Extractive industries, Conservation and Indigenous Peoples' Rights

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INTRODUCTION

The Forest Peoples' Programme (FPP) has a long track record of working with indigenous peoples in addressing their problems with the extractive industries, notably through the World Bank's Extractive Industries Review, which proposed a standard that the International Council on Metals and Mining and the World Bank are still reluctant to accept. FPP and its partners conclude that this refusal to accept a 'best practice' standard – and the fact that the Bank routinely fails to adhere to its own lower standards that it has incorporated into its safeguard policies - means that the extractive industries can and do operate in a way which has a destructive impact on indigenous peoples and their environment (Caruso 2003: 105, World Bank 2011).

FPP also works directly with indigenous peoples and other non-governmental organization (NG0) partner organizations in Cameroon, Indonesia, Peru, Suriname, Guyana, Colombia and many other countries, on these issues. Through field programs and policy dialogues, it also endeavours to get the International Union for the Conservation of Nature (IUCN) and other conservation organizations to ensure mining, logging and agri-business respect indigenous peoples' rights.

While the standards that extractive industries should be required to accept (but do not) are quite clear with respect to the direct impacts of their operations, one of the really difficult areas is getting them to accept any responsibility for the wider, often indirect, impacts of their operations. Road building that opens forests for extraction also opens them to other outsiders, as do dam building to supply power, power lines, pipelines etc., often with a direct and devastating impact on the forest and forest peoples. Remote sensing over decades shows that these infrastructures trigger widespread regional land use changes that have huge long-term impacts on forest ecosystems and forest based livelihoods (Asner *et al.* 2009, Laurence *et al.* 2009). From the point of view of indigenous territories and natural habitats, it is these wider, indirect impacts that pose the greatest threats, rather than the localised impacts of mines and oil and gas wells themselves.

This paper focuses on the interplay between the extractive industries, indigenous forest peoples and conservation. It examines the impact of the extractive industries and the overlap between indigenous territories and those of the great apes, arguing that conservation needs to rapidly expand its focus from seeking to control territory to protect particular species or ecosystems, to supporting the rights and sustainable livelihoods of forest peoples. Such an alliance stands a far greater chance of securing the forest and forest peoples' sustainable livelihoods than an approach in which indigenous peoples are often incidental victims in the ongoing battle between extractives and conservation.

The first part of this paper examines the dynamic between extractive industries, conservation and indigenous peoples' rights in a context where there is an increasing recognition of rights and a decreasing ability and willingness of governments to recognize and act on those rights. The second part, drawing on examples from Indonesia and Liberia, examines whether voluntary standards such as those adopted by the Roundtable on Sustainable Palm Oil might provide a model for the extractive industries to follow.

The third part of the paper highlights the evidence that the drivers of deforestation are large-scale businesses such as agri-business and industrial logging, examines evidence that forest peoples are the best guardians of the forest, and draws on examples from Cameroon to

examine how conservation can reorientate itself in line with forest peoples' rights and aspirations. The fourth part of the paper uses examples from Papua, Guyana, Cameroon and Peru to examine the importance of legally binding standards on the extractive industries, and concludes by seeking to chart a way forward in the current context where REDD+ raises the stakes for all parties.

1. EXTRACTIVE INDUSTRIES:

Extractive industries in the context of Conservation and Human Rights

There is a paradox concerning social change. Existing global processes are often assumed to be immutable givens, whilst the radical changes that gave rise to them are seen as having been somehow inevitable. In reality, these large processes continually shape people's sense of what is possible. They are also themselves continually reshaped by people's collective determination to ensure their own and others' wellbeing.

Current dominant thinking and practice asserts that people's development needs and the need to conserve the biosphere on which we depend are mutually exclusive. As a consequence we are asked to diminish development in the name of conservation and diminish conservation in the name of development.

But does this approach reflect reality?

There is abundant evidence to show that the wellbeing of human and non-human aspects of the ecosystem depend on a healthy environment, supported by national and international legislation and governance that enable people to make decisions about how best to ensure a sustainable and life-giving environment for themselves and their children. The evidence presented in this paper highlights, for example, the fact that deforestation rates in indigenous forest peoples' territories are considerably lower than in conventional protected areas, implying that focusing on the wellbeing of people in their environment is a far more effective approach to conservation than 'pure' conservation itself.

On the negative side, evidence suggests that not only large-scale extractive industries, but also top-down conservation drives a wedge between local people and their environments in a way that destroys their livelihoods and sustainability of their environments. In contrast, recognition of forest peoples' customary rights by conservation programs helps to stop, slow or at least reorientate destructive forest developments. Building an alliance with forest peoples' groups helps achieve conservation goals much more sustainably.

This fundamental point needs to be understood from the outset. It then becomes clear that recognition of indigenous peoples' rights is more than 'simply' a human rights issue, but instead one that affects human survival. The essential interdependency of all species means that diminishing others - human or non-human - can only diminish our own chances of thriving, and even surviving, over the long term.

1.1. Extractive Industries

The preliminary conclusion of the World Bank's internal review was that:

> "Increased investment in the EI [extractive industries] sector has the potential to bring important development benefits but it is not a universal good. In fact, the evidence

> suggests that it is more likely to lead to bad development outcomes when governance is poor. Because of the Bank's focus on poverty, and the links between poverty and poor governance, this means that increased EI investment is likely to lead to bad development outcomes for many if not most of the Bank's clients." (2002: 20)

John Ruggie (the UN Secretary-General's Special Representative on Business and Human Rights) makes clear that those in government and business are also ultimately dependent on ensuring the social and environmental wellbeing of others. He concludes that:

> "Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business." (Ruggie 2008: 8 cited in Weitzner 2011: 39)

Taking into account human rights may mean having to drastically scale back the speed and extent of the business operations of a large logging or mining player. It may even mean dramatically changing the nature of those operations so that their starting point ensures that profitability is not at the expense of local social and ecological relations. If civil society successfully pushes for the rules of the game to be changed at the international level, then this may become the route to profitability rather than the route to being overtaken by less scrupulous competitors.

The Roundtable on Sustainable Palm Oil (RSPO) is a case in point. Here, because the major buyers of palm oil are susceptible to civil society pressure, major international suppliers are eager to retain their market share by being seen to abide by the social and environmental safeguards established by the RSPO.

But not everyone accepts that RSPO standards truly address social and environmental concerns. For example, Valerie Phillips, forest campaigner of the Greenpeace branch in Papua New Guinea, one of the three countries most adversely affected by the palm oil industry, writes that:

> "The RSPO gives the companies a green front and encourages more consumption, which is precisely the cause of the problem." (Zhou 2010)

Perhaps it helps to distinguish here between those opposing the palm oil industry as inevitably an environmental and social ill, and those seeking to ensure that communities are better able to protect their rights and environment when faced with the palm oil industry. The two positions are not mutually exclusive, but the leverage sought by those pursuing the latter approach arises precisely because companies wish to appear to be a beneficial presence.

Although the RSPO is a voluntary certification process established through civil society pressure from outside and inside the industry, it is based on the key human rights principles of ensuring that palm oil developments recognize communities' rights both to their lands, and to give or withhold their free prior and informed consent (FPIC) to what happens on this land. This provides a key basis for ensuring communities can enter into dialogue with companies. Whether that dialogue is meaningful or not often depends on community awareness and mobilization, on whether there is sufficient national and international civil society support for communities' rights to be recognized, and whether that support can ensure corporations recognize their obligation to respect human rights. This latter point was articulated very clearly

in Bali at the November 2011 landmark workshop on *Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform*:

> "the responsibility [of corporations] to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[1]

1.2. Conservation

In a similar way, conservation organizations have been making great strides towards recognising that protected areas must respect the rights of indigenous peoples as enshrined in international law. This must include the right to give or withhold their free prior and informed consent to the establishment of new protected areas in their customary territories.

The Worldwide Fund for Nature's (WWF) Statement of Principles on Indigenous Peoples makes very clear that this is not only a question of respecting fundamental human rights, but also a question of recognising that such people have been at the forefront of conservation for millennia[2]. In the preamble WWF states:

> "Most of the remaining significant areas of high natural value on earth are inhabited by indigenous peoples. This testifies to the efficacy of indigenous resource management systems. Indigenous peoples, their representative institutions and conservation organizations should be natural allies in the struggle to conserve both a healthy natural world and healthy human societies. Regrettably, the goals of conserving biodiversity and protecting and securing indigenous cultures and livelihoods have sometimes been perceived as contradictory rather than mutually reinforcing." (2008: 1)

In addition:

> "WWF recognizes that indigenous peoples have the rights to the lands, territories, and resources that they have traditionally owned or otherwise occupied or used, and that those rights must be recognized and effectively protected, as laid out in the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples." (2008: 2).

Yet in practice conservation organisations often continue to exclude local people from using forest and other resources, and only consult them after they have drawn up management plans rather than co-creating such plans.

Conservationists admit that conservation is failing. Although eco-guards in Southern Cameroon arrest Baka (indigenous forest people) for assisting others to hunt elephants, the same guards know that the Baka are being paid a pittance for this, and that they are forced to seek such employment because they are excluded from using, managing and protecting their own forest. During recent fieldwork, FPP talked to a conservationist in southern Cameroon who said that "*the key issue is how to provide local people with economic benefit so that they buy into conservation.*" (Pers. com. March 2010)

This assumption, that conservation needs to take control of an area and exclude local people, and subsequently needs to find a way of buying them off, is directly refuted in Liz Wiley's excellent study of the land ownership system in Cameroon - *Whose land is it? The status of customary land tenure in Cameroon* - where she points out:

> "By depriving communities of recognition that they are the lawful owners of forested and rangeland resources, the law removes their greatest incentive to use these assets in sustainable ways, let alone adopt more active and policed systems which, as the local residential populace, they are best positioned to operate and sustain. Instead, affected communities are alienated. Government finds itself having to 'buy back' cooperation in return for benefits of access which affected communities consider their due right, creating further antagonism." (Wiley 2011: 93)

As one conservationist in Kenya put it (echoing conservationist sentiment throughout the world) as he described the impossible task facing the 'fortress conservation' approach:

> *We can never have enough people on the ground to protect the animals and trees.* (Pers. com. August 2011)

Successfully conserving forests and species requires a remedy that is both much more straightforward and far more radical. Rather than imposing protected areas and seeking to buy local people into the process, the right to own and manage the resources upon which communities depend needs to be recognized and supported. For example, conservationists could provide eco-guards, or support community members to themselves become eco-guards, to help communities withstand powerful outsiders intent on extracting resources unsustainably. Instead, in seeking to exclude local people from the resources they depend on, conservationists often destroy the only basis for long-term sustainability. As one Baka man in Cameroon put it:

> *We will only receive benefit if our rights are recognized. Rights not only to the land where we are living, but also to the forest that we have customary use of.*

1.3. The stakes get higher: decreasing regulation, yet increasing rights

Many analysts have pointed to the way in which indigenous peoples' rights and the recognition of customary rights have made huge advances over the last few decades. At the same time they point out that governments in the Global North and South have been persuaded to continually change the rules that govern trade, ensuring that the rules governing financial and industrial corporations are weaker and the rules that back up those corporations' rights (e.g. WTO trade rules) are far stronger. This was in response to corporations demanding that governments make fewer and fewer interventions in their activities, a call that was suddenly reversed when this lack of regulation led to the financial turmoil of 2007/8. The crisis saw governments intervene in a massive way, but only to prop up and enable the continuation of the same unsustainable process rather than to impose regulations that could ensure sustainability.

