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# LAND TENURE, PROPERTY RIGHTS, AND NATURAL RESOURCE MANAGEMENT:

LAND TENURE AND PROPERTY RIGHTS REFORM IN THE DEVELOPING WORLD: WHO IS VULNERABLE?

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# ACRONYMS AND ABBREVIATIONS

DFID	Department for International Development (UK)
FAO	United Nations Food and Agriculture Organization
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
IDPs	Internally Displaced Persons
INRA	National Agrarian Reform Institute
IPCC	Intergovernmental Panel on Climate Change
LTPR	Land Tenure and Property Rights
LWU	Lao Women's Union
OECD	Organization for Economic and Cooperative Development
RAAN	North Atlantic Autonomous Region
RAAS	South Atlantic Autonomous Region
TCOs	<i>Tierras Comunitarias de Origen</i>
UNESCO	United Nations Educational, Scientific and Cultural Organization
USAID	United States Agency for International Development
VAIPO	Vice Ministry of Indigenous Affairs
WWF	World Wildlife Fund

# EXECUTIVE SUMMARY

Public policies and economic development programs and projects addressing issues of land tenure and property rights often share the objectives of improving the livelihoods of the poor and reducing their vulnerability to economic shocks. However, the land rights of specific sectors of the population may be made *more* vulnerable if they are not properly identified and incorporated into policy making and program design and implementation. This paper identifies five categories of population groups whose vulnerability is potentially increased by land tenure and property rights interventions: women; households that have been directly affected by HIV/AIDS; pastoralist communities; indigenous populations; and people who have been displaced during violent conflicts (refugees, IDPs, and demobilized combatants) or who are threatened to be displaced by natural disasters or climate change (“climate refugees”). These are populations who, either because of their ascribed characteristics (e.g., gender or ethnicity), livelihood systems (e.g., mobile populations or commonly held resource bases), and/or external shocks (e.g., natural disasters or violent conflict), have weak claims on land rights that might be formalized as part of land tenure reform.

## WOMEN

For women in developing countries, property rights in land—whether these are customary or formal in nature—act both as a form of economic access to key markets, as well as a form of social access to non-market institutions such as the household and community-level governance structures. In addition to the short- and medium-term economic gains generated by greater access to product, capital, and land markets, women with stronger property rights in land are also less likely to become economically vulnerable in their old age, or in the event of the death of or divorce from their spouse. Evidence from numerous empirical studies suggests a positive correlation between women’s land ownership and household expenditures on food and children’s education.

There are important regional and sub-regional gender-related differences in land tenure regimes, legal structures, and household resource allocation that should be taken into consideration in the formation of land policy and land administration initiatives. In Latin America, where inheritance is the most important medium through which women become independent land owners, laws and customs governing inheritance are key to the gender distribution of land. Beginning in the 1990s, a “second generation” of Latin American agrarian reform—one in which the clarification and legalization of property rights has taken precedence over redistribution—has significantly improved the share of allocations and titles issued to women. Women’s customary land rights in Africa vary significantly across the region, but can be characterized as secondary land rights—dependent on a woman’s affiliation with a spouse or her natal family—in many areas. There are significant contradictions between formal legal recognition of gender equality in property rights and respect for customary law, which often denies women independent claims on land. In Asia, India and China have demonstrated commitment at the national levels to strengthening women’s property rights in land, but long traditions of patrilineal inheritance and patrilocal residence make these policies difficult to implement at the state and local levels. Other Asian countries face the challenge similar to Africa of the existence and recognition of pluralistic legal systems which are historically biased against women’s land ownership.

Several general recommendations emerge from the analysis of gender and land policy on a global level:

- (1) The importance of a gender progressive legal framework, particularly in the areas of marital property and inheritance.

- (2) A proactive role for government in land regularization campaigns, including joint titling and activist training and awareness programs.
- (3) The need for deep, local-level knowledge of customary norms and practices affecting women's rights and access to land and other natural resources.

## HIV/AIDS-AFFECTED HOUSEHOLDS

A growing body of empirical literature explores the ways in which the HIV/AIDS pandemic interacts with land tenure systems—in particular, the inheritance systems within customary land tenure systems—to deny access rights to households that have been directly impacted by the disease. Most of this research concludes that the survivors of AIDS-afflicted families are the victims of denial of inheritance rights and subsequent property grabbing. The prevalence of customary land tenure systems is key to understanding the ways in which the HIV/AIDS pandemic has heightened the vulnerability of certain categories of people, in particular, surviving widows and orphans. Many customary tenure systems are based on continued, active use of agricultural lands; if farmers are too sick to work, and spouses are too busy caring for sick household members to tend to the farm, then the household may be at risk for having their land access revoked by local authorities. Inheritance practices within African customary land tenure systems also often deny HIV/AIDS survivors access to land; widows and orphans have no or weak claims to independent land rights upon the death of their husband or parent(s).

There is clearly a need for targeted interventions to protect the property rights of AIDS-affected households, particularly statutory legal reform which would supersede customary practices with respect to the disposition of property upon household dissolution. Recommendations include:

- Amend divorce and inheritance laws to reflect the presumption of spousal co-ownership of family property and of equal division of property upon the termination of marriage, including that provisions that recognize women's equality under the law are not undermined by customary law and practice.
- Training for judges, magistrates, police, and relevant local and national officials on laws relating to women's equal property rights and their responsibility to enforce those laws.
- Ensure access of indigent women and orphans to legal assistance to pursue civil property claims, including support for the activities of nongovernmental organizations that provide legal services to women whose property rights have been violated.
- Introduce a simple and low-cost system of registering the land of AIDS patients and assist them with registering their land so that after their deaths, their widows and children will have an easier time of proving their land rights and will be less at risk of landgrabbing.

## PASTORALIST SOCIETIES

As a system of land use and management, African pastoralism is characterized by several unique features which are particularly challenging from a land policy perspective: seasonal mobility, fluid boundaries and different degrees of access rights, and the common use of grazing lands. Traditional pastoral land use systems are under threat from population pressure and the expansion of sedentary agriculture in areas bordering on rangelands. Pastoralist lands have been subject to many attempts at tenure and property rights reform, which broadly fall into the categories of privatization and nationalization. The allocation of individual private property rights in pastoral areas has transformed some formerly pastoral and nomadic systems into agro-pastoralist systems. State ownership of pastoral lands, which is the most widespread policy framework in rangelands around the world, has been largely unsuccessful due to government agencies' limited knowledge of

agroecological conditions and local rules of use and management. The emerging consensus is that the following principles should govern pastoral land policy:

- (1) Granting of greater land tenure security in the form of communal, village-based, or cooperative property rights guaranteed by law.
- (2) Development of appropriate forms of conflict mediation and resolution to address both internal disputes as well as conflicts between pastoralists and their neighbors.
- (3) Legal recognition of, and meaningful technical support for, customary resource management practices, with an emphasis on risk management and the rights and objectives of multiple rangeland users.

## **INDIGENOUS POPULATIONS**

Indigenous populations, who have inhabited and derived livelihoods from specific territories within modern nation-states since the pre-colonial period, have recently become the subject of targeted land tenure reforms aimed at clarifying and strengthening their property rights. These new policies and programs have been particularly important in Latin America, and have given rise to a host of issues and conflicts related to the granting of large land areas—often containing valuable natural resources—to minority indigenous communities. International Labor Organization Convention 169 establishes the international legal framework for the recognition of the territorial rights of indigenous and tribal population, including special safeguarding of rights over natural resources. Significant progress has been made over the past 20 years in granting land rights to indigenous populations, particularly in tropical lowland forest areas of Latin America. In nine countries, a total of almost 50 million hectares of public forest is currently reserved for use by indigenous peoples, and another over 200 million hectares are owned outright by these communities. Obstacles to the granting of use and ownership rights to indigenous populations in Latin America include competing land claims and conflicts over natural resources such as timber and subsoil hydrocarbons.

## **POST-CONFLICT AND CLIMATICALLY VULNERABLE POPULATIONS**

Post-conflict land tenure issues revolve around three primary sets of concerns: 1) those land issues that may have contributed to the initial cause and conduct of the conflict, 2) those land and property issues that emerged during a conflict, and 3) a set of tenure-related issues necessary for effective recovery. Land conflicts originating either in historical inequities or in increased land scarcity can have far-reaching impacts on social peace. In addition to these pre-existing land issues, a host of new and volatile land-related problems invariably arise during civil conflicts—many related to the large dislocations of the population. At the heart of these directly conflict-related land issues are competing claims to property by refugees and internally displaced people on the one hand, and by those who have either occupied abandoned lands during the war, or have become “hosts” to dislocated populations on the other. These competing claims are complicated by the fact that, especially in Africa, evidence of rights to land is largely undocumented and rooted in local-level institutions which have often been transformed or destroyed as a result of the violence. Even though pre-conflict customary institutions are weakened during social upheavals, several studies have found that improvised, local-level solutions to post-conflict land disputes are often the best building blocks for national policy with respect to stabilization and recovery.

Recommendations for land policies aimed at consolidating peace in areas emerging from conflict include:

- (1) Property Commissions (or Claims Commissions) can play a leading part in processes of reconciliation and property restitution, by facilitating dialogue and data collection while dealing with competing claims, resettlement, and compensation in the aftermath of conflicts involving mass population displacements.

- (2) Comprehensive dialogue programs can help to resolve enduring land disputes which would otherwise degenerate into fighting, and can pave the way for acceptable institutional reforms.
- (3) Investment in agricultural infrastructure in post-conflict settings can complement land policy by creating new income-generating opportunities. Fostering agricultural productivity and production will prevent the outbreak of food crises, and create employment and other economic opportunities for demobilized war veterans.

In addition to the almost 70 million people worldwide who have been displaced by war and civil conflict, an emerging concern among both climate change experts as well as the international refugee community is the potentially widespread displacement of large populations due to flooding, drought, and other severe weather events brought on by global warming. Numerically and geographically, South and East Asia are particularly vulnerable to large-scale forced migration. The relevance of climate migration to land policy lies in the necessity of developing legal norms and practices to facilitate the resettlement of affected populations, both within their nations of origin as well as across international borders. Policymakers should consider three broad categories of responses to the climate migration issue:

- (1) Expanding the definition of a refugee under current international law to include those displaced by climate change;
- (2) Incorporating forced migration into current domestic plans for climate change adaptation; and
- (3) Addressing Organization for Economic and Cooperative Development (OECD) countries' willingness to accommodate climate migrants through immigration.

The paper concludes by noting the cross-cutting and overlapping nature of vulnerability with respect to land policy. Careful empirical analysis of the manifestations of potentially overlapping and mutually reinforcing sources of vulnerability is vital to the design and implementation of land policies and programs seeking to strengthen the land rights of these diverse populations.

# 1.0 INTRODUCTION

While Land Tenure and Property Rights (LTPR) projects have the objective of improving the livelihoods of the poor and reducing their vulnerability to economic shocks, specific groups of people may be made more vulnerable by LTPR projects if they are not properly identified and included in the project design and implementation. While there is now wider recognition for greater attention to the role of women in LTPR design and consideration of project impacts on women, there is a growing concern that there are other vulnerable groups of people whose input to and benefits from LTRP projects are minimal. These populations may vary in any given context. Potentially vulnerable groups include indigenous peoples, minority ethnic groups, minority religious groups, HIV/AIDS victims, orphans, internally displaced persons (IDPs) and refugees, demobilized soldiers, the landless, and migrant populations such as pastoralists and other secondary right holders. These populations experience new challenges with growing resource scarcity, conflict, political instability, and the breakup of households as male labor migration and HIV/AIDS increase. Identification of these groups and of potential project impacts in the design stage of LTPR projects may prevent or lessen adverse impacts.

This paper identifies five categories of population groups whose vulnerability is potentially increased by LTPR projects: women; households that have been directly affected by HIV/AIDS; pastoralist communities; indigenous populations; and people who have been displaced during violent conflicts (refugees, IDPs, and demobilized combatants) or who are threatened to be displaced by natural disasters or climate change (“climate refugees”). For each of these groups, the relevant theoretical, empirical, and policy literature on their interface with land tenure issues is reviewed, with the goal of calling attention to the principal challenges faced by these vulnerable populations.

## 2.0 DEFINING VULNERABILITY IN THE CONTEXT OF LAND TENURE AND PROPERTY RIGHTS REFORM

The concept of vulnerability has become widespread in the international development community. The United Nations Food and Agriculture Organization (FAO) defines vulnerable groups as those “which would be vulnerable under any circumstances (e.g., where the adults are unable to provide an adequate livelihood for the household for reasons of disability, illness, age, or some other characteristic), and groups whose resource endowment is inadequate to provide sufficient income from any available source.” Vulnerability indices have been developed by the World Food Program with respect to food insecurity, and donors such as the UK Department for International Development (DFID) and the World Bank conduct “vulnerability assessments” based on assets and social risk management, respectively (Scaramozzino 2006).

With respect to land in particular, an operational definition of vulnerability should address the question of what factors render specific groups especially vulnerable to changes in land tenure systems and property rights reform. A starting place might be to identify populations who, either because of their ascribed characteristics (e.g., gender), livelihood systems (e.g., mobile populations), and/or external shocks (e.g., natural disasters or violent conflict), have weak claims on land rights that might be formalized as part of an LTPR program. Related to this are groups who are discriminated against within customary land tenure regimes (such as widows and orphans) and have difficulty accessing whatever formal or statutory system might exist. Populations that rely on common property regimes (such as some indigenous populations, as well as spatially mobile pastoralist groups) are also vulnerable to changes in land tenure and property rights regimes insofar as these reforms individualize ownership and/or challenge the authority of local land allocation and management institutions. Finally, and related to the importance of community-based customary land tenure systems in much of the developing world, populations that are forcibly dislocated from places of origin as a result of either natural disasters or violent conflict are made vulnerable to land policies that seek to resettle them, oftentimes in new and unfamiliar environments with very different “rules of the game” with respect to land rights.

# 3.0 IDENTIFYING VULNERABLE GROUPS: THEORY AND EVIDENCE

## 3.1 WOMEN

### 3.1.1 Why are Land Rights Important for Women?

In most developing countries, land is a critical asset for women and men, and especially for the urban and rural poor. Property rights in land—whether these are customary or formal in nature—act both as a form of economic access to key markets, as well as a form of social access to non-market institutions such as the household and community-level governance structures. Because of land’s fundamental importance in conferring such access, it is essential that policies that seek in any way to alter the distribution or to formalize property rights in land take great care to not inadvertently disenfranchise the most vulnerable members of the target population, including women. Indeed, if such land programs form part of an overall poverty reduction strategy, it is incumbent upon policymakers to seek to understand the ways in which these most vulnerable groups gain access to land, the particular challenges facing their claims to land rights, and the role that effective rights to land can play in securing their livelihoods and those of their families.

