

Challenges to Indigenous Land Tenure

Case studies in the context of Latin America and the Caribbean

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Acronyms

DEA	Drug Enforcement Agency
IACHR	Inter-American Court of Human Rights
IADB	Inter- American Development Bank
ILO	International Labor Organization
NGOs	Non-governmental Organizations
REDD+	Reducing Emissions from Deforestation and Forest Degradation
UNDRIP	UN Declaration of the Rights of Indigenous Peoples
USAID	United States Agency for International Development

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I. INTRODUCTION

Three Reasons to Legalize Indigenous Lands (Aside from Treaties and Conventions)

Human Rights

Why is the issue of indigenous land tenure important? One reason relates to human rights in general. The colonial world, and especially its diseases, reduced the indigenous population by 95% in the first 80 years. Their land was occupied and, in most countries, the remaining population was put to work for the colonizers. Post-colonial governments have been gradual in restoring limited land rights and citizenship to indigenous people, especially lowland forest-dwelling people. In the meantime, many thousands of lowland indigenous people have lived marginalized lives, often dominated by fear, especially the fear that accompanies a complete lack of power when things are going badly. The issue of human rights is embodied in treaties and conventions to which most Latin American nations have agreed.

Pragmatics

Pragmatically, it can be argued that indigenous ecological knowledge will die if indigenous people lose their natural resource base. The value of such knowledge has been evident in medicine and it may be even more valuable in a drying world.

Strategy

Strategically, programs such as REDD+ need to establish ownership of forest resources in a precise and agreed-upon way in order to ensure that funds in the north-south transfer are distributed to the polities that actually control the use of the forests and their conservation. Lowland indigenous people are the logical owners and stewards, because they have depended on forest resources for thousands of years. They have a stake.

II. THREE GENERAL CHALLENGES

The Challenge of Size

There is one challenge that seems to arise each time a modern Latin American nation has made a decision to recognize the land rights of lowland forest-dwelling indigenous people within its borders. This challenge arises from political sectors alleging the nation is awarding too much land to too few people.¹ On its surface, the challenge arises from a common misunderstanding about indigenous land needs. At a deeper level, the challenge arises from competing economic interests for the same natural resources.

¹ Stocks. 2005. Too Much for Too Few: problems with indigenous land tenure in Latin America. Annual Reviews in Anthropology 16: 85-104.

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Taking the surface argument seriously, the common colonial and post-colonial policy of “civilizing” indigenous people often includes an assumption that the “social value” of forested land is equivalent to its agricultural use. Otherwise, how can one explain all of the national policies that reward people on the forest frontiers for cutting down forests for pasture and labeling the newly cleared land “improvements.” With this mindset, awarding indigenous people forested lands that will not be cut down is to “waste” the land.

Whereas many people support the idea of forest conservation in parks and ecological protected areas established by the state, the notion that indigenous people might protect forests for their own interests is alien, even though many academics have championed the idea. Yellowstone Park is an example. It was established by ejecting indigenous people at a great cost in lives.

But, as Mac Chapin showed us in his National Geographic map of Central America – a land much intervened by development – the areas where indigenous people have maintained their own languages and cultures, are areas where the natural resources are healthy. Furthermore, this outcome is not necessarily due to low population densities, as researched by scholars² and shown in the Colombia case study below. Indigenous people who exist in traditional habitats have four basic needs for land. These are lands for settlements, agriculture, hunting and gathering (including fishing), and untouched conservation areas that ensure the sustainability hunting and gathering. Modern ecological models of sustainability in fishing are similar. They demand areas that are never fished as part of the sustainability package.³

Thus, if ecosystem services are appropriately valued, titling relatively large extensions of land and natural resources to indigenous people can be a path toward a sustainable future for everyone, as well as supporting more basic issues of human rights and cultural survival. Yet the path toward secure indigenous land tenure is still beset by challenges, not merely based on the “too much for too few” objection.

The Challenge of Representation

Indigenous organizations nearly all have a fundamental structural problem that makes establishing who speaks for whom difficult. The problem stems from the egalitarian political organization of most lowland indigenous communities (less so with indigenous people who are classified as “*campesinos*”). In such communities, political power flows upward from the base. Decisions by leaders have to be approved by the base, which makes the time required for

² Denevan W. (Ed.). 1992. The Native Population of the Americas in 1492. Madison: University of Wisconsin Press

³ Roberts C.M. et al. 2005. The Role of Marine Reserves in Achieving Sustainable Fisheries. Philosophical Transactions of the Royal Society of London 360(1453): 123-132. Available online at doi: 10.1098/rstb.2004.1578.

