Too Much for Too Few: Problems of Indigenous Land Rights in Latin America

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Abstract

In a number of countries in Latin America, recent changes in the constitutional and legislative environment under which indigenous people hold or claim land and natural resource rights have triggered a number of processes and projects to demarcate, legalize, or otherwise consolidate indigenous lands. This review begins with a look at Nicaragua and goes on to examine five of the South American processes, allegedly with the most favorable legal and policy environments, and concludes that they suffer from common problems related to (*a*) the amount of land and resources being claimed by relatively small numbers of people, (*b*) the contestation of the claims by non-indigenous sectors, and (*c*) the nature of indigenous organizations and the NGOs that support them. The confrontation between policy and reality yields some lessons for the future.

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UN: United Nations

INTRODUCTION

Latin America is alleged by many to be undergoing a sea change regarding the place of indigenous people in their respective national societies. A spate of recent books on the changes in the political landscape (Assies et al. 2000, Brysk 2000, Langer & Muñoz 2003, Maybury-Lewis 2002, Sieder 2002, Van Cott 2000, Warren & Jackson 2002) and major systematic international institutional studies on indigenous land rights (Colchester et al. 2001, Daes 2001, Plant & Hvalkof 2001, Roldán Ortiga 2004) testify to the great interest these changes have aroused in the academic and development communities. The door has been opened to new forms of political participation and the promise of a measure of cultural, political, and economic autonomy, of control over natural resources, and of new forms of indigenous land tenure.

At the end of the United Nations' (UN) International Decade of the World's Indigenous Peoples (1995–2004), these changes appear as significant advances in an arena where there seemed to be little progress for many years. Advances in policy, however, are not necessarily advances in application, and it takes more than paragraphs in a document to change 500 years of colonial and postcolonial practice, especially when the practice involves something as essential as land. The good news is that the indigenous struggle to regain control over lands that indigenous people presently occupy is now viewed as legitimate and legal in policy sectors in a number of Latin American countries. More good news is that the World Bank has been a leader in keeping pressure on the politicians. The bad news is that the squatters, gold miners, ranchers, guerillas, local police forces, paramilitaries, oil companies, loggers, and other assorted claimants to space and resources currently occupied by indigenous people have not all gotten the message. In the on-the-ground contentious and messy world of the vindication of indigenous land rights, sometimes policy seems impossibly far away, and sometimes the men with the guns just take what they want. Worse, as policy makers in several countries have begun to realize the actual number of hectares and dollars involved in phrases such as "rights to lands they traditionally occupied," they have moved into a static mode and, in some cases, have retreated from the policy advances. This review begins with a detailed look at a major policy advance and its impact where no one expected it, Nicaragua. The Nicaraguan case is interesting, not only for its legal precedent, but also as another illustration of the confrontation between policy and reality in indigenous affairs (e.g., Schmink & Woods 1992). It then briefly examines the forces that are changing the way policy makers interpret land issues across Latin America and looks at the application of indigenous land policy in Brazil, Colombia, Bolivia, and Peru, all countries judged to be advanced in the policy arena with regard to land issues. A final section draws parallels and distinctions between cases and makes conclusions about the difficulties encountered in applying policy and the implications these cases make for the future.

NICARAGUA SURPRISES EVERYONE AND IS SURPRISED

Late in the muggy afternoon of August 3, 2003, I sat in a freezing air-conditioned hotel room in Managua, Nicaragua, editing the first draft of a team report on the land claim of Awas Tingni, an indigenous Mayangna community in Nicaragua. The claim encompassed 94,000 hectares and included traditional

hunting, fishing, and agricultural areas. It did not encompass all the Mayangna had occupied historically in the Wawa River Basin, but it was the best they could hope for, given the counterclaims of indigenous Miskitu communities and logging cooperatives, invasions of ladino/mestizo squatters, and the Miskitu-dominated political climate of the Mosquitia, in which they are less than a 10% minority. The report was lengthy and contained an ethno-historical evaluation based on documents and academic studies, an oral history to connect the people with the written history, studies of current land use, a census of those considered to have land rights, an analysis of the subsistence economy and the cash economy, and an ethnographic treatment of the community. Accompanying the study were geographic information systems maps identifying vegetation, ecosystems, soil types, the locations of old settlements, hunting and fishing camps, areas of cultural and historical significance, neighbors, place names, counterclaims, and a host of other details. It had taken 2 months of fieldwork for 9 outside researchers and technical trainers and 20 community researchers and guides to compile.

Nicaragua would seem to be moving quickly in the direction of recognizing indigenous land rights, first with its 1987 autonomy law and its constitutional backing (Hale 1994; Vilas 1989, pp. 142–47) that granted certain political, cultural, and natural resource rights to Nicaragua's east coast indigenous and African Nicaraguan populations, and then with a 2003 indigenous demarcation law. The work in Awas Tingni itself came as a result of a landmark legal case brought by the community before the Inter-American Court of Human Rights (Anaya & Grossman 2002). In 1995, the community protested a logging concession that had been granted by Violeta Chamorro's government to a Korean logging firm on what they viewed as their land, under their interpretation of their customary or traditional tenure rights. After several years of testimony before the Inter-American Commission on Human Rights (see Davis 1988 for the background and significance of this organization with regard to land rights), the case was moved to the related court, the Inter-American Court of Human Rights. The decision of the court on August 31, 2001, was startling and unequivocal. The community was indeed judged to have "customary" land rights on the basis of historical occupation. Furthermore, Nicaragua was judged to have violated the rights of the Mayangna by imposing a logging concession on those lands without consultation, and also for the lack of a legal framework through which they could claim their land rights according to Nicaraguan law. Although a number of international treaties and declarations have expressed that indigenous peoples of the world have such rights, no other international court has been as explicit as the Inter-American court. Earlier cases in other courts had rejected the *terra nullius* argument that lands were legally unoccupied until the arrival of colonizing powers (Anaya 1996, pp. 21–23), but they stopped short of ruling in favor of indigenous customary rights on national lands in deference to postcolonial state sovereignty.