Land ownership clearly confers direct economic benefits as a key input into agricultural production, as a source of income from rental or sale, and as collateral for credit that can be used for either consumption or investment purposes. Depending on the norms governing intra-household decision making and income pooling, women may not fully participate in these benefits if they do not share formal property rights over the land; only independent or joint ownership can assure women access to control over land-based earnings. Comparative analysis of data from Nicaragua and Honduras, for example, suggests a positive correlation between women’s property rights and their overall role in the household economy: greater control over agricultural income, higher shares of business and labor market earnings, and more frequent receipt of credit (Katz and Chamorro 2002).

In addition to the short- and medium-term economic gains generated by greater access to product, capital, and land markets, women with stronger property rights in land are also less likely to become economically vulnerable in their old age, or in the event of the death of or divorce from their spouse. In her study of gender and inheritance in rural Honduras, for example, Roquas (1995) finds that widows (and women landowners in general) are more likely to work their lands indirectly, relying on some combination of hired labor, family labor, and rental to generate income, and/or using the property as collateral for loans for non-agricultural undertakings. Moreover, for widows, land ownership may be one of the few vehicles through which elderly women can elicit economic support from their children, either in the form of labor contributions to agricultural production or cash or in-kind transfers. In the absence of other forms of social security, the elderly rural population relies heavily on inter-generational transfers for their livelihoods, and children are more likely to contribute to their parents’ well-being if the latter retain control over a key productive (and inheritable) resource such as land (Lucas and Stark 1985).

Land is a particularly critical resource for a woman in the event that she becomes a de facto household head as a result of male migration, abandonment, divorce, or death. In both urban and rural settings, independent

real property rights under these circumstances can mean the difference between dependence on natal family support and the ability to form a viable, self-reliant female-headed household. Indeed, women's land rights within marriage may afford them greater claims on the disposition of assets upon divorce or death of their husband, as Fafchamps and Quisumbing (2002) found to be the case in rural Ethiopia.

In addition to the direct economic benefits of land ownership, property rights may serve to empower women in their negotiations with other household members, and with the community and society at large. Intra-household economic theory suggests that the strength of spouses' "fallback positions" or "threat points"—how well they can do in the absence of economic cooperation with their partners—is an important determinant of their ability to shape household preferences and therefore resource allocation decisions (cf. Katz 1997). Data from Central America, for example, indicate that greater female landholdings are associated with modest increases in food expenditures and child educational attainment, controlling for other relevant household characteristics and unobserved preferences, with elasticity in the 0.01 - 0.05 range (Katz and Chamorro 2002). Allendorf's (2007) study in Nepal further suggests that women who own land are significantly more likely to have the final say in household decisions (a measure of empowerment) and that children of mothers who own land are significantly less likely to be severely underweight. Quisumbing and Maluccio (2003) also find a positive relationship between the amount of assets (including land) that a woman possesses at the time of marriage and the shares of household expenditures devoted to food, education, health care, and children's clothing.

Even beyond increasing bargaining power within the household, land rights may empower individuals to participate more effectively in their immediate communities and in the larger civil and political aspects of society. From a gender perspective, facilitating women's greater participation in these extra-household institutions has both the value of diminishing male dominance of community-level decision making, and the benefit of building up women's organizational skills, social networks, and social capital. Women with property rights are more likely to be active members of their communities and, as a result, community institutions themselves are more likely to be responsive to the needs of women.

### **3.1.2 Regional Challenges to Gender Equity in Land Policy**

While the basic principles of the direct and indirect benefits of independent land rights for women are global in nature, there are important regional and sub-regional gender-related differences in land tenure regimes, legal structures, and household resource allocation that should be taken into consideration in the formation of land policy and land administration initiatives. Ultimately, the specific local and national institutions governing land rights must be identified through legal, institutional, and social field research. What follows are findings from the secondary literature regarding general patterns and trends in the major regions of the developing world.

#### ***Latin America***

In Latin America, where inheritance is the most important medium through which women become independent land owners, laws and customs governing inheritance are key to the gender distribution of land. Women are eligible to receive property primarily in their roles as wives and daughters.

Many Latin American countries limit the portion of an individual's property that s/he can freely will to others and subject the remainder to certain rules regarding the distribution to surviving spouses and children. In the case of an intestate death, all Latin American countries designate the legitimate children of the deceased, regardless of sex, as the first beneficiaries of equal shares of the property (less the marital share). However, given widespread land scarcity, it is common for families to consolidate inherited property either through sales or more informal arrangements that allow one or several (usually male) siblings to retain control of the farm. In most of the region, only if there are no living children do wives become primary beneficiaries, eligible to share the estate with the parents of the deceased.

From a gender perspective, the upshot of all of the laws governing inheritance is that landowners who leave wills have a fair amount of discretion regarding the disposition of their property—and are therefore likely to be influenced in their decision by intra-household norms and expectations—while those who die intestate (especially common among the poor) are subject to national law which gives priority to children and some protection to spouses.

A second important means by which women in Latin America acquire land is through state-sponsored redistribution and titling programs. Dating back to the 1960s for most Latin American countries, the majority of agrarian reform legislation privileged men by designating only household heads with agricultural experience as potential beneficiaries (Deere and León 2001). Women, therefore, make up fewer than 20 percent of the beneficiaries in 10 countries for which gender-disaggregated data are available (*ibid.*). However, a “second generation” of agrarian reform—one in which the clarification and legalization of property rights has taken precedence over redistribution—has seen the share of allocations and titles issued to women in the 1990s increase to close to 40 percent.

Nicaragua is a particularly interesting Latin American case study of gender and property rights in land because of the way in which land reform and counter-reform have been carried out over the past 30 years. The Sandinista regime (1979–1990) inherited an extremely unequal distribution of land from the Somoza dictatorship and carried out various forms of redistribution to households and cooperatives, as well as converting some farms into state-owned enterprises. The 1981 Agrarian Reform Act was unprecedented in Latin America for its explicit integration of gender criteria in the selection of beneficiaries. Between 1979 and 1989, women accounted for 11 percent of production cooperative members and 8 percent of those allocated individual parcels (Ceci 2005).

With the end of the revolutionary period in 1990, government land distribution switched its orientation towards demobilized combatants, as part of the peace process. Female beneficiaries of this stage of land distribution accounted for 6 percent of the total, although between 10 and 15 percent of demobilized soldiers were women. Land titling programs began in 1992 and, during the first four years, women accounted for 25 percent of those receiving individual, joint, or group titles. In 1995, a major legislative leap was taken in relation to Nicaraguan women’s rights to land, with the recognition of joint land allocation and titling; in 1997, joint titling became compulsory for married couples and for those living in stable *de facto* relationships. These legislative changes, coupled with comprehensive gender training within the land reform agency (INRA), led to a marked increase in the percentage of female beneficiaries of the titling program: between 1997 and 2000, 42 percent of those receiving title were women (*ibid.*).

## *Africa*

The rights of African women regarding land ownership and management vary significantly according to the cultural and historical context of the region into which they are born into, as well as the region into which they marry. In his survey of land tenure rights of African women, Kevane (2004) divides Africa into six sub-regions. Three of these regions—those influenced by Islamic law, the matrilineal areas of Africa, and the house-property systems of East Africa—offer women greater opportunities for land rights when compared to the remaining three regions: the cocoa and coffee producing areas of West Africa, Sahelian West Africa, and Southern Africa.

According to Islamic law, daughters are entitled to inherit a share of land equal to half of the share of land bequeathed to their brothers. In addition to this, a woman in some areas is also entitled to one-eighth of her husband’s land, should the woman be widowed. However, Islamic communities throughout western Africa tend to avoid adhering to Sharia law by forcing women to cede or sell inherited land to their brothers or other male relatives.

In matrilineal regions, land is also often bequeathed to both male and female members of the family. In areas throughout central Africa, where matrilineal descent is highly concentrated, the villages also tend to be

matrilocal, with women living in their home villages after marriage. These areas tend to see higher incidence of female retention of land ownership after marriage or through inheritance.

Eastern African countries, including Kenya and Tanzania, have an entirely different cultural foundation regarding land ownership. Under the house-property systems of these areas, a husband may have several wives, yet must provide some portion of his cattle, farmland, and homeland to each wife. In this scenario, each wife maintains control over the production of her allocated property—conditional on her bearing sons. Although the wife does not own the property in the technical sense, such as with a land title, she does normally have “veto power” over the husband’s decisions regarding her property. In addition, it is customary in many house-property communities for the husband to offer property as compensation upon divorce. While the house-property system appears to offer women greater control over land in some areas, women’s rights are still limited to their status as daughters and wives rather than as individual members of the community. A woman’s inheritance rights to land may be weakened by claims of male relatives of her deceased husband, or by claims of her brothers to her father’s property (Tsikata 2003).

The cocoa producing regions of West Africa tend to be areas where women lack basic rights in regards to land ownership and management. There is also virtually no variation in the rights granted to women in matrilineal or patrilineal communities, as men successfully gain individual ownership rights over the land and women tend to gain communal rights in the name of their matriarchy. In patrilineal communities, women with a claim to land are actually representing an absent brother, or other male relative. Courts in these regions also tend to favor the rights of men over women.

In Sahelian West Africa and much of Southern Africa, women gain land chiefly through marriage. The use rights a newly married woman is granted from her husband’s lineage are precarious and contingent in nature; upon divorce, widowhood, or relocation, women generally lose these rights.

Since 1998, Ethiopia has embarked on an ambitious land certification program which emphasizes joint documentation in the names of both husbands and wives. This national effort to strengthen women’s rights to land is particularly interesting, since it contradicts the traditional land tenure system, which is characterized by patrilineal inheritance and virilocal residence. The new laws governing the land certification program stipulate that all documents be issued jointly to husbands and all wives (polygamy is common in some regions, and wives may live separately on different parcels of land). However, land brought into marriage may be certified to the individual, which clearly works against women. An early impact evaluation of the effects of land certification in Southern Ethiopia indicates that both women and men perceive their tenure security to have increased, and over 40 percent of wives thought that having their names and pictures on the certificates would strengthen their position in cases of divorce or death of their husbands (UN-HABITAT 2008).

## *Asia*

In India, women may acquire land through inheritance, government transfers, and the market. With respect to inheritance, in most of India, inheritance was traditionally patrilineal, with some limited matrilineal pockets, as in northern and central Kerala in the south and Meghalaya in the northeast. During the twentieth century, inheritance laws shifted significantly toward gender equality. For instance, the Hindu Succession Act (HSA) of 1956 made sons, daughters, and widows equal claimants in a man’s separate property and in his share in the joint family property. It also gave women full control over what they inherited, to use and dispose of as they wished. Similarly, the Muslim Personal Law Shariat (Application) Act of 1937 substantially enhanced Muslim women’s property rights compared with those prevailing under custom (Agarwal 2002).

A recent sample survey of rural widows suggests that while only a small proportion (13 percent) of daughters inherits land from their fathers, more than half of widows inherited land owned by their deceased husbands (Chen 2000). However, widows’ land shares are rarely recorded formally in village land records, and where the land is so recorded, the widow’s name is almost always entered jointly with her adult sons, who effectively control the land. Widows without sons rarely inherit.

Historically in India, government land transfers—whether as part of agrarian reform, resettlement, or antipoverty programs—have been almost exclusively targeted to men. However, the most recent Five Year Plans have included many provisions for fostering women’s participation in land transfer schemes. For example, the Land Markets section of the Five Year Plan for 2007-2011 specifies that

Groups of poor farmers, especially women and dalits [untouchables], who are willing to work in groups should be provided liberal assistance for acquiring land for joint activities, either in terms of collectively purchasing or collectively leasing in land in groups. Institutional credit should also be made available by way of medium or long-term loans for group investment and farming activities. Poor dalit women should be especially assisted to purchase or lease in land in groups through targeted schemes.

Likewise, the Homestead section mandates that

All new homestead land distributed to landless families should be only in women’s name. Where more than one adult woman (say widows, elderly women, etc.) is a part of the household, the names of all female adults should be registered.

While such provisions reflect recognition at the national level of the proactive role of government in strengthening women’s land rights, land law, policy, and program implementation ultimately lie in the hands of state governments, which have exhibited varying levels of commitment to gender equality of property rights.

Women’s rights to land in China have undergone significant transformations with the radical shifts in land policy beginning with land reform and collectivization in the 1950s and 1960s, through the establishment of the three-tier system of rights in land beginning in the 1980s. Under the current system, which is also known as the “household responsibility system,” the state ultimately owns or controls all land. The national government devolves local control to administrative units, which in turn contract responsibility for working the land and paying taxes on it to households (Judd 2007). The initial distribution of land was based on per capita equal allocation and contracts had terms of 15 years. In 1998, the terms of these household contracts were extended to 30 years, increasing tenure security, but limiting the ability of local land authorities to reallocate parcel sizes with changes in household size and composition.

Within the current Chinese land tenure regime, women’s access to land is therefore based on participation in long-term use right contracts with local land administrators. The primary source of their vulnerability in this regard is the patrilocal nature of post-marital residence: when women move to their new husband's village, they potentially both forfeit use and inheritance rights in their natal village, and are unlikely to gain those rights to land in their husband’s community. Because of the long-term nature of the household contracts with no provisions for reallocations during contract terms, families with sons have to support new daughters-in-law without additional land, and families with daughters retain “excess” land when their daughters leave the household or village to marry (Zhang et al. 2008).

In recognition of women’s precarious land rights with longer-term contracts and limited land readjustments, new legislation was enacted in 2003 specifically addressing the post-marital change of residence. Article 30 of the Land Contracting Law prevents local land authorities from taking away a woman’s original contracted land if she marries during the land contract term, unless she receives land in her marriage village. Likewise, the new law stipulates that when a woman is divorced or widowed, the contract-issuing party cannot take away her land if she still lives at her current place of residence or moves to a new place of residence where she cannot get land. This latter provision is particularly important for older, less educated women, who are less likely to be able to obtain off-farm employment and are therefore especially dependent on land as a means to earn a return on their labor (ibid.)

In other parts of Asia, women’s property rights in Asia are heavily influenced by religion and custom. Many countries have pluralistic legal systems codifying the various customary or religious family laws, some of which provide for equal access to land along gender lines; examples include Cambodia and Laos. Community

property regimes are also recognized in formal law in Indonesia, Laos, and Vietnam. Other countries have less favorable legal regimes: in Nepal, equal property rights are constitutionally provided, although neither formal nor customary law otherwise provides for equal rights, and Sri Lanka has a pluralistic system which makes no provision for joint ownership of land.