Viviane Weitzner is one such analyst, and in her *Tipping the Power Balance* (2011), she claims:

> "The last few decades have witnessed unprecedented growth in activities worldwide to extract minerals, oil and gas. Global demand for extractives has soared, buoyed by investors turning to gold and other commodities to fend off and stabilize the economic downturn, and spurred also by new actors, such as China, scouring the globe for resources to meet the demands of a growing population. Government reforms and free trade agreements are helping slake this global thirst, providing favorable conditions to enable foreign direct investment in the extractive sector.

> "Riding this wave of demand, extractive companies are travelling to ever-more remote areas in search of new deposits. Increasingly, they are eyeing the rich resources in the ancestral homelands of Indigenous and Tribal Peoples, and in the process are creating panic and igniting conflict." (Weitzner 2011: 1)

On the same page, Weitzner has a map that shows the homeland of the Embera Chami Indigenous People in Caldas, Colombia, and a smaller map focusing on just one part of it, showing how their territory is crisscrossed with mining concessions issued by the State without prior consultation or consent:

To address this situation - where extractive companies are placing increasing and enormous pressures on communities' ancestral lands - Weitzner argues that the key need is to ensure:

> "the participation of potentially affected communities in decision-making - and to obtain their free, prior and informed consent before proceeding with any plans or projects affecting their homelands". (2011: 1)

That such participation is increasingly happening is due in large part to another development over the last few decades:

> "Indigenous Peoples have made significant inroads and far-reaching gains in the international arena with respect to recognition of their right to have a say in proposed developments affecting their territories. The right to free, prior and informed consent is now recognized as a minimum standard for respecting indigenous rights". (Weitzner 2011: 2)

1.4. Free prior and informed consent and self-determination

If the right to FPIC is now recognized as a minimum standard for respecting indigenous peoples' rights, the broader right of which it is a part is the right to self-determination; a fundamental right of all peoples that underpins the work of the United Nations.

1.4.1. Self-determination:

That the right to self-determination also applies to peoples within nation states is made explicitly clear in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP affirms many rights already contained in international human rights treaties, and applies these to the collective rights of indigenous peoples, for whom many aspects of life are shared, such as ownership of lands and resources. UNDRIP states:

> Article 3
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Here and elsewhere, international law recognizes custom as a source of rights. These rights stand independent of whether the State has recognized them or not. For this reason,

international law recognizes that indigenous peoples' rights do not depend on an act of the State because their rights derive from their own laws and practices. This is both because of the general principle that human rights are considered to be inherent, not grants of a government, but also because of the specific point that customary law, occupation and use precede and/or are independent of the State.

In ***Rights to Lands and Territories*****,** Marcus Colchester (*Beyond Tenure* 2008) it is argued:

> "In line with international human rights law and jurisprudence, forest peoples claim the right to own their lands and forests in accordance with their customary norms and with their right, as peoples, to self-determination.
>
> The rights basis for land tenure, thus, is not just a claim for respect of property rights. It also implies a consideration of so-called first-generation human rights (the civil and political rights of individuals in relation to the state); second-generation human rights (the economic, social, and cultural rights of individuals in relation to the state); and third-generation human rights (the collective rights of peoples to self-determination and development in relation both to other peoples and to states).
>
> Forest peoples are very diverse, ranging from indigenous peoples and other long-term residents who regulate their affairs according to custom, to newcomers and settlers who have moved into forests voluntarily in colonization schemes or for lack of alternatives. It is estimated that some 370 million people consider themselves to be indigenous. Of those, as many as one-half depend on forests. According to a widely cited but equally uncertain statistic from the World Bank, some 1.2 billion people worldwide depend on forests.
>
> Although all humans and all peoples have the same rights, their rights are expressed—and need to be respected—in diverse ways in conformity with historical and cultural specificities. This approach has long been recommended by the UN's Committee on the Elimination of Racial Discrimination and was recently reaffirmed by the UN General Assembly's approval in September 2007 of the UN Declaration on the Rights of Indigenous Peoples." (2008: 1-2)
>
> "In contrast to [the] widely prevalent situation of non-recognition of forest peoples in Africa and Asia, most Latin American countries have now overhauled their laws and constitutions. Most recognize that Latin American states are multinational and pluricultural, and they make provisions in law for the recognition of indigenous organizations and, albeit limited, for forms of self-governance." (2008: 4)
>
> "In line with indigenous peoples' own demands for full ownership and control of their customary territories as inalienable properties held in accordance with their own customs, international human rights laws accept that indigenous and tribal peoples have the right to hold and transmit their properties according to their customary systems of tenure and that the tenurial regimes must enjoy equal protection of the law." (2008: 8)

1.4.2. Free prior and informed consent

FPIC is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. FPIC is now a key principle in international law and jurisprudence related to indigenous peoples.

FPIC implies informed, non-coercive negotiations between investors, companies or governments and indigenous peoples prior to the development and establishment of oil palm estates, timber plantations, mining concessions or other enterprises on their customary lands. This principle means that those who wish to use the customary lands belonging to indigenous communities must enter into negotiations with them. It is the communities who have the right to decide whether they will agree to the project or not once they have a full and accurate understanding of the implications of the project on them and their customary land. As most commonly interpreted, the right to FPIC is meant to allow for indigenous peoples to reach consensus and make decisions according to their customary systems of decision-making.

What are some of the obstacles to FPIC?

It can be difficult to identify who should verify that the right to FPIC has been respected and how this should be done. In the publication *Making free, prior and informed consent work: challenges and prospects for indigenous peoples* (FPP, June 2007), Colchester and Ferrari argue that:

> "One of the perceived strengths of processes based on recognition of the right of indigenous peoples to give or to withhold their FPIC to activities, laws and policies that apply to their lands is that it implies also an acceptance of indigenous peoples' own processes of decision-making. Decisions based on the right to FPIC being, by definition, 'free' should allow scope for indigenous peoples to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws. Indigenous peoples exercise their right to FPIC over the lands, territories and natural resources that they have customarily owned, occupied or otherwise used (as well as over their cultural heritage and traditional knowledge). The right to FPIC derives from a people's right to self-determination and is strongly connected to their related rights to their territories and to self-governance." (2007: 5)

One of the key steps here is that FPIC is not conducted in a tick box fashion with outside consultants coming in and deciding that the community on balance accepts the project. Instead FPIC requires investing the time and resources in providing adequate information well enough in advance, and enabling and supporting indigenous decision-making processes that can allow a people to decide whether or not they accept a project happening on their territory.

One challenge for indigenous peoples in their efforts to exercise their right to FPIC is to ensure that their systems of decision-making are genuinely representative and made in ways that are inclusive of, and accountable to, members of their communities.

Colchester and Ferrari (2007) identify some experiences with third-party audits for the Forest Stewardship Council (FSC) in Indonesia and suggest that verifiers have been unduly lenient about what constitutes adequate compliance, thereby weakening any leverage that communities may gain from companies' obligations to respect their rights and priorities in accordance with FSC voluntary standards. What is crucial is that FPIC is not considered a one off event that happens before a project commences, but should be an ongoing process of ensuring a company complies with its obligations.

Another key issue here is that national governments often deny the status of indigenous peoples within their borders and so companies may argue that they cannot – or do not need to – undertake FPIC. For example, in relation to the Lokoño and Trio peoples of western Suriname:

> "the Suriname Government denies that the peoples concerned have rights to their lands and does not accept that they have the right to FPIC . . . The mining companies concerned, Alcoa and BHP-Billiton, notwithstanding having policies which appear to require that they respect human rights, have declined to treat with the affected communities as rights holders and, although they have gone beyond national legal requirements to carry out an environmental and social impact assessment, argue that they cannot go beyond the law in Suriname in respecting indigenous peoples' rights." (Colchester & Ferrari 2007: 8)

A similar situation is playing out in relation to Malaysian plantation and industrial conglomerate Sime Darby in Liberia, where the Government claims that it alone speaks on behalf of the people and can make agreements with companies on their behalf, thus obviating the need for FPIC. However, the agreement signed between the Government of Liberia and Sime Darby is explicit about Sime Darby abiding by the RSPO and thus the Government has – through this process – accepted the community's right to FPIC (Kenrick *et al.* 2013).

By insisting on their right to FPIC, forest peoples have been able to block plantations and dams planned for their lands and have been able to negotiate fairer deals with palm oil developers, loggers and local government land use planners. As to whether FPIC means the right to veto what happens on a peoples' lands: fundamentally it must have that right at its heart; the State can override this for 'compelling reasons', however these reasons ought to be painstakingly proven rather than simply asserted.

Why is respect for FPIC important for companies and government?

The right to FPIC is necessary to ensure a level playing field between communities and the government or companies and, where it results in negotiated agreements, provides companies with greater security and less risky investments. FPIC also implies careful and participatory impact assessments, project design and benefit-sharing agreements. FPIC has been widely accepted in the 'corporate social responsibility' policies of private companies working in sectors such as dam building, extractive industries, forestry, plantations, conservation, bio-prospecting and environmental impact assessment.

Why is the right to FPIC so crucial now?