Although Nicaragua has not yet ratified the International Labor Organization = Convention 169 that, among other things, supports traditional "territorial" land rights (to be defined below) for the world's indigenous people, it has signed the American Convention on Human Rights (see Anaya & Williams 2001 for a description of how this system applies to indigenous people), which makes the court decisions legally binding. For reasons of its own,[1] the government agreed to legalize the "traditional" lands of Awas

[1]Nicaraguan politicians consider that the nation will have to resolve the indigenous land tenure issues on the Atlantic coast before they can profit from the exploitation of what they think of as the "national forest." They tend to think of indigenous claims as islands in a sea of national forests. Indigenous people tend to think that there is no national forest in eastern Nicaragua, only contiguous and often overlapping territorial claims. These two competing "maps" of eastern Nicaragua are reminiscent of Orlove's (1991) work on Lake Titicaca.

GEF: Global Environmental Facility

USAID: United States Agency for International Development

Tingni. Thus, in January 2003 the Nicaraguan congress took a bill out of committee where it had languished for more than four years and passed an indigenous "demarcation" law. This law was originally drafted at the insistence of the World Bank as a precondition for releasing funds for the Atlantic Biological Corridor Global Environmental Facility (GEF) project under the theory that secure tenure for indigenous communities would prevent resource degradation by excluding outside appropriators (Graham 1997). Regional autonomy alone, it was felt, had not worked to protect resources. Additionally the autonomous regions where people were aware of the United States Agency for International Development (USAID)-funded demarcation of six indigenous territories between 1994 and 1998 in the BOSAWAS biosphere added political pressure, along with the elaboration of a 1997 World Bank–funded regional map of community claims (Dana 1998; Dana et al. 1998; Offen 2003a; Stocks 1996, 2003).

As a number of researchers have commented, the World Bank has played a pivotal role in advancing the cause of indigenous and traditional people with regard to biodiversity conservation (e.g., Brysk 2000, Davis 1993, Offen 2003b, Partridge et al. 1996), and much of the impetus in Latin America for change in the legal framework surrounding indigenous land tenure comes from that source and other multi-lateral donors who have followed their lead. However, even with the powerful influence of multilateral and bilateral lenders, no community or multi-community territory has yet been titled under the new Nicaraguan law. In October 2004, Awas Tingni was offered relatively small and noncontiguous pieces of agricultural land instead of the territory we documented; the offer is scarcely more than what agrarian reform would have extended on the basis of some boilerplate formula of people per hectare of farmland. Political insider gossip holds that the claim is unofficially thought to be "too much land for too few people," which is another way of saying that too many political and economic interests want the land.[2] Because the upper Wawa River basin is heavily forested and the water quality of its discharge inevitably affects offshore fisheries, this offer—besides working an injustice on the Mayangna—fails to protect some of the most important natural resources in eastern Nicaragua. The community has rejected the preliminary offers and may go back to court.

My impression is that Nicaragua's political reaction to the literal application of its own high-minded constitutional and legislative framework—drafted at the insistence of foreign-supported combatants in the case of regional autonomy, and a powerful international lender in the case of the demarcation law—is becoming the norm rather than the exception. Despite the promising openings, the movement toward effective indigenous ownership and control over indigenous lands has bogged down in some of the places where it seemed most advanced. Although indigenous rights activists, action-oriented anthropologists, and some (not all) conservationists would love to see progress in this matter, the fact is that governments have become less enthusiastic. After 15 years of legislation that seemed to favor indigenous rights, many fronts of progress seem stymied. At stake are a number of deeply practical issues that include the sovereignty of states faced with ambiguous definitions of territoriality within their boundaries (Assies 2000, Stavenhagen 2002), the difficulty and ambiguity of establishing parallel legal systems for indigenous cultural systems and nonindigenous peoples (e.g., Padilla 1996; Sieder 1997, 2002a; Yrigoyen Fajardo

[2] As this review was written, the Nicaraguan government announced plans to legalize five indigenous territories in and about the Bosawas International Biosphere Reserve in May 2005. Indigenous people will own ~75% of the 7500 km^2 reserve. The path is smoother for the Bosawas territorial claims because they fall into a protected category that prohibits contestation from commercial logging and mining interests and prohibits the legalization of individual squatter claims.

2002), the postmodern dilemmas of indigenous self-representation (e.g., Assies 2000; Conklin 1993; Hendricks 1991; Hoffman French 2004; Jackson 1991, 1995; Rappaport & Dover 1996; Turner 2002; Warren & Jackson 2002), the contradictory tendencies of decentralization and privatization that have allegedly co-opted and undercut the entire indigenous movement while seeming to strengthen it (e.g., Assies 2000, Padilla 1996, Ramos 2002), and the question of who controls and benefits from surface and subsurface natural resources on indigenous lands (e.g., Corry 1993, Davis & Wali 1994, Van Cott 2002, Yrigoyen Fajardo 2002). This last issue is perhaps the most difficult to implement of the new constitutional provisions. As Van Cott (2002) points out, no country complies with its own constitution or with international treaties in this regard. Until the Awas Tingni case, nowhere in Latin America could indigenous people say "no" and make it stick.