In many Asian countries, however, even when gender equity of property rights is specified in both customary and formal law, land titling programs tend to be biased towards male heads of household only. An important exception to this has been the evolution of a land titling program in Laos, which has been underway since the early 1990s. In the early stages of both the rural and urban titling campaigns, in spite of relatively positive legal, political, and cultural conditions (such as bilateral inheritance) for recognition of women's property rights, there were significant problems in issuing land documents to women. An influential study undertaken by the research arm of the Lao Women's Union (LWU) in 1998 revealed significant discrepancies between actual landholders and the names on the new land documents: for example, while 30 percent of parcels in the sample had been inherited from the wives' families, only 16 percent of the titles were in the wives' names (GRID 2000). Concerned that the property rights formalization programs were disenfranchising women, the LWU began an active campaign to increase women's participation, including training and education programs targeted to female beneficiaries and field adjudication teams, and revision of the land documents themselves to allow for non-household heads and couples to be registered as landowners. Two separate household surveys conducted in 2002 and 2003, respectively, indicate that the efforts of the LWU have translated into significant gains for women in the land formalization programs: 28-34 percent of land titles and 15-24 percent of land certificates in the surveyed areas had been issued to women as individuals, and another 38-41 percent of titles and 27-28 percent of certificates were in the names of wives and husbands together (Burapha Development Consultants 2003; Laos, Ministry of Finance, Department of Lands 2003).

### **3.1.3 Policy Priorities for Strengthening Women's Land Rights**

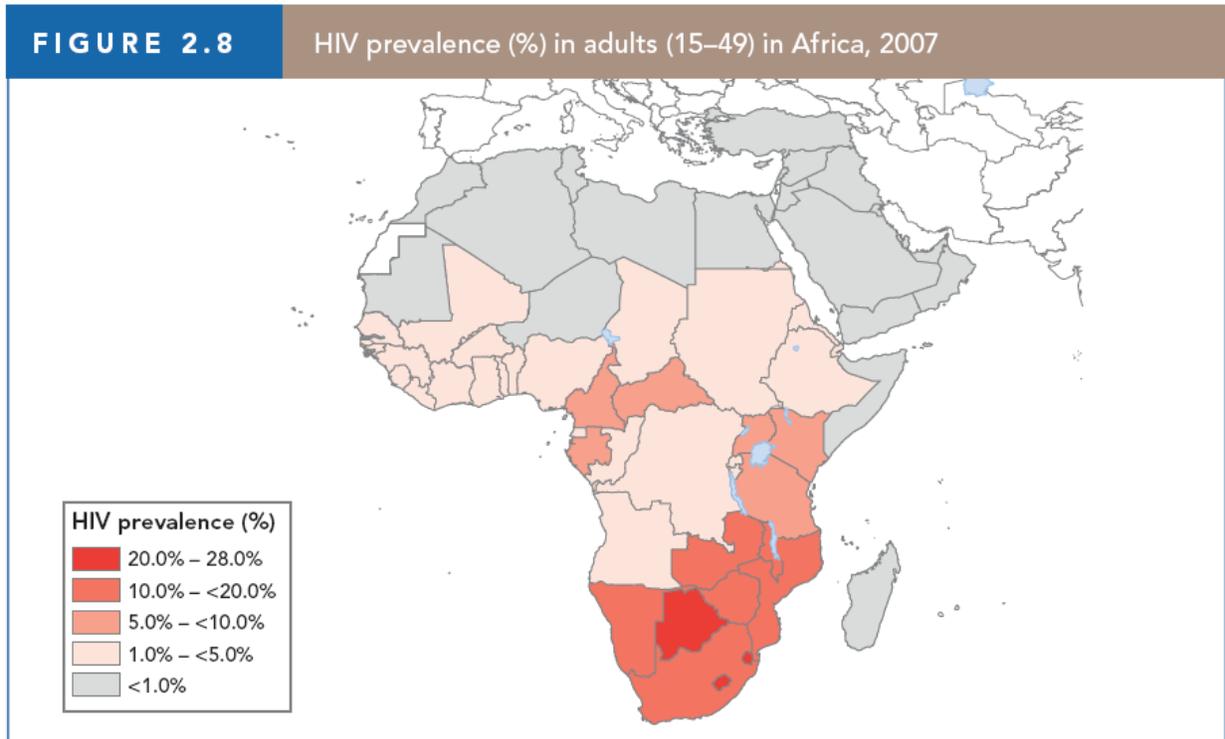
As the section above illustrates, the challenges to and opportunities for enhancing women's land rights vary enormously across the developing world. However, several common policy themes emerge on a global level:

- (1) The importance of a gender progressive legal framework, particularly in the areas of marital property and inheritance. Wives should have equal claim to land held by the household, and wives and daughters should be guaranteed shares of bequeathed land.
- (2) A proactive role for government in land regularization campaigns, including joint titling and activist training and awareness programs. Formalization of land tenure offers a unique opportunity to recognize women's land rights and to enshrine these rights in legally binding documents.
- (3) Deep local-level knowledge of customary norms and practices affecting women's rights and access to land and other natural resources. Policy formulation should be informed by systematic field-level research to ascertain opportunities for and barriers to strengthening women's rights.

## **3.2 HIV/AIDS – AFFECTED HOUSEHOLDS**

The HIV/AIDS pandemic, beyond its devastating impact on public health, has implications for the way in which land is distributed and utilized, especially in Africa. The most severely affected region is Southern Africa, where adult HIV prevalence rates are above 10 percent (see Map 1).

**Map 1**  
**Adult HIV Prevalence in Africa, 2007**



Source: UNAIDS (2008)

There is a growing body of empirical literature which explores the ways in which the HIV/AIDS pandemic interacts with land tenure systems—in particular, the inheritance systems within customary land tenure systems—to deny access rights to households that have been directly impacted by the disease. While most of this research concludes that the survivors of AIDS-afflicted families are the victims of denial of inheritance rights and subsequent property grabbing, there is evidence that some widows and orphans are able to use their status to negotiate continued access to land. In this section, we begin by considering why HIV/AIDS-affected households should be considered a key category of “vulnerable group” with respect to land tenure and property rights. We then turn our attention to evidence of land loss among surviving AIDS household members (primarily widows), and the role that provisions of customary law governing inheritance play in denying widows and orphans access to land after a husband has died. We consider the special case of orphans as related to contested guardianship and land before concluding with policy questions and concerns.

### 3.2.1 Why is there a Relationship between HIV/AIDS and Land?

It is well-known that much of African land is held under customary tenure systems; Deininger (2003) estimates that statutory law only covers between 2 and 10 percent of land in most African countries. Moreover, formal land law in much of Africa gives explicit recognition to customary tenure; a 2002 review of the status of customary tenure in 20 new African land laws identified only four countries (Eritrea, Ethiopia, Rwanda, and Zanzibar) which did not recognize customary tenure (*ibid.*).

The prevalence of customary land tenure systems is key to understanding the ways in which the HIV/AIDS pandemic has heightened the vulnerability of certain categories of people, in particular, surviving widows and orphans, for two main reasons. First, many customary tenure systems are based on continued, active use of

agricultural lands; if farmers are too sick to work, and spouses are too busy caring for sick household members to tend to the farm, then the household may be at risk for having their land access revoked by local authorities (Mbaya 2002). Studies in Kenya, Lesotho, and South Africa suggest that AIDS-affected households facing such shortages of labor try to avoid losing custody over land by making alternative contractual arrangements such as hiring casual workers, sharecropping, renting/leasing out, or simply “lending” their land to less-affected members of the community (Drimie 2003; Strickland 2004).

The second feature of African customary land tenure systems that is particularly relevant for HIV/AIDS-affected households is inheritance practice. With the partial exception of areas influenced by Islamic inheritance laws and those matrilineal societies that privilege women as owners of land (found mostly in Central Africa), women have no or weak claims to independent land rights upon the death of their husband. Most commonly, widows become dependent on their husband’s natal family for continued access to land, sometimes by being “inherited” by another male family member. Drimie (2003) argues that AIDS widows’ land rights may be even weaker than other women’s, because the impoverishing effects of the disease “means that upon finding herself a widow, a woman has few resources left with which to resist outside pressures exerted by neighbors or members of the extended family, or make choices that are ultimately in her own best interest.”

One final point regarding the overall relationship between HIV/AIDS and land tenure is that securing women’s property and inheritance rights has the potential to both mitigate the consequences of HIV infection in the household and to contribute to the prevention of HIV infection. On the one hand, since land is the key asset in rural economies for generating livelihoods, access allows survivors to provide for themselves and their children. On the other hand, land rights may help prevent the spread of HIV/AIDS by reducing widows’ vulnerability to domestic violence, unsafe transactional sex, and other AIDS-related risk factors (Strickland 2004).

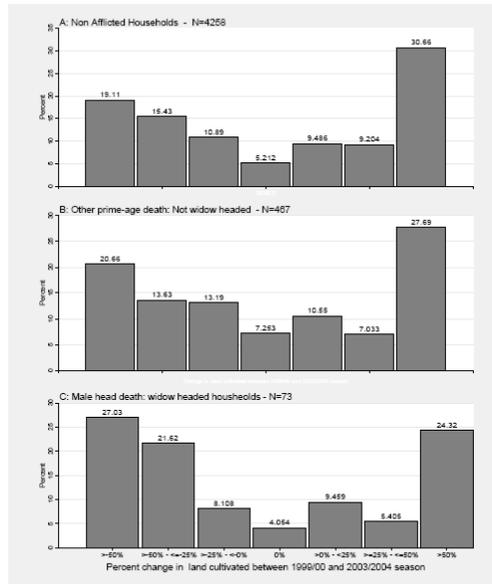
### **3.2.2 AIDS Widows’ Vulnerability to Loss of Land Rights**

Most of the literature on HIV/AIDS and land has focused on the situation of surviving widows and their lack of land rights after the death of their husbands. Much of the evidence in this regard is anecdotal or “case study” in nature, including the dozen country reports presented at the FAO/Southern African Regional Poverty Network Workshop on HIV/AIDS and Land in Pretoria in 2002. Strickland (2004) summarizes the problem as follows:

If widowed, women often are victimized by others (such as in-laws and their relatives) through manipulative decision making that denies rightful inheritance. They may suffer partial or total loss of assets, including land and house, to relatives of the deceased spouse through customary practices involving property grabbing or asset stripping. Such practices, fueled increasingly by high mortality rates and the stigma and discrimination commonly experienced by survivors of AIDS victims, leave affected households destitute and more vulnerable to further consequences of HIV/AIDS.

The most solid empirical evidence of the scope and magnitude of AIDS widows’ loss of land rights is the work done in Zambia by the Food Security Research Project, a collaborative program between the Government of Zambia and Michigan State University’s Department of Agricultural Economics (Chapoto et al. 2006). This research uses nationally representative longitudinal survey data of 5,342 rural households in Zambia surveyed in 2001 and 2003 to examine the extent to which widows lose their rights to land after the death of their husbands, whether they lose all or part of the land they were formerly controlling, and whether there are certain characteristics of the widow, her deceased husband, and/or her household that influence the likelihood of her losing land rights. The study finds that over half (56 percent) of the households that suffered the death of the male household head and became headed by a widow after the 2001 survey cultivated less land in 2004 than in 2001. Over 27 percent of the widow-headed households cultivated less than half of the land they cultivated in 2001 (see Figures 1 and 2).

**Figure 1. Percent changes in cropped area among non-afflicted households, households incurring male-head mortality, and households incurring other prime-age mortality (not widow-headed).**



Source: CSO/MACO/FSRP PHS 1999/2000 and SS 2001 and 2004

Source: Chapoto et al. 2006

**Figure 2: Comparison of land cultivated in 2001 and 2003 (Hectares)**



Source: CSO/MACO/FSRP Post Harvest Survey 1999/2000 and Supplemental Survey, 2001 and 2004

Source: Chapoto et al. 2006

In Zambia, mitigating factors protecting widows from land loss include:

- *Age of the widow.* Land cultivation declined by 12.5 percent among households headed by a widow age 50 and above compared to a 45.0 percent decline among households headed by a widow age 18 to 33, holding all other variables at their mean levels. The authors speculate that this finding could reflect assumptions implicit in traditional land inheritance laws that younger women are more likely to remarry and gain access to the new husband's land, thereby obviating the need for her to keep most of the deceased husband's land.
- *Wealth status of the household.* Widow-headed households experiencing the greatest decline in cropped area appeared to be relatively wealthy prior to the death of the husband. Cropped land declined by 34.2 percent if the household was initially non-poor compared to an increase of 9.0 percent if the household was poor to begin with, other factors held constant at their mean levels.
- *Kinship ties to local authorities.* Widows whose family has kinship ties to the village authorities were less likely to lose land. Other factors held constant, land cultivation declined by only 12.4 percent when the widow was related to the headman and by 73.4 percent if not. Chapoto et al. (2006) comment that "this finding implies that, with the willingness and participation of community leadership, it may be possible to protect widows from losing their assets and land to other relatives ... [it] also underscores the importance of social relations within the community in influencing land tenure and allocation decisions, including the disposition of land used by widows."

### 3.2.3 AIDS-related Challenges to Customary Inheritance Practices

Prior to the onset of the AIDS epidemic in Africa, widows were often protected against dispossession through the practice of "wife inheritance," in which a woman marries her husband's brother or another male relative and thereby retains indirect access rights to land. This practice is widely recognized as contributing to the spread of HIV/AIDS among the population, and is now being rejected in some settings where women and men alike are fearful of infection, social stigma, and discrimination associated with contact with AIDS-affected households.

Most of the literature implies that when a widow is rejected for inheritance because of her association with the disease, she is also forced to relinquish any property rights she had through her husband's family (Human Rights Watch 2003, Strickland 2004). However, a recent study conducted in southern Zambia argues that some widows are able to invoke HIV/AIDS to avoid being inherited along with all land and property by the deceased's kin and instead, to gain control over their deceased husband's land (Frank and Unruh 2008). This strategy involves widows whose husbands are suspected of having died from HIV/AIDS, actually promoting the idea that they themselves might also have HIV/AIDS, and thus that they pose a significant risk to any potential in-laws who would attempt to inherit them, their children, and the household's land and property. The researchers' interpretation is that

with the purposeful suggestion of such risk, the widow is able to express concern about the broader community, and therefore insist on not being inherited, and to instead argue that she should keep all land and property so as to be able to support her children—with security of children ... being a community priority ... This argument proves attractive to the deceased's relatives because it serves to alleviate the kin of the deceased from providing full material support for wife and offspring throughout a potentially long and ultimately fatal illness, while at the same time ensuring that efforts have been made to secure the future livelihood of the widow's children (Frank and Unruh 2008).

Thus, while it is clear that AIDS is undermining the widespread practice of wife inheritance, it is not yet certain whether communities will find alternative ways of providing continued support to widows and their

children (for example, by granting them independent land rights), or whether they will abandon all responsibility for surviving members of affected households.

### 3.2.4 Orphans' Land Rights in the Context of HIV/AIDS

For Africa's more than 30 million orphans, of whom over 10 million are AIDS orphans, rights to land are even more tenuous and indirect than for the surviving wives of AIDS victims. Many are caught between a weakened traditional extended family support system and inadequate modern institutions to provide care; the result is that they are forced to largely fend for themselves. Moreover, many orphans are not only compelled to support themselves, but they often have to defend their property and inheritance rights against usurpations by relatives, neighbors, and strangers (Rose 2006).