This is for the positive reason that human rights are stronger and more widely recognized today, but also for specific reason Weitzner mentions above, which is that self-determination and collective rights have gained recognition through the sustained efforts of indigenous peoples, and so communities are pressing for more direct control of their own affairs. On the other hand, however, there is arguably a greater need for FPIC because liberalization and structural adjustment have weakened States. Globalization has brought the private sector into direct contact with indigenous communities, and the private sector wants clear rules vis-à-vis communities to secure their investments from risk. As the UN Commission on Human Rights notes:

> "A license to operate from the State is not a sufficient condition for success. Companies need . . . a social license to operate from surrounding communities" (UNHCHR 2005: 5)

In a similar vein, the World Resource Institute (WRI) highlights why FPIC and recognizing communities' rights should be important to corporations including the extractive industries:

> "Is your company better off having the people in the communities where you operate with you or against you? It is just plain common sense."

In Sarawak 56 cases before the courts relating to native peoples' rights to land directly concern oil palm companies[3] and the NGO SawitWatch has documented 663 land disputes between oil palm companies and local communities in Indonesia (Colchester and Chao 2011: 14).

2. VOLUNTARY STANDARDS?

Palm Oil and the RSPO in Indonesia and Liberia: The intersection between Conservation, Extractives and Customary Rights

2.1. "*Now we have some orangutans but there is no habitat left for them*"

In *Securing High Conservation Values in Central Kalimantan,* the RSPO's Ad Hoc Working Group on High Conservation Values (HCVs) in Indonesia reports on a field investigation carried out in Central Kalimantan to review legal options for securing HCVs in oil palm development areas. The investigation involved field visits and interviews with communities and government officials at all levels.

In terms of conservation, and the conservation of ape habitats in particular, the impact of the extractives is made devastatingly clear in a statement by a government official who describes what is left:

> *There are little bits of nature but not much. … Now we have some orangutans but there is no habitat left for them* (Adviser to the Head of the District Office for Estate Crops, in Colchester *et al.* 2011: 24)

In Central Kalimantan, the majority of the population is still indigenous Dayak. The area contains a great expanse of once-forested, low-lying lands with mineral soils and extensive areas of peat. In the last ten years vast areas of forest and peatlands have been allocated, and much of it cleared, for oil palm. Now it has been chosen as a pilot province for the implementation of the Indonesian Government's strategy for Reducing greenhouse gas Emissions from Deforestation and forest Degradation (REDD+).

The report describes how the impact of the extractives ends up meaning that marginalized people are pitted against marginalized nature:

> "In Kotawaringin Timur, the focus of the field visit, nearly 50% of the entire district has now been allocated to oil palm. The rapid expansion has left affected communities virtually landless and unprovided with smallholdings. There are numerous land disputes, even in RSPO member areas. The combination of landlessness and lack of smallholdings is putting intensive pressure on the small areas set aside for HCVs in some estates. HCVs are resented by marginalized communities deprived of livelihood options.

> "Local officials interviewed, from village level up to the Governor are unanimous on the need for a change of approach and they assert that oil palm expansion has been accompanied by widespread irregularities both in the hand out of concessions by officials and in the observation of legal requirements by developers. Much of the areas crucial for protecting HCVs have already been destroyed. While better enforcement of existing regulations and prosecutions of violators is now emphasised, the government is passing new laws to improve enforcement. National level reforms are now needed to secure these Provincial advances." (Colchester *et al.* 2011: 3)

The key finding of the working group was that customary lands must be identified and local livelihoods secured, so that impoverished communities are not obliged to move into the only lands left, those set aside for remnant HCVs.

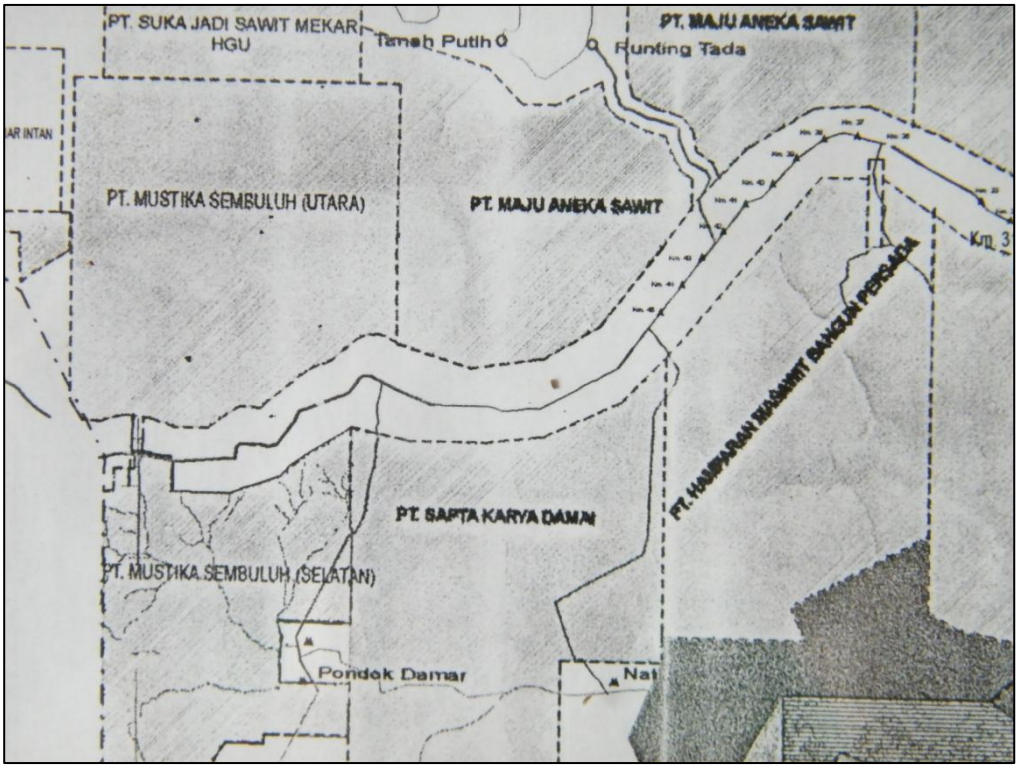
2.2. Impact of industrial palm oil on communities, forests and wildlife

Interviewees from Pondok Damar community – a Dayak village of over 300 families - described how the forests surrounding their village and farmlands used to contain orangutans and other wildlife.

The community members thought they had an agreement from the company not to clear and plant along roads and rivers, and not to clear their crops - in other words to leave them about 300ha. The palm oil company, Wilmar, states that there was no such agreement according to their records. One interviewee said that "*We were very naive when they first came in*", and others expressed concerns about the extent to which they had lost lands to the development, claiming that lands had been taken in exchange for as little as Rp. 150,000 (US$20 approx.) per hectare. The interviewees described what had happened:

> *Most of the land has been planted, it is almost all gone.*
>
> *We did not really agree or disagree. When people saw all the money they lost their heads and relinquished their lands. It is now hard to find fish. There also used to be deer but now game is scarce.*
>
> *People who relinquished their lands to the company are now landless. Yes, the company paid them but now they have nothing. Only some of those who hung on to their own lands have now been able to plant sawit. Yes, they [the company] did carry out socialization but they explained the advantages and not the disadvantages. They said there would be jobs and education.*
>
> *Here we have no land left.*
>
> *If we had known that it would be like this we would have used customary means to defend our lands. But by following government rules we released our lands and now they are gone. We are now just spectators looking on.*
>
> (in Colchester *et al*. 2011: 12-13)

They accept that they had been naïve, that they had hoped that they would get jobs with the company but very few had actually got jobs in the end, leading to social jealousy and conflict between those with and those without jobs.



This map (including the community of Pondok Damar) shows how most lands have been allocated to companies for oil palm, leaving very little land along roads for community use. In practice the ad hoc field investigation found that oil palm had been planted right up to the edge of the roads further reducing the lands available for communities (Colchester *et al. 2011: 14*)

2.3. The RSPO as a model for extractive industry practice?

In contrast to this situation where a community did not feel enabled to make an informed and free decision, the RSPO provides an excellent model – in theory if not necessarily in practice – of the framework extractive industries must operate within to ensure the rights and livelihoods of customary communities are upheld as well as the wellbeing of the environment.

As was noted above, the adoption of such an approach across the industry requires a combination of civil society pressure, and national and international legislation to ensure that communities' struggles to have their rights and ecosystems protected are fully recognized in commercial 'practice' as well as in legal 'theory'. The same report notes that the RSPO:

> "seeks to ensure that palm oil is produced in ways that do not harm the environment, provides a fair deal for communities and smallholders, respects the rights of women, workers, local communities and indigenous peoples, and ensures that plantings and mills are developed in transparent ways with the participation of other stakeholders. To achieve this, the RSPO requires producer members to have their plans independently assessed in order to ascertain that they are complying with the RSPO's Principles and Criteria, which establish how this should be achieved and verified. Central requirements of the RSPO Principles and Criteria are that no lands should be acquired without the free, prior and informed consent of legal and customary land owners and that (since 2005) no lands should be cleared which are primary forests or which contain high conservation values (HCVs).

> A study carried out for the RSPO in 2009 showed that in Indonesia companies seeking to comply with the RSPO requirements on conserving HCVs are running into difficulties because laws do not explicitly mention or require protection of HCVs and the permitting process strongly encourages companies to rapidly develop all lands allocated to them for planting. Companies which do not develop all their permitted areas fast enough are liable to forfeit their permits which may then be allocated to other companies which may not be RSPO members. Alternatively, the study found, some companies doing HCV assessments in compliance with RSPO requirements choose to excise HCV areas from their concessions when they apply for their final leases . . . This then creates the risk that these excised HCV areas are allocated to other companies . . . " (Colchester *et al.* 2011: 4)

The 2009 study referred to above found that local authorities often reallocated land to other companies as a direct result of the company engaging in the RSOP process. The report finds that:

> "Some RSPO member companies have invested a considerable amount of resources, time and effort in identifying High Conservation Value (HCV) areas and areas important for local livelihoods. These efforts have delayed land acquisition, clearance and planting. These delays have meant that companies have exceeded the permitted three-year period for preparing their areas prior to them securing their final leases. Overriding appeals by the companies, local government officials have chosen to terminate these permits and/or restrict the areas permitted to these companies and have re-allocated parts of these areas to other companies including non-RSPO members, some of which are allegedly clearing lands including HCV areas." (Colchester *et al.* 2009: 5)

The RSPO Ad Hoc Working Group on HCVs in Indonesia sought to explore means of effectively securing HCVs in palm oil development areas in Indonesia, in line with the Principles and Criteria of the RSPO, notably the principle of ensuring that customary rights are recognized.

