THE PROTECTION OF INDIGENOUS PEOPLES' LANDS FROM OIL EXPLOITATION IN EMERGING ECONOMIES

by

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VOLUME I

PARTS I AND II

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ABSTRACT

Large-scale oil exploration and production has had many negative environmental and cultural consequences for indigenous peoples. The extraction of oil resources from their traditional lands has largely taken place with complete disregard for the right of indigenous peoples to control and participate in the development process.

In the last two decades, the international community has given increased attention to the recognition and protection of indigenous peoples' rights, and an immense body of literature analysing international legal developments in this area has arisen. However, this literature does not distinguish between the situation of indigenous peoples in emerging and developed economies by providing a comprehensive analysis of the economic, political and social factors that undermine the effectiveness of laws pertaining to the recognition and protection of indigenous peoples' land rights and the environment in these countries.

Through case studies of three emerging economies — Ecuador, Nigeria and Russia — this thesis analyses the factors present to a greater or lesser degree in emerging economies, such as severe foreign indebtedness and the absence of the rule of law, that undermine the effectiveness of the legal system in protecting indigenous peoples from oil exploitation. Having identified these factors, I propose that a dual approach to the protection of indigenous peoples' traditional lands and their environment be adopted, whereby international laws that set out the rights of indigenous peoples and place duties on states in this regard, are reinforced and translated into practice through the self-regulation of the international oil industry through a voluntary code of conduct for oil companies seeking to operate on indigenous peoples' traditional lands.

Based on an analysis of the features, strengths and weaknesses of different types of codes of conduct, and on a survey of the rights of indigenous peoples contained in international human rights law, international developments in environmental law and practice, and the newly emerging practices of international oil companies in the area of community relations, I draft a voluntary industry-wide code of conduct for oil and gas corporations seeking to operate on the traditional lands of indigenous peoples. After presenting the draft code in full, I discuss the rationale for the provisions of the code and mechanisms for its implementation.

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University Library, being available for loan and photocopying.

6/12/00

Alexandra Sophia Wawryk

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INTRODUCTION

In 1971, the Economic and Social Council of the United Nations Commission on Human Rights authorised the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a comprehensive study of the problem of discrimination against indigenous populations and suggest the necessary national and international measures to eliminate such discrimination. The *Study of the Problem of Discrimination Against Indigenous Populations*,[1] originally published as a series of reports between 1981 and 1983, became the standard reference for discussion of the rights of indigenous peoples within the United Nations system.

After extensively surveying the situation of indigenous peoples worldwide through the reception of submissions from governments, indigenous peoples, non-governmental organisations and specialist United Nations institutions, the Special Rapporteur J. Martinez Cobo made a number of findings and recommendations with respect to a range of indigenous demands. The following findings are among those made by the Special Rapporteur regarding land rights:[2]

- Large scale violations of the rights of indigenous populations to their land and its resources have occurred systematically for many centuries;
- The invasion of lands by non-indigenous persons or companies, frequently multinationals, have occurred and are still occurring, and government authorities have not acted with the necessary firmness and effectiveness to avoid or mitigate the disastrous consequences for the indigenous communities involved;
- No proper or effective legal guarantees exist regarding the right of indigenous populations to the land which they and their forefathers have worked from time immemorial, the forms of land tenure, the use of the resources traditionally generated, or the resources which that land contains;
- In some countries, the "plunder of land" is effected by the means of legal instruments. This occurs in many ways, including laws which empower the government to take

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1 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7 & Adds 1-4 (1986) (J. Martinez Cobo, Special Rapporteur).

2 Ibid, Add. 4 at 16-18.

possession and sell indigenous property if "necessary for the preservation of the property" or "in the national interest". Where special protective laws exist, loopholes in the laws, collusion by public authorities and interested non-indigenous peoples, and falsification of documents are among the practices that render the laws ineffective;

- In many legal systems, mineral and hydrocarbon deposits belong to the State, so that the granting of licences for the exploration and mining of deposits is handled mainly by the government authorities. Under many national laws, government ownership of subsurface resources allows the government to grant licences to develop these resources irrespective of land ownership.

Not only do inadequate laws on indigenous ownership to land and subsurface resources render the lands and sacred sites of indigenous communities vulnerable to invasion, but the severe environmental degradation caused by development of mineral and hydrocarbon resources in many cases jeopardises the traditional lifestyle of indigenous communities.

The Special Rapporteur recommended the introduction of minimum legal standards that he perceived as necessary to protect indigenous peoples from the adverse effects of unwanted and uncontrolled development of subsurface resources on their lands. The standards he recommended included the following:[3]

- Recognition of the principle of unrestricted ownership and control of land, including all natural resources, by indigenous peoples;
- International and national recognition and full protection by law of the right of indigenous populations to own their land communally and manage it in accordance with their own traditions and culture;
- Where deposits in the subsoil are the preserve of the State, the State must allow full participation by indigenous communities in respect of the granting of licences; the profits generated; and the procedure for determining damage caused and compensation payable;
- No mining whatsoever should be allowed on indigenous land without first negotiating an agreement with the indigenous peoples who will be affected;
- The protection and preservation of existing indigenous land bases from exploitation by multinational corporations without the explicit consent of the communities concerned should be guaranteed;

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[3] Ibid at 39-42.

- Lands which are sacred or have a historical and spiritual significance for indigenous populations must in all cases be excluded from licences and concessions and protected from incursions of any kind.

Despite the findings and recommendation of the Study, subsurface resource exploitation continues to present a major threat to indigenous peoples. By its decision 1997/114 of 13 April 1997, the Commission on Human Rights approved the appointment of Mrs. Erica-Irene Daes as Special Rapporteur to prepare a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address ongoing problems in this regard. In her second progress report on the working paper, the Special Rapporteur stated that:

> the legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every part of the globe, indigenous peoples are being impeded from proceeding with their own forms of development consistent with their own values, perspectives and interests. [4]

The Special Rapporteur goes on to state that the State assertion that it has complete rights to subsurface resources has had numerous unfortunate social, economic, environmental and cultural consequences for indigenous peoples. She notes that:

> Much large-scale economic and industrial development has taken place without recognition and respect for indigenous peoples' rights to lands, territories and resources. Economic development has largely been imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development. ... Oil and gas exploration and exploitation, geothermal energy development, mining, dam construction, logging, agriculture, ranching and other forms of economic activity ostensibly in the national interest have had an adverse impact both on indigenous peoples who have already suffered from contact and colonialism, and on indigenous peoples in areas long isolated. [5]

Fifteen years after the Cobo Report was first published, it is clear that the exploitation of oil, gas and minerals continues to adversely affect the lives of indigenous peoples.[6] National

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4 United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous Peoples: Indigenous People and Their Relationship to Land*, Second Progress Report on the Working Paper Prepared by Mrs. Erica-Irene Daes, Special Rapporteur, UN Doc E/CN.4/Sub.2/1999/18, 3 June 1999, United Nations High Commissioner for Human Rights <http://www.unhchr.ch/>, para 63.

5 Ibid paras 64 and 66.

6 Reports of specific cases of subsurface mineral and oil exploitation on the lands of indigenous peoples can be found in recent articles and books, for example Howitt R, Connell J and Hirsch P, *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (Oxford University Press, Melbourne, 1996); United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples: Transnational Investments and Operations*

laws fail to grant and protect indigenous title to land. Governments continue to expropriate lands and territories and extinguish indigenous land titles in order to gain the economic benefits accompanying the exploitation of subsurface resources. Where indigenous communities have legal title to their traditional lands, those communities cannot control the exploitation of subsurface resources because the resources are owned by the government.

The Role of this Thesis

In the absence of adequate national laws to protect indigenous peoples rights, an immense body of literature has arisen examining the extent to which international law can protect the rights of indigenous peoples. The amount of literature specifically addressing indigenous land rights in international law is somewhat sparse in comparison to self-determination and political rights, about which multitudes of articles have been written.[7] This relative lack of literature is reflected by the United Nations Commission on Human Rights approving the appointment of Erica-Irene Daes as Special Rapporteur to conduct a study into the on-going problems associated with land rights as recently as April 1997, and the inclusion of "environment, land and sustainable development" as an item on the agenda of the WGIP for the first time in 1997 at its fifteenth session.

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upon the Lands of Indigenous Peoples, Report of the Centre on Transnational Corporations Submitted Pursuant to Sub-Commission Resolution 1990/26, UN Doc E/CN.4/Sub.2/1994/40, 15 June 1994; and Gedicks A, *The New Resource Wars: Native and Environmental Struggles Against Multinational Corporations* (Southend Press, Boston, 1993).