In much of rural Africa, customary norms stipulate that a trustee within the extended family—ordinarily a senior male relative of a deceased man—should take care of the needs of a deceased man's wife and children. The trustee assumes control and administration of the husband/father's property and is expected to make sure that it is used for the benefit of the man's wife and children. Evidence from across Southern and East Africa, however, suggests that this system is breaking down, as trustees/guardians take advantage of their customary rights to property, while neglecting their commensurate duties to the orphaned children.

Rose (2005) studied the case of Rwanda, which is somewhat unique in that the number of non-AIDS orphans (mostly war orphans) is about equal to the number of AIDS orphans. Customary law and practice, which combined guardianship over minor children with patrilineal inheritance at maturity, was ill-equipped to address the land access problems of the many newly created orphans after the 1994 genocide and war. Several challenges faced the customary system for the first time: (1) the land rights of orphans, particularly females, were limited under customary law; (2) many of the close relatives who would normally have become guardians had died; (3) those relatives who did become orphans' guardians faced a potential conflict of interest—they sometimes felt compelled to compete for scarce land with those orphans whose rights they were supposed to be protecting; and (4) orphans' land rights were in competition with returning refugees who also needed land.

Under these circumstances, orphans in Rwanda and other countries have found themselves engaged in land disputes with their own guardians—the same people who are supposed to represent them before the local authorities and courts. Since neither African customary nor statutory law is well-equipped to handle these sorts of cases, and given the many practical barriers orphans face in staking effective claim to their parents' land, the result has been widespread dispossession of perhaps the most vulnerable population on the continent.

### 3.2.5 Policy Issues

There is clearly a need for targeted interventions to protect the property rights of AIDS-affected households. Human Rights Watch (2003) makes the following recommendations for action, which are particularly clear on the need for statutory legal reform to supersede customary practices with respect to the disposition of property upon household dissolution:

- Amend or repeal all laws that violate women's property rights, including the rights of widows, and hold accountable those authorities who undermine statutory protection of women's equal right to property by applying discriminatory provisions of customary law.
- Awareness campaigns to inform the public about women's property rights.
- Training for judges, magistrates, police, and relevant local and national officials on laws relating to women's equal property rights and their responsibility to enforce those laws.

- Ensure access of indigent women to legal assistance to pursue civil property claims, including support for the activities of nongovernmental organizations that provide legal services to women whose property rights have been violated.
- Amend divorce laws to reflect the presumption of spousal co-ownership of family property and of equal division of property upon the termination of marriage, including that provisions that recognize women's equality under the law are not undermined by customary law and practice.

Rose (2006) also makes a series of recommendations regarding the protection of children's property and inheritance rights, including legal reform to explicitly recognize orphans as land claimants; encouragement of succession and estate planning with parents; and support for traditional guardians as well as strengthening systems of alternative caregiving and advocacy for orphaned children. With respect to using land reform to reduce orphans' vulnerability, a specific set of recommendations is to:

- Introduce a simple and low-cost system of registering the land of AIDS patients and assist them with registering their land so that after their deaths, their children will have an easier time of proving their land rights and will be less at risk of landgrabbing.
- Assist orphans with land administration activities so as to ensure that their land rights are protected.
- Encourage land administrators to allocate land to the most vulnerable groups, including orphans.

### 3.3 PASTORALIST SOCIETIES

Pastoral communities are widespread in the marginal areas of the Sahel, the Middle East and North Africa, East Africa, and Central Asia. Rangeland-based livestock production systems account for 29 percent of the total world land area and 37 percent of the land area of Sub-Saharan Africa (ILRI 2002). An estimated 60 million people in Sub-Saharan Africa (approximately 11 percent of the total population) and 200 million worldwide rely on some form of pastoralism for their livelihoods (ibid.; Nori et al. 2008). Map 2 shows the global distribution of pastoral production systems.

#### 3.3.1 Pastoralist Land Tenure and Livelihoods

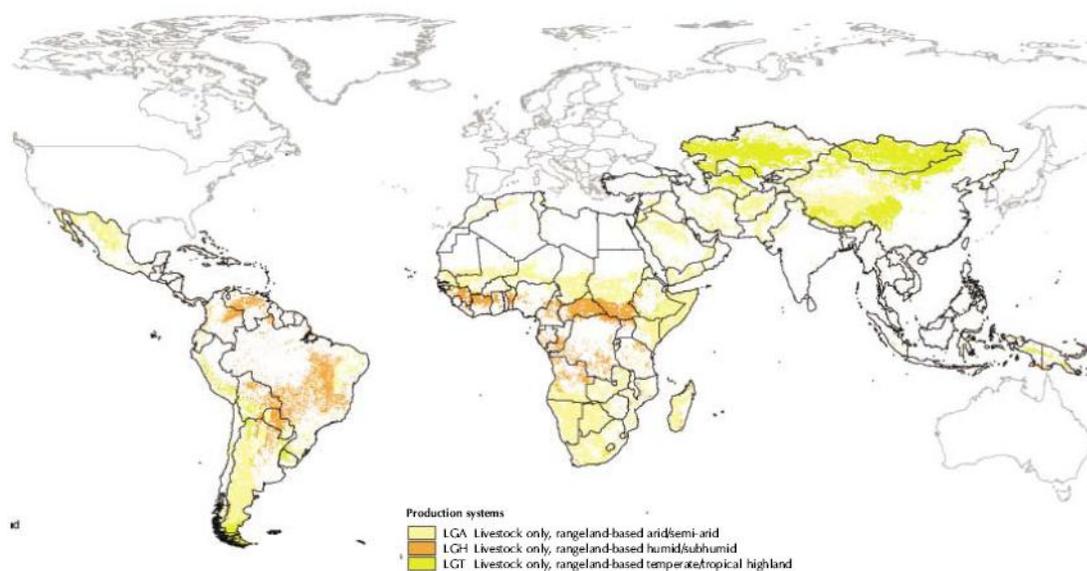
In what sense are pastoralists uniquely vulnerable to changes in property rights? As a system of land use and management, African pastoralism is characterized by several unique features which are particularly challenging from a land policy perspective. (We will not address the equally important issue of water rights in this paper.) The first is mobility. Seasonal movements are essential for pastoralists to tackle marked spatial and temporal variations in livestock grazing resources while enabling pasture restoration at certain times of the year. Mobility allows herders to exploit multiple niches distributed across space and at different times to depress fluctuations in production; it enables herders to engage in opportunistic grazing strategies that both increase average herd productivity and reduce the riskiness of production resulting from climatic variability.

Mobility gives rise to a second characteristic of pastoral land use: fluid boundaries and different degrees of access rights—what Goodhue and McCarthy (2008) call “fuzzyness.” For example, pastoral communities grant each other access to their territories in order to overcome feed shortages resulting from drought or seasonal variations, and to confirm their claims and strengthen their traditional social relations and networks with other communities (Ngaido and McCarthy 2003). “Fuzzy” access rights are also evident in the tendency in some pastoralist systems for rights to pasture in outlying areas used in the rainy season to be undifferentiated among group members, while rights to pasture in home areas during the dry season are much more nuanced (Goodhue and McCarthy 2008). In most pastoral areas, differing categories of rights over resources coexist, ranging from those that are more private (such as dry season wells), to those that are more

communal in nature, such as access to dry season forests or grazing around a water point. Wet season pastures and water tend to be managed under controlled open access systems (Nori et al. 2008).

## Map 2 Global Distribution of Pastoral Production Systems

Map 3a. Livestock only, rangeland-based (LG) production systems



Source: ILRI (2002)

A third central feature of traditional pastoralist systems is the common use of land as opposed to individualized grazing areas. Various forms of common and open access tenure regimes are well suited to support the system of mobility, by reducing the transactions costs of negotiating access that would necessarily accompany more rigid, geographically defined boundaries of ownership (Ngaido and McCarthy 2003). However, as is well-known for common pool resources of all types, a lack of clearly defined individual property rights can lead to overuse of the resource—overgrazing and lack of range management in the case of pastoral systems. This tension between the need for flexible spatial and social boundaries in highly variable environments and the requirement for social and spatial exclusion that is usually necessary for sustainable resource management lies at the heart of pastoralist land tenure policy debates (Mwangi and Dohrn 2006).

It is widely recognized that traditional pastoral land use systems are under threat from population pressure and the expansion of sedentary agriculture in areas bordering on rangelands. Pastoralism is particularly sensitive to population growth since the technical possibilities of increasing the productivity of the rangeland on a sustainable basis are limited. Larger populations of both pastoralists and agriculturalists also disrupt the reciprocal arrangements that had existed between the two groups, whereby herders gained access to crop residues and farmers obtained milk and meat. Conflicts between nomadic and settled communities are more and more common: in Northern Nigeria, Fulani pastoralists are faced with up to 8-10 percent decline in their rangelands following the appropriations by Hausa farmers and Fulani agropastoralists (Hoffman 2004). Similar processes of range enclosure are also occurring in Niger and in Senegal (Mwangi and Dohrn 2006).

### 3.3.2 Land Policy for Pastoralist Societies

Pastoralist lands have been subject to many attempts at tenure and property rights reform. While these policies and programs vary significantly by country, they broadly fall into the categories of privatization and nationalization.

The argument in favor of private land tenure is primarily based on the tragedy of the commons—the assumption that pastoralists will overstock, overgraze, and damage rangeland resources because of the mismanagement inherent in the traditional patterns of communal rangeland tenure combined with individual herd ownership. In economic terms, privatization has the potential to internalize negative externalities, since property rights holders are thought to have the necessary incentives to manage their resources efficiently, invest in improvements, and respond to market demands. Moreover, in this view, the tradability of private rights promotes the transfer of resources to the most efficient users by selling or granting access rights through different contractual and tenure arrangements. While these arguments overlook the strong social controls that constrain individual herders on common lands, as well as the existence of informal mechanisms of resource transfers and exchanges, it is true that overgrazing can occur when traditional common property institutions begin to break down in the face of population, climatic and other pressures, and convert to open-access regimes.

Experiences of privatization in pastoral areas have been of two types. The first type relates to the allocation of individual private rights on arable lands as a mechanism to settle pastoral communities and enlarge their livelihood strategies. The second type, which consists of recognizing pastoral rights and granting to communities rights to all resources, is known as common property.

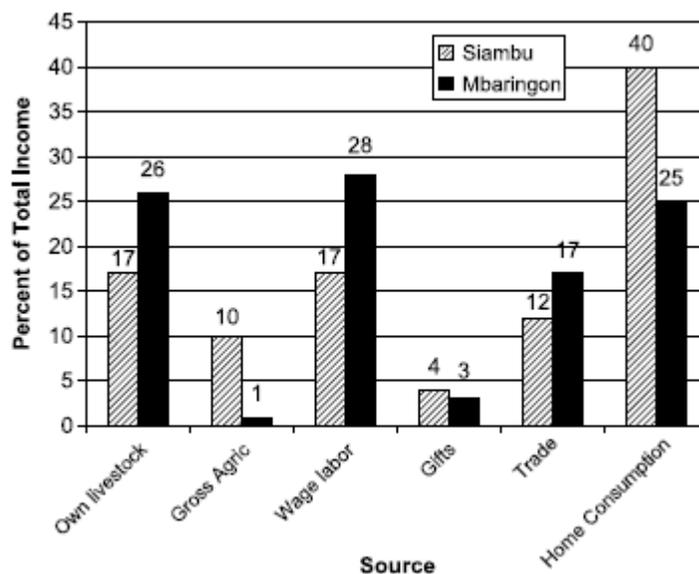
The allocation of individual private property rights in pastoral areas—which has come about both as a result of state policy and from within some pastoralist communities—has transformed some formerly pastoral and nomadic systems into agro-pastoralist systems. In response to smaller land bases, households reduce their herd sizes and diversify their income-generating activities. In Uganda, for example, land that was communally grazed in the past was subdivided into smaller land parcels and reallocated to individual owners by the state-appointed Ranch Restructuring Board in the late 1980s. The owners were encouraged, and in some cases assisted, to fence off the allocated land. In a study on the effects of private property rights on overgrazing in southwest Uganda, Sserunkuuma and Olson (2001) found that 72 percent of the individually held farms were maintaining herd sizes which exceeded the carrying capacity of their lands. The research also suggested that the likelihood of overgrazing decreases with farm size, with the level of alternative sources of income, and with the amount of land devoted to food crop production.

Another study of land privatization in Kenya compares the livelihood strategies of two Samburu pastoralist communities (Lesorogol 2005 and 2008). In one (Saimbu), the land was equally sub-divided into approximately 23 acre parcels and privately titled in 1992. In the other (Mbaringon), land was adjudicated as a group ranch in 1978, and land ownership and management remain communal in nature, with local councils of elders deciding which areas should be reserved for dry season grazing and regulating use of water points. Analysis of income sources nine years after privatization shows that households with individual land holdings rely less on earnings from livestock and significantly more on sales and home consumption of agricultural products (see Figure 3 below). Wealth stratification, as measured by livestock ownership, also increased in the privatized community but not in the communal area.

In North Africa, Tunisia and Morocco have experimented with both individual and communal adjudication of pastoralist lands (Ngaido and McCarthy 2003). In central Tunisia, tribal lands were allocated to tribal members and several institutional innovations introduced: community cooperative reserves, co-management between communities and forest services of remaining community pastures, and private ranges. In Morocco, the privatization process focused on tribes, which can register and title their land resources in the name of their tribe, but perpetual use-rights were granted to members on arable rainfed lands and private property on irrigated lands. Consistent with the findings from East Africa, comparison of land use and income sources across these property rights regimes found that households with secure access to cropland are more likely to

specialize in crop farming, while households with grazing rights in communal areas are more likely to specialize in livestock farming (ibid.). For example, Bedouin households in central Tunisia, where privatization has proceeded much faster than in the south, devote about 14 percent of their land to cereal crops and over half to fruit trees. In the south, virtually all of the traditionally managed land remains in extensive rangelands.

**Figure 3**  
**Percent of Total Income by Source,**  
**Private vs. Communal Land Tenure Adjudication**



Source: Lesorogol (2005)

State ownership of pastoral lands, which is the most widespread policy framework in rangelands around the world, has been motivated by the belief that governmental institutions have the greatest capacity to improve the resource base and the performance of the livestock sector. However, in most cases, government agencies responsible for state rangelands have only limited knowledge of agroecological conditions, and even less understanding of local rules of use and management. These information problems increase the costs of enforcing management decisions by government agents. A number of different institutional arrangements have been introduced to manage some of these costs, including the granting of common use rights to communities or cooperatives, grazing licenses, and leaseholds. In the case of granting common use rights, pastoralists are typically given only a limited role in the management and investment decisions, and they are often prohibited from using the land for alternative activities such as cropping (such as in Syria and Ethiopia) (Ngaido and McCarthy 2003). In some cases, common use rights are granted to formalized pastoral organizations, such as cooperatives. While most of these efforts have been short-lived and/or problematic in the sense of engendering internal conflict, Jordan’s herder-driven cooperatives have been cited as a “best practice” of granting greater management authority to local communities (Deininger 2003). These cooperatives are reported to have higher productivity than state-managed reserves, without requiring expensive fencing and guarding. Household expenditures on livestock feed—an important indicator of how well or poorly herders are doing at maintaining their natural pastures—are, on average, 21 percent lower in the cooperatives compared to common tribal use areas (Ngaido and McCarthy 2003).