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decisions quite long if the leaders are away from home in regional or national capitals relating to the regional or national NGOs. In many cases, the step of approval from the base before proceeding to implement a decision is foregone. The people of the base, themselves, may be quite surprised, disappointed and even furious about a decision on their behalf made by a leader whom they have not seen in months.

Indigenous organizations implode frequently after general assemblies and all the officers may be fired. Former indigenous leaders travel around the world, sometimes for years, attending conferences and signing declarations, supposedly on behalf of entire tribes or associations of tribes. In some cases, former leaders live in the capital cities and organize to siphon off international assistance with no communication whatever with their base. The challenge is for organizations supporting indigenous land tenure to verify whether the opinions of indigenous rights NGOs and indigenous leaders truly represent the base.

The Challenge to International Development Organizations

The principal challenge to International Development Organizations is related to personnel changes associated with career paths. I have noticed within USAID and the World Bank, for example, that the policy that moves people out of a specific mission in three years or so, militates against developing the local expertise for dealing with indigenous issues. Lessons learned are forgotten over time. For indigenous lowland people, projects are people, i.e., they deal with a person they know much more easily than a succession of people they don't know. Missions in foreign countries with substantial indigenous populations should have an office devoted to indigenous issues that is staffed by career employees who remain in the mission.

The cases discussed below represent some of the complexities, and often weaknesses, of the process of legalizing indigenous land tenure in Latin America. As we will see, there are cross-cutting issues that arise from each case.

III. FOUR SPECIFIC CASES

The Reserves of Costa Rica

The Costa Rican government thought it had settled the issue of Indigenous lands in 1977 when it began to create indigenous "Reserves". The government then proceeded to ignore the invasions of the reserves by non-indigenous farmers and ranchers and never implemented a systematic "saneamiento" to clear the land of former colonists. In some cases, the reserves have been reduced in size by government fiat.⁴ There are now 22 Reserves. The reserves are

⁴ Fundación Iriría Tsochok. 1998?. Indigenous Peoples in Costa Rica: on the road to extinction? Available online by Abyayala News at <https://saic.nativeweb.org/ayn/crilo.html>

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governed by “development” committees that must include a non-indigenous representative of the government. This provision has effectively forestalled attempts at indigenous organization.

I was drawn to this problem in the early 1990s when a Costa Rican newspaper reported that the Maleku indigenous group had invaded a *hacienda*. As a representative of Cultural Survival, I investigated the case and discovered that the Maleku – the most isolated and traditional indigenous community in Costa Rica – had been forcibly removed during the Contra War from their homes and habitat in the marshy lowlands of the Costa Rican side of Lake Nicaragua. They were relocated far upstream from the river mouth from whence they came, now near a new highway, established with USAID money meant to “develop” the forested border with Nicaragua during the war. Their favorite food, riverine turtles, were no longer available and when I first met them, the men had just returned from an illegal journey to their homeland to collect some. Maleku lands in this new area were invaded by colonists seeking land close to the new highway. At the point I contacted them, one colonist near the reserve had abandoned his *hacienda* because of debt and the Maleku moved in, because they had nowhere else to farm. Their reserve was completely invaded by colonists and the attempts to “save their culture” were obviously misdirected.

Investigation into the situation of other Costa Rican indigenous reserves revealed that the invasion of indigenous reserves was not only universal, but seemed intractable. Many reserves, like that of the Maleku were over 90% invaded. My conclusion is that a major challenge to indigenous land tenure is the lack of protection given to indigenous land by national and often regional governments, even when the land is supposedly protected. *Indigenous private communal property rights are not equal to private individual property rights when it comes to government protection.* This is widespread in Latin America.

The Mayangna and Miskitu of Nicaragua

When the *Sandinista* party gave up power to the *Chamorro* government after the 1990 elections, the largest indigenous groups, the Miskitu and the Mayangna, were allowed to return to the forested north central and northeast parts of the country from whence many had been extracted during the Contra War at a great cost in lives. Many of them in the east had fled the Sandinistas to Honduras and some Mayangna were coerced into becoming indigenous Contras, as a condition placed by certain Miskitu armed leaders for placing their families in the Honduran refugee camps.