7 For example, the following books and articles represent just some of the available literature on the right of indigenous peoples to self-determination: Anaya S, *Indigenous Peoples in International Law* (Oxford University Press, New York, Oxford, 1996); Tomuschat C, *Modern Law of Self-Determination* (Kluwer Academic Publishers, Netherlands, 1993); Anaya S, "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 *Transnat'l L & Contemp Probs* 131; Barsh R, "The Challenge of Indigenous Self-Determination" (1993) 26 *U Mich J Law Reform* 277; Berg B, "Introduction to Aboriginal Self-Government in International Law: An Overview" (1992) 56 *Saskatchewan L Rev* 375; Berkey C, "International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples" (1992) 5 *Harv Hum Rts J* 65; Corntassel J and Primeau T, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination'" (1995) 17 *Hum Rts Q* 343; Daes E, "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3(1) *Transnat'l L & Contemp Probs* 1; Lam M, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) 25 *Cornell Intl LJ* 601; Moris H, "Self-Determination: An Affirmative Right or Mere Rhetoric?" (1997) *ILSA J Int'l Comp L* 173; Quane H, "The United Nations and the Evolving Right to Self-Determination" (1998) 47 *Intl Comp LQ* 537; Rafiq Islam M, "Indigenous Self-Determination in the Final Draft Declaration of the UN Working Group" (1997) 1 *Mac LR* 139; Rodríguez-Orellana M, "Human Rights Talk ... and Self-Determination Too!" (1998) 73(5) *Notre Dame L Rev* 1391; Turpel M, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 *Cornell Intl LJ* 579.

The literature addressing indigenous land rights in international law tends to describe the relevant provisions of international legal instruments, and assess the adequacy of the wording of the relevant articles. One "body" of literature describes the land rights provisions set out in instruments of international law specifically concerned with indigenous peoples' rights, such as the United Nations Draft Declaration on the Rights of Indigenous Peoples,[8] and ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.[9] While some of the literature focuses on land rights in particular, more often than not the discussion on land rights takes place as part of the broader discussion of a number of rights that have developed in international law.

Another body of literature describes the application of international human rights laws and principles, such as procedures under the International Covenant on Civil and Political Rights[10] and other UN human rights mechanisms, to indigenous lands rights.[11] A third body

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8 Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Docs E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56 (contained in Annex to Resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities); 24 *ILM* 541 (1995); United Nations High Commissioner for Human Rights <http://www.unhchr.ch/>. Anaya S, *Indigenous Peoples in International Law*, above n7; Anaya S, "International Law and Indigenous Peoples: Historical Stands and Contemporary Developments" (1994) 18 *Cultural Survival Quarterly* 42; Anaya S, "Indigenous Rights Norms in Contemporary International Law" (1991) 8 *Ariz J Intl & Comp L* 1; Barsh R, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" (1994) 7 *Harv Hum Rts J* 33; Chapman M, "Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection" (1997) 26 *Anglo-Am L Rev* 357; Lawrey A, "Contemporary Efforts to Guarantee Indigenous Rights Under International Law" (1991) 23 *Vand J Transnat'l L* 703; Stamatopoulou E, "Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic" (1994) 16 *Hum Rts Q* 58; Stomski L, "The Development of Minimum Standards for the Protection and Promotion of Rights for Indigenous Peoples" (1991) 16 *Am Indian L Rev* 575; Torres R, "The Rights of Indigenous Populations: The Emerging International Norm" (1991) 16 *Yale J Int'l L* 127; Williams RA Jnr, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) *Duke LJ* 660.

9 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, International Labour Organisation, 72 ILO Off Bull 59 (1989); 28 *ILM* 1382 (1989) (entered into force 5 September 1991). Anaya S, *Indigenous Peoples in International Law*, above n7; Barsh R, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 *Okla City U L Rev* 209; Chapman M, above n8; Hannum H, "New Developments in Indigenous Rights" (1988) 28 *Virg JIL* 649; Lerner N, "The 1989 ILO Convention on Indigenous Populations: New Standards" in Dinstein Y and Tabory M (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992); Sargent L, "The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?" (1998) 29(3) *Inter-Am L Rev* 451; Stamatopoulou E, above n8; Swepston L, "A New Step in International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15 *Okla City U L Rev* 677; Swepston L and Plant R, "International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations" (1985) 124(1) *Int Lab Rev* 91.

10 International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171; [1980] ATS 23; 6 *ILM* 368 (1967) (entered into force 23 March 1976).

11 Anaya S, *Indigenous Peoples in International Law*, above n7; De Bolívar M, "A Comparison of Protecting the Environmental Interests of Latin-American Indigenous Communities from Transnational Corporations Under International Human Rights and Environmental Law" (1998) 8(1) *J Transnat'l L & Pol'y* 105; Dommen C, "Claiming Environmental Rights: Some Possibilities Offered by the United Nation's Human

of literature focuses on international environmental law and the environmental conservation of indigenous peoples' traditional lands.[12]

In this international legal literature, there is no comprehensive analysis of the different political, economic or social factors confronting the governments of non-Western countries (emerging economies) and the impact of these factors on the ability and willingness of these governments to incorporate international laws protecting land and resource rights into domestic legal systems and to enforce those laws.[13] Some writers have discussed the application of individual instruments of international law to the situation of particular indigenous groups in developing countries. For example, Naqvi examines whether the United Nations Draft Declaration on the Rights of Indigenous Peoples is applicable to the situation of the Kalash in Pakistan, by discussing such issues as whether the Kalash are

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Rights Mechanisms" (1998) 11(1) *Geo Int'l Envtl L Rev* 1; Pritchard S, "The International Covenant on Civil and Political Rights and Indigenous Peoples" in Pritchard S (ed), *Indigenous Peoples, the United Nations and Human Rights* (The Federation Press Pty Ltd, Sydney, 1998); Pritchard S and Heindow-Dolman C, "Indigenous Peoples and International Law: a Critical Overview" (1998) 3(4) *AILR* 473.

12 Bosselmann K, "The Right to Self-Determination and International Environmental Law: an Integrative Approach" (1998) *NZ J Env L* 1; Craig C and Ponce Nava D, "Indigenous Peoples' Rights and Environmental Law" in United Nations Environment Program, *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP, 1995); Cycon D, "When Worlds Collide: Law, Development and Indigenous People" (1991) 25 *New England L Rev* 761; De Bolívar M, above n11; Dommen C, above n11; Fabra A, "Indigenous Peoples, Environmental Degradation, and Human Rights: a Case Study" in Boyle A and Anderson M (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, New York, 1996); Ganz B, "Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection" (1996) 9 *Geo Int'l Envtl L Rev* 173; Geer M, "Foreigners in Their Own Land: Cultural Land and Transnational Corporations — Emergent International Rights and Wrongs" (1998) 38 *Virg JIL* 331; Hitchcock R, "International Human Rights, the Environment and Indigenous Peoples" (1994) 5 *Colo J Int'l Envt L & Pol'y* 1; IUCN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions* (International Books, Utrecht, 1997); Kastrup J, "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 *Texas Int LJ* 97; Pritchard S and Heindow-Dolman C, above n11; Shutkin W, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virg JIL* 479.

13 In addition to the articles that describe generally developments in international indigenous rights law, none of the articles which focus on one particular instrument of international law differentiate between developed and developing countries. These articles include, for example, Barsh R, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples", above n9; Daes, "Equality of Indigenous Peoples Under the Auspices of the United Nations - Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 *St. Thomas L Rev* 493; Daes, "Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples" (1994) 63 *Nordic J Int'l L* 205; Nunes K, "'We Can Do ... Better": Rights of Singular Peoples and the United Nations Draft Declaration on the "Rights of Indigenous Peoples"' (1995) 7 *St. Thomas L Rev* 521; Pritchard S, "The United Nations and the Making of a Declaration on Indigenous Rights" (1997) 3 *Aboriginal Law Bulletin* 4; Sanders D, "Developments at the United Nations" (1994) 1 *Can Native L Rep* 12; Sanders D, "A Text and a New Process" (1994) 1 *Can Native L Rep* 48; Swepston L, above n9. Although Kastrup and Stamatopoulou are doubtful of the ability of national governments to implement land right policies, they do not conduct an in-depth analysis of the factors involved. One exception is Dean Cycon's article "When Worlds Collide: Law, Development and Indigenous People" (1991) 25 *New England L Rev* 761, in which the author describes some of the economic, political and social factors that inhibit the ability of nation-states to effectively regulate the impact of large-scale capital-intensive resource development on the lands of indigenous peoples.