There appears to be a growing consensus around the basic principles, if not the specific institutional forms, that should govern pastoral land policy. As Ngaido and McCarthy (2003) put it:

It becomes important to realize that there is no returning to traditional pastoral systems because pastoral societies have ... been evolving to internalize or adapt to internal and external pressures.

Central to any policy targeted to pastoralist communities, and essential to providing both incentives and protection for these communities, is the granting of greater land tenure security in the form of communal, village-based, or cooperative property rights guaranteed by law. A second component is the development of appropriate forms of conflict mediation and resolution to address both internal disputes as well as conflicts between pastoralists and their neighbors. A final element of pastoralist land policy should include the legal recognition of, and meaningful technical support for, customary resource management practices, with an emphasis on risk management and the rights and objectives of multiple rangeland users.

### **3.4 LAND TENURE REFORM AND INDIGENOUS POPULATIONS**

Indigenous populations, who have inhabited and derived livelihoods from specific territories within modern nation-states since the pre-colonial period, have recently become the subject of targeted land tenure reforms aimed at clarifying and strengthening their property rights. These new policies and programs have been particularly important in Latin America, and have given rise to a host of issues and conflicts related to the granting of large land areas—often containing valuable natural resources—to minority indigenous communities.

The justification for formalizing land rights on behalf of indigenous populations can be based on one or a combination of arguments: (1) the protection of indigenous lands from market forces and competing claims, usually involving the placement of restrictions on communities' capacity to transfer their lands; (2) a recognition of indigenous peoples' special rights to their lands and territories, either as peoples who predate the nation-state or as the victims of historical discrimination; and (3) the promotion of indigenous stewardship and management of natural resources, especially in tropical forests (Plant and Hvalkov 2001).

For their part, indigenous peoples may have varying justifications for their claims to land rights. Many claims are grounded in ancient or historical title, in the form of collective land titles issued during the colonial period. This tends to be the case for the indigenous peasant communities who are still located in or near their areas of traditional occupation. A second kind of claim is based on immemorial possession and a special relationship with the land and environmental resources, whether or not any form of written title has ever been issued. This tends to be the case of the lowland and forest-dwelling Indian communities, few of whom possessed or demanded land titles until a few decades ago. A third kind of claim can be for compensation for past injustices and discrimination, to benefit indigenous communities that have lost their lands over time.

#### **3.4.1 The International and National Legal Frameworks**

A logical starting place for the analysis of recent developments in the area of indigenous land rights is the International Labor Organization Convention 169, which establishes a framework for the recognition of the rights of indigenous and tribal populations. Article 1 of the Convention, which was issued in 1989 and since ratified by 13 Latin American countries,<sup>1</sup> defines indigenous people as those: (1) whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (2) who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the

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<sup>1</sup> Ratification implies that states are obliged to bring national legislation into line with provisions of Convention.

establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions. Article 1 also establishes “self-identification” as a “fundamental criterion” for determining the groups to which the provisions of the Convention apply.

Articles 13-19 of the Convention address the land rights of indigenous populations. The key provisions are: (1) recognition of the rights of ownership and possession over the traditionally occupied lands; (2) special safeguarding of rights over natural resources; (3) protection from forced relocation and incursion by third parties; (4) respect for land transfer customs within indigenous communities; and (5) equal inclusion of indigenous communities in national agrarian programs.

Two aspects of the land provisions of Convention 169 are especially noteworthy. The first is the use of the concept of territories, which “covers the total environment of the areas which the peoples concerned occupy or otherwise use.” The relevance of this will be discussed further below. The second precedent-setting provision of the convention concerns the rights of indigenous peoples to “participate in the use, management and conservation of the natural resources pertaining to their lands.” Specifically, Article 15 states:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

The requirement of governments ratifying the Convention to engage in consultation, to share the benefits from natural resource extraction, and to offer compensation to indigenous populations for these resources, has been at the forefront of indigenous land policy in Latin America, and will be discussed further below.

Consistent with the ratification of ILO Convention 169, between 1985 and 2000, 14 Latin American countries revised their constitutions, adopting the concept of the pluri-ethnic nation-state. Twelve countries have established norms that protect indigenous communal rights to inalienable and unmortgageable lands. Some Latin American constitutions also recognize customary legal systems and traditional authorities as legitimate public entities for autonomous land administration.

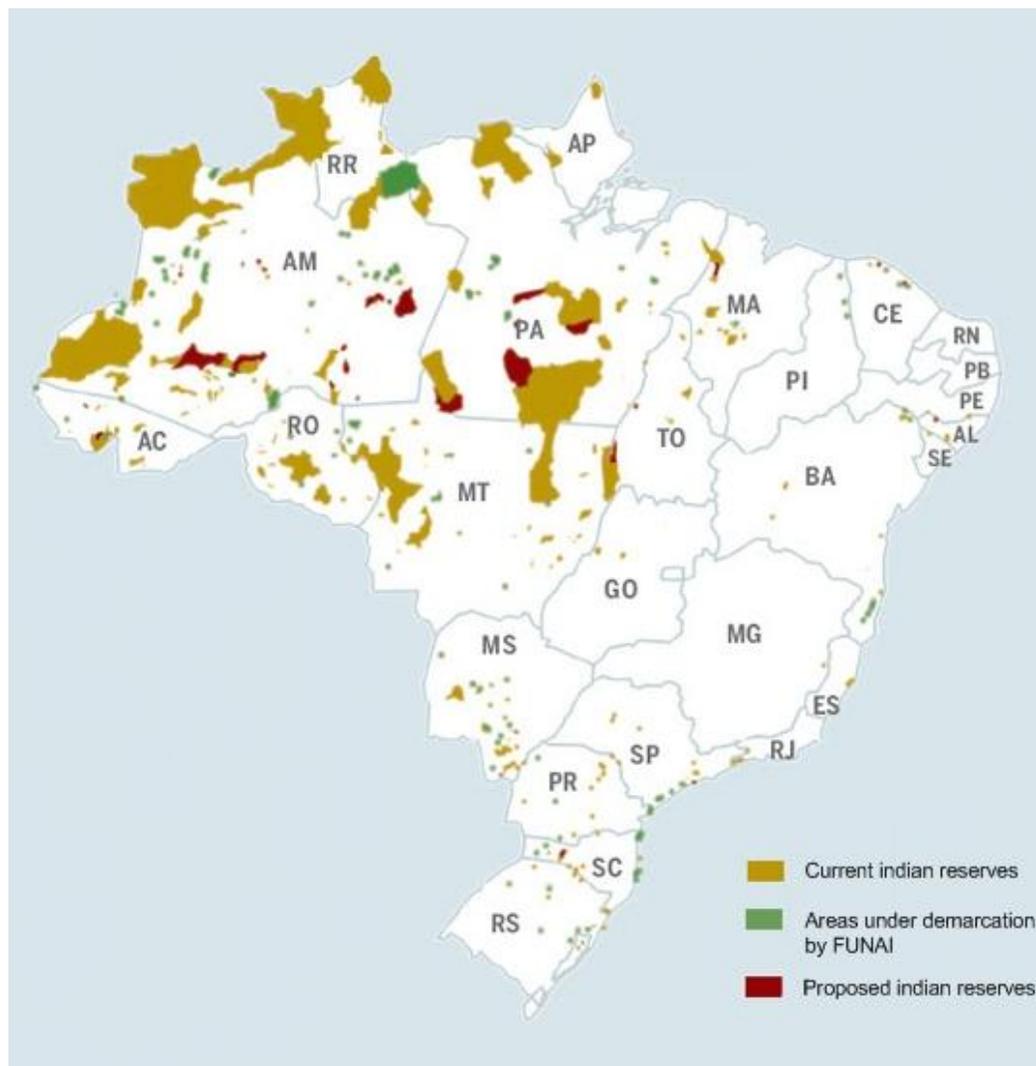
The legal status of indigenous lands varies by country (Roldan 2004). In Brazil, approximately 580 *terras indigenas* have been demarcated and are in the process of registration (see Map 3). Progress on finalizing the property rights of indigenous communities has been slow, since third parties are allowed to contest the demarcations. In Bolivia, large amounts of Amazonian forest have been communally titled, and the new Political Constitution of 2009 contains strong statements of indigenous rights and autonomy, establishing the *Territorio Indigena Originario Campesino* (Indigenous Aboriginal Peasant Territory) as a new legal form of indigenous territorial units (see case study below). In a reversal of recent trends, and as part of larger changes in pro-market land legislation, four countries have removed blanket protections prohibiting the sale of indigenous lands: Nicaragua (1990), Mexico (1992), El Salvador (1992), and Peru (1993).

### 3.4.2 Land vs. Territory

Although at first blush it may seem an inconsequential semantic distinction, the difference between indigenous land rights and territorial rights has become an important and contentious issue across Latin America. The distinction is twofold. First, as implied in ILO Convention 169, territory refers to the larger natural environment inhabited and used as a source of livelihood by indigenous populations. This would include renewable and nonrenewable resources such as forests, water, and subsoil minerals and hydrocarbons. Especially where indigenous people engage in extensive land use strategies such as shifting cultivation, hunting, and gathering, the magnitude of the areas that can be claimed according to these criteria is potentially vast, relative to the size of most indigenous populations.

One of the most significant developments with respect to the definition of the boundaries of indigenous land claims has been self-demarcation and mapping by indigenous communities. Using a variety of methodologies, ranging from highly participatory approaches involving village sketch maps to more technical efforts with geographic information systems (GIS) and remote sensing, indigenous populations across Latin America have been able to represent their territorial claims based on their own criteria for their spatial needs (Chapin et al. 2005).

**Map 3**  
**Brazil's Indigenous Lands**



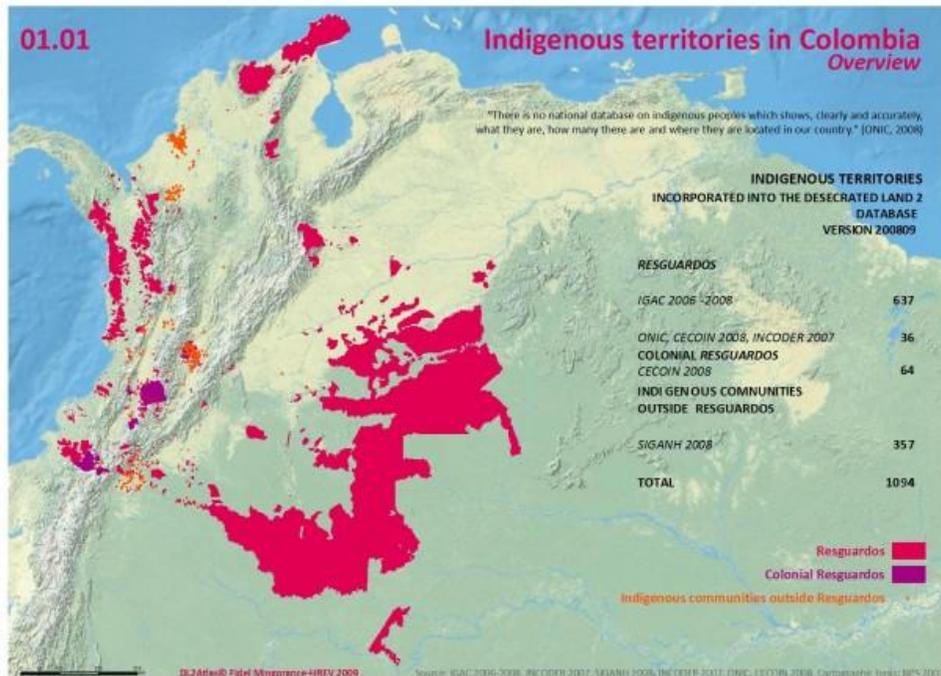
In addition to the expanded spatial notion of territory, the other implication of the territorial approach is more political in nature, in the sense that the granting of territorial rights includes a measure of autonomous governance not necessarily incorporated into land titling per se. In other words, the notion of territory opens the door to the recognition of some measure of indigenous political, administrative, and/or fiscal autonomy in designated geographical regions. This has been the approach taken in Panama, where the country's three indigenous *comarcas*, covering approximately 1/5 of national territory, exercise significant regional autonomy (see Map 4). Likewise, Nicaragua has recognized the autonomy of its North and South Atlantic Regions, principally inhabited by the indigenous Miskitu, Mayangna, and Rama people, as well as by the Afro-descendent populations of Creole and Garifuna. Together, the RAAN and RAAS comprise half of

Nicaraguan national territory and 70 percent of its forest, but are home to only 11 percent of the total population (see Map 7 and case study below). Colombia is also in the process of converting its Indian *resguardos* into “indigenous territorial entities,” which would have a status on par with municipalities, including fiscal transfers (Stocks 2005). These territories comprise a total of 52 percent (21,240,403 hectares) of the Amazon region, in the form of 121 legally recognized *resguardos* (WWF 2005) (see Map 5).

**Map 4**  
**Panama Comarcas**



**Map 5**  
**Indigenous Territories in Colombia**



### 3.4.3 Indigenous Land Tenure Systems in Latin America

In discussing land policy for indigenous populations in Latin America, it is essential to distinguish between the tenure and livelihood systems of the Andean and Central American highlands and the tropical forest lowlands. The distinctions are on several levels, including land use patterns and integration into the national market economy. Amazonian and other lowland indigenous peoples are usually characterized by horizontal or extensive land use. The fragility of tropical lowland soils demands long fallow periods, which means that agriculturalists must have access to large territorial areas in order to engage in flexible production strategies, which include shifting cultivation, hunting, gathering, and fishing. Customary indigenous tenure regimes cover extensive contiguous territories that encompass a range of habitats including forests, savannahs, rivers, and lakes. Traditional tenure exhibits a nested structure, with larger “collective” territorial units enclosing smaller units, which correspond to specific access, use, and proprietary rights. The limits of the territory are defined by regular and intermittent resource-use patterns that may extend a long way from settlements (Plant and Hvalkov 2001).

Given the nature of the livelihood strategies and customary tenure arrangements of lowland indigenous populations, collective or communal land titling has generally been the preferred form of property rights regularization in these areas. The state also recognizes the benefits of collective land ownership insofar as they incur lower costs of surveying and registration; depending on the degree of recognition of self-governance within the indigenous land areas, the government may also delegate dispute adjudication, land inheritance and management to customary authorities. However, collective land titling to indigenous communities can also raise difficult issues of legitimate representation and institutional authority within these communities (Colchester et al. 2004).