However, immediately after the war, in order to save the forests of the north central part of the country from loggers, the government created the BOSAWAS reserve on forested lands, former habitats of both ethnic groups.⁵ The indigenous people, whose lands these had always been, were angry. I began to work on their tenure problem in 1992⁶ first with Cultural Survival and then with The Nature Conservancy. I discovered that their settlement pattern and

⁵ Eventually BOSAWAS became a UNESCO international biosphere reserve.

⁶ Stocks A., 2003. Mapping Dreams In Nicaragua's Bosawas Reserve. *Human Organization* 62(4): 65-78.

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preferred mode of land titling was multi-community territories, each territory occupying a unique watershed draining the *Santa Isabelia* mountain range. There turned out to be six territories and it happened that each territory claimed contiguous parts of the *Isabelia* Mountain Range. These areas, remote from settlements, were held by the Mayangna to be areas “for plant and animal reproduction,” not to be hunted, and the home of dangerous serpent-like mythical creatures called Waulas.⁷

In the course of making maps of territorial claims, the necessity of assisting in the creation of legal “civil societies,” equivalent to NGOs in order to administer the territories became evident. This was done and plans were made to defend the lands claimed against further encroachment by colonists. This defense was tested in 2002 after ten years⁸ and the study revealed that the indigenous Mayangna and Miskitu had protected their land and forests with almost no subsidy for ten years, whereas land protected by the Nicaraguan government was totally invaded at the cost of the forest.

When I finished the territorial maps, zoning and socioeconomic studies in Bosawas in 1998, Nicaragua still lacked any law that would support legalizing an indigenous community, much less a territory similar to what is recommended by ILO 169 or the UN declaration of the rights of indigenous people (UNDRIP). Eventually, due to pressure from the World Bank in connection with its Central American Biological Corridor and a decision by the Inter-American Court of Human Rights (IACHR) with regard to the Awas Tingni Mayangna lawsuit, Nicaragua passed indigenous land laws that supported the territorial claims.

From the Nicaraguan case, three challenges are apparent. The first is the *need for indigenous land laws that permit territorial titling*. The closely-related second challenge is the *need for land areas large enough to support conservation as a means of insuring future wildlife harvests in hunted areas*. Indigenous people who still have forest-dependent cultures generally have their own ways of conservation of biodiversity connected with hunting and fishing. A third challenge is the need to assist in the formation of civil societies to represent the territories and to plan for the defense of the territories, in the absence of police protection, once they were titled. *Transparent and functional civil societies for representation and defense is required*.

The Maya of Belize

Court decisions in 2008 and 2015 by the Belize Supreme Court and, on appeal, the Caribbean Court of Justice respectively have opened the path to indigenous private communal land titles.

⁷ Stocks A., 1996. The BOSAWAS Natural Resource Reserve and the Mayangna of Nicaragua. *In* Traditional Peoples and Biodiversity Conservation in Large Tropical landscapes. K H. Redford and J.A. Mansour, Editors, pp 1-31. America Verde Series of The Nature Conservancy. Washington DC: Island Press

⁸ Stocks A., et al. 2007. Indigenous, Colonist and Government Impacts on Nicaragua’s BOSAWAS Reserve. *Conservation Biology* 21: 1495-1505.

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Since 1936, the southern part of Belize (Stann Creek and Toledo districts) have contained indigenous “reservations,” each one identified with a Q’eqchi’ or Mopan Maya community. There are around 36 functioning reservations (some have been abandoned), each governed by an *Alcalde* answerable to the people and a Chairman, answerable to the Toledo Development Association.

The government is the owner of all land within a reservation; however, land, under traditional practice, is held through usufruct rights controlled by community leaders (*alcaldes* in this case). In each reservation, the government, in the past, leased land to individuals for an annual fee. One type of lease, if paid off, can be converted to a private individual title. The government is permitted to sell or lease land to outsiders, thus subtracting the land from the “reservations” with no requirement that the reservation/community be indemnified. The reservation forests are also the source of much illegal wood in Belize and the government does little to stop it.