"indigenous peoples" within the scope of the Declaration,[14] and Shutkin, Brady and Fabra each examine the articles of various instruments of international law to determine whether the Huaorani of Ecuador may invoke international law to protect themselves against the invasion of oil companies on their lands.[15] However, these articles do not provide a comprehensive analysis of the factors that prevent governments in emerging economies from protecting land rights and the implications for the effectiveness of international law in those countries.

This lack of recognition and analysis of the application of international indigenous rights laws in emerging economies is due in part to past definitions of "indigenous peoples" which, by requiring the domination of peoples from colonisers from overseas as one of the characteristics of indigenous peoples, have excluded the peoples in Asia and Africa from being perceived as "indigenous peoples" for the purposes of international law. As the countries of Asia and Africa, with the states of Latin America, comprise the majority of emerging economies, it is no surprise that the effectiveness of international indigenous rights laws according to the special characteristics of these states has not been analysed. It is only recently that alternative definitions (still controversial) have been advanced to include the minority peoples of Asia and Africa within the definition of "indigenous peoples" for the purposes of international law.[16]

Through case studies of three indigenous peoples in three emerging economies, this thesis will analyse the economic, political and social factors present to a greater or lesser degree in emerging economies, such as severe foreign indebtedness, the absence of the rule of law, the influence of the military, and a corrupt judiciary, that limit the ability and desire of those countries to protect indigenous peoples from subsurface resource exploitation, thereby undermining the effectiveness of indigenous rights laws and environmental laws in emerging economies. This will be done in the context of the exploitation of oil.

Having identified and analysed the relevant economic, political and social factors that undermine the effectiveness of indigenous rights laws and environmental laws in emerging

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[14] Naqvi F, "People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law" (1996) 71 *Indiana LJ* 673.

[15] Brady J, "The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigneous Peoples" (1997) 10 *Harv Hum Rts J* 291; Fabra A, above n12; Shutkin W, above n12.

[16] The question of defining the term "indigenous peoples" in relation to the peoples of Asia and Africa is discussed further in Chapter 1, Section 1.2, pp21-29.

economies in the context of the exploitation of oil, I present a dual approach to the protection of indigenous peoples' traditional lands from oil exploitation. This dual approach is based on regulation of the two primary and most powerful actors concerned in the development of oil resources — the government, which is responsible for enacting and enforcing land title and environmental laws, and issuing oil licences; and the oil companies, which actually conduct the exploration and production activities on indigenous peoples' lands.

The first aspect of this dual approach involves an examination of the rights of indigenous peoples and the duties and obligations of states set out in international human rights laws and international environmental law, and the provision of a critique of these laws and their effectiveness in protecting indigenous peoples' land rights, particularly in emerging economies. The second aspect of this dual approach is the international regulation of the international petroleum industry. In particular, I argue that self-regulation of the international petroleum industry through a voluntary code of conduct for oil companies seeking to operate on indigenous peoples' traditional lands has a useful role to play in translating international land rights into reality in emerging economies where factors such as the absence of the rule of law and inadequate institutional capacity limit the effectiveness of national laws.

The presentation of a code of conduct is extremely topical, with several indigenous organisations submitting preliminary global guidelines on the working policies, practices and directives of transnational corporations operating in indigenous areas to the WGIP in its fifteenth session in 1997, and asking for financial support from the High Commissioner/Centre of Human Rights in order to develop, adopt and implement the guidelines by the year 2000.[17] At the 52nd Session of the Sub-Commission on the Promotion and Protection of Human Rights, held in August 2000, a number of non-government human rights organisations called for a code of conduct to regulate and monitor the activities of transnational corporations according to human rights norms and principles.[18] The Sub-Commission has responded to this call by requesting Miguel Alfonso Martinez of the WGIP

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[17] *Report of the Working Group on Indigenous Populations on its Fifteenth Session* (Geneva, 28 July - 11 August 1997), Conclusions and Recommendations, Item 5, "International Decade of the World's Indigenous People" and the Annex to the Report, UN Doc E/CN.4/Sub.2/1997/14, 13 August 1997, United Nations High Commissioner for Human Rights <http://www.unhchr.ch/>. The guidelines included several aspects such as: prior informed consent and consultation with indigenous peoples; written agreements; compensation; monitoring and recourse; transparency; and full application of corporate environmental policies.

to prepare a working paper on possible principles and guidelines for private sector energy and mining concerns that may affect indigenous lands for submission to the WGIP at its nineteenth session in 2001.[19]

By focusing on exploitation of one resource, my thesis will provide a broad perspective on the social, economic and political factors that place resource exploitation ahead of the land rights of indigenous peoples, and examine the advantages and disadvantages of the international regulation of corporations, which is forming the subject of current and future debate.

Structure of this Thesis

Part I of this thesis contains definitions and background information that will aid the reader's understanding of this topic. Chapter 1 discusses the definition of "indigenous peoples" and "emerging economies", while Chapter 2 describes the structure of the international oil exploration and production industry that is to be regulated by the Code of Conduct drafted in Part IV of this thesis.

Part II contains case studies of three indigenous peoples in three emerging economies: the Huaorani of Ecuador (Chapter 3), the Ogoni of Nigeria (Chapter 4) and the Khanty of Western Siberia, in Russia (Chapter 5). In each case study I examine the relevant domestic law pertaining to indigenous peoples' land rights and the environment, and identify and analyse the social, economic and political factors that undermine the effectiveness of these laws. The conclusions drawn from these case studies are contained in Chapter 6. In these case studies and throughout the thesis, I use "land rights" to refer to specific issues of concern to indigenous peoples in the context of oil exploitation, namely indigenous rights to:

- the ownership, possession of use of traditional lands;
- the ownership and control of subsurface resources;
- be informed of, consulted about, and take part in negotiations over resource development on traditional lands;

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[18] *United Nations Press Release,* Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, 9 August 2000, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>.

[19] Resolution of the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc E/CN.4/Sub.2/2000/L.37, United Nations High Commissioner for Human Rights <http://www.unhchr.org/>.

- participate in the benefits of oil exploitation;
- conservation and protection of their environment;
- compensation; and
- the right not to be forcibly relocated from traditional lands so that resource exploitation may proceed.

Three countries have been chosen as a number that will allow each case study to be analysed in sufficient depth to provide a broad comparison between emerging economies, while preserving the overall balance of the case studies within the structure of the thesis. The particular peoples and countries chosen provide geographic representation across the globe, with one country from South America (Ecuador), one from Africa (Nigeria), and one from the Siberian part of Russia (which is part of Asia). This selection of countries offers two developing countries for analysis (Ecuador and Nigeria) and one country in transition from socialism to a market economy (Russia). These particular countries have also been chosen on the basis of ease of access to information, in terms of the number of articles written on these countries, and my ability to obtain copies of the laws, including translations into English in the case of Russia and Ecuador.

Part III describes and analyses the existing international law particularly relevant to the protection of indigenous land rights. Chapter 7 discusses global (as opposed to regional) international laws that set out the rights of indigenous peoples, while Chapter 8 examines the regional human rights regimes that may aid indigenous peoples in their struggles to protect their land rights. Chapter 9 examines recent developments in international environmental law of relevance to the conservation and protection of the environment of indigenous peoples in the context of oil exploitation. Part III serves two major functions in this thesis. First, as states generally have ownership rights to subsurface resources, and are responsible for issuing oil licences, the Part provides an analysis of the obligations and duties places on states in relation to protecting indigenous peoples traditional lands from the negative consequences of oil exploitation. Second, the rights of indigenous peoples and duties placed on states in this regard in international law will be used as a basis for the content of proposed Code of Conduct regulating the international oil exploration and production industry that is presented in Part IV.

Part IV addresses the international regulation of the international oil exploration and production industry. Chapter 10 examines the various types of codes that are available to the international community to regulate the industry, including public international codes of conduct, private internal corporate codes of conduct, codes of conduct drafted by industry associations for adoption by their members, and codes prepared and implemented by non-governmental organisations for adoption by corporations. Having discussed the features, advantages and disadvantages of each type of code in Chapter 10, in Chapter 11 I present a voluntary industry code of conduct for oil corporations operating, or seeking to operate, on the traditional lands of indigenous peoples. The provisions of this draft Code are discussed in Chapter 12. Chapter 13 suggests various means by which the implementation and enforcement of the proposed Code of Conduct may be monitored by international oil exploration and production industry.