In contrast to the “horizontal” systems of the tropical lowlands, highland indigenous communities in Latin America are characterized by the fragmentation and parceling of their lands into tiny plots, resulting in landlessness and out-migration. Typically, households simultaneously hold private land individually and also possess access rights to communal lands, which may include cultivable plots, pasture, and forest. They may also cultivate multiple land parcels that are spread vertically across different agro-ecological zones. Since the 1990s, land policy for highland indigenous populations in most countries has focused on individual titling and registration, thus promoting fully transferable property rights within these communities. While it is true that highland indigenous economies are significantly more integrated into the national market—including the market for land—than those of the lowlands, opening up the possibility for parcels to be sold or otherwise transferred to non-indigenous third parties may pose a risk to the integrity of these communities, and a threat to their land tenure security in the longer run (Plant and Hvalkov 2001).

### 3.4.4 Progress in and Challenges to Implementing Indigenous Land Rights

#### *Who Owns the Forest?*

With the ratification of ILO Convention 169 and the national-level constitutional, legislative, and agrarian policy reforms that have been adopted across Latin America, significant progress has been made in granting land rights to indigenous populations, particularly in tropical lowland forest areas. A comparison of forest tenure distribution between 2002 and 2008 suggests that in this short period, almost 12 million additional hectares of forest were set aside for use by indigenous and other forest communities, while ownership rights over an additional 55 million hectares were transferred to indigenous and other forest communities (see Table 1). In the nine countries for which we have data, a total of almost 50 million hectares of public forest is currently reserved for use by indigenous peoples, and another over 200 million hectares are owned outright by these communities.

**Table 1: Forest Tenure Distribution in Nine Latin American Countries, 2002 and 2008**

Country	Total Forest (Mha. 2005)	Percent Forest Cover (2005)	Designated for use by communities and indigenous peoples		Owned by communities and indigenous peoples	
			2002	2008	2002	2008
<b>Bolivia</b>	58.7	54.2	16.6	19.52	2.8	9.04
<b>Brazil</b>	477.7	57.2	11.68	25.62	74.5	109.13
<b>Colombia</b>	60.7	58.5	0	0	24.5	27.5
<b>Ecuador</b>	10.9	39.2	0	0	2.17	6.83
<b>Guyana</b>	15.1	76.7	0	0	1.4	2.36
<b>Honduras</b>	4.6	41.5	0	.27	0	.11
<b>Mexico</b>	64.2	33.7	0	0	44	38.71
<b>Peru</b>	68.7	53.7	8.4	2.86	2.25	12.62
<b>Suriname</b>	14.8	94.7	.51	.51	0	0
<b>Total</b>	<b>775.4</b>		<b>37.19</b>	<b>48.78</b>	<b>151.62</b>	<b>206.3</b>

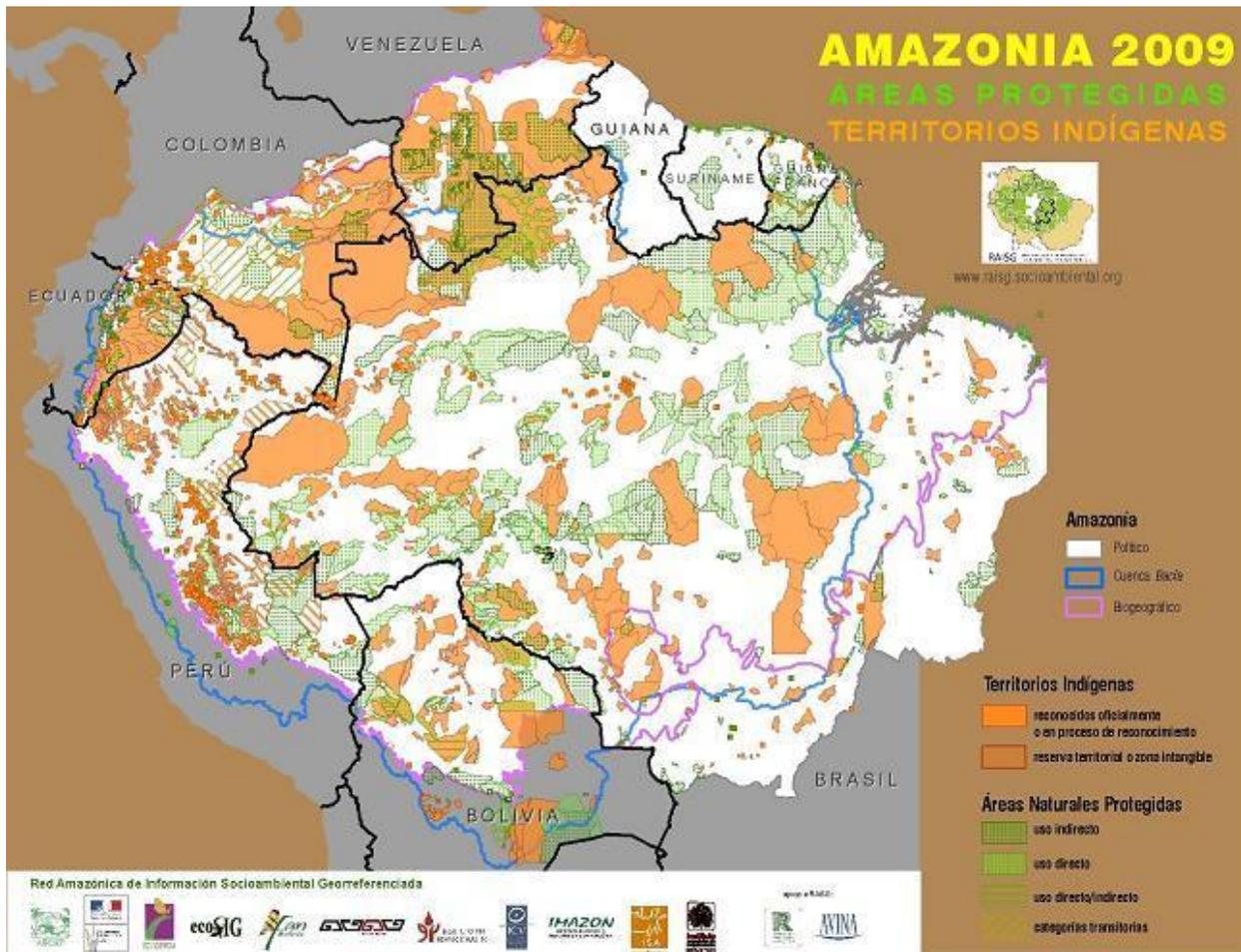
Sources: FAO (2006), Rights and Resources Initiative (2009)

### *Conflicting Claims over Indigenous Lands*

Despite the acceleration in granting use and ownership rights over forest lands to indigenous populations in Latin America, a number of obstacles remain. One key issue is the resolution of competing claims over the same land. In some cases, these claims come from colonists and neighboring non-indigenous communities. As a result of both state-sponsored colonization programs as well as spontaneous migration to lowland areas, there is commonly a presence of non-indigenous (and/or highland indigenous) settlers in the lands adjudicated to indigenous peoples. In cases where title is issued to indigenous peoples over large and contiguous territorial areas, a major challenge is to sort out the competing claims to the land and to determine the priorities for granting compensation to either indigenous or non-indigenous land occupants. This can become particularly problematic when there is a delay between the granting of statutory rights and the implementation of these rights in the form of titling and registration; as Stocks (2005:98) puts it, “time is an enemy of the process of securing indigenous lands.”

In other cases, competing claims to indigenous land come not from private sources, but from national parks, protected areas, and biosphere reserves, which often overlap the areas of indigenous habitation. In some cases, these areas were created within the territories already titled to indigenous communities, creating intersecting land claims and potential conflict. Map 6 demonstrates the overlap of protected areas and indigenous territories in the Amazon Basin.

**Map 6**  
**Protected Areas and Indigenous Territories in the Amazon, 2009**



### *Rights over Natural Resources*

Much of the new activity around the granting of indigenous land rights in Latin America is being carried out in the context of broader forest tenure reforms, which can be distinguished from earlier generations of agrarian or land reform by its orientation towards forest conservation as well as livelihood goals (Larson et al. 2008). Forest management systems that give rights to communities have been widely promoted as part of conservation policies, but only recently has the realization grown that effective community-based management requires tenure reforms and not just shared or devolved management (Colchester et al. 2004). Forest reform often involves the recognition of rights of people already living in the forest, who also are likely to have their own system of tenure relations and forest governance. This process of formalizing what existed previously as customary institutions brings with it an additional set of challenges, including clarification of the nature of the rights and institutional authority of indigenous communities over the natural resources contained within their territories.

With respect to forest resources, many Latin American governments had awarded large timber concessions in areas of traditional indigenous habitation. When these areas are ceded as collective property, the question becomes, what role do indigenous populations and their organizations play in negotiating (or re-negotiating) the terms of such concessions, and how should the benefits be shared among the government and the

indigenous communities? Experiences with community forest initiatives have encountered problems of market barriers, financial risk, and limited local management capacity (Larson et al. 2008).

Besides timber and other non-timber forest resources, there has been a huge increase in energy development, particularly hydrocarbons, in tropical Latin America, with substantial international investment in the oil and gas potential of Brazil, Bolivia, Colombia, Ecuador, and Peru. The marked increase in petroleum or mineral development in remote areas has led to prolonged negotiations between indigenous peoples and governments concerning control over resource and energy development, including profit-sharing arrangements (Plant and Hvalkof 2001).

### 3.4.5 Case Studies: Nicaragua and Bolivia

#### *Nicaragua*

As mentioned in the previous discussion of indigenous territorial rights, in 1987, Nicaragua signed a unique autonomy agreement with indigenous and Afro-Nicaraguan (Creole) leaders that recognized common property land holdings and created two multi-ethnic autonomous regions: the North Atlantic Autonomous Region (RAAN) and the South Atlantic Autonomous Region (RAAS). The implementation of the land rights provisions of the Autonomy Law, however, has been generally characterized by government resistance and has engendered a great deal of inter-ethnic and other forms of conflict on the ground. Finley-Brook and Offen (2009) suggest that three major factors help explain the failure of the Autonomy Statute to advance multi-ethnic rights: (1) government interest in promoting the export of natural resources from the region (which is sometimes referred to as the Moskitia, after the majority indigenous Moskitu population), including timber, gold, and lobster; (2) the failure to pass subsequent regulations to fill the legal and institutional voids in the autonomy agreement; and (3) the overlapping of communal territories with existing land titles, resource concessions, and private property regimes.

Only after 16 years of internationally financed mapping projects, a World Bank loan precondition requiring the government to deal with indigenous land claims, and the judicial victory of the land claims of the Mayangna community of Awas Tingni in the International Court for Human Rights did Nicaragua finally pass a law governing the demarcation of indigenous lands in the RAAN and RAAS. The Demarcation Law (No. 445), which passed the National Assembly in 2003, charged municipal and regional agencies (notably the Demarcation Commission CONADETI) with the responsibility for carrying out the demarcations and for settling conflicting claims. The law further required compensation to third parties that had settled in indigenous areas since 1987 and would be forced to move; non-indigenous settlers make up about half the population of the RAAN and RAAS (Finley-Brook and Offen 2009).

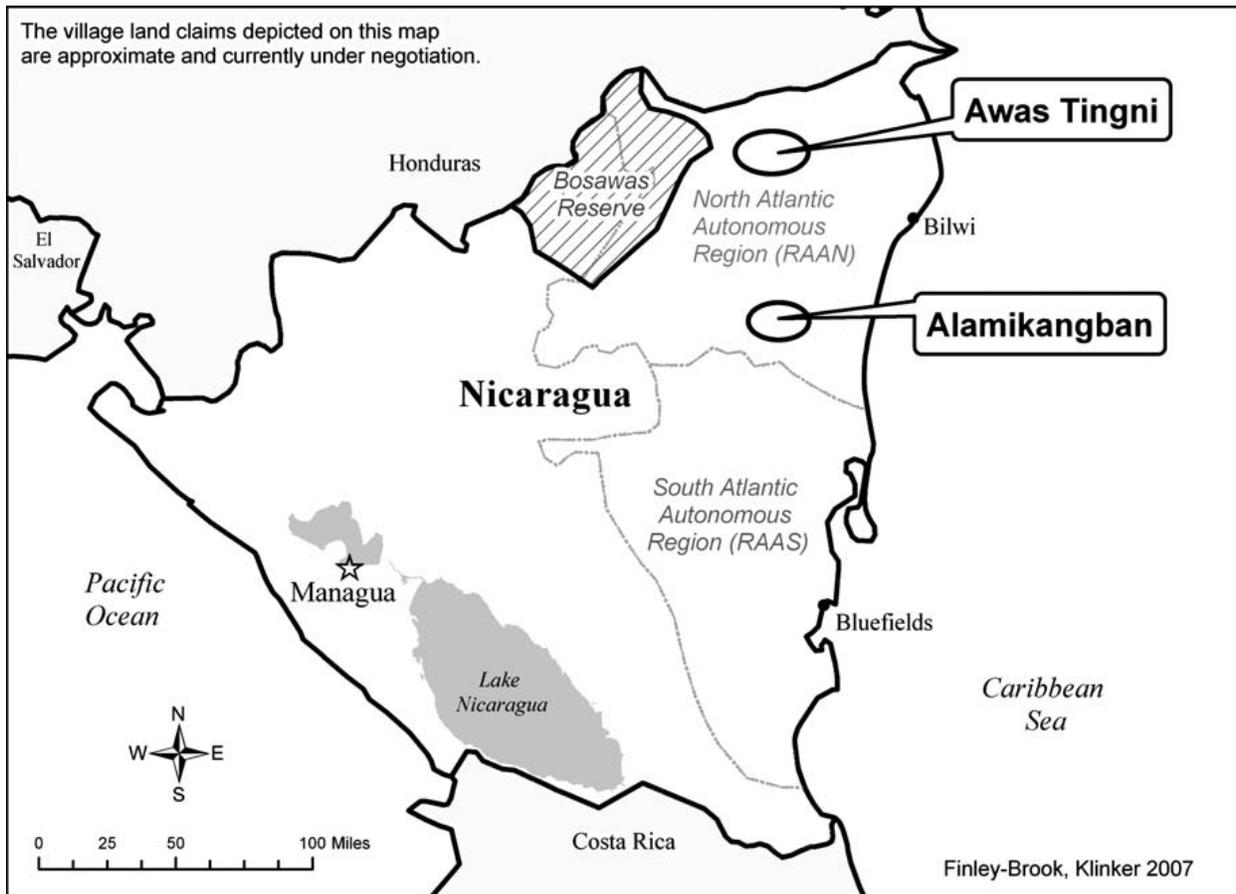
Larson et. al (2008) argue that although the failure to move more quickly on demarcation and titling—most of the RAAN and the RAAS remain untitled and there are an estimated 300 outstanding communal land claims—has increased conflicts over land, tenure rights have generally improved. The government can no longer grant logging or any other natural resource concessions on untitled lands claimed by indigenous communities without community approval. The Demarcation Law also establishes basic guidelines regarding how third parties in indigenous territories should be addressed, as well as procedures for resolving border conflicts between communities.