Getting from Then to Now

Stavenhagen (2002) attributes the immediate causes of the present "indigenous movement" to the peasant and guerilla insurrections of the 1960s and 1970s and the collapse of the Soviet empire in 1989. Van Cott (2002) refers to the many challenges to state sovereignty in the Andes as a "crisis of legitimacy" that provoked decentralization. Many countries with simmering rebellions focused on the theme of agrarian reform in the 1960s and 1970s, although the efforts were usually cautious and inadequate. In Ecuador, for example, the agrarian reform of the 1960s left one third of the agricultural land in the hands of large landowners and one third in the hands of medium-sized private entrepreneurs. Indigenous subsistence farmers split the remaining third with mestizo market-oriented smallholders, an outcome that delayed peasant rebellion only temporarily (Smith 1992, Zamosc 2003).

During the 1980s the discourses of economic globalization, indigenous rights, and biodiversity conservation began to cohere like a *cuajada*, the simple white cheese made by cattle ranchers all over Central America. Although economic globalization undermines state sovereignty through structural adjustments and the reduction of the state's ability to set economic policy and living standards—thereby presenting ample political space for indigenous groups and the rest of civil society to contest the state—it also supports privatization as a more flexible way to run a world economy. This tendency has been responsible for a number of attacks on the "inalienable," "untransferable," and "unmortgageable"[3] attributes of classic indigenous legal landholding. Mexico's rejection of the inalienable principle of communal *ejido* lands in its 1991 constitution is one example (Aguilar Camín & Mercer 1993), and Peru's similar treatment of its native and peasant communities with its 1993 constitution stems from the same economic philosophy. The same underlying reasoning, however, can aid indigenous people in situations where indigenous control over the land base is ambiguous and not supported in law. Neoliberal economic reasoning, prominently represented by the World Bank, USAID, and many other multilateral and bilateral donors, identifies the lack of clear property rights as one of the major impediments to capitalist development (e.g., Adelman 1984, De Soto 1989, Deininger 2003, Durrand-Lasserve & Royston 2002, Sanjak et al. 2002, Weaver et al. 1997). Even though Hardin's (1968) "tragedy of the commons" thesis seemed to leave indigenous communal land in a never-never-land of degrading resources, the work of Ostrom and her colleagues on common

[3]Ortiga (2004, p. 27) defines inalienability as "incapable of being lawfully alienated, surrendered or taken away by another." Unmortgageable is defined as "not susceptible of being mortgaged or given as collateral to access credit," whereas untransferable is "incapable of being transferred from one person to another."

NGO: nongovernmental organization

ILO: International Labor Organization

property regimes scotched the notion that communal (group) property is equivalent to the open-access commons about which Hardin wrote (Ostrom 1990; Ostrom et al. 1994, 1999). Scholars have argued for 30 years that group property is the best way to insure sustainable management of natural resources (e.g., Ciriacy-Wantrup & Bishop 1975).

The modern indigenous rights movement is filling some small part of the vacuum created by the undermining of state sovereignty. The numbers of nongovernmental organizations (NGOs) that support indigenous and black rights and the representative "ethnic" organizations themselves exploded in the 1980s, and this trend continued into the 1990s (Assies 2000, Bebbington 1996). Offen (2003b, p. 50) refers to this explosion as the "NGOization of the indigenous and black rights movement." The support has concentrated mainly in areas where biodiversity and indigenous (or African-indigenous) lands overlap, such as the Pacific lowlands of Colombia where 4.5 million hectares in 122 black territories were titled between 1996 and 2003, benefiting 270,000 people. Northeastern Brazil has also been a recent site of such activity (Arruti 2000, Hoffman French 2004, Offen 2003b, Warren 2001).

Anthropologists have been highly involved in the evolution of "outside" support for indigenous rights (Messer 2002). The NGO involvement in indigenous land issues has been gaining strength for more than 50 years since David Maybury-Lewis, Charles Wagley, and others began to consider how the Amazonian cultures they studied, and to which they became committed, could survive the onslaught of Brazilian development. Maybury-Lewis went on in 1971 to found the organization Cultural Survival at Harvard. In the same year, the World Council of Churches sponsored a symposium in Barbados that produced the Declaration of Barbados regarding indigenous rights (WCC 1971). The issue of land rights was specifically mentioned in Article 2. Withal, by the late 1980s, the currents emerging from peasant and indigenous movements and support organizations were strong enough that the International Labor Organization (ILO) revised the earlier assimilationist viewpoint in Convention 107 and replaced it with Convention 169 (ILO 1989), which asserted indigenous land rights and, for the first time, used the term territory to refer to indigenous traditional landholding. "Territory" was defined as covering "the total environment of the areas which the [indigenous peoples] occupy or otherwise use" (Article 13[2]). The convention mandated the identification of such lands, urged states to provide access to lands historically occupied, but now contested, and mandated that each signatory state have legal procedures by which the land rights could be claimed (Article 14 [2 and 3]). Many Latin American states have now signed the document. Outside of Latin America, almost no one has.[4]

In 1994, the United Nations produced its own Draft Declaration on the Rights of Indigenous Peoples (UN 1994), which skirted the question of land titling by merely stating in Article 10 that "indigenous peoples shall not be forcibly removed from their lands or territories." Such lands, territories, waters, etc., are mentioned several times in the convention, but the discourse over the rights of individual states has tended to make the U.N. organization tread lightly about supporting independent or autonomous ethnic territories within the borders of states. In the same mode, the 1997 Draft American Declaration on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights contains two articles (Articles 25 and 26) that insure no new boundaries will unify ethnic groups across state lines and that indigenous territories, even if recognized, will not