Their key conclusions would apply to any regulatory regime seeking effective compliance of extractive industries with environmental and social safeguards. The key recommendations concerned:

- **Intervening earlier**: HCVs must be identified and secured by legally enforceable processes much earlier in the development cycle.
- **Land tenure:** Much more needs to be done to identify customary lands and secure local livelihoods, so that impoverished communities are not obliged to move into the only lands left, those set aside for remnant HCVs.
- **Information**: Communities need much greater information and proper engagement in planning to ensure they understand HCVs and the RSPO.
- **Auditing**: Certification bodies need much more detailed guidance on how to audit HCV assessments.
- **Legal reform**: For the RSPO process to protect HCVs and communities, legal reforms and enforcement are necessary at local and national levels. (Colchester *et al.* 2011: 3)

2.4. Liberia: Agri-business, forests and communities' livelihoods

Awareness of these kinds of social and ecological impacts of agri-business expansion in places like Malaysia and Indonesia led to new standards for acceptable palm oil development. The RSPO is a third-party voluntary certification process, which adopted a set of Principles and

Criteria that are substantially consistent with a rights-based approach, and which seeks to divert palm oil expansion away from primary forests and areas of critical HCV while prohibiting the takeover of customary lands without communities' FPIC. Increasingly, adherence to the RSPO standard is becoming a requirement for access to the European market and major palm oil producing conglomerates seeking to maintain market share are now members of the RSPO.

With palm oil agri-business now rapidly expanding in many parts of Africa, RSPO procedures should mean that situations can be caught and addressed earlier in the planning cycle, and the errors and injustices of the past avoided (FPP and SawitWatch, 2012; Kenrick *et al*, 2013).

A press conference in September 2011 by local communities in Grand Cape Mount, Liberia, denounced the takeover and destruction of their lands for palm oil development by the Malaysian conglomerate, Sime Darby. The local communities filed a formal complaint to the RSPO via FPP and their chosen legal representative, Green Advocates. In response, Sime Darby froze its operations in the contested area and, through the RSPO secretariat, agreed to bilateral negotiations with the communities to resolve their differences.

In December 2011, FPP facilitated a first meeting between the local communities and senior Sime Darby staff from Malaysia and Liberia, to explore ways of resolving these conflicts. The bilateral meeting made good progress in agreeing a process for resolving the land dispute. However, soon after this, negotiations between the communities and Sime Darby broke down following the Liberian Government's insistence that the communities should talk with them and not directly with the company.

On 2 January 2012 the President of Liberia and various Ministers came to Grand Cape Mount to meet with communities, informing them that it was their duty not to obstruct Sime Darby and that they should not be misled by civil society organisations. But the communities still presented 14 issues that they wanted resolved. The communities' lawyer – Green Advocates' Alfred Brownell - explained the situation to the President, who appeared to say that the government had not agreed to the communities' land being cleared for palm oil development. The President then set up an inter-Ministerial committee headed by the Ministry of Internal Affairs to resolve the issues through three sub-committees addressing compensation, water and land. The Government reiterated that negotiations between Sime Darby and the communities could not go ahead, but should instead take place between the communities and the government.

Meanwhile, a letter purportedly coming from one of the original signatories of the communities' complaint to the RSPO, was sent to the RSPO in order to withdraw the communities' complaint against Sime Darby. Subsequent work in Liberia by FPP in February 2012 established that this letter had not been written by the communities nor authorized by them and was signed by only one traditional leader under duress.

In early February 2012, FPP staff returned to Liberia to help communities move the RSPO process on and to ensure that Sime Darby responded to their complaints. FPP staff visited communities and discovered that their environment of forests and farms has been completely destroyed, bulldozed to bare earth by Sime Darby to plant cloned Malaysian oil palm trees. The compensation for destroying the communities' crops (there was no compensation for taking the land) was a pittance, or didn't materialise. As one community member pointed out:

> *I had 334 trees but was only paid compensation for 134 trees. I was told if I don't accept this then I won't get anything. I had no choice. They didn't ask permission to take the land . . . Sime Darby said 'the Government has given us the power to do this'. If we had the power to resist we would not have let them take the land.*

Just as in the situation in Indonesia described earlier, local people had been misinformed as to the extent of destruction that would take place, and they had also been led to believe that they would retain their farms even with the palm oil plantation. There was no opportunity to say 'no' to the process: it was a question of taking the compensation and having one's land destroyed, or not taking the compensation and having one's land destroyed.

FPP sought to help break the deadlock by holding meetings with Sime Darby, Liberian government ministries, community support organisations such as Green Advocates and the Sustainable Development Institute (SDI, Liberia), and with the communities themselves. As a consequence of this, as well as parallel meetings between FPP's director and Sime Darby staff in Malaysia, an op-ed article in the New York Times by SDI's Silas Siakor, and negotiations by Alfred Brownell of Green Advocates, significant changes got underway, especially in the Government's own management of this situation.

The Liberian Land Commission replaced the Ministry of Internal Affairs in leading on the issues. The Land Commission not only promised to ensure that communities who had lost their land in Grand Cape Mount have their land demarcated and their land issues resolved, but also announced a major reorientation in how it addresses oil palm development projects in Liberia. The Commission proposed freezing future concessions, while seeking to regularise 'tribal' lands in the area of the concession handed to Sime Darby before the company expands further. It also stated that it would seek to resolve the land issues in favour of the communities in the disputed area of Grand Cape Mount. If this course of action is pursued then the communities and their civil society partners' complaints will indeed have been heard and acted on.

Critical to this process has been the willingness of senior company managers in Malaysia to become centrally involved, the willingness of the communities' lawyer to speak out strongly, and the provision of facilitation by an international civil society group (in this case FPP) which seeks to help people to regain their rights while also finding a way for the company to act. Equally crucial has been the fact that at least one part of the Government has sought to resolve these issues in a way which can respect communities' rights, can ensure the company retains its RSPO certification, and can demonstrate that the Government is committed to ensuring the wellbeing of its citizens.

Whether the outcome of this process is fulfilled or dashed by Government action, the key elements needed to ensure effective regulation of extractives in a way that can ensure a win-win-win are evident in this case.

3. COMMUNITY COMMONS:

Protecting commons from the conservation vs development battle

3.1. Communities protect forests better than protected area regimes

The basic principle of FPIC is that those who have an investment in the long-term sustainability of their locality are the ones who should make the informed decisions about developments there. That such decisions should include decisions on conservation might at first alarm wildlife or ecosystem conservationists. However, this principle is in line with the evidence that communities protect forests better than protected area regimes do.

Research by the Center for International Forestry Research (CIFOR) compared 40 protected areas and 33 community-managed forests in 16 countries across Latin America, Africa and Asia. Their researchers found that while protected areas lost an average of 1.47% of forest cover per year, community managed forests lost just 0.24% per year. In other words, community-managed forests did over six times better than protected areas.

CIFOR concludes that:

> "Forests managed by local or indigenous communities for the production of goods and services can be equally (if not more) effective in maintaining forest cover than those managed under solely protection objectives" (Porter-Bolland *et al.* 2011)

Community-based forest management now comprises 8% of the total of the world's managed forests, and up to 20% of Latin America's forests. Interestingly, research for the World Bank's Independent Evaluation Group found that –"In Latin America, where indigenous areas can be identified, they are found to have extremely large impacts on reducing deforestation" (Nelson and Chomitz 2011: 9).

The graph below - on the subject of deforestation in the Brazilian Amazon - shows the comparison for the region.

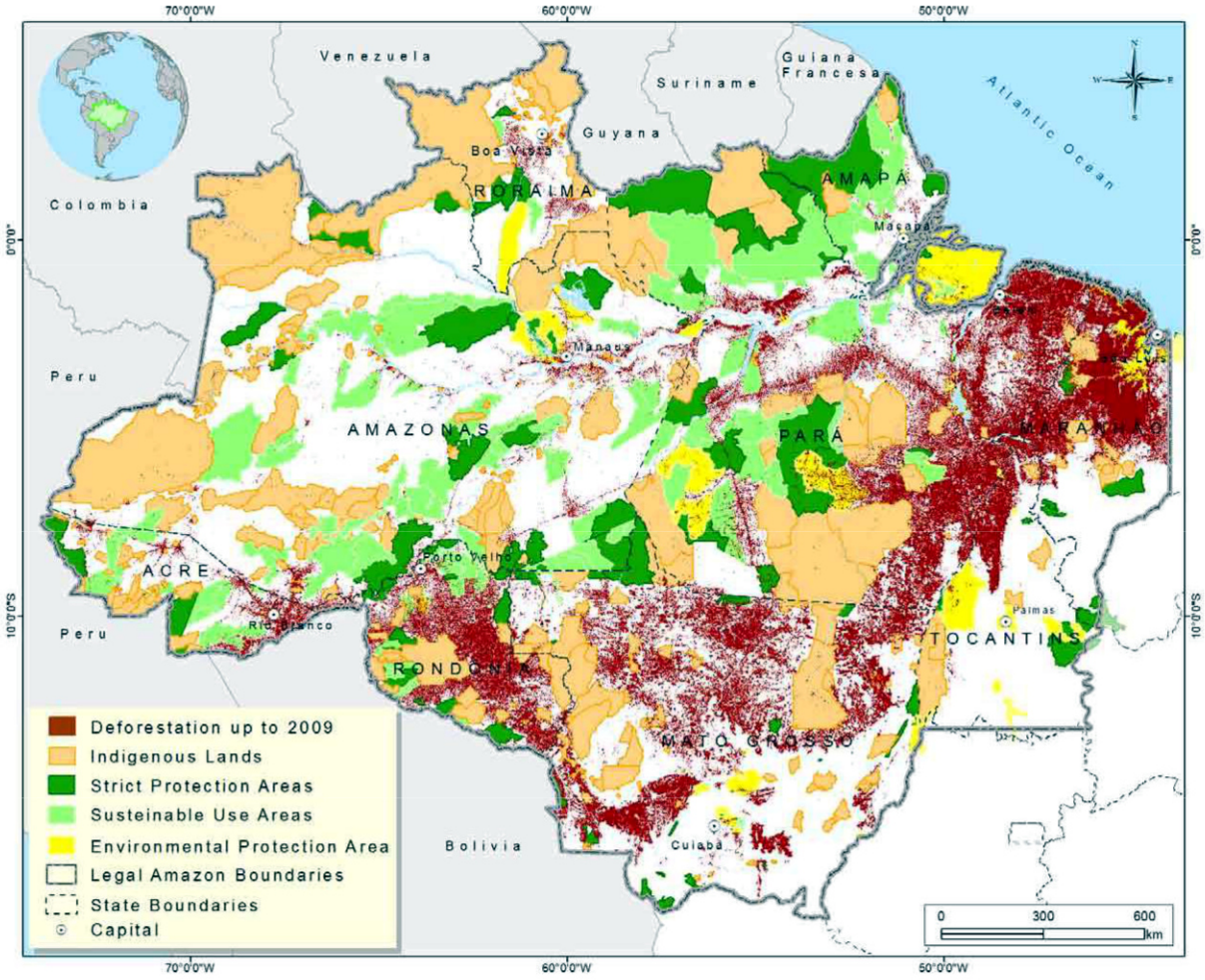
*Comparison of the proportion of deforestation in the Protected Areas in the Brazilian Amazon**