In 1994, the government established the Sarstoon Temash National Park which was land used by five Toledo Maya reservations and one Garifuna community. The government failed to announce the fact to them until 1996.

Most community members stopped annual payments to the government years ago. Some community members have developed extensive cattle pastures that, because of the permanent nature of pastures, are effectively privatized to individual community members. Also, community members in economic straits have sometimes sold their “rights” to land to outsiders and to other Q’eqchi’ people.

I began this year (2016) providing technical assistance in Belize to an NGO and several “reservations” on a participatory model through which communities could claim rights to private communal property. I have been amazed at the depth of mistrust between communities regarding community boundaries. Much of the problem relates to a poor mapping methodology pursued twenty years ago when, with Bernard Nietschmann’s assistance, the Maya Atlas was created in Belize. In this case researchers approached each individual “reservation” community and asked them about their boundaries with no process for reconciliation with neighbors. The results were maps of conflicts. Worse, people seeing themselves on a map showing community boundaries feel strongly that their claims should outweigh the claims of neighbors.

Two challenges are apparent from the Belize case. *Poor initial mapping can enormously complicate the titling process.* The second challenge is that the government has allowed informal and formal private individual property within communities for many years. There is no process in place to integrate these properties within the community or to indemnify informal or formal property owners in a process of “saneamiento.” *Mixed tenure types in a community can also complicate future titling. Saneamiento can be more important than mere titling for future stability.*

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The A'i (Cofán) of Colombia⁹

The A'i live south of the headwaters of the Putumayo River and are on both sides of the Colombian-Ecuadorian border. Both groups' lands were fragmented by the oil boom in the 1950s. The Colombian A'i were given large "Reserves" for exclusive indigenous use in the 1960s. Accurate maps of them were never provided and have not been found in government archives. The Reserves were areas where individual colonist land titles were prohibited by law.

When the coca-growing industry shifted to the Putumayo region, after DEA pressure on Peru and Bolivia increased drug suppression there, the Reservas were quickly invaded by colonists, eager for the money from coca agriculture and proximity to the laboratories. In an effort to salvage some parts of the Reserves, the A'i were granted small "Resguardos" within them, the oldest and strongest indigenous land tenure juridical figure in the hemisphere. The Resguardos were, however, only a fraction of the Reserves from which they were carved. In 1994, the government created the new *Resguardo Indígena* Ukumari Kankhe, again without a map, but with a crude description of boundary points. In Ecuador, until recently, the A'i were limited to a few small community areas after territorial devastation by the oil industry. However, they now own or manage quite large areas of ecological reserves.

In 2008-2009, under pressure from the DEA, the Colombian military and paramilitary groups, the cocaine industry shifted westwards to Cauca Department and to the Pacific side of the Darién, as well as returning to Peru and Bolivia. Many of the coca growers in the Putumayo abandoned their plots, but many sold "improvements" before leaving and a number of large cattle ranches are presently in place.

I worked with the A'i in 2010 and 2011 to create geo-referenced maps of the original Reservas and the Resguardos by working with their oldest people. The A'i hope to recover the Reservas and to let the forest grow again. Their plans for the new Ukumari Kankhe Resguardo are to leave the forest intact and use the area only for religious ceremonies.

Ukumari Kankhe was created specifically as a sacred area not to be settled. The A'i are, by their own description, yagé people. Their community leaders are "Taitas" who are both religious and political leaders. At least weekly, the communities each hold yagé ceremonies that involve trekking into the forest to their yagé ceremonial centers and conducting all-night ceremonies. According to Randy Bormann, a missionary-linguist who works with the A'i in Ecuador, as much as 35% of their language deals with forest ecology and the morality embedded in it. An examination of the forest cover in the "Resguardos" of the A'i reveals that as much as 95% of the forest remains intact, despite the fact that they live in these relatively

⁹ Stocks A., Ruiz M., Rios C. 2016. GIS and The A'i of Colombia: reserves, resguardos and the future. *International Journal of Applied Geospatial Research* 7(3): page numbers not set yet.

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small areas. They prefer to farm along streams and avoid cattle ranching rather than to cut their forests.

Two challenges are exposed by the A'i case. The first is the importance of land tenure history and the *need to recognize and revindicate older rights*. The second is *a need to recognize and prioritize land claims for cultures that are especially protective of natural resources*.