[4]In Latin America, Mexico ratified Convention 169 in 1990, Bolivia and Colombia in 1991, Costa Rica and Paraguay in 1993, Peru in 1994, Honduras in 1995, Guatemala in 1996, Ecuador in 1998, Argentina in 2000, Venezuela and Dominica in 2002, and Brazil in 2003. Outside of Latin America, only Denmark, Norway, the Netherlands, and Fiji have signed.

challenge the sovereignty of the state (OAS 1997). These limitations would seem to contradict Article 18(3i), which guarantees title to lands and resources held before colonization, a provision which, if honored, would unite indigenous groups such as the Yanomamo (Venezuela/Brazil) and the Miskitu and Mayangna (both in Nicaragua/Honduras) across state boundaries.

At the same time, a significant part of the biodiversity conservation community in the late 1980s and early 1990s was arguing against the creation of new parks and human-excluded protected areas and in favor of community conservation in which local communities in biodiverse regions would become protagonists for protecting the resources they depended on for cultural or even biological survival (e.g., Poole 1989, 1994; Stevens 1997; Western & Wright 1994). Turning over land to communal groups as owners and stewards (privatization) has been explicitly argued as a conservation policy since the 1980s (Vogel 1992). Indeed, scholars have often argued that indigenous people are the best guardians of the land when the management objective is conservation (e.g., Durning 1992, McIntosh 2004). Surprisingly, biodiversity in many parts of the world correlates positively with indigenous population density (Balmford et al. 2001, Vogel 2001). In Central America the presence of intact tropical forest tracts is associated definitively with the presence of tribal ethnic groups (Chapin 1992, 2003; Chapin & Threlkeld 2001; Herlihy 1997), and the same seems to be true of the Amazon (e.g., Schwartzman et al. 2000). Other researchers have argued that all tropical forests are anthropogenic (Baleé 1989, for the Amazon; Noble & Dirzo 1997, for the general statement).

Case Studies

In Roldán's (2004) authoritative analysis of the current legal framework for change, Latin America can be divided into countries that have "superior" legal frameworks for indigenous land tenure, frameworks "in progress," or "deficient" frameworks. Those in the first group are Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru. In the second group are Argentina, Guatemala, Honduras, Mexico, Nicaragua, and Venezuela. Everyone else is in the third group. Because the "superior" countries have presented the most opportunities for change, this section takes a "natural history" approach to examining the progress on indigenous land issues in four of these countries: Brazil, Colombia, Bolivia, and Peru.

TI: *terras indigenas*

FUNAI: Fundação Nacional do Índio

Brazil. Brazil's ~410,000 indigenous people (FUNAI 2004) are only 2.2% of the population, but they inhabit more than 12.5% of Brazil. Despite their numbers, they are of enormous symbolic importance. Even before ILO Convention 169, Brazil changed its constitution in 1988 to reflect a modern multicultural and proindigenous stance. The former policy of fraternal protection of those who were only partially capable held that indigenous people required tutelage by the state. Lands are held in trust by the state, very much as indigenous lands are held in the United States. Government agencies were tasked with identifying indigenous lands, protecting them, relocating outsiders when necessary, and pacifying "wild" Indians (de Souza Lima 1991). In a sharp about-face, Article 231 of the 1988 constitution holds that Brazil's indigenous people are the original and natural owners of Brazilian land and that their land rights have precedence over other land rights. They are all full citizens but have a right to maintain their own cultural identities. The state should respect, demarcate, and protect *terras indígenas* (TIs), although Article 231 maintains the "trust" status of indigenous land and defines such lands in basic agreement with ILO 169: (*a*) lands inhabited on a permanent basis; (*b*) lands used for productive activities; (*c*) lands essential to the preservation of environmental resources necessary for their well-being; and (*d*) lands necessary for their physical and cultural reproduction, according

to their usage, customs, and traditions. Article 67 of the 1988 constitution ordered the demarcation of all TIs within five years. In 1991, Presidential Decree 22, modified by 608, declared that demarcation of the TIs would be completed by 1993. The World Bank immediately released funds to support the work.

The deadline was not met. By 1993 only 291 of 559 TIs had been demarcated. In the first few years of the process, many powerful sectors of society with material interests in the natural resources embedded in the TIs complained to politicians about the constitutional measures and the decrees that supported and regulated them. In 1996, President Cardoso addressed what he held to be unconstitutional aspects of Decrees 22 and 608. Under the auspices of strengthening the eventual official "registration" for the TIs, he produced Decree 1775, which gives "states, municipalities and individuals" the right to contest demarcations at any point in the process, until the land is fully registered. A 90-day period was provided for the contestation of already-demarcated lands that had not yet been registered. Of the 559 indigenous areas identified at that time in Brazil, 344 were thus opened to contestation. Many argued that the real motivation for the decree was to open up the TIs for natural resource exploitation. Titles of already-titled TIs were threatened to be revoked on the basis of contestation. Predictions of total disaster for indigenous land rights were on every side (e.g., Borges & Combrisson 1998, Schwartzman et al. 1995, Turner 1996). Perhaps the most disturbing fact to critics was that demarcated and registered TIs were subject to invasion while claims were being contested (Westlund & Borges 1996), and indeed invasions were the order of the day and have continued. Others (Pires-O'Brien 1999) have maintained that ultimately the indigenous movement must take into account such squatter claims if it is to prosper in Brazil.