Category	% of the category deforested
State Conservation Unit – Sustainable Use	1.22
State Conservation Unit – Full Protection	1.40
Federal Conservation Unit – Sustainable Use	2.46
Federal Conservation Unit – Full Protection	1.25
Conservation Unit total	**1.63**
Indigenous Lands	**1.46**

** regardless of the date of creation/approval, excluding the APAs.*

Source: Veríssimo, et al*, 2011 © IMAZON/ISA*

Deforestation and Protected Areas in the Brazilian Amazon up to 2009:



Source: Veríssimo, et al*, 2011 © IMAZON/ISA*

According to Veríssimo *et al* (2011) there is, in fact, much less difference in deforestation rates between the various categories than CIFOR's research suggests. For example, the "full protection" categories have slightly lower internal deforestation rates than the IP territories, and the difference between IP territories and the combined PA category is not that substantial.

However, Veríssimo *et al*'s analysis suggests that the effectiveness of IP territories compared to PAs becomes very clear when one considers the fact that IP territories are often established right on the deforestation frontline (Nepstad *et al*, 2006), where deforestation pressure is very intense, whereas many PAs are established in more remote areas. Thus, the basic point that the CIFOR research pointed to - that communities can protect forests far better than strict protected areas - is emphasized rather than undermined by Veríssimo *et al*'s additional analysis.

3.2. Forest peoples are not drivers of deforestation

Study after study demonstrates that the main drivers of deforestation are *not* poor farmers or pastoralists or hunters and gatherers. Large-scale deforestation is driven by large-scale logging, mining, commercial farming, ranching and plantations, which often also force local people off their own land, obliging them to contribute to the process of deforestation.

The Union of Concerned Scientists points out that:

> "For many years, tropical deforestation was attributed to expanding populations of subsistence farmers cutting down the forest for small-scale agriculture and firewood. But many recent scientific studies show that large, commercial agriculture and timber enterprises are the principal agents of tropical deforestation" (Boucher *et al.* 2011: 114)

Zimmerman and Kormos expand on this in a May 2012 Bioscience article where they point out that even so-called 'sustainable' commercial logging destroys the tropical forest. Their conclusion that the only sustainable form of logging is small-scale community level logging mirrors the evidence that community forests are better protected than those in protected areas. Their report and conclusions are worth examining further:

> "A convincing body of evidence shows that as it is presently codified, sustainable forest-management (SFM) logging implemented at an industrial scale guarantees commercial and biological depletion of high-value timber species within three harvests in all three major tropical forest regions. The minimum technical standards necessary for approaching ecological sustainability directly contravene the prospects for financial profitability. Therefore, industrial-scale SFM is likely to lead to the degradation and devaluation of primary tropical forests as surely as widespread conventional unmanaged logging does today. Recent studies also show that logging in the tropics, even using SFM techniques, releases significant carbon dioxide and that carbon stocks once stored in logged timber and slash takes decades to rebuild. These results beg for a reevaluation of the United Nations Framework Convention on Climate Change proposals to apply a Reducing Emissions from Deforestation and Forest Degradation subsidy for the widespread implementation of SFM logging in tropical forests. However, encouraging models of the successful sustainable management of tropical forests for timber and non-timber products exist at local-community scales." (Zimmerman and Kormos 2012: 479)

> "In contrast to industrial logging, many small-scale community and private landowner timber and non-timber forest-management options, often in combination with other small-scale economic alternatives, have proven to lead to the protection of reasonably intact tropical forest ecosystems while promoting sustainable livelihoods (e.g., Bray *et al*. 2003). The common thread of these models of successful common-pool resource management in the tropical forestry sector is governance—if only at the local or community level—but only when it is fostered by national legislation, especially the ratification of community land tenure." (Zimmerman and Kormos 2012: 485)

However, many countries' REDD+ plans (made up of Readiness-Plan Idea Notes - R-PINs - and Readiness Preparation Proposals - R-PPs) and much of the public rationale given for REDD+ still frames the issue of how to tackle deforestation in terms of how to control poor people's behaviour, how to police and/or compensate them to ensure that they don't use forest lands, rather than how to support them to further develop livelihoods that sustain the forests.

> For example, Cameroon's R-PIN (submitted to the World Bank's Forest Carbon Partnership Facility in 2008) states that slash and burn agriculture "is certainly responsible for the greatest loss of forest cover", yet the only reference supporting this claim is to a World Bank (2000) report that suggests that the main drivers of deforestation are the industrial logging and large-scale plantations that create a degraded landscape in which small-scale agriculture and fuel-wood demands become unsustainable.

The evidence shows that people with strong relationships to land, particularly indigenous peoples, best protect the ecosystems they live in and depend on, and that securing and protecting their rights is fundamental to sustainable management and development. The question then becomes how best to protect forests through securing forest peoples' rights? One answer to this emerged in a land tenure conference in Douala in 2011 where the focus was on the need to ensure that state legal systems recognize and secure indigenous peoples' and local communities' customary rights rather than subordinate or otherwise compromise them.

3.3. Community commons – a beneath-the-radar solution?

Community commons regimes are, by definition, more focused on ensuring the wellbeing of their localities, so they are rarely visible to outsiders unless and until they come up against larger global processes. This is one of the reasons why they continually appear to be on the point of disappearing – they often only become visible when they reach the point where their existence is under threat.

However globally, between 1 and 2 billion people define their right to the land through what the community says, which means that the commons estate is huge. In sub-Saharan Africa, 1.6 billion hectares, 75% of the land area, is held by communities under customary law. Around 1.4 billion hectares is land that is not cultivated but is collectively held forest, rangeland etc. In most of Africa, private title is only between 2 and 10% of the land (e.g. in Cameroon it is 2%). The colonial legacy led to the rest of the land being considered 'without owner'. This land was therefore expropriated by the colonial power – a situation that was maintained by many African states after independence.

The vast majority of forest, pastoral, farming and other land in Africa has been managed by communities in accordance with their customary law, a dynamic approach to the management of natural resources that develops and responds to modern realities, including population growth and movement, shifting resource use, and food sovereignty. Customary land tenure provides a secure foundation for sustainable development providing that it is protected under statutory law.

The alternative is to continue with an outdated colonial-derived system that makes communities squatters on their own lands. In this context, the biggest driver of social conflict, and in extreme cases civil war, is the denial of rights to land and resources. There has been a huge amount of conflict of this kind in recent times in both Central and West Africa.

Liz Alden Wiley writes that:

> "although governing bodies in the world community have been slow to acknowledge the centrality of tenure injustice in triggering conflict and civil war, this is demonstrably the case in many agrarian settings." (2006: 6)

Wiley argues that when such issues are left unresolved then it makes the occurrence or resumption of civil war far more likely, she further argues that this makes securing land rights even more urgent, not only for people but also for their governments.

In this context, a critical role for the modern state is to establish ways of recognizing and incorporating customary land tenure into national law, accepting that it is fair, adaptable,

dynamic and legitimate. Recognition of customary land tenure provides a route to food sovereignty and a secure basis for development, particularly in the context of large-scale land acquisition by domestic and international actors, resource depletion, population growth and climate change. Since few countries take this approach, there is an urgent need for reform.

Mobilized by the need to address the urgency of these threats, communities and civil society are increasingly recognizing that a legitimate solution lies in protecting and strengthening customary land tenure and community governance.

Community and civil society representatives at the African Community Rights Network and Communities' Douala Conference on Community Rights (13-16 September 2011) argued that on the basis of the provisions of the African Charter on Human and Peoples' Rights, natural resources should be managed for the exclusive benefit of the people. The representatives argued that there are enormous benefits to recognizing customary land tenure systems, and huge problems created by giving primacy to foreign-derived law. They argued that such an approach could guarantee a long-term development path that is sustainable, fair, just and self-determined.

As a consequence they made the following recommendations to African governments to create the enabling conditions that ensure:

- Customary land rights are recognized as property rights in statutory law, not just as user or occupation rights, and have an equivalent force of law to private deeded property rights. Customary land must include not only the land of the family, house and farm but also forest, rangeland and other lands held collectively, including those that are currently considered as state-owned.
- Legal recognition of community governance, and ensure support for inclusive, transparent and democratic community governance.
- Legal reform to recognize customary land rights as property rights in statutory law, is based on public participation, especially that of indigenous peoples and other local communities, and that this same approach is taken to other national and international processes.

3.4. Reconciling state and community rights to resources

The African Commission on Human and Peoples' Rights (African Commission) adopted a 'Resolution on a Human Rights-Based Approach to Natural Resource Governance' at its 51st Ordinary Session held from 18 April to 2 May 2012 (FPP, 2012d).

The Resolution highlights the interdependence of political, social, developmental and environmental integrity evident in articles 20, 21 and 24 of the African Charter which protect respectively people's right to:

- Freely determine their political status and pursue their economic and social development according to the policy they have freely chosen
- Freely dispose of their natural resources
- A satisfactory environment.

Box 1: Mapping traditional forest livelihoods and great ape conservation

In Cameroon, FPP, CED and local partners worked with Baka hunter-gatherer settlements to map their traditional territories, which overlap areas of high concentrations of western lowland gorillas and chimpanzees. The intention was to help them to map their ancestral lands that have become overlapped by the new Boumba Bek and Nki National Parks, in order to secure their rights while also protecting these endangered species.

This initiative around Mambele illustrated significant overlaps between community forests and those used by gorillas in and around these protected areas, associated logging concessions and commercial safari zones. It documented local and indigenous communities' attitudes towards gorilla and ape conservation, documenting their strong pro-conservation bias for these species.

