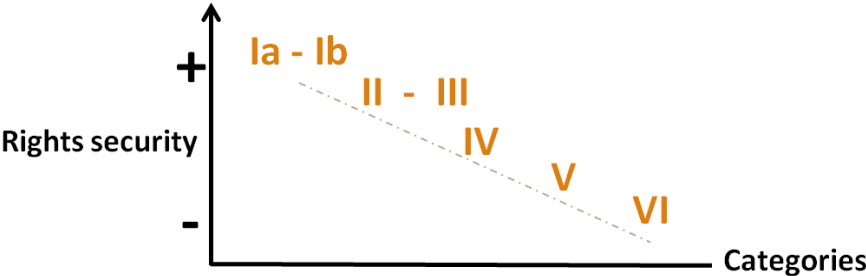
Category V indigenous territorial rights are usufruct rights over territories held in trust by third party, generally the State. Indigenous peoples are give exclusive or priority use of land and resources. However, these rights are unilaterally revocable by states, and indigenous peoples may not have the right to confront development project on their territories.

The Australian Native Title Act of 1993, gives aboriginal people the right to practice their law and customs over their traditional lands and waters. Thus, they can live, hunt, gather, fish, and access these land and resources. These rights can be exclusive to a community, restricting access to non members. If not, these land and resources rights will be Category VI.

Category VI: Restricted usufruct

Category VI indigenous territorial rights are usufruct benefiting indigenous peoples on land and resources held in trust by a third party, generally the State. The practice of indigenous traditional activities may be limited by restrictions over the range of allowed use of resources, or by share of these land rights with non indigenous groups, leading to competition. These rights are inferior to State rights and may be unilaterally revoked.

The land rights system of many African countries recognizes customary law and land tenure. These rights are generally held in trust over lands that were transferred to the state during the establishment of modern states that keeps ownership of the territories. In many cases, hunter-gatherers uses of land are not officially recognized, and thus indigenous peoples such as Batwa (“Pygmies”) benefits from customary rights shared with the Bantu villages they are associated to⁷.



CONCLUSION

This draft framework for indigenous land and resource rights is built on the analysis of international norms, local and regional legislations, and the grievance of indigenous peoples regarding the territorial issues they are facing. As a draft, it aims at offering a basis for discussion, completion, modification and progressive refinement with the contribution of local and regional experts.

As the analyzed corpus underlined the critical importance of traditional lands and resources in indigenous societies, rights security and the level of self-determination they provide naturally stood out for the categorization and its hierarchization. Yet, submitting this draft framework to the consideration of indigenous peoples and organizations may lead to another articulation of the categories along other priorities and shall thus be discussed.

This categorization framework applies to lands and resources rights recognized to indigenous peoples. Nevertheless, not all territorial rights benefiting indigenous peoples are officially recognized as such. As an example, Indonesian government recognizes customary land

⁷ African Commission on Human and Peoples’ Rights, University of Pretoria, Centre for Human Rights, International Labour Office, 2009. *The overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries.* ILO, Geneva.

rights over forests to *komunitas adat terpencil* (geographically-isolated customary law communities), internationally considered as indigenous peoples while the government argues that this concept is not applicable within the country. Such land and resources rights shall however be considered in this framework as they benefit directly indigenous communities and secures the tenure of their territories.

As the focus is on recognized territorial rights, it is beyond the scope of this study and framework to consider the level of implementation of these laws. Being part of a wider project aiming at building a World Atlas of Indigenous Territories, this classification will be applied to polygons / areas representing the extent of the recognized territories. Thus, lack of implementation of these rights will result in an absence of representation on the map such as a other absences of indigenous land and resources rights recognition. As these situations are frequent and considering the emergence of indigenous territorial claims through counter-mapping⁸ project allowing them to map their territories independently from state institutions, representation of land claims waiting for, or being denied, recognition shall be considered, as they also constitute relevant information. However, if these territories call recognition by one or the other of these laws, they fall out of these categories until formal recognition.

⁸ This term refers to maps produced as alternatives of State maps, and generally used as political tool. It was first coined by Peluso, Nancy Lee. 1995. *Whose Woods Are These? Counter-Mapping Forest Territories in Kalimantan, Indonesia*. *Antipode* 27 (4): 383 406.