PART 1 DEFINITIONS AND BACKGROUND INFORMATION

CHAPTER 1: DEFINITIONS

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1.1 Definition of "Emerging Economies"

There is no one clear, fixed and generally-accepted definition of an "emerging economy". In fact, it is extremely difficult to find a scholarly definition at all.[1] This may stem from the fact that historically, the phrase "emerging economy" devolved to satisfy the need for a change in terminology as the communist world collapsed, and as the phrase "Third World" became inappropriate to "describe and classify countries contained within its banner".[2] Thus, the phrase "emerging economies" has been used interchangeably with the phrase "developing countries", "Third World" countries, "emerging market economies", "emerging market systems" and "emerging markets".[3]

For the purpose of this thesis, the term "emerging economies" refers to a group or countries that includes "countries in transition" from socialist to market economies, and "developing countries", that are, generally speaking, yet to undergo the industrialisation and development of high-technology societies of the Western "developed" countries.

"Countries in transition" are central and eastern European countries, and the new independent states of the former Soviet Union.[4] "Countries in transition" also include countries that have been defined as "more advanced developing countries".[5] These countries are generally high-income developing countries that are either oil producers (Brunei, Kuwait, Qatar and the United Arab Emirates) and/or offshore financial centres (Singapore).[6]

The "developing countries" are largely the countries of South and Central America, Africa, the Middle East, and non-OECD Asia and the Pacific. The majority of developing countries are low income (least developed countries and other low income countries) and lower

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1 The exception is Nichols P, "A Legal Theory of Emerging Economies" (1999) 39 *Virg JIL* 229. In his article, Nichols seeks to redress the vacuum of legal theory regarding emerging economies, pointing out that the term "emerging economies" refers merely to a group of countries, but is "empty" as an analytical phrase: at 233.

2 Ibid at 233.

3 Ibid at 233-235; Cohen M, "A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries" (1996) 15 *Stan Envl LJ* 130 at 131 and n3.

4 Development Assistance Committee, *Development Co-operation Report 1997* (OECD, Paris, 1998) pA101; OECD, *External Debt Statistics* (OECD, France, 1997) at 5.

5 Development Assistance Committee, ibid; OECD, ibid at 4-5.

6 Development Assistance Committee, ibid; OECD, ibid at 4.

middle-income countries, but countries can also be classified as "developing" even though they are high income countries (for example, Hong Kong and New Caledonia).[7]

The category of "emerging economies" excludes the developed countries or "Western countries".[8] A comprehensive discussion of the nature and development of Western countries is beyond the scope of this thesis. For the purpose of this thesis, these countries can be described briefly here as "the ensemble of industrialised countries that, in the 1990s, collectively retain by far the greatest concentration of wealth, economic and scientific-technological power on the globe, and whose peoples enjoy by far the highest standard of living".[9] Key features of these countries include the reliance on a market-based economy to allocate resources and achieve the production and distribution of goods and services, and

> a distrust of dictatorship and absolute rule; a commitment to constitutional government with or under freely elected governments and representative assemblies, which guaranteed the rule of law; and an accepted set of citizens' rights and liberties, including freedom of speech, publication and assembly; and the belief that state and society should be informed by the values of reason, public debate, education, science, and the improvability (though not necessarily the perfectability) of the human condition. [10]

It is obvious that the term "emerging economies" embraces a large range of countries with diverse cultures, economies and legal systems. However, it is possible to identify some features of "countries in transition" and "developing countries" that are generally common to emerging economies, if not always characteristic of every country.

With few exceptions, the gross domestic product per capita of emerging economies is far smaller than that of developed economies, and in many cases is accompanied by enormous external debt.[11] Emerging economies tend to receive, rather than provide, foreign assistance and foreign direct investment, particularly through projects guaranteed by international

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7 Other countries in this category are: Chinese Taipei, Macao, Republic of Korea, Aruba, Bermuda, Cayman Islands, Falkland Islands, French Guineas, Netherlands Antilles, Virgin Islands, Israel, French Polynesia, Northern Marianas and Cyprus. See Development Assistance Committee, ibid.

8 The OECD consists largely, but not exclusively of "developed" or "Western" countries. The OECD members are:
Europe: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Republic of Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey and the UK.
Other: Australia, Canada, Japan, Mexico, New Zealand, Republic of Korea, USA.
The exceptions to "Western" countries are: Hungary and Poland (economies in transition); and the Republic of Korea, Mexico and Turkey (developing countries).

9 Hobsbawm E, *Age of Extremes: The Short Twentieth Century 1914-1991* (Abacus, London, 1995) at 15.

10 Ibid at 110.

11 Nichols P, above n1 at 286.

financial institutions.[12] In this respect, the collapse of communism has left countries in transition "hungry for foreign investment capital and desperate for environmental assistance", so that in the context of resource development it is appropriate to class these countries with developing countries as emerging economies.[13]

Emerging economies are also similar in their endeavour to transform their economies to industrialised, market-based economies in order to achieve the economic growth and efficiencies afforded by a market-based economic system. Many emerging economies undertake market reforms in pursuance of conditions attached to loans by international lending institutions. One key feature of market-based reform is the implementation of privatisation plans, not only in pursuit of economic efficiency promised by private ownership and the free market, but also in the hope of attracting foreign investment to stimulate economic development.[14] Emerging economies can thus be characterised by their attempts to move from development based on state planning and public ordering, reliance on public enterprise, pervasive regulation and closed economies, to development based on markets and private ordering, privatisation, deregulation and open economies.[15]

Another characteristic of emerging economies is their endeavour to transform institutional arrangements, including legal systems, from "a relational orientation to a formal orientation."[16] Law, as with other institutions, may be formal or relational. The distinguishing feature of a formal institution is its impersonality. In contrast to relational institutions, which emphasise pre-existing relationships or the status or position of persons, individuals who facilitate relations through a formal institution need not have any prior relationship with one another.[17]

One of the absolutely fundamental elements of a formal legal system is the rule of law.[18] In contrast, the rule of law does not apply to relational legal systems, where the interpretation

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12 Kerr T, "What's Good for General Motors is Not Always Good for Developing Nations: Standardizing Environmental Assessment of Foreign-Investment Projects in Developing Countries" (1995) 29(1) *Int Law* 153 at 153 and n2; Cohen M, above n3 at 131 and n3.

13 Cohen M, ibid at 131 and n4.

14 Nichols P, above n1 at 287-288; Salacuse J, "From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World" (1999) 33(4) *Int Law* 875 at 882-886.

15 Salacuse J, ibid at 882-886.

16 Nichols P, above n1 at 233.

17 Ibid at 244.

18 Other characteristics of formal law that have been identified are as follows: formal law is administered through formal and often ritualised legal procedures; lawyers and judges are specialised technicians who study the law, and often rely on precedent; and Kantian notions of abstract personhood and individual

and enforcement of the law relies on status and pre-existing relationships.[19] Relational law incudes traditional law, such as African customary law, where, broadly speaking, the law is made up of rules and procedures that remain informal and personal in application; the resolution of disputes takes place in the course of face-to face relationships within the community; justice emerges from the collective judgment of the community; and the force of the law lies in consensus.[20] Other systems of relational law where status and pre-existing relationships are dominant, and the rule of law in the Western sense is absent, include socialist legal systems and authoritarian regimes.[21]

Generally speaking, formal legal systems exist "in Western Europe, North America, and Australia and New Zealand - the developed, industrialised "mature" economies" - whereas the relational system exists or recently existed in Africa, Asia, Central and Eastern Europe, the former Soviet Union, and South America - the location of most emerging economies".[22]

The attempt to transform their legal and commercial institutions from a relational to a formal orientation, in order to "facilitate relationships among strangers rather than only among parties with preexisting relationships" is another characteristic of emerging economies.[23] A major reason for this institutional transformation is the desire to increase economic growth by creating trading relationships with persons outside the society, in particular with developed economies. As emerging economies move towards development based on private markets and open economies, they are seeking to undertake judicial and legal reforms essential to achieving the rule of law that is necessary for the efficient and effective operation of a private market system.[24]

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autonomy undergird liberal political ideas, including equality before the law; equal treatment of persons as ends, not means. Ibid at 248.

19 Ibid at 248-249.

20 Ibid.

21 Socialist law as relational law is exemplified by the following factors: the individual may be subordinated to the collective good; the written law does not always reflect the law in practice, as for example, the will of the Communist Party in Soviet Russia was the source of law, but the will of the Party did not always reflect written law; the interpretation and enforcement of the law in socialist systems relies on status and pre-existing relationships; and socialist systems tend to operate in the absence of the rule of law. See Nichols P, above n1.

22 Ibid at 277.

23 While systems of socialist law dominated Central and Eastern Europe and the former Soviet Union, traditional law exerts a powerful influence on the legal systems of Africa, Asia and South America: Ibid at 277-278.