Decree 1775 did not cause all the disastrous results that were predicted, but it has drastically slowed the process of TI demarcation and registration and has challenged the ability of Fundação Nacional do Índio (FUNAI) to respond to its mandate. Between 1991 and 1993, 229 TIs were registered, but between 1993 and 2004 only 89 have been added. Fifty of the registered TIs are either undergoing boundary revision or have revision planned (FUNAI 2004). In a notable case, in December 2003, the Raposa/Serra do Sol TI was reduced in favor of ranchers and miners who had invaded the claim. At the same time, because of "structural adjustments," FUNAI has suffered personnel cuts of more than 60%; and yet, the numbers of indigenous peoples and claims has increased. Whereas in 1991 there were ~300,000 indigenous people, today there are an estimated ~410,000 in 220 distinct ethnicities, many of which are newly "rediscovered." The official number of TIs in some part of the process has increased, from 559 in 1996 to 580 in 2004. The President of FUNAI, Mercio Pereira Gomes, recently mentioned a possible number of 620 TIs in the future because of the new claims from the northeast (2004). At the current rate of progress, it will take more than 35 years to finish the job if the political will does not weaken further.

Colombia. Three years after Brazil's changes, Colombia, in a 1991 crisis of governance (Van Cott 2002), drastically changed its constitution. To control insurgencies and to reduce the role of the central government, the nation is decentralizing. The changes in Colombia are far-reaching, and many issues have emerged from this experiment that apply widely to the new land regimes in Latin America. The ~500,000 (Padilla 1996) indigenous people in Colombia constitute ~2% of the population and consist of 84 ethnolinguistic groups, concentrated mainly in the Cauca region around Cali and in the Amazon lowlands. They inhabit nearly 28.5 million hectares of land, ~27% of the country's national lands (Jackson 2003). In the Colombian case, indigenous lands were

thoroughly enshrined by colonial law, and subsequent governments have upheld the legality of the "reserves" (*resguardos*). Under the new constitution, the old *resguardos* are to become, or to be integrated into, inalienable indigenous territorial entities (ETIs). From the indigenous perspective, the decentralization of political and economic power seems, on the surface, to be a response to the demands for land and autonomy that had gone on since the conquest, but the situation is not that simple. The new ETIs are indigenously governed political/cultural/economic entities in geographic space that include one or more *resguardos*, as well as other lands. They are not exclusively indigenous, however. They all have both mestizos and indigenous people, although they are supposed to be governed by indigenous councils, which can raise taxes, organize the educational system, and determine land regimes within their boundaries. Thus, private property can coexist with communal property, which worries some observers that unacceptable degrees of social stratification may ensue as mestizos or affluent indigenous families gain land and power (Field 1996). In general, this radical change has caused interesting problems to surface, including debates about the value of various property regimes, indigenous legal jurisdiction over mestizos, and the claim of essential attributes of ethnicity itself. In particular, indigenous ideas about such issues as human rights and property rights tend to focus on the community, not the individual. Western notions of democracy are also individualized into a one-person-one-vote system for mestizos, whereas indigenous people may seek consensus or make decisions through religious figures such as the *mamus* of the Iku. Many indigenous people say the constitution is not their "original law" (Padilla 1996). Mestizo peasants, government workers, small business owners, and ranchers are not happy about the proposed indigenous council government, and many have claimed indigenous status either by marrying indigenous people or by reasserting an underlying and formerly moribund ethnic identity. Government workers, particularly, are concerned about the possible loss of jobs as their ties to the center are broken and they face working for the councils.

ETI: indigenous territorial entities

ETA: African-Columbian territorial entities

From the perspective of many outside observers, the changes have undermined the force of the indigenous movement (Jackson 1996, Padilla 1996, Ramos 2002, Rappaport & Dover 1996). In Padilla's (1996) terms, the state has inserted a "Trojan horse" into the indigenous movement by making indigenous territories part of the state political apparatus. As indigenous leaders are now concerned with public administration using European forms of discourse, they are no longer as active in resistance. Outsiders also point to the presence of numerous contenders for power operating within the sphere of the ETIs, including drug traffickers and a confusing plethora of rebel forces and paramilitaries (Taussig 2003), all of whom to some degree prey on indigenous people even as they recruit them for their own purposes. Indigenous people, in their own defense, have taken up the same activities, for example, growing *coca* in the Vaupés or poppies in Cauca (Field 1996, Jackson 2003).

Despite the mid-to-late-1990s assessments of what might happen in Colombian indigenous land tenure (e.g., Gaia Foundation 1993), little has happened. Enabling legislation, the long-expected Organic Territorial Ordering Law, has been in draft for several years but has not been passed. Attention has shifted from *resguardos* to Colombia's black populations. Since 1996, a World Bank–funded Natural Resource Management project has been operating to demarcate and title 5 million hectares of land to black community councils in the form of African-Colombian territorial entities (ETAs) parallel to the ETIs (Offen 2003b). However, Colombia has descended into increasing violence. *Cultural Survival Quarterly* produced its Winter 2003 issue on the Colombian case seven years after the flurry of writing and analyses in the mid 1990s. Particularly singled out for criticism was the implementation

TCO: *tierras comunitarias de origen*

of Plan Colombia, which has involved crop eradication on 95,000 hectares and, perhaps even more seriously, increased levels of support for the military. Jackson (2003), in a recent article posted on the Web site of the American Anthropological Association, notes that the contestation power of indigenous people is bland compared with the various armed groups, all of which tend to dislocate physically, target, and kill indigenous people, especially leaders. These intervening processes have had severe effects on indigenous people and have prevented the implementation of the ETIs. Since September 11, 2001, the U.S. government has increasingly linked the antidrug funding to antiterrorist funding and now seems to be concentrating on assuring the continued supply of Occidental Petroleum's oil production to the market. According to K. Offen personal communication) political insiders say that President Uribe's backroom discussions with the many oil, gas, logging, and military interests involve the possibility of retracting some, and perhaps all, of the ETI claims. However, the mapping and documentation of Amazonian indigenous *resguardos* is ongoing under funding from the European Union (Vieco et al. 2000) to prepare for any eventual political opening in the future.