> "Mambele is surrounded by key gorilla habitat, and it is common to hear the cry of chimpanzees, and to see monkeys in the trees. Mambele is also encircled by ancient settlements of indigenous peoples who rely upon the forest for their livelihoods. The potential for conflict between these two groups is therefore high – at least theoretically. However, around Mambele, there are strong local cultural norms preventing the hunting of most primates by the local communities, and which serves to protect them in their habitat. For example, the largest group of Baka come from the Kema and Mambe clans. Kema refers to the magistrale monkey. Baka from the Kema clan do not eat any monkeys or apes." (Nelson & Venant 2008: 14)

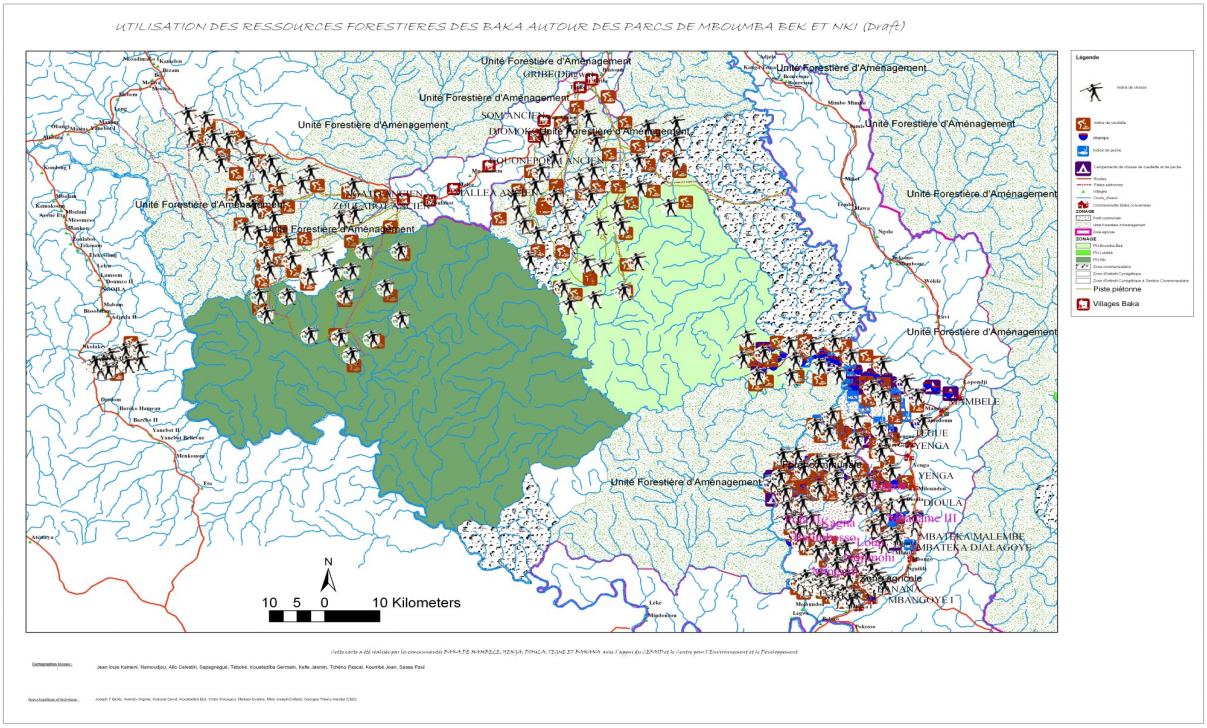
Critically, this project supported forest communities to highlight publicly their concerns about numerous, serious allegations of human rights abuses by forest guards who are charged with enforcing national park rules. These regulations ban all access and use inside national parks in Cameroon, even where they overlap peoples' ancestral lands. The persistent pattern of these complaints echoes those of forest peoples from in and around most national parks in Central Africa's forests. Local communities continuously expressed their clear wish to participate in the protection of their forest, but not at the expense of their human rights, nor if it undermined their livelihoods. Local people want to be part of the solution to protecting great apes around Mambele. They are passionate about the riches in their forest. After all, as one local Baka said:

> *"when WWF arrived did they find this forest destroyed? No, they came because the forest was rich ... and we showed them all these places they now want to protect – we guided them through the forest to those places ... we need this forest to survive, and we should be left to continue our traditional use ... if this is done, then when people come to destroy this place (like poachers), we will be the first to report them to the authorities ... but they do not listen to us now."* (Nelson & Venant 2008: 13)

This project helped communities to bring these concerns into a dialogue with conservation agencies charged with protecting Cameroon's forests and wildlife. Through negotiation and the development of joint, field-based activities it supported the establishment of a collaborative agenda shared by communities and conservation agencies to enable community rights to be protected in the park management plan while conservation objectives are also achieved. In this way clans and communities interest in protecting their totemic animals can translate into a collaborative approach to protecting the environment.

John Nelson and Messe Venant 2008

Maps of forest use by communities from the western Dja underline the need for greater community-conservation dialogue (Nelson & Venant 2008: 4)



The resolution notes recent and rapid progress in the definition of minimum international standards with respect to natural resources, the African Commission goes on to emphasize how communities in Africa continue to suffer disproportionally from human rights abuses in their struggle to assert their customary rights to access and control various resources, including land, minerals, forestry and fishing.

The Resolution calls upon states to adopt a human rights-based approach to natural resources governance, including through the establishment of a clear legal framework that recognizes how the respect of human rights is a condition for sustainability. States must ensure that communities benefit from any development on their land or resources and ensure independent social and human rights impact assessments that guarantee communities' right to FPIC, effective remedies, fair compensation and respect for the rights of indigenous peoples as well as the rights of women.

This latter point highlights how, despite the pivotal role of women in land and resources management and their vast knowledge with respect to conservation and sustainable use, they are most often neglected and side-lined from decision-making processes that crucially affect them, their families and communities.

While the Resolution reaffirms state sovereignty over national resources in accordance with the Rio Declaration and the African Charter "principle of State sovereignty over natural resources", it provides that the State is responsible "for ensuring natural resources stewardship *with* and *for the interest of*, the population" and "in conformity with international human rights law and standards". Notably, for indigenous peoples, this means the recognition by states of their right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and to own, use, develop and control the

lands, territories and resources that they possess through traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired, as provided for by the 2007 United Nations Declaration on the Rights of Indigenous Peoples and other instruments of international law.

Weitzner (2011: 80, Endnote 24) examines exactly this point about communities' rights in relation to the extractive industries and the State. She writes that the Inter-American Commission on Human Rights (IACHR) notes that while States may claim ownership of sub-surface mineral and water rights, for example:

> "this does not imply...that indigenous or tribal peoples do not have rights that must be respected in relation to the process of mineral exploration and extraction, nor does it imply that State authorities have freedom to dispose of said resources at their discretion. On the contrary, Inter-American jurisprudence has identified rights of indigenous and tribal peoples that States must respect and protect when they plan to extract subsoil resources or water resources; such rights include the right to a safe and healthy environment, the right to prior consultation and, in some cases, informed consent, the right to participation in the benefits of the project, and the right of access to justice and reparation" (IACHR 2009, para 180).

The IACHR notes, she adds, that:

> "the right to the natural resources which are both in and within the ancestral lands is a necessary derivation, including the specific rights of indigenous peoples over the natural resources of the subsoil"(para 181). "The property rights of indigenous and tribal peoples thus extend to the natural resources which are present in their territories, resources traditionally used and necessary for the survival, development and continuation of the peoples' way of life."

The distinct vulnerability and special rights of indigenous and tribal peoples are now recognized in a variety of instruments, and are being upheld through a number of mechanisms. Weitzner highlights several specific gains, including:

- **UNDRIP**: The approval in 2007 of the UN Declaration on the Rights of Indigenous Peoples, which sets out the minimum standards that should be respected in upholding Indigenous rights and is now a consensus agreement, opposed by no country;
- **IACHR**: The Inter-American Human Rights System, and international jurisprudence such as the 2007 *Saramaka People* judgment of the Inter-American Court of Human Rights, which establishes clearly that states should uphold the right to free, prior and informed consent for mining projects affecting ethnic territories;
- **CBD**: The inclusion in instruments such as the Convention on Biological Diversity of far-reaching provisions for the protection of traditional knowledge;
- **CERD**: Observations and recommendations by international bodies such as the Committee on the Elimination of Racial Discrimination, established under the Convention of the same name — recommendations that continue to clarify Indigenous and Tribal rights;
- **UNPFII**: The establishment of the UN Permanent Forum on Indigenous Issues, and the UN Special Rapporteur on the Rights of Indigenous Peoples;
- **ILO 169**: International Labour Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries;

- **Safeguard policies** that protect Indigenous rights. Adherence to these policies is now a condition for obtaining financing from international financial institutions such as the World Bank Group and regional development banks.

4. LEGALLY BINDING STANDARDS?

The role of international institutions

4.1. Upholding or marginalizing rights: Papua to Guyana to Cameroon

The international mechanisms listed above come into effect through international and national political, legal and financial institutions. But how effective are they? Weitzner suggests (2011: 33) rather optimistically that:

> "In the face of weak governance and regulations to hold companies to account within both host and home governments, international financial institutions play a critical role in requiring conditions of companies and governments borrowing funds. The World Bank Group — and particularly the IFC, the private-sector lending arm of the Group — is seen globally as the standard-setter for corporate behavior. . . "

However, she then qualifies her point by adding that:

> "there is scope for confusion in how to interpret free, prior and informed consent in light of the current lack of references to international standard-setting exercises, international instruments such as the UNDRIP, and international jurisprudence defining the scope of FPIC — instead, the [IFC's draft Performance Standards] language leaves too much of the interpretation of what FPIC comprises, and whether it has been obtained, to the discretion of companies." (Weitzner 2011: 33)

Augustine Hala, presenting the Papua New Guinea case study to a workshop on 'Indigenous Peoples, Extractive Industries and the World Bank', puts the situation rather more graphically, when he explains the impossibility of reconciling an indigenous, customary and commons approach with a commodity approach:

> *Land is our life. Land is our physical life – food and substance. Land is our social life, it is marriage, it is status, it is security, it is politics. In fact, it is our only life. Tribesmen would rather die to protect their traditional land. . . When you take our land you cut away the heart of our existence . . . Big multinational foreign companies being from an alien culture would neither understand nor grasp the significance of this. For them land is a commodity to be bought or sold. They just treat it as an exploitable resource . . . Why would a genuine funding organization like the World Bank Group fund culprit industries and their government cronies to violate lesser indigenous communities' rights to exist?* (in Caruso *et al.* 2003: 2)

Similarly, participants in an Amerindian Peoples Association/Forest Peoples Programme 2009 workshop on "Indigenous peoples' rights, REDD and the draft Low Carbon Development Strategy in Guyana" expressed concerns that seem to boil down to objecting to their government, and international conservation and development processes all treating the forest as a commodity. Some parts of government try to sell the forest to conservationists as protected (so placing severe restrictions on communities' subsistence activities) while others

try to hand it out to mining concessions (and so destroy the fragile ecosystem on which communities depend).