24 Salacuse J, above n14 at 886-888.

1.2 Definition of "Indigenous Peoples"

There is no one, universally accepted definition of "indigenous peoples". The need for, and content of, a definition of "indigenous peoples" has evoked considerable controversy in the international community, particularly in the meetings of the United Nations Working Group on Indigenous Populations (WGIP) and the meetings of the Working Group established to consider the Draft Declaration of Indigenous Rights adopted by the WGIP in 1995.[25] As indigenous people acquire rights under instruments of international law, and states acquire restrictions and responsibilities, particularly in terms of resources, so the term "indigenous peoples" has begun to acquire political significance in international law.

The discussion in this Chapter will focus on a particular aspect of the definition of "indigenous peoples", namely the application of the concept to Asia and Africa. This serves a dual purpose. First, as the majority of emerging economies are situated in Africa, Asia and Latin America, the various difficulties of applying the concept of "indigenous peoples" to the countries of Asia and Africa that have been raised by members of the international community must be addressed if the thesis is to have practical significance. The second reason, closely related to the first, is to justify the countries and peoples I have selected for my case studies, particularly in the case of the Ogoni people, of Nigeria, an African country.

1.2.1 Definitions from International Documents and Legal Literature

Various attempts have been made over the years to precisely define the term "indigenous peoples". This "positivist" approach "treats "indigenous peoples" as a legal category requiring precise definition, so that for particular operational purposes it should be possible to determine, on the basis of the definition, exactly who does or does not have a particular status, enjoy a particular right, or assume a particular responsibility."[26]

Three recent and commonly-cited definitions of "indigenous peoples" relevant to the international community are those specified in the United Nations *Study of the Problem of*

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[25] Working Group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995.

[26] Kingsbury B, "'Indigenous Peoples' in International Law: a Constructivist Approach to the Asian Controversy" (1998) 92(3) *AJIL* 414 at 414.

Discrimination Against Indigenous Populations ("the Cobo Report");[27] ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries;[28] and the World Bank's Operational Directive 4.20.[29] While the United Nations draft Declaration on the Rights of Indigenous Peoples does not define the term "indigenous peoples", the Proposed American Declaration on the Rights of Indigenous Peoples describes the types of people to whom the Proposed Declaration will apply.

1.2.1.1 *Study of Discrimination Against Indigenous Populations* ("the Cobo Report")

No official definition of "indigenous peoples" has been adopted by the United Nations, but the UN has been guided in practice to some extent by the definition expounded in the Cobo Report.[30] This definition reads as follows:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
>
> (a) Occupation of ancestral lands, or at least part of them;
> (b) Common ancestry with the original occupants of these lands;
> (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc,);
> (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
> (e) Residence in certain parts of the country, or in certain regions of the world;
> (f) Other relevant factors.
>
> On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is accepted by these populations as one of its members (acceptance by the group). [31]

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27 United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7 & Adds 1-4 (1986) (Jose R Martinez Cobo, Special Rapporteur) (hereafter referred to as "The Cobo Report").

28 ILO Convention No. 169, adopted 27 June 1989, 72 ILO Off Bull 59 (1989); 28 *ILM* 1382 (1989) (entered into force 5 September 1991). This Convention replaced ILO Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

29 *World Bank Operational Manual*, Operational Directive 4.20, September 1991, World Bank <http://www.worldbank.org>.

30 Kingsbury B, above n26 at 419.

1.2.1.2 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries[32]

Article 1 of ILO Convention No. 169 provides that the Convention applies to:

> (a) Tribal peoples in independent countries 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;
>
> (b) Peoples in independent countries 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 colonisation or the 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.
>
> 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
>
> 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

1.2.1.3 Proposed American Declaration on the Rights of Indigenous Peoples [33]

There is no actual definition of "indigenous peoples" in the Proposed Declaration, although Article 1(1) states that the Declaration "applies to indigenous peoples as well as to peoples whose social, cultural and economic conditions distinguish them from other sectors of the national community, and whose status is regulated wholly or in part by their own customs or traditions or by special laws or regulations", and pursuant to Article 1(2), "self-identification as indigenous shall be regarded as "a fundamental criterion for determining the peoples to which the provisions of the Declaration apply".

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[31] The Cobo Report, above n27, Add 4, para 379.

[32] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Organisation, 72 ILO Official Bull. 59, 28 *ILM* 1384 (1989) (entered into force 5 September 1991).

[33] *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session, OEA/Ser/L/V/II.95, Doc 6, 26 February 1997; reprinted in *Annual Report of the Inter-American Commission on Human Rights 1996*, OAS Doc OEA/Ser.L/V/II.95, Doc 7, rev, 14 March 1997, Ch IV, "Proposed American Declaration on the Rights of Indigenous Peoples", Inter-American Commission on Human Rights <http://www.cidh.oas.org/annualrep/96eng/96ench4.htm>.

As with ILO Convention No 169, Article 1(3) of the Proposed American Declaration on the Rights of Indigenous Peoples provides that "the use of the term "peoples" in this Instrument shall not be construed as having any implication with respect to any other rights that may might be attached to the term in international law".

1.2.1.4 World Bank Operational Directive 4.20

According to the World Bank Operational Manual, "special action is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other resources".[34] Among other things, Operational Directive 4.20 describes the World Bank's policies and procedures for projects that affect indigenous peoples; sets out processing and documentation requirements; and provides policy guidance to ensure indigenous peoples benefit from projects assisted by the Bank and avoid or mitigate potentially adverse effects on indigenous peoples from Bank-assisted projects.[35] The definition of "indigenous peoples" used by the Bank is as follows:

> The terms "indigenous peoples," "indigenous ethnic minorities, "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.
>
> Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.
>
> Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity ... Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
>
> (a) a close attachment to ancestral territories and to the natural resources in these areas;
> (b) self-identification and identification by others as members of a distinct cultural group;
> (c) an indigenous language, often different from the national language;
> (d) presence of customary social and political institutions; and

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[34] *World Bank Operational Manual*, Operational Directive 4.20, above n29, paras 1-2. The World Bank is currently reviewing all of its operational policies, including OD 4.20. In the *Approach Paper on Revision of OD 4.20 on Indigenous Peoples*, Davis, Salman and Bermudez recommend that the Bank implement a "process for identifying the populations covered by the Operational Policy that draws upon previous definitional criteria, but gives greater attention to national and international legal definitions and to consultations with governments, regional and national indigenous organisations, NGOs and academic experts": Davis S, Salman A and Bermudez E, *Approach Paper on Revision of OD 4.20 on Indigenous Peoples*, World Bank <http://www.worldbank.org>, para 4(a).

[35] *World Bank Operational Manual*, Operational Directive 4.20, above n29, para 2.

(e) primarily subsistence-oriented production. [36]

It can be seen from the above definitions that a wide range of factors have been used in attempts to define which "peoples" are "indigenous", including the following:[37]

- cultural distinctiveness (for example, religion, language, dress, laws, social and economic organisation);
- ancestry/descent;
- attachment to a particular territory;
- priority in time;
- historical continuity (evidenced by factors such as ancestry and culture);
- dispossession/invasion by a colonial power;
- geographically separate territory;
- subordination/subjugation/oppression;
- marginalisation or vulnerability as ethnic, cultural or linguistic groups;
- self-identification as indigenous, and group acceptance.

1.2.2 Problems with Applying the Concept of "Indigenous Peoples" to Africa and Asia

Some governments have stated the concept of "indigenous peoples" is relevant only to certain regions of the world.[38] Certain factors used to define indigenous peoples, in particular

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[36] Ibid paras 3-5.

[37] Early definitions of "indigenous peoples" in international law characterised indigenous peoples as peoples of countries colonised by the European settler countries, and focussed on the so-called "backwardness" of these peoples. For example, in the Final Act of the Berlin Africa Conference 1884-1885, the term "indigenous" was used to distinguish between the citizens of the Great Powers and those persons in Africa who were under colonial domination. Article 22 of the *Covenant of the League of Nations* laid a duty on its members to promote the well-being and development of the "indigenous populations" of the colonies and territories under their control, characterising "indigenous populations" as "peoples not yet able to stand by themselves under the strenuous conditions of the modern world", as contrasted to the more "advanced" societies. United Nations Working Group on Indigenous Populations, *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the concept of "indigenous people", UN Doc E/CN.4/Sub.2/AC.4/1996/2, reprinted (1996) 2 *AILR* 162, paras 11-14. The use of the "stage of development" or "backwardness" to define indigenous peoples is not acceptable and is omitted from the list.