Bolivia. As in Brazil and Colombia, the Bolivian constitutional changes of 1994 declared the country to be multiethnic and pluricultural. Highland indigenous people of the Quechua, Jaqui, and Uru language groups account for ~3.5 million people today of the ~8 million Bolivians. Thirty-one surviving original ethnolinguistic groups, today numbering ~243,000 people (projected from Mihotek 1999 at a 3%/year growth rate), only 3% of the Bolivian population, reside in the lowlands. The 1952 *Moviemiento Nacional Revolucionario* broke up many latifundia in the highlands under agrarian reform in 1954 but had very little effect on the lowlands. However, agrarian reform obligated both highland and lowland communities to organize in "peasant centers" (*centrales campesinos*), rather than as ethnicities. The cannier and more acculturated "mission Indians," such as the Guaraní and the Trinitarios—left over from the Jesuit Missions of the seventeenth and eighteenth centuries (Jones 1984)—dominated the lowland *centrales campesinos*, but there was no legal framework for territorial aspirations, except for individual communities to claim contiguous lands, as in the case of the Chiquitanos. Illicit logging and the ongoing industrial soybean frontier financed by international lending institutions assaulted indigenous forests continuously all through the 1960s and1980s (Colchester et al. 2001, p. 32). In 1987, the world's first large debt-for-nature swap executed by Conservation International (without significant indigenous consultation) encompassed much of the land of the lowland Chimán and provoked widespread indignation. The resulting Indigenous March for Land and Dignity by lowland indigenous peoples in 1990 was highly attended by the media and caused a mini-governmental crisis. Suddenly land titles for nine lowland territories in the Andean foothills (2.9 million hectares) were given by three Presidential Decrees, but there was no corresponding effort at institutional organization for governance. These territories have been subsequently plagued with enormous invasion and governance issues because some are protected areas and some are home to various development and conservation projects (Albó 2002). In 1996, Law 1715 (agrarian reform) presented the legal figure of original community lands [*tierras comunitarias de origen* (TCOs)] to lowland indigenous peoples and allowed groups of communities to claim a territory jointly. The nine already "decreed" territories were further protected under this law. Sixteen more territories immediately applied for land, for a total of nearly 20 million hectares, and the land transactions in them were immobilized by 1998. These new TCOs suffer from the same invasions by logging and governance issues as do the original nine. Additionally, several of them are home to various ethnic groups unrepresented

in the *central campesino* that applied for the land under the laws (Stocks 1999). The 16 new TCOs demanding territory occupy 11.7 million hectares. One not-yet-immobilized TCO claims 1.4 million hectares, while a national park exclusively managed and occupied by a Guaraní TCO occupies 3.4 million hectares. In all, lowland indigenous people (3% of the population) are claiming 19.4 million hectares, or 17.68% of Bolivia.

In its application, Law 1715 has been severely criticized (Colchester et al. 2001). Its advantage is that it allows for titling territories rather than communities, but the process of cadastral studies [called "cleansing" (*saneamiento*)] gives priority to all other claimants before indigenous people, including, in at least one notorious case, a highly controversial forest concession. Assies (2000) refers to the *saneamiento* process as creating "archipelagos" of indigenous land. *Saneamiento* effectively ground to a halt by 1999. Another mass protest was organized in 2000, the Third Indigenous and Peasant March for Land, Territory and Natural Resources. The government retreated on giving forest concessions priority in the *saneamiento* process and agreed to streamline the titling process. As of 2001, the government had paved the way for 1.8 million more hectares of titled land (four TCOs), but more than 16 million hectares of land claims have not been subject to *saneamiento* or legal titling.

Governance of TCOs has not fared any better. Law 1551, a decentralization (popular participation) law was created with the 1994 constitution (Ceto 2003). The law creates new municipal boundaries that coincide with Bolivia's system of departments subdivided into provinces. Federal revenues are to be shared with these municipalities. Unfortunately, the municipalities crosscut TCO boundaries, which undercuts the ability of the TCO to self-govern. Although the law allows for creating indigenous municipal districts (DMIs) within municipalities, there will be no indigenous municipalities. Thus, the possibility of a TCO/municipality union is legally forestalled. A TCO could theoretically be composed of several DMIs that correspond to different municipalities, and the new municipalities are not obligated to share funds with the DMI. If they do share funds, it is through the political party system, not through the ethnic organization that may be more important to the TCO or even the DMI. All in all, some observers conclude that Law 1551 signaled the collapse of the state's interest in indigenous welfare. The initiative is now back in the hands of the indigenous institutions themselves and their supporting NGOs (Calla 2000, Orellana Halkyer 2000).