Two of the best documented experiences with indigenous land tenure regularization in Nicaragua are the Bosawas Biosphere Reserve and the community of Awas Tingni, both located in the RAAN (Finley-Brook and Offen 2009) (see Map 7). The Bosawas Reserve was created in 1991, partly with the justification of protecting indigenous livelihoods from non-indigenous (*mestizo*) colonization. In 1997, the Bosawas was recognized as an UNESCO Biosphere Reserve, in spite of expressed indigenous concerns that such a designation would further restrict their land uses. In 2005, the Nicaraguan government granted six land titles covering 2,531 square kilometers to 41 indigenous communities in the Bosawas Reserve. Unfortunately, these titles were temporary in nature, and only one was ever registered after considerable effort on the part of the

community. Even more disturbing, the current government has initiated a process to revoke this one registered title (ibid.).

In the case of Awas Tingni, community members began claiming land rights in the mid-1990s, after the government granted a Korean multinational corporation a 30-year 62,000-hectare timber concession on historically indigenous lands. In 2001, when the International Court for Human Rights handed down a sentence in favor of the Awas Tingni, an important international precedent was set recognizing communal land as a human right for indigenous peoples. The government eventually issued a title to Awas Tingni in December 2008, but irregularities remain and there have been conflicts with surrounding Miskitu communities.

**Map 7**  
**The North and South Atlantic Autonomous Regions of Nicaragua**



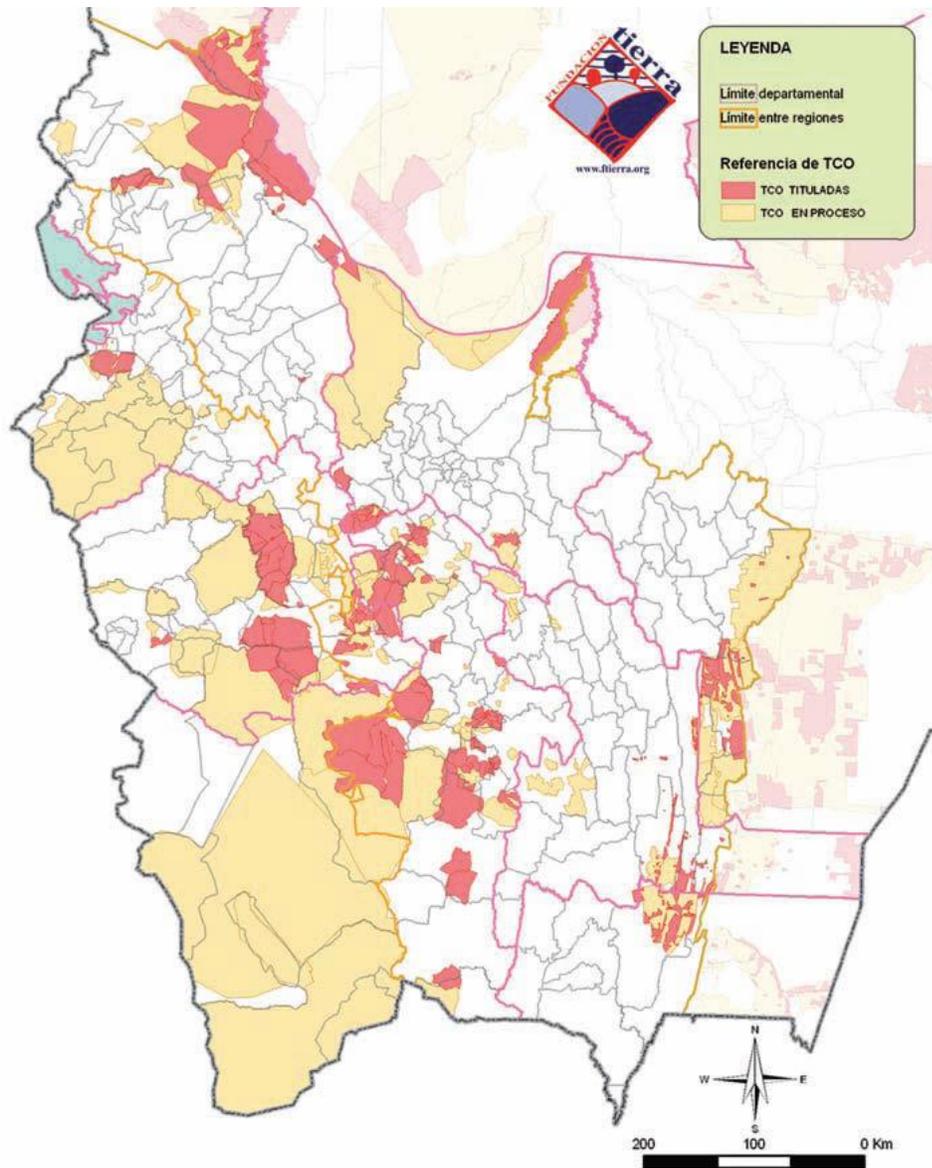
### **Bolivia**

In Bolivia, where 71 percent of the national population is indigenous, there has been a historically strong overlay of ethnicity with land policy. The agrarian reform of 1953 dissolved many of the colonial-era *haciendas* in the highlands and valleys and redistributed the land to the indigenous (Quechua and Aymara) former farm laborers. Over time, high population growth has fragmented these holdings, creating pressure on small farmers to migrate to urban areas and to the Eastern Lowlands, where extremely large landholdings were allocated to non-indigenous owners during the 1970s (Urioste 2009).

In 1996, a new agrarian reform law was passed, with the dual objectives of securing existing property rights and distributing public lands. This law was modified in 2006 to increase government's ability to take over un- and underutilized land—estimated to be approximately 6 million hectares, and located almost exclusively in

the Eastern Lowlands and the Amazon—without compensation, and to distribute expropriated lands to landless local residents and indigenous highlanders. In the highlands themselves, a “Special Procedure for Rapid Titling” allows communities and small landholders demonstrating rights of possession to be titled via a process of internal property rights clarification (*saneamiento interno*) led by community authorities (ibid.). Map 8 shows the current status of communal land titling in the Bolivian highlands.

**Map 8**  
**Tierras Comunitarias de Origen in the Bolivian Highlands**



Source: Colque (2009)

The real emphasis of Bolivian land policy in the past five years, however, has been the titling of indigenous lands in the Amazon in the form of *Tierras Comunitarias de Origen* (TCOs). To date, more than nine million hectares—over 15 percent of Bolivia’s total forest area—has been allocated to lowland indigenous groups (see Table 1, page 24). The titling process takes place in three steps: (1) the government first determines and validates the territorial needs of petitioning group, in the form of a spatial needs assessment carried out by the Vice Ministry of Indigenous Affairs (VAIPO); (2) the National Agrarian Reform Institute (INRA) then “immobilizes” the proposed TCO, prohibiting the entrance of third parties who may try to establish new claims; and (3) competing property claims are evaluated (*saneamiento*), using as a basic criteria the demonstrated productive use of the land (known as the “social and economic function”) (Larson et al. 2008). Although these tropical forest areas are relatively sparsely populated, a number of colonists (who may themselves be indigenous migrants from the highlands) had received land titles under the previous agrarian reform program, or occupy land without legal title. Some problems have arisen, as the law gives discretion to the government agency as to whether to give priority to indigenous or colonist populations in the event of overlapping land claims.

### 3.4.6 Whither Land Policy for Indigenous Populations in Latin America?

It is clear that enormous and important advances have been made in the recognition of indigenous land rights in Latin America over the past 20 years. This is evident at the level of constitutional reforms, new agrarian and forest legislation, as well as on-the-ground demarcation and titling programs, particularly in tropical lowland areas. Use and ownership rights over significant quantities of land have been transferred to indigenous communities. However, national governments’ commitment to transferring large land areas to minority populations has to contend with at least two major challenges: competing claims from non-indigenous sources, and rights over valuable natural resources contained within indigenous territories. As Venezuela’s President Hugo Chavez said during an indigenous titling ceremony in 2005, “Don’t ask me to give you the state’s rights to exploit mines, to exploit oil ... Before all else comes national unity.”

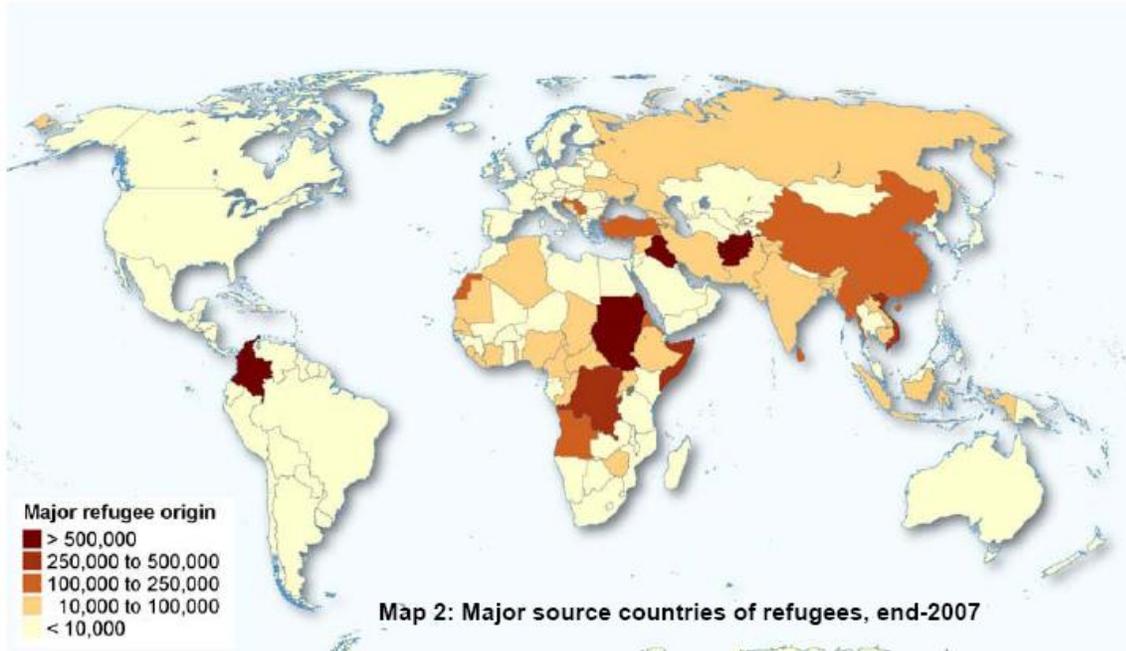
## 3.5. POST-CONFLICT AND CLIMATICALLY VULNERABLE POPULATIONS: REFUGEES, INTERNALLY DISPLACED PEOPLE, AND EX-COMBATANTS

The United Nations High Commission on Refugees estimates that, as of the end of 2007, there were 67 million people who had been forcibly displaced from their areas of origin. Of these, 16 million are refugees (outside of their country of origin) and 26 million are conflict-generated internally displaced persons (IDPs) (UNHCR 2008).<sup>2</sup> On the African continent, there are close to 2.3 million refugees and 5.9 million IDPs. The major refugee source countries are Sudan, Somalia, Burundi, and the Democratic Republic of the Congo (370,000) (see Map 9 below). Major countries of refugee asylum are Tanzania, Chad, Kenya, and Uganda. The countries with the greatest numbers of IDPs are the DRC, Somalia, Sudan, and Uganda.

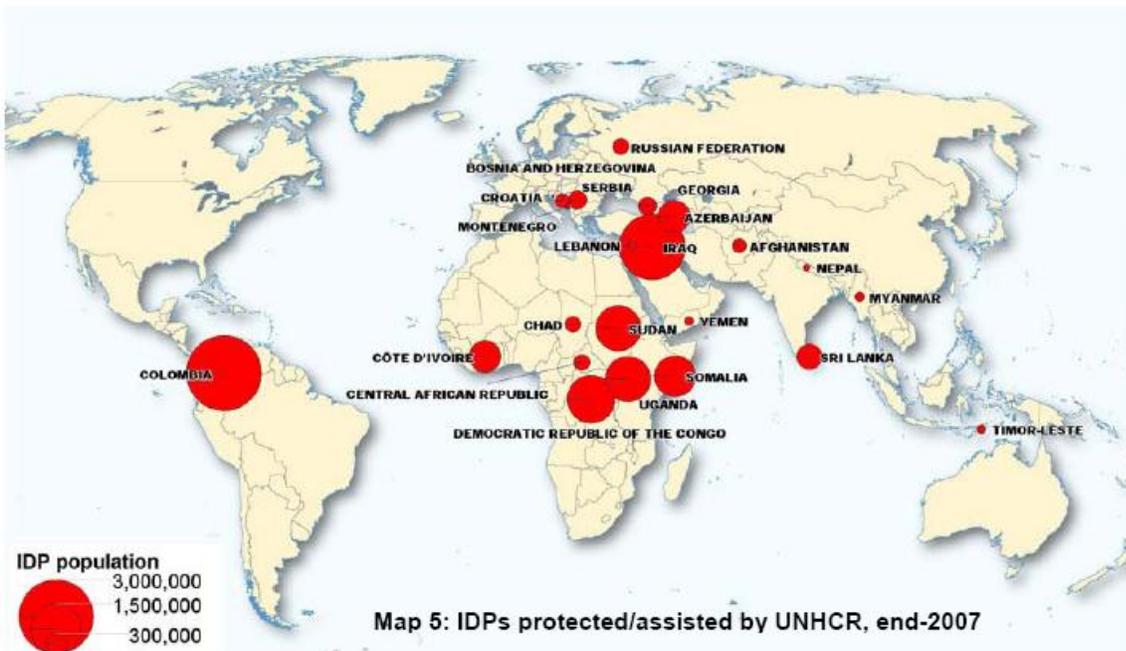
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2 The United Nations defines a refugee as “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” Internally displaced persons are people or groups of individuals who have been forced to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights, or natural- or human-made disasters, and who have not crossed an international border.

**Map 9**  
**Major Source Countries of Refugees**



**Map 10**  
**Internally Displaced Populations**



The land tenure and property rights issues which arise as a result of conflict-induced displacement are enormously complex, politically sensitive, and difficult to characterize in a general fashion—each conflict

situation has its own particular history and dynamic with very different implications for the nature of post-conflict land issues. Nevertheless, in this section we attempt to identify some common challenges facing land policy formulation and implementation in a post-conflict setting, with a focus on the African experience. We also address the special challenges facing populations who are displaced as a result of climate change-induced threats to their natural resource base.