[38] *Report of the Working Group on Indigenous Populations on its Thirteenth Session* (Geneva, 24-28 July 1995), UN Doc E/CN.4/Sub.2/1995/24, 10 August 1995, Centre for World Indigenous Studies Fourth World Documentation Project Archives <http://www.halcyon.com.FWDP.fwdp.html>, para 57; *Report of the Working Group on Indigenous Populations on its Sixteenth Session* (Geneva, 27-31 July 1998), UN

"priority in time" and "historical continuity" with a "preinvasion society", present difficulties in the application of the concept of "indigenous peoples" to the states of Africa and Asia.

The term "indigenous peoples" is controversial to many African states. First, most Africans regard themselves as indigenous to the countries in which they live, in the dictionary sense of the word "indigenous", meaning "native to (a place)".[39] In this sense, all Africans are indigenous peoples, including those who control the government and political power in African states. Some African states distinguish their situation of historical coexistence and political integration of ethnic groups with that of countries where the indigenous people were subjugated by colonists coming from overseas. To some African states, "indigenous peoples" is a Western concept, referring to "the living descendants of preinvasion inhabitants of lands now dominated by others".[40]

Second, during the years of their struggle for independence, the leaders of the new African states used the term "indigenous peoples" to unite the African peoples against the colonial powers. After gaining independence, the leaders claimed that the term "indigenous peoples" has "divisive connotations for young nations which prioritised national consolidation, unity and identity after many years of colonial rule which divided Africa into small antagonistic ethnic groups".[41] Some African states fear that applying "indigenous peoples" rights to some ethnic groups at the exclusion of others could lead to inter-group competition for resources and the intensification of ethnic politics at the expense of national unity.[42]

Some of the states of Asia have also argued against applying the concept of "indigenous peoples" to their territories. In particular, Bangladesh, India, Malaysia, China and Myanmar have maintained the term "indigenous peoples" is not applicable to their countries.[43] There

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Doc E/CN.4/Sub.2/1998/19, 19 August 1998, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>, para 33.

39 Murumbi D, "Concept of Indigenous" (1994) 1 *Indigenous Affairs* 52 at 52; Date-Bah S, "Rights of Indigenous People in Relation to Natural Resources Development: an African's Perspective" (1998) 16(4) *J Energy & Nat Resources L* 389 at 389; *The Macquarie Encyclopedic Dictionary* (The Macquarie Library Pty Ltd, NSW, 1990).

40 International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter*, Report of a Conference held in Nairobi from 2 to 4 December 1985 convened by the International Commission of Jurists, at 54; Date-Bah S, above n39 at 390-391.

41 Murumbi D, above n39 at 52.

42 Date-Bah S, above n39 at 411.

43 *Report of the Working Group on Indigenous Populations on its Thirteenth Session*, above n38, para 57; *Report of the Working Group on Indigenous Populations on its Sixteenth Session*, above n38, para 33; Kingsbury B, above n26 at 433-436; Barsh R, "Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object - and the Irresistible Force" (1996) 18 *Hum Rts Q* 782 at 791-794.

are three main reasons for this.[44] As in Africa, "indigenous peoples" is seen as a Western concept, which is applicable only to countries where the native peoples have been dispossessed and marginalised by colonial powers, distinguishing this situation from the history of political coexistence and ethnic integration in Asia. Second, as the entire population of many Asian states have been living on the land for the past several millennia, the states argue that in practice it is "impossible or misleading to seek to identify the prior occupants of countries and regions with such long and intricate histories of influx, movement and melding".[45] Third, there is a fear that "recognising rights on the basis of prior occupation for particular sets of groups will spur and legitimate mobilisation and claims by a vast range of groups, undermining other values with which the state is properly concerned".[46]

Thus, the requirement of "priority in time" creates difficulties in the African and Asian context because "after centuries of migration, absorption and differentiation, it is impossible to say who came first".[47] The requirement of marginalisation and dispossession by a colonial power does not accurately describe the current situation of states in Africa and Asia, where marginalisation from power occurs at the hands of neighbours or other "ethnic groups", who are also "indigenous" in the sense of "native to the country".

Furthermore, the denial of African and Asian States that indigenous "peoples" exist within their territories, and arguments in the international community over whether indigenous groups should be defined as "indigenous "peoples", have been inextricably linked to the existence and implications of the right of self-determination of "peoples" in international law. Of particular concern to governments is the association of independent statehood with the right of self-determination of "peoples" in the *International Covenant on Civil and Political Rights*,[48] the *International Covenant on Economic, Social and Cultural Rights*,[49] and the Charter of the United Nations.

In the context of the right of self-determination in international law, the definition of "peoples" as "all the persons within the boundaries of a country or geographical entity that

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44 Kingsbury B, ibid at 433.
45 Kingsbury B, ibid; *Report of the Working Group on Indigenous Populations on its Thirteenth Session*, above n38, para 57.
46 Kingsbury B, ibid.
47 Ibid at 435.
48 Adopted 16 December 1966, 999 UNTS 171; [1980 ATS 23; 6 *ILM* 368 (1967) (entered into force 23 March 1976).
49 Adopted 16 December 1966, 993 UNTS 3; 6 *ILM* 360 (1967) (entered into force 3 Jan 1976).

has yet to achieve independence or majority rule" is uncontroversial.[50] The applicability of the right of self-determination to the whole populations of territories under conditions of classic colonialism is unquestionable in international law.[51] The United Nations has applied the right of self-determination and decolonisation to any territory that is "geographically separate and is distinct ethnically and/or culturally" from an administering State.[52]

In contrast, interpreting the term "peoples" to include any homogenous groups of peoples with, for example, a common history, culture and language, such as indigenous peoples, ethnic groups, tribes and racial groups, is still extremely controversial.[53] The requirement in General Assembly Resolution 1541 of a "geographically separate" territory has been taken in the past to imply an intervening ocean ("the blue water thesis") or state, thereby precluding from decolonisation procedures indigenous or tribal peoples living within the boundaries of independent states. Many governments are reluctant to associate the term "peoples" with

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[50] Kiwanuka R, "The Meaning of "People" in the African Charter on Human and Peoples' Rights" (1988) 82 *AJIL* 80 at 90. It is also uncontroversial that the term "peoples" includes the aggregate population of independent states, that is, the whole of the population of independent states is entitled to self-determination.

[51] The Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), December 14 1960, UN GAOR, 15th Sess, Supp No 16, at 66, UN Doc A/4684 (1961); Western Sahara Case, *ICJ Reports* 1975, para 55, stating that "the principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514(XV)". See also Fanana N, "The Peoples' Rights under the African Charter on Human and Peoples' Rights" (1997) 10(1) *Lesotho LJ* 37 at 43; Umozurike U, "The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights" (1988) 1 *Afr J Int'l L* 65 at 72.

[52] Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations (Declaration on Non-Self-Governing Territories, GA Res 1541, December 15 1960, UN GAOR, 15th Sess, Supp No 16 at 29, UN Doc A/4684 (1961), principle 6.

[53] In support of the argument that "peoples" includes any homogenous groups of peoples in the context of the right to self determination contained in Article 20 of the African Charter on Human and Peoples' Rights, see Umozurike U, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers/Kluwer Law International, The Hague, Netherlands, 1997); D'Sa R, "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action" (1987) *Aust YB Int L* 101; Fanana N, above n51; Kiwanuka R, above n50; Mumba S, "Prospects for Regional Protection of Human Rights in Africa" (1982) *Holdsworth L Rev* 101; Murumbi D, above n39 at 54; Nobel P, "The Concept of 'Peoples' in the African (Banjul) Charter on Human and Peoples' Rights" in Nobel P (ed), *Refugees and Development in Africa* (Scandinavian Institute of African Studies, Uppsala, 1987); Umozurike U, "The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights", above n51; and in general, Dinstein Y, "Collective Human Rights of Peoples and Minorities" (1976) 25 *Intl and Comp LQ* 102 at 108. Cf Bondzie-Simpson E, "A Critique of the African Charter on Human and Peoples' Rights" (1988) 31 *Howard LJ* 643; International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter*, Report of a Conference held in Nairobi from 2 to 4 December 1985 convened by the International Commission of Jurists, at 54; Date-Bah S, "Rights of Indigenous People in Relation to Natural Resources Development: an African's Perspective" (1998) 16(4) *J Energy & Nat Resources L* 389 at 411; and United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, Final Report by Miguel Alfonso Martínez, Special Rapporteur, UN Doc

indigenous groups (as opposed to "populations" or "people") because they fear that recognising a right of self-determination of indigenous peoples will lead to secessionist claims by indigenous peoples seeking independent statehood, thereby undermining the territorial integrity of states.[54]

This fear is particularly acute for "almost every African nation", where "one of the most pressing problems facing African leaders is the threat of disintegration from within".[55] Thus, recognising the right of self-determination for ethnic communities, with its implications for secession and potential threat to the territorial integrity of existing states, would be "politically imprudent for the vast majority of African states".[56]

It is in this context that Asian and African nations have claimed that the culturally distinct peoples living within their borders are "minorities" not "indigenous peoples". The United Nations has historically separated the treatment of indigenous peoples and ethnic, religious and linguistic minorities, with different international legal rights pertaining to these two groups, the most crucial being the recognition of the right of internal self-determination in the case of indigenous peoples, but not minorities. This brings us into the realm of determining how indigenous peoples and minorities should be distinguished, a question which has troubled legal scholars and the international community for some time.[57]

E/CN.4/Sub.2/1999/20, 22 June 1999, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>.