Concerns over mining were voiced by community participants:

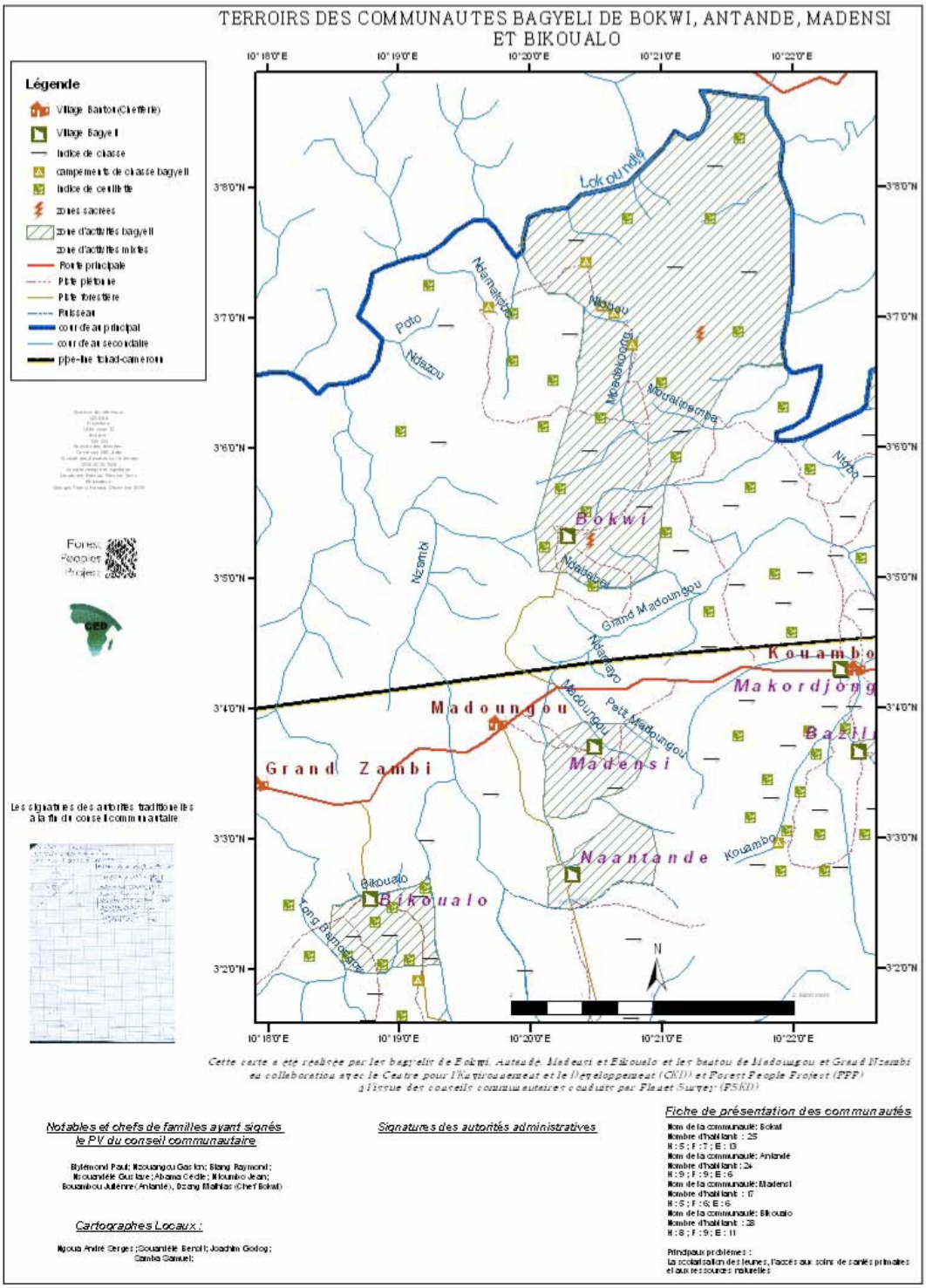
> *We are worried that parts of government are fast-forwarding the granting of mining concessions while the government talks of protecting forests. These concessions are damaging riverbanks and creek heads that supply water to our communities. These rivers are the very heart and veins of the forest, so why can't the government establish a moratorium on granting concessions in fragile areas, like watersheds?* [Community member, South Rupununi] (APA/ FPP: 19)

Several participants raised the issue of how government plans might affect rotational farming and traditional practices. They sought assurances from government that these activities would not be targeted under the Low Carbon Development Strategy/REDD:

> *Our rotational farming must not be classified as 'deforestation' nor 'degradation' as our traditional farming is carbon neutral. Why is traditional farming being held up to the world as one of the most dangerous things? Let us target big industries and polluters and not target indigenous peoples: we are not in the same bracket as them. The government says it wants to protect the forest, yet in our area . . . we see signs notifying new mining concession all along the riverbanks*. [Community member, Santa Rosa Village, Region 1] (APA/ FPP: 20)

Guyana's obligations under other human rights instruments like the International Convention for the Eliminations of all forms of Racial Discrimination (ICERD). The ICERD Committee (known as CERD) has called on Guyana to amend the Amerindian Act to recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy including water and subsoil. (APA/ FPP 2009: 9).

The predicament of these communities in Guyana is echoed in a myriad of other places, such as in communities in Southern Cameroon affected by the Chad-Cameroon oil pipeline.



Example of Community Map produced with the Bagyeli, Cameroon (Nelson 2007: 13)

Box 2: Chad-Cameroon oil pipeline in southern Cameroon: community mapping and advocacy working to protect sustainable use of the forest

Twenty indigenous Bagyéli communities from Bipindi Arrondissement in the Chad-Cameroon Pipeline Zone have secured formal recognition for their land rights in Cameroon's Ocean Department after six years of effort. A project coordinated by the UK-based FPP, and working with the Cameroon NGOs the Centre for Environment and Development (CED), and Planet Survey Sustainable Environment and Development (PSEDD) helped achieve this. The work was funded by the UK Department for International Development (DFID) and Comic Relief.

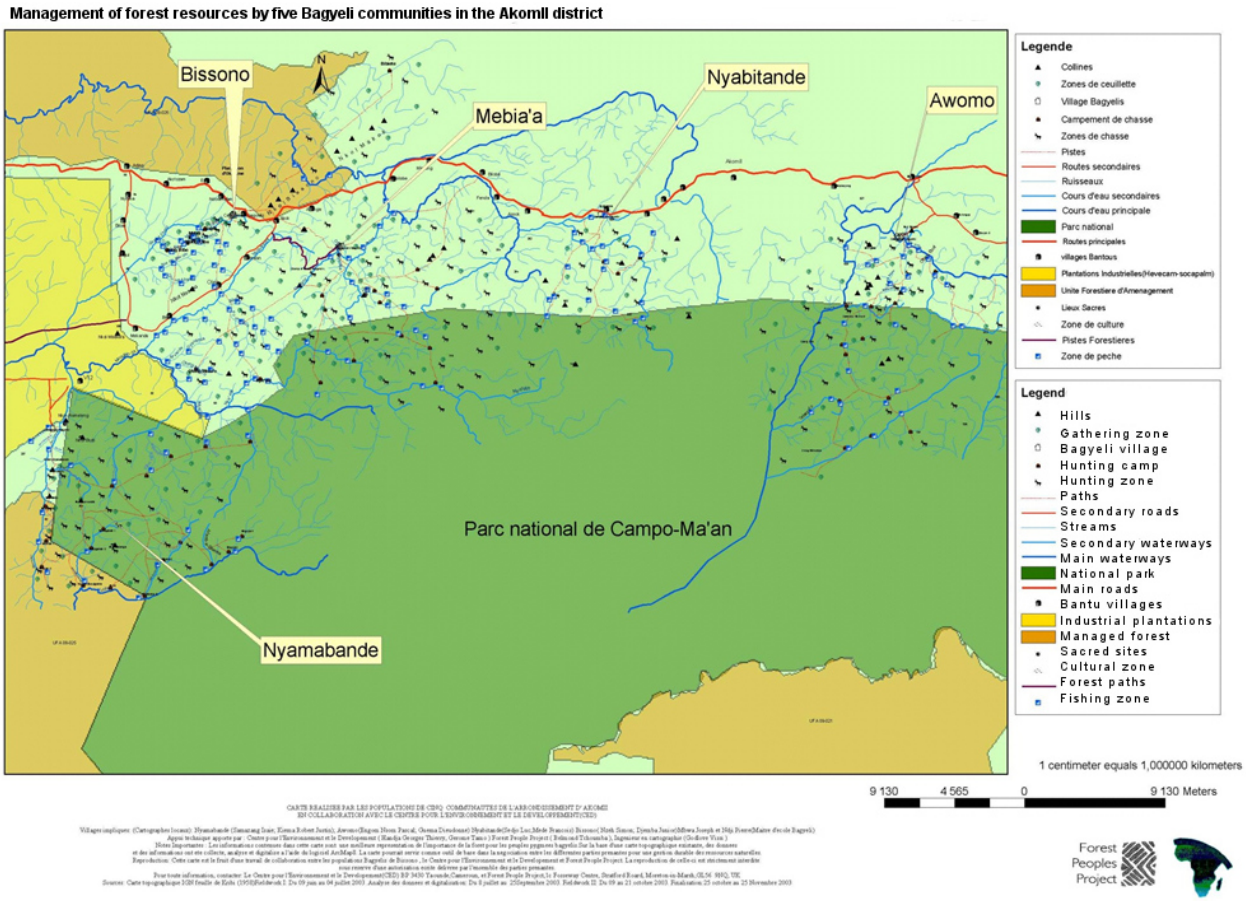
Evidence collected during FPP's consultations with communities in 2001 showed the impact of the oil pipeline route on Bagyéli communities: the pipeline crossed Bagyéli land at least five times in the Bipindi area, required some Bagyéli to move the location of their camps, and threatened sacred sites. However, at the time no Bagyéli had received individual compensation since, it was claimed, they were not affected. FPP's consultation found also that the oil company's compensation program had led directly to increased pressure against Bagyéli land rights from neighboring Bantu communities, who claimed ownership of the lands that they occupied and used. Based upon those claims the oil company gave compensation to these neighboring communities instead.