In one of the most comprehensive analyses of post-conflict land tenure issues, Unruh (2004) suggests that there are three primary sets of concerns: 1) those land issues that may have contributed to the initial cause and conduct of the conflict, 2) those land and property issues that emerged during a conflict, and 3) a set of tenure-related issues necessary for effective recovery.

### **3.5.1 Land as a Source of Conflict**

While the economic literature on the linkages between inequality in the distribution of land ownership and the probability of outbreak of civil war is inconclusive (Cramer 2003 and Kniss 2009), it is clear that land conflicts originating either in historical inequities or in increased land scarcity can have far-reaching impacts on social peace. Deininger (2003: 157) argues that

such conflicts are more likely to arise where (a) there is a history of large-scale, historical expropriation of land rights; (b) land becomes more valuable either because of technical and economic change or as a result of increased scarcity of productive land brought about by population growth; and (c) economic opportunities are lacking in other sectors of the economy and/or the state is in fiscal crisis.

Unruh (2004) also comments that the importance of land and property rights issues during and subsequent to civil conflict is reflected in the significant role that agrarian reform has played in many insurgent and revolutionary agendas.

### **3.5.2 Conflict-related Land and Property Issues**

In addition to these pre-existing land issues, a host of new and volatile land-related problems invariably arise during civil conflicts—many related to the large dislocations of the population. At the heart of these directly conflict-related land issues are competing claims to property by refugees and IDPs on the one hand and by those who have either occupied abandoned lands during the war, or have become “hosts” to dislocated populations on the other. These competing claims are complicated by the fact that, especially in Africa, evidence of rights to land is largely undocumented, and rooted in local-level institutions which have most likely been transformed or destroyed as a result of the violence. As Unruh (2004) puts it, “[p]hysical separation changes, terminates, or puts on hold prevailing rights and obligations among people regarding land and property, especially where actual occupation, or social position forms the basis or a significant aspect of claim.” Mozambique is a case in point: social customary evidence such as testimony, community, and lineage membership, and history of occupation were significantly devalued due to widespread dislocation, while the existence of permanent, physical investments in land, such as agroforestry trees, greatly increased in value as evidence (Unruh 2002). Even where evidence of pre-conflict land rights is documented, records may become lost or destroyed during the conflict (as they were in East Timor in 1999, as well as in Rwanda and Somalia), or multiple, often contradictory, documentation can be used as the basis for land claims.

Former combatants and their families make up another vulnerable group specific to post-conflict situations warranting attention with respect to land policy. In many countries, providing ex-combatants with access to land forms a part of the reinsertion and reintegration of soldiers and/or members of armed groups back into civil society (Body 2005). In Ethiopia, for example, half a million soldiers were demobilized after the overthrow of the Derg government by rebel forces in 1991 (Ayalew et al. 1999). As part of its reintegration program, 170,000 ex-combatants who had served for at least 18 months and were classified as “rural settlers”

received a plot of land<sup>3</sup> and basic agricultural inputs; livestock was also supplied but only to about one-third of this group. Equally, if not more, important than the granting of new land to demobilized soldiers was the fact that many ex-combatants were able to reclaim state land that had been previously allocated to them by local Peasant Associations. In some areas, neighbors continued to cultivate the land on behalf of the soldiers' families; in others, where conscription rates were particularly high, surviving combatants found it relatively easy to claim land upon their return. A household survey conducted in 1994-95 found no statistical difference in mean land holdings between households headed by former soldiers and others in the same communities (Ayalew et al. 1999).<sup>4</sup>

Deininger (2003) identifies six land issues unique to post-conflict situations:

- (1) The need to use land to provide a livelihood for demobilized soldiers and displaced populations;
- (2) The presence of large numbers of refugees who may have been driven from their lands and whose documents to prove ownership have been destroyed or lost;
- (3) A particularly severe situation for female-headed households, widows, and orphans;
- (4) A breakdown of traditional village structures and the often well-balanced systems of informal secondary land and resource rights that were associated with them;
- (5) A rapid increase in the frequency and extent of land disputes; and
- (6) Contamination with land mines and difficulties in physical movement.

### 3.5.3 Land Tenure Policy for Peace and Recovery

As is the case with the other vulnerable groups discussed in this paper (HIV/AIDS-affected households and pastoralist communities), the relationship between customary and statutory land tenure systems is critical to understanding the situation of those who have been displaced during conflicts. Even though pre-conflict customary institutions are weakened during social upheavals, several studies have found that improvised, local-level solutions to post-conflict land disputes are often the best building blocks for national policy with respect to stabilization and recovery. Unruh (2004) argues that post-conflict rural societies quickly develop new land-related norms and informal institutions with a good deal of local legitimacy, which should be taken advantage of as the formal system begins to reestablish itself. Since informal land tenure systems resuscitate more quickly than formal ones—usually out of necessity to make use of the land for immediate food production needs—local authorities will have increased relative power in the post-conflict tenure setting.

A post-conflict recovering population will not wait for a legal system to put itself together before engaging in land tenure activities. It is instead up to the formal system to engage the emerging trends of the informal tenure sector early and continually in the re-establishment of the formal system, so that the two have a shared legitimacy and effectiveness that is of real utility. (Unruh 2004)

Several relatively successful examples of post-conflict governments utilizing “on-the-ground” experiences as the basis for land policy can be found in Mozambique, Ethiopia, and Cambodia. To varying extents, each of these governments relied on local institutions to mediate and resolve conflicts that emerged during the resettlement of displaced populations. Moreover, in all three countries, the formulation of new land laws governing longer-term property rights issues was carried out with relatively high degrees of consultation, and

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<sup>3</sup> Data from a household survey in 15 villages in 1994/95 suggests that the average land grant was .77 hectares (Ayalew et al. 1999).

<sup>4</sup> Non-soldiers do have significantly higher values of livestock holdings than ex-soldiers (ibid.)

the resulting legislation contains unprecedented recognition of the role of local institutions in land governance (Deininger 2003; Unruh 2004; Pons-Vignon and Lecomte 2004).

Both the United Nations Food and Agriculture Organization (FAO) as well as the United States Agency for International Development (USAID) have published detailed guidelines for policymakers and practitioners regarding land issues in post-conflict environments (FAO 2005; USAID 2005). The FAO document covers “best practices” with respect to assessment, emergency activities (including the adjudication of land rights), and the development and implementation of policies (including restitution and resettlement). The USAID “toolkit” includes a useful Rapid Appraisal Guide as well as a comprehensive listing of monitoring and evaluation indicators for achieving specific objectives related to land and conflict.

More modestly, the OECD recommends the following land policies aimed at consolidating peace in areas emerging from conflict:

- (1) Property Commissions (or Claims Commissions) can play a leading part in processes of reconciliation and property restitution, by facilitating dialogue and data collection while dealing with competing claims, resettlement, and compensation in the aftermath of conflicts involving mass population displacements.
- (2) Comprehensive dialogue programs can help to resolve enduring land disputes which would otherwise degenerate into fighting, and can pave the way for acceptable institutional reforms.
- (3) Investment in agricultural infrastructure in post-conflict settings can complement land policy by creating new income-generating opportunities. Fostering agricultural productivity and production will prevent the outbreak of food crises, and create employment and other economic opportunities for demobilized war veterans.

### 3.5.4 Climate Change Refugees

An emerging concern among both climate change experts as well as the international refugee community is the potentially widespread displacement of large populations due to flooding, drought, and other severe weather events brought on by global warming. As early as 1990, the Intergovernmental Panel on Climate Change (IPCC) noted that the greatest single impact of climate change could be on human migration—with millions of people displaced by shoreline erosion, coastal flooding, and agricultural disruption. Since then, various analysts have tried to put numbers on future flows of climate migrants (sometimes called “climate refugees”)—the most widely repeated prediction being 200 million by 2050 (Brown 2008).<sup>5</sup>

The meteorological impact of climate change can be divided into two distinct drivers of migration: climate processes such as sea-level rise, salinization of agricultural land, desertification, and growing water scarcity; and climate events such as flooding, storms, and glacial lake outburst floods. But non-climate drivers, such as government policy, population growth, and community-level resilience to natural disaster, are also important. All contribute to the degree of vulnerability people experience.

Temporary migration as an adaptive response to climate stress is already apparent in many areas. In Bangladesh, for example, increased flooding is forcing evacuation of some rural areas; most of the refugees relocate in the capital city of Dhaka (Friedman 2009). The picture is nuanced, however; the ability to migrate is a function of mobility and resources (both financial and social). In other words, the people most vulnerable to climate change are not necessarily the ones most likely to migrate.

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<sup>5</sup> Predicting future flows of climate migrants is complex—stymied by a lack of baseline data, distorted by population growth, and reliant on the evolution of climate change as well as the quantity of future emissions.

Numerically and geographically, South and East Asia are particularly vulnerable to large-scale forced migration. This is because sea level rise will have a disproportionate effect on their large populations living in low-lying areas. Millions more are vulnerable in Africa, particularly around the Nile Delta and along the west coast of Africa. Small island states around the world are particularly vulnerable to sea level rise because, in many cases (the Bahamas, Kiribati, the Maldives, and the Marshall Islands), much of their land is less than 3 or 4 meters above present sea level. Other island states tend to have high levels of development and high density population around their coasts. Half the population of the Caribbean, for example, lives within 1.5 km of the shoreline (Brown 2008).

The relevance of climate migration to land policy lies in the necessity of developing legal norms and practices to facilitate the resettlement of affected populations, both within their nations of origin as well as across international borders. The issue assumes even greater complexity when considering the likelihood that the burden of providing for climate migrants will be borne by the poorest countries—those least responsible for emissions of greenhouse gases. Brown (2008) suggests three categories of policy responses to the climate migration issue:

- (1) Expanding the definition of a refugee under current international law to include those displaced by climate change;
- (2) Incorporating forced migration into current domestic plans for climate change adaptation; and
- (3) Addressing OECD countries' willingness to accommodate climate migrants through immigration.

# 4.0 CONCLUSIONS AND RECOMMENDATIONS

We have identified five categories of population groups whose vulnerability is potentially increased by land tenure and property rights policies and programs: women; households that have been directly affected by HIV/AIDS; pastoralist communities; indigenous populations; and people who have been displaced during violent conflicts or who are threatened to be displaced by natural disasters or climate change. While not comprehensive, these populations, either because of their ascribed characteristics, livelihood systems, and/or external shocks, have particularly weak claims on land rights that might be formalized as part of an LTPR program. Recognition of the specific constraints facing these populations is key to designing and implementing land policies that do not further disenfranchise them, and to developing strategies to strengthen the position of these groups with respect to secure access to land and other natural resources.

With respect to gender, we have argued that property rights in land act both as a form of economic access to key markets for women, as well as a form of social access to non-market institutions such as the household and community-level governance structures. Important regional differences exist in the ways in which women gain various forms of land rights. In Latin America, land is largely privatized, and inheritance is the most important transfer mechanism; policymakers, therefore, need to pay particular attention to joint titling of current marital holdings as well as enforcement of gender-equitable bequests to wives and daughters. In Africa, the prevalence of gender-biased customary legal systems, and significant sub-regional and local diversity in land tenure systems, suggests a proactive role for government in challenging women's secondary land rights through progressive legal reform and privileging women in land redistribution and registration and titling programs. In Asia, India and China have demonstrated commitment at the national levels to strengthening women's property rights in land, but long traditions of patrilineal inheritance and patrilocal residence make these policies difficult to implement at the state and local levels. Other Asian countries face the challenge similar to Africa of the existence and recognition of pluralistic legal systems, and the need to counter customary gender biases with land policies and programs that grant equal rights to women.

A second category of population that is particularly vulnerable to changes in land tenure arrangements is households that are directly affected by the HIV/AIDS pandemic, especially in Southern Africa. The main sources of vulnerability lie in the fact that many customary tenure systems are based on continued, active use of agricultural lands, and the weak inheritance rights of widows and minor orphans. Many of the policy recommendations with respect to protecting widows' access to land overlap with those addressing women's land rights more generally; the international human rights community has strongly advocated for statutory legal reform to supersede customary practices with respect to the disposition of property upon household dissolution. With respect to orphans, legal reforms to explicitly recognize orphans as land claimants, along with land registration and bequest planning programs targeted to AIDS patients, could help to protect children's property and inheritance rights.

Pastoralist populations are vulnerable to changes in property rights by virtue of several unique characteristics of their system of land use and management: spatial mobility across highly variable environments; fluid boundaries and different degrees of access rights; and the common use of grazing land. Under threat from population pressure and the expansion of sedentary agriculture in areas bordering on rangelands, traditional pastoral land use systems have been subject to a variety of attempts at tenure and property rights reform, ranging from privatization to nationalization. There is now a growing consensus that granting of greater land tenure security in the form of communal, village-based, or cooperative property rights guaranteed by law is

the preferred approach to protecting these communities, as well as to establishing incentives for sustainable resource management. In addition, it will be necessary to develop appropriate forms of conflict mediation and resolution, as well as to provide technical support for customary resource management practices.

Important advances have been made in the recognition of indigenous land rights in Latin America over the past 20 years. This is evident at the level of constitutional reforms, new agrarian and forest legislation, as well as on-the-ground demarcation and titling programs, particularly in tropical lowland areas. Use and ownership rights over significant quantities of land have been transferred to indigenous communities. However, national governments' commitment to transferring large land areas to minority populations has to contend with at least two major challenges: competing claims from non-indigenous sources, and rights over valuable natural resources contained within indigenous territories.

Large-scale dislocations of populations due to war, insurgency, and other forms of violence gives rise to competing claims to property by refugees and the internally displaced on the one hand, and by those who have either occupied abandoned lands during the war, or have become "hosts" to dislocated populations on the other. Former combatants and their families make up another vulnerable group specific to post-conflict situations warranting attention with respect to land policy. Evidence from some post-conflict societies suggests that improvised, local-level solutions to post-conflict land disputes are often the best building blocks for national policy with respect to stabilization and recovery. Such national policy should include the establishment of a property or claims commission, a comprehensive dialogue program, and significant investment in agricultural infrastructure to allow resettled populations to begin generating livelihoods.

In the case of climate refugees, the eventual magnitude of which is unknown, it will be necessary for the international community to address these potentially large flows of very poor people displaced from their areas of origin by treating them as true refugees, and by making available resources for their resettlement both within the most affected regions, as well as in those countries most responsible for climate change.

One final comment concerns the cross-cutting and overlapping nature of vulnerability with respect to land policy. The particular challenges facing women with respect to land rights, for example, may be even more acute for women who are also members of other vulnerable populations, such as pastoralists, indigenous populations, and refugees. Likewise, macro events such as civil conflicts and climate change not only generate their own categories of vulnerable populations in the form of refugees and IDPs, but also have important impacts on other marginal groups. Careful empirical analysis of the manifestations of these potentially overlapping and mutually reinforcing sources of vulnerability is vital to the design and implementation of land policies and programs seeking to strengthen the land rights of these populations.

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