54 Anaya S, *Indigenous Peoples in International Law* (Oxford University Press, New York, Oxford, 1996); Barsh R, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" (1994) 7 *Harv Hum Rts J* 33; Umozurike U, *The African Charter on Human and Peoples' Rights*, above n53; Umozurike U, "The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights", above n51.

55 D'Sa R, above n53 at 118. In the passage of text cited, D'Sa refers to article 29 not article 20, but this is clearly a misprint.

56 Anthony A, "Beyond the Paper Tiger: the Challenge of a Human Rights Court in Africa" (1997) 32 *Texas Int LJ* 511 at 515.

57 There are indications the United Nations is reconsidering the usefulness of employing a clear-cut distinction between minorities and indigenous peoples. United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN Doc E/CN/Sub.2/2000/10, 19 July 2000, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>, containing a paper each by Asbjørn Eide and Erica-Irene Daes. Erica Irene-Daes has suggested that it is more useful to clarify the "ideal types" of each group, recognising there may be overlap between them, rather than "attempting to define a sharp conceptual boundary between the two". She suggests that the ideal type of "indigenous peoples" is a group that is aboriginal to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organisation within the territory. The ideal type of "minority" is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry. The ideal type of "indigenous people" focuses on aboriginality, territoriality and the desire to remain collectively distinct, whereas the ideal minority focuses on the groups' experience of discrimination and the desire to integrate freely into national life to the degree they choose. This is a "practical and realistic approach" that

However, this is a large and complex subject in its own right, and one which it is beyond the scope of this thesis to discuss. It is also irrelevant in the context of this chapter, which is seeking to address the common conceptual and political obstacles that have been raised by Asian and African states to identifying the peoples within their borders as indigenous peoples.

1.2.3 Application of the Concept of "Indigenous Peoples" to Africa and Asia

1.2.3.1 Addressing the conceptual issues

The Chairperson-Rapporteur of the WGIP, Mrs Erica-Irene Daes, in her working paper for the United Nations Working Group on Indigenous Populations (WGIP) on the concept of "indigenous people",[58] rejects the suggestion that "indigenous" is only applicable to situations where the original inhabitants of the territory were subjugated and physically dispossessed by settlers from overseas bearing alien cultures and values. Daes rejects the requirement that conquest, colonisation, subjugation or discrimination must be at the hands of persons from other regions of the world rather than neighbours because the distinction between long-distance and short-distance aggression is unjustified, and it is "logically impossible to establish a cut-off distance".[59] It also assumes cultural differences are a simple linear function of distance.[60]

Daes agrees that persons who have control of the national political system are not less native to the soil than groups identified as "indigenous" or "tribal", but argues that the conceptual difficulty disappears "indigenous" peoples are thought of as groups which are native to their

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is purposive, linking the characteristics of groups to their aspirations and to the rights they can realistically exercise. It is also able to accommodate cases which satisfy both ideal types and which merit both kinds of protection.

58 United Nations Working Group on Indigenous Populations, *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the concept of "indigenous people", UN Doc E/CN.4/Sub.2/AC.4/1996/2, reprinted (1996) 2 *AILR* 162.

59 Ibid para 63.

60 Ibid. This argument has been supported by indigenous peoples, who have stated that "[W]e do not see any fundamental difference between indigenous peoples subjected to external colonisation and indigenous peoples subjected to internal colonisation. We hold the view that colonisers are colonisers, regardless of whether they are of overseas origin, or whether they come from the same continent". Statement by the Saami Council to the Seventeenth Session of the United Nations Working Group on Indigenous Populations, 26-30 July 1999, Agenda Item 8, Netwarriors International Political Observers <http://www.hookele.com/netwarriors/WGIP-99.html>.

own ancestral territories within the borders of a State.[61] A similar view has been advanced by inidgenous peoples. For example, the Saami Council has stated that:

> [P]eople living in their ancestral territories are indigenous regardless of who the invaders or colonists are. We emphasise that indigenous peoples rightfully claim to be indigenous in their own territory, and not outside it. When elaborating on the definitions of indigenous peoples, one should thus bear in mind that indigenous peoples, for example in Asia, are not claiming to be indigenous in relation to the entire country. They are claiming to be indigenous to a distinct territory, within the country.[62]

Daes concludes that no single definition could capture the diversity of indigenous peoples worldwide, and that it was not desirable nor possible to arrive at a universal definition.[63] Instead, she compiles a list of factors that are relevant to understanding the concept of "indigenous peoples", stressing that these do not comprise an inclusive or exhaustive definition, but are merely indicators of indigenousness which may be present to a greater or lesser extent in different cases which will provide a useful guide to decision-making.[64] The factors are as follows:

> (a) Priority in time, with respect to the occupation and use of a specific territory;
> (b) The voluntary perpetration of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
> (c) Self-identification as well as recognition by other groups, or by the state authorities, as a distinct collectivity; and
> (d) An experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions prevail.[65]

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61 United Nations Working Group on Indigenous Populations, *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, above n58, para 64. See also Lynch O, "Legal Challenges Beyond the Americas: Indigenous Occupants in Asia and Africa" (1996) 9 *St Thomas L Rev* 93 at 94, arguing that indigenous peoples can be thought of as people "residing in the ancestral domains of their forebearers".

62 Statement by the Saami Council to the Seventeenth Session of the United Nations Working Group on Indigenous Populations, above n60.

63 United Nations Working Group on Indigenous Populations, *Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, above n58, para 71.

64 Ibid para 70.

65 Ibid para 69. At a meeting of indigenous peoples prior to the 14th session of the WGIP, indigenous peoples expressed support for Daes' conclusions and recommendations. In a joint resolution on the concept and definition of indigenous peoples, the indigenous peoples stated that they "categorically reject any attempts by governments to identify Indigenous Peoples", "endorse the Martinez Cobo report" and "acknowledge the conclusions and recommendations by Chairperson-Rapporteur Madame Erica-Irene Daes in her working paper on the concept of indigenous peoples". *Report of the Working Group on Indigenous Populations on its Fourteenth Session* (Geneva, 29 July - 2 August 1996), UN Doc E/CN.4/Sub.2/1996/21, 16 August 1996, Centre for World Indigenous Studies Fourth World Documentation Project Archives <http://www.halcyon.com.FWDP.fwdp.html>, para 31. At the 15th Session of the WGIP, many indigenous peoples expressed full support for the conclusions contained in the Chairperson-Rapporteur's supplementary working paper: *Report of the Working Group on Indigenous Populations on its Fifteenth Session* (Geneva, 28 July - 11 August 1997), UN Doc E/CN.4/Sub.2/1997/14, 13 August 1997, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>.

While Daes includes "priority in time" as a factor that is an "indicator of indigenousness", this is not a strict requirement that in its absence, vitiates a claim to indigenousness.

Benedict Kingsbury has argued that from a functional viewpoint, such as in the practice of the World Bank, a requirement of "being first in time" in a particular region is not a necessary, rigid condition of being "indigenous".[66] He suggests that functional matters such as "dispossession of land, cultural dislocation, environmental despoliation and experiences with large development projects" establish a unity for indigenous peoples that are not dependent on historical continuity or priority in time. This accords with other writers who maintain that, in Africa, establishing priority in time is viewed as a futile exercise that only serves to exclude many of the peoples who today are facing severe difficulties in trying to secure access to land,[67] and that the empowerment of indigenous minorities so that they can preserve cultures and lands against those in political power is the key issue.[68]

> Fixed definitions and concepts (such as indigenous peoples) can become strait-jackets which prevent discussion and deflect from the problems afflicting specific indigenous peoples in various African countries. Instead, we need to find better ways to empower these peoples and improve their lot. One of the problems which needs to be addressed is the human rights of cultural minorities, including the right to live on their ancestral land without arbitrary displacement.[69]

1.2.3.2 Addressing the issue of secession

While an in-depth study of the right of self-determination and secession is beyond the scope of this thesis,[70] it should be noted that several arguments have been advanced in order to overcome States' fears of secession. One solution is to devise a special category of political rights for indigenous peoples, whereby indigenous peoples are accorded the right to live according their own systems of government ("internal" self-determination) but not the right to form new states ("external" self-determination).[71] This approach is adopted in ILO

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66 Kingsbury B, above n26 at 454.