DMI: indigenous municipal districts

NC: native community

Peru. Peru's lowland indigenous people have been reduced from more than 100 pre-Columbian language groups to 65 today, ~300,000 people (Smith et al. 2003), occupying only 0.8% of the country but 15% of the eastern lowlands. In the Andes, Quechua and Aymara people number at least 10 million people, 47% of the nation, and they occupy more than 50% of the national land (Van Cott 2002). Peruvian law has fluctuated a good deal over the years with regard to lowland indigenous people (Stocks 1984, Varese 1972). In 1909, Law 1220 (a forest law, not an indigenous law) gave to the state dominion over forests. Indigenous people were permitted to live in and around the forest, but they could not obtain land titles. In 1974, the military government of Juan Velasco Alvarado passed Law 20653 creating the legal figure of the native community (NC) in the lowlands and the peasant community in the highlands (Lowenthal 1975). In a complete reversal of the "normal" Latin American indigenous policy, the communities titled under this law owned the forest rights and subsurface rights. However, the law did not permit several communities to claim effective multi-communal territories in the sense of ILO Convention 169. Communities were often spatially distant from each other (the archipelago syndrome again), and large gaps were left that could be, and were, filled by ladino/mestizo colonists and were open to logging concessions.

PETT: Special Project on Land Tilting

DANIDA: Danish International Development Agency

Perhaps even more immediately vexing to many upper Amazon indigenous fishing communities is that the rights to water courses are retained by the state, which has led to much usurpation of fishing stocks even within areas "owned" by indigenous communities (Stocks 1981). However, within a year of passing Law 20653, the military government took a right turn. In 1978, Law 22175 replaced the radical provisions of Law 20653 and rescinded the ownership over forests and subsurface resources for all subsequent NC titling. Indigenous farmers, under this law, must request permission from the state even for swiddens if the lands are forested. But Law 22175 goes farther. Article 28 subjects NCs to the greater "social interest," and Article 29 provides right-of-way for all state-constructed roads now and in the future. This article also allows free passage, without indigenous consultation, to oil or gas pipelines and installations, telecommunication or energy electric lines, and public irrigation and drainage channels. However, the law does sustain a 1957 law that allows for indigenous subsistence "reserves," blocks of communally or multicommunally owned land that can be used for hunting, fishing, and gathering, a provision that has been the basis for recent indigenous land projects described below. Nevertheless, under General Morales Bermudez, the process of titling new NCs stopped.

When civilian government resumed in 1980, oil and gas exploration intensified and, by 1983, Peru had eight special projects underway to transform the forested eastern foothills of the Andes into farmland without consultation with indigenous residents. Only the pressure of the USAID-Palcazu Project—converted from a colonization disaster to an early integrated conservation and development pioneer—managed to break the logjam of titling, which had been halted in the late 1970s. Legalization of the 10 Yanesha communities within the Palcazu valley was made a precondition of releasing USAID loan money for the project (Stocks 1990, Stocks et al. 1994).

The 1985–1990 American Popular Revolutionary Alliance government of Alan Garcia, while espousing a rhetoric of support for indigenous communities, was fiercely contested by the traditional left in the form of the Tupac Amaru Movement and a much more radical Maoist left in the form of the Shining Path. Both groups established lowland forest refuges, and neither respected the land rights of indigenous peoples. Violence shut down most of the old special projects. Under Alberto Fujimori (1990–2000), a land-titling program funded by the World Bank [the Special Project on Land Titling (PETT)] affected the individual parcels of thousands of Quechua and mestizo farmers; however, the program does not work on NC titling (Plant & Hvalkof 2001, p. 64), and PETT claims a lack of financial and personnel resources to do so. As of 2000, 139 NCs still had titles pending, 300 more were not even in the process, and 85% of the already-titled communities were applying for expansions (IACHR 2000).

As in the case of other Latin American nations, structural adjustments to the government's social sector and the strong neoliberal tendency toward privatization have left to NGOs the support of indigenous people in Peru. A number of NGOs have been involved with land rights, including an ambitious effort under Oxfam and Moore Foundation funding to put existing communities on a geographic information system (Smith et al. 2003) and the Danish International Development Agency (DANIDA)-funded Ucayali Titling and Communal Reserve Project, which has worked in the interstices of various laws, including Law 22,175, the National Forestry Law, and the Law of Protected Areas to title 209 new communities with 2.5 million hectares and 7.5 million hectares of forest reserves (García et al. 1998). This innovative project has tried to circumvent the limitations placed by the emphasis on titling individual communities by convincing communities to apply for contiguous lands (Gray 1998b, p. 206). Additionally the project has demarcated territories for the Mashco-Piro,

Isconahua, and Murunahua ethnolinguistic groups in Madre de Dios, which remains untitled (Gray 1998a, pp. 206–21) and threatened by oil interests and loggers. Six new indigenous reserves have also been created under Article 17 of Law 26834 (Law of Protected Natural Areas), which allows comanagement between the National Natural Resource Institute (INRENA) and indigenous communities. This process started in 1987 with the 55,000-hectare Yanesha communal reserve, which stands between the Yanachaga National Park and 10 Yanesha communities in the Palcazu Valley (Stocks 1990). Later reserves include the 616,000-hectare El Sira reserve created under the Ucayali Project in 2001, and the Tamshiyacu-Tahuayo reserve, created in 1990 along the Amazon mainstream, has 322,500 hectares (Newing & Bodmer 2004, Newing & Wahl 2004). Three more reserves have followed.