Our research in 2001 found that the original development process for the Indigenous Peoples Plan (IPP) stipulated by World Bank policy had failed to provide culturally meaningful space to enable Bagyéli participation in the design of the IPP. This meant it did not address Bagyéli's main priorities – securing their access to agricultural land, and protecting their customary rights in forests. Instead the IPP focused solely on supporting Bagyéli agricultural, health and education, but without any meaningful participation by Bagyéli in the design, planning or implementation of the work of the Foundation for Environment and Development in Cameroon (FEDEC). FEDEC is responsible for managing a 25-year endowment fund established by the oil company, and which is supposed to finance the IPP, but which after over five years is still failing to involve Bagyéli in its decision-making.

In response to repeated community requests, FPP, CED and PSEDD initiated a project with 27 local and indigenous communities to empower Bagyéli to engage civil society and defend their rights. Between 2002 and 2007 the project supported consultations and training, inter-communal dialogue, community documentation including participatory resource mapping, new agreements between local people concerning their rights to their lands, and community-managed microprojects, culminating in formal recognition by the government for Bagyéli land rights in June 2007.

Nelson 2007

As we have seen, the Bagyeli were severely marginalized not only by the way in which the pipeline destroyed their forest but also by the way compensation was determined. They were also marginalized by conservationists' response to the pipeline. When conservationists spoke out against the destruction of the rainforest caused by the Chad-Cameroon oil pipeline in southern Cameroon, they were rewarded with the creation of a national park - Campo Ma'an – in south Cameroon to compensate for that destruction. For the Bagyeli hunter-gatherers of the region not only had the pipeline destroyed their forest, they were now excluded from more of the forest by 'fortress conservation'. Working with Bagyeli communities over many years, FPP worked to support the Bagyeli to map their customary use of their traditional territories that they were now excluded from through their being designated a national park. Through being able to demonstrate this to conservation and government authorities, the Bagyeli secured rights of access and inclusion in the new management plan for Campo Ma'an – a breakthrough in conservation practice in Central Africa.



4.2. Best and worst-case scenarios

Best-case scenarios:

Weitzner writes that "the key question is how to make FPIC work in practice":

> "Several international expert mechanisms — including the World Bank's World Commission on Dams, the Extractive Industries Review (EIR) and the UN Permanent Forum on Indigenous Issues — have provided guidance on how to implement free, prior and informed consent." (2011: 27)

She continues:

> "there is no blueprint, no easy checklist, for free, prior and informed consent processes. At its core, FPIC is about building respectful relationships, and requiring outsiders to recognize that they are visitors in someone else's homeland. But beyond respectful relationships and rights, it is good business practice. A major company that invests in a project in which explorers have done proper due diligence and undertaken appropriate consent processes will, for example, be in a far better position regarding both the potential for the project to move forward and shareholder confidence. Because each process is culturally specific, guidance from those who hold the right to give or withhold consent is critical. . .
>
> "[Yet] we have seen cases where companies have completely ignored the presence of indigenous peoples, or pretended they do not exist."

Worst-case scenarios:

There is no shortage of examples of outcomes where both people and ecosystems suffer. One such scenario may well be getting worse as a result of the Peruvian Government's recently approved expansion plans for the Camisea gas project in the heart of a Reserve for isolated indigenous peoples. The Government is also considering gazetting a further concession that could overlay Manu National Park, a UNESCO World Heritage Site. These decisions threaten the lives and rights of its inhabitants and represent an infringement of both international law and Peruvian domestic legislation (FPP 2012c).

The **'***Kugapakori, Nahua and Nanti reserve for peoples in isolation and initial contact'* in South-East Peru was established in 1990 to safeguard the territories and rights of its indigenous inhabitants living in isolation from national society and in the initial stages of contact. Despite this protected status, it is also overlain by Lot 88, an oil and gas concession containing the Camisea natural gas fields which has been exploited by the Camisea consortium, led by Argentine company Pluspetrol since 2002. Concerns from civil society about the likely impacts of the gas project on the Reserve's indigenous inhabitants resulted in strict conditions imposed on the Peruvian government by the Inter-American Development Bank when they granted a loan for the project in 2002. This resulted in a new law for the reserve in 2003 which clarified that; 'the granting of new rights to exploit natural resources was prohibited. In 2006, the Peruvian Congress went further and enacted legislation that established a supposed ban on extractive industries within *all* Reserves established for isolated peoples in Peru.

Despite this legal commitment to limit the exploitation to existing activities, the Peruvian Government and the Camisea consortium is pressing ahead with its expansion plans for the construction of 3 wells, several drilling platforms, a water treatment plant, pumping station, heliport and even a pipeline. The activities would involve intensive 2D and 3D seismic testing and would directly affect several known settlements of the Reserve's Machiguenga inhabitants. In reality, the expansion plans are even more ambitious.

Extractive activities within reserves for isolated peoples in Peru are ostensibly illegal but the government is attempting to justify its plans using an argument of national interest. These measures can be challenged at a domestic level with an appeal to the constitutional court of Peru whose recent decisions support the rights of indigenous peoples to self-determination expressed in their right to give or withhold consent regarding any development that may affect their territories. If and when such domestic measures are exhausted then a petition can be made to the Inter-American Court of Human Rights whose jurisprudence on the rights of indigenous peoples living in isolation clearly defines major extractive projects as incompatible with state obligations to guarantee their lives and rights.

International legal standards are very clear on the obligations of states to protect the rights of indigenous peoples in voluntary isolation or initial stages of contact, people who are extremely vulnerable.

The Nahua, one of the inhabitants of the Reserve, offer a tragic example of such vulnerability. In May 1984 they experienced their first contact when a small group were captured by loggers who were attempting to access the valuable timber in their territory. Within only a few months, Nahua population had been reduced by almost 50% due to outbreaks of respiratory infections to which they had no immunity. The diseases and resulting dependency on loggers

for humanitarian aid meant they were unable to prevent their territory from being overrun by loggers.

One of the only surviving Nahua described this experience:

> *It was then that we were grabbed by the sickness, the sickness that finished off my people. Coughs, fevers just like that. Before this, we used to have a little fever but no one had ever seen this burning fever, no one had ever coughed before. We tried to cure it with some leaves that we plastered onto the sick but it didn't work, it wasn't its remedy. Only a very few of us survived, so few of us, there were so many of us before but now we were almost finished and the vultures ate the bodies because no one buried them. This is how my people were finished (FPP 2012c).*

Due to cases such as these, the United Nations' Office of the High Commissioner for Human Rights (OHCHR) is extremely clear on the severe risks posed by permitting extractive industries such as logging, mining, oil or gas in these territories. While the exact nature of the expansion plans are still unknown, the consequences are very clear.

4.3. Charting a way forward in the context of REDD+ raising the stakes

The 'Indigenous Peoples' Declaration on Extractive Industries' (Caruso *et al*. 2003) states that:

> *Our futures as indigenous peoples are threatened in many ways by developments in the extractive industries. Our ancestral lands - the tundra, drylands, small islands, forests and mountains - which are also important and critical ecosystems have been invaded by oil, gas, and mining developments which are undermining our very survival. Expansion and intensification of the extractive industries, alongside economic liberalization, free trade aggression, extravagant consumption and globalization are frightening signals of unsustainable greed.*

What has come into sharp focus since that 2003 declaration is that conservation, far from helping to protect such peoples' sustainable relationships with their environment, can act to further alienate and impoverish them.

This is not helped by the way REDD+ has raised the stakes, leading governments and corporations to anticipate that they can secure vast amounts of money for laying claim to forest and asserting that much would have been destroyed if it was left to local people, but that it is now safe in their hands. This means that they have even greater incentive to claim as their own forest that has been preserved by customary tenure systems for millennia.

However the international scrutiny REDD+ brings, and the processes of FPIC that are supposed to be engaged in by REDD+ projects at all levels, also means that REDD+ provides an opportunity for those same customary use communities that have preserved their ecosystems for millennia to assert their rights. Whether REDD+ becomes another extractive industry or a means to ensure rights, or whether its time as the focus of both these processes is vanishing as quickly as summer Arctic ice is thinning, is likely to become rapidly apparent.

Meanwhile, drawing on changes in the international human rights framework outlined earlier, and on parallel changes in conservation thinking through which the 'new conservation

paradigm' has emerged, there is a real opportunity to recognize the damage caused by running roughshod over local people's lives – whether in the name of economics or the environment.

The emergence of the 'new conservation paradigm' can be traced through the Durban Action Plan of 2003, the Programme of Work on Protected Areas of the UN's Convention on Biological Diversity, and the IUCN's World Congress in 2008. This last passed resolutions that recognized the need to respect and actively promote indigenous peoples' rights and livelihoods as fundamental to developing successful conservation strategies.

In particular, Resolution 4.052 states the need to develop a "*mechanism to address and redress the effects of historic and current injustices against indigenous peoples in the name of conservation of nature and natural resources*". The Whakatane Mechanism (FPP 2012e) that has been piloted by CEESP and FPP in Kenya and Thailand in 2011 and 2012 is one such mechanism. It is designed to identify problematic areas where protected areas are having a negative impact on people and where their rights are being violated, and to propose solutions and develop transparent and accountable processes to implement them. At heart, the Mechanism creates a context in which indigenous peoples and local communities can bring their grievances to IUCN and appeal to conservation bodies, human rights organizations and national governments to work with them to resolve outstanding conflicts between conservation and indigenous peoples.

Both of the pilot Whakatane assessments uncovered profound common ground between the needs and aspirations of local indigenous people and those of conservation. Both identified just how hard it is for conservation institutions to recognize that, although they "*can never put enough bodies on the ground to protect the ecosystem and wildlife*", there are enough bodies there already, and ones who know the land far better than guards coming in from outside, if only they can "*recognize that they are visitors in someone else's homeland*".

Conservation itself is raising the stakes. It can resume an old battle with extractive industries in which both dispossess local people and conservation inevitably loses to the extractives. Or it can develop strong, realistic alliances that secure conservation objectives, and support local people to negotiate with the extractive industries from a position of strength. This would mean that local people wouldn't have to try and seize what they can from their environment before it is destroyed by others, but can act to ensure the long-term wellbeing of their children and their children's children.

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