In perhaps the most damaging blow, Peru's 1993 constitution, although affirming the ethnic multiplicity of the country, revoked the inalienability of indigenous lands and reasserts the state's absolute control and ownership of natural resources (Dean 2002). There has been a rush of concessionaires and oil and gas companies. Thus, the most recent chapter in indigenous lands is represented by oil and gas pipelines that traverse some of the remaining intact and fragile indigenous lands. The most recent dispute regards the Camisea pipeline, which is crossing the Machiguenga and Nomatsiguenga lands (WRM 2003). Pravda (2003) claimed that one of the major contractors is Halliburton International and that the Bush administration put great pressure on Peru to sign the contract. Indigenous land law has not been subsequently revised to support territoriality, and indigenous property remains alienable and subject to mortgage. Five of the six new reserves are threatened by government road-building and settlement schemes, and 7.5 million hectares of logging concessions have been given out that exclude communities. Newing (2004) reports that the Toledo government is extremely wary of creating new communal reserves that would tie up resources that could be given out in concession.

INRENA: National Natural Resource Institute

CONCLUSIONS

It is difficult to look at these four South American cases, each playing out in a "superior" legal context, without reflecting on the devilish content of the details. In the end, Awas Tingni may have a shorter road than a Colombian ETI despite the difference in the quality and quantity of the legislative framework. However, too much land for too few people is a common theme in each of the countries examined here, and the economic roots of the contestation are clear enough. If indigenous lands in the lowland tropics contained no valuable natural resources, the constitutional changes and enabling legislation might be applied without great moment in a decade of on-the-ground work.

A deep paradox in all cases is that the increasing debility of states in the central exercise of power—a defect directly correlated with neoliberal decentralization—provides political openings not only for indigenous people to contest the state, but also for all social sectors with similar desires. Non-indigenous sectors have contested indigenous land titling and made it difficult to control even titled lands. As political space is opened for indigenous people, counter-claimants to their land and resources multiply. The forward movement with regard to indigenous lands is in real danger of being contested so sharply and powerfully that it will effectively be extinguished. One is reminded that in the U.S. case real movement on civil rights did not stem from decentralization. Strong institutional support from the state seems critical in these cases and makes the difference between countries like Brazil, where the procedures are clear and there exists a state bureaucracy specifically dedicated to implementing the laws regarding indigenous citizens, and Colombia, where state support is strong in the courts but theoretical in the field. Peru

and Bolivia both suffer from ineffective state institutions and a plethora of dissonant laws with regard to indigenous lands.

Another message strongly emerges from these cases. Time is an enemy of the process of securing indigenous lands. Not only does the length of time correlate positively with the buildup of resistance and the weakening of political will, but also it correlates with the rise of new indigenous claimants. The road to effective land rights both narrows and lengthens as it is traversed.

Another issue is that of the weakness of the indigenous governing institutions. With the possible exception of Peru, which has had 30 years of practice in the very restricted sphere of native community governance, the issue of democratic representation at the grassroots level for indigenous territories (i.e., for the larger-than-community polities) is in disarray. This perplexing problem has been mostly ignored in the rush to get lands delimited, demarcated, and legalized, but it is an extremely vulnerable aspect of the indigenous land movement. In Bolivia, the *Centrales* are still the registered "owners" of the TCO claims while the claims await the *saneamiento* process. Meanwhile, loggers often receive permission from the leaders of the *Centrales* to extract wood from the TCOs, as often as not on the lands of indigenous people who have no representation in the *Centrales*. In Peru, the legal requirement that a native community must execute its own forest extraction (under permission from the forest service) is routinely circumvented by having a native leader apply for the permit, then allowing a local logger to take the wood in exchange for a kickback. The chaos surrounding the ETIs in Colombia has prevented implementation of any effective government, so local invasions and erosion of the natural resource base are difficult for anyone to control. The problem of invasion of Brazil's TIs, especially by gold and diamond miners, is also well-known. In Nicaragua, the indigenous territories demarcated within the BOSAWAS International Biosphere Reserve, still without title, have formed civil societies—essentially legalized indigenous NGOs—for governance, but with mixed results.

The threats outlined above demand a response, but the ability of indigenous groups to respond is often, unfortunately, in the hands of the NGOs that support them, and there is no consistency in the philosophy, goals, and methods of NGOs that work with indigenous people. Some NGOs are oriented toward income issues and others toward biodiversity conservation; some combine both of the above, whereas others promote medicinal plants, education, religion, or a plethora of other issues. Very few of them are able or willing to take on the land issues as a means of achieving their more distant goals, yet this is precisely what is needed. Obviously, dealing with land issues plunges NGOs into the heart of politics and conflict. Just as obviously, they must ally with each other, form organic ties with the (usually underfunded and understaffed) government institutions responsible for the legalization of land, and make land issues a priority. Where indigenous people have strong NGO support, government permission, or participation, have worked through governance issues, have management plans, and are legally empowered and institutionally supported to defend their lands and resources, the outcome can be strongly positive for biodiversity conservation, income, and education. I do not view "ethno-development" as suspiciously as do some (e.g., Escobar 1995, 1998, 1999, 2001), as long as it is based on indigenous secure control over lands and resources. In the absence of strong support for land issues, however, most advances in "development" are illusory.

After reviewing a detailed set of case studies from Latin America, Colchester et al. (2001, p. 32) draw the conclusion that constitutional pronouncements without enabling legislation and technical rules are empty and that natural resource and economic policy must be consistent with land policy. At the policy and legislative level, this is certainly

sound advice. What seems clear from this review is that no amount of law and policy can create and sustain field realities by themselves. The future challenge is for indigenous groups to improve their own organizations, for NGOs to concentrate on land issues, and to support and link with government agencies with a mandate to apply indigenous land laws. The current work of mapping and documenting indigenous territories, as with Awas Tingni, is helpful, even if government does not immediately respond positively, because the work tends to create indigenous polities unified toward a concrete end. Such realities have a way of establishing their own legitimacy over time, whereas claimants to "rights" who do not exercise them actively are rendered simply "interesting."

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