67 International Work Group for Indigenous Affairs, *The Indigenous World 1994-95* (IWGIA, Copenhagen, 1995) at 171.

68 Murumbi D, above n39 at 54; Parkipuny M, "The Indigenous Peoples Rights Question in Africa", Statement before the UN Working Group on Indigenous Populations, no date, Fourth World Documentation Project <http://www.halcyon.com/pub/FWDP/Africa/parkipny.txt>.

69 Murumbi D, above n39 at 54.

70 On indigenous self-determination, see the references listed in the Introduction, n7.

71 This approach appears to have favour among states, as evidenced by Article 1(3) of the proposed Inter-American Declaration on the Rights of Indigenous Peoples, and Article 1(3) of ILO Convention No.169,

Convention No 169 and the Proposed American Declaration on the Rights of Indigenous Peoples, both of which contain a provision stating that the definition of "peoples" shall not be construed as having any implication with respect to any other rights attached to the term in international law.

Second, the assumption that self-determination always entails secession has been challenged by indigenous peoples, who have pointed out: first, that right of secession is limited by other principles of international law;[72] and second, that the aspirations of most indigenous peoples do not include independence and secession, but rather autonomy and control over the direction of their lives and affairs.[73]

1.2.3.3 A suggested "functional" approach for the purposes of this thesis

This thesis is concerned with the protection from resource exploitation of the traditional ancestral lands of indigenous peoples or groups whose social, cultural and economic conditions distinguish them from other sectors of the national community, and whose status is regulated wholly or in part by their own customs or traditions or by special laws or regulations. The focus of this thesis is on the ability of such groups to protect the traditional ancestral lands that constitute the foundation of their spiritual, cultural and physical existence from resource exploitation, and the empowerment and protection of these groups through the regulation of the activities of the international oil industry, that is, the regulation of the behaviour of corporations not states.

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which recognise a right of self-determination but deny that this right has any implications in international law. See above, Sections 1.2.1.2 and 1.2.1.3, pp19-20. However, as Barsh notes, this interpretation perpetuates the racist distinction between the rights of indigenous peoples and the rights of other peoples: Barsh R, above n54 at 36.

72 It has been argued that the 1970 Declaration on the Principles of Friendly Relations Among States In Accordance With the Charter of the United Nations (GA Res 2025, UN GAOR, 25th Sess, Supp No 28, at 121, UN Doc A/8082 (1970)), according to which "nothing is to impair territorial integrity of states" that are "conducting themselves in compliance with the principle of equal rights and self-determination of peoples", denies an unlimited right to secessionist self-determination. On the question of secession, not all states will enjoy their territorial integrity, but only those conducting themselves in compliance with the requirements above. The denial of human rights of peoples, including internal self-determination, may bring about a legitimate claim for secession. See Fanana N, above n51 at 54.

73 World Council of Indigenous Peoples, Submission to the 14th Session of the United Nations Working Group on Indigenous Populations, October 1995, *Report of the Working Group on Indigenous Populations on its Fourteenth Session*, above n65. Of course, this still begs the question in the case of indigenous peoples who do wish to secede.

In this context, the pragmatic or functional approach of the World Bank in identifying "indigenous peoples" provides a useful model. The World Bank, in practice, ignores the difference between minorities and indigenous peoples when assessing the effect of developments on vulnerable peoples. The Bank does this in order to protect these peoples from the adverse effects of resource development, particularly in relation to their ancestral lands, without becoming bogged down in questions of definition. The World Bank is able to adopt this approach because, as a development agency not a government, it is not sensitive to political issues such as the implications of recognising a right of self-determination for the territorial integrity of states, but rather, is concerned with the practical effect of its loans on "vulnerable" peoples relying on their traditional lands for sustenance.

Similarly, in the case of developments undertaken by oil companies, a functional or pragmatic approach should be used in deciding whether a Code of Conduct regulating the activities of oil companies operating on indigenous peoples' lands should be applied by an oil company. In the context of regulating the way in which oil developments are carried out, the key matters under a functional approach that present a unifying force for peoples, whether the peoples are "indigenous" or "minorities", are cultural distinctiveness, and a connection with ancestral lands and territories that constitute the foundation of their spiritual, cultural and physical existence. Where these elements are present, the Code of Conduct for oil companies drafted in Chapter 11 should be observed.

For the purposes of this thesis, I have selected three peoples whose traditional ancestral lands constitute the foundation of their spiritual, cultural and physical existence, and who have their own distinct cultural, economic, religious and social systems. As I will be describing the Huaorani of Ecuador, the Khanty of Siberia and the Ogoni of Nigeria in detail in each case study, the following outline is provided only briefly to establish that crucial factors exist that identify them as "indigenous peoples".

First, the Huaorani of Ecuador are a minority indigenous group that has lived in the Amazon rainforest since before the arrival of the Spanish settlers in the sixteenth century; they have their own distinct culture and language based on survival in the jungle; they have experienced dispossession of their lands, discrimination and marginalisation; they self-identify as indigenous, and are recognised as such by the Ecuadorean government.

Second, the Khanty of Western Siberia are a minority group indigenous to Siberia with connections to the land over many centuries; they have their own culture and economy designed based on survival in the harsh conditions of Siberia; they have experienced genocide, oppression, dislocation and marginalisation since the sixteenth century as a result of Russian colonisation; they self-identify as indigenous, and are recognised by the Russian government as a "Small Peoples of the North" entitled to particular protection.

Third, the Ogoni people of Nigeria are a minority of 250,000 people in a land with a population of approximately 100 million persons; the Ogoni inhabited their traditional lands prior to colonisation by the British and the establishment of the borders of Nigeria customary African law recognises their occupation and ownership over land in the Niger delta ("Ogoniland") for centuries; there is no challenge from the government or other indigenous groups over "Ogoniland" as the ancestral territory of the Ogoni; they have their own culture and languages; they wish to maintain a strong identity; they self-identify as indigenous; and they have suffered marginalisation from political power and severe oppression from the dominant ethnic groups in Nigeria since independence from Britain in the 1960s.

The Ogoni people would fail to qualify as "indigenous peoples" under a requirement of dispossession or marginalisation by an colonial power, as their current oppression comes from the hands of other native African groups who dominate the government in Nigeria. However, my selection of the Ogoni can be justified under the pragmatic approach to the definition of "indigenous peoples", and also under the broad and flexible approach to the definition of indigenous peoples, suggested by Mrs Daes. In addition to the characteristics of the Ogoni described above that justify their inclusion in a case study in this thesis, the Ogoni are regarded as indigenous by the International Work Group for Indigenous Affairs,[74] and are allowed to participate in the sessions of the WGIP, which in practice views definition as "indigenous" as the concerns of the peoples themselves, not states.[75]

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[74] International Work Group for Indigenous Affairs, *The Indigenous World 1994-95*, above n67 at 180-181.

[75] Pritchard S (ed), *Indigenous Peoples, the United Nations and Human Rights* (The Federation Press Pty Ltd, Sydney, 1998) at 43.

CHAPTER 2: THE INTERNATIONAL PETROLEUM INDUSTRY

TABLE OF CONTENTS

2.1 Introduction

The petroleum industry has an "upstream", "midstream" and "downstream" sector.[1] "Upstream" activities comprise exploration and production of crude oil. The "midstream" sector is the transport of crude oil via tankers and pipelines to refineries. "Downstream" activities include refining crude oil, and the distribution, retail and marketing of refined products. This thesis is concerned with the exploration, production and transportation of crude oil on the lands of indigenous peoples. Activities associated with the downstream sector do not fall within the ambit of this thesis. Accordingly, the background material on the international petroleum industry presented in this Chapter is concerned primarily with the exploration and production of crude oil.

This background material serves two key purposes. First, the information on world reserves, production and consumption demonstrates the significance of emerging economies in the international oil exploration and production industry, and hence the relevance of this topic for the indigenous peoples that reside within the borders of these countries. Second, the material describing the companies and industry organisations involved in the international oil production and exploration industry, contained in sections 2.4 to 2.6 of this Chapter, provides a basis for understanding the corporate structure of the industry that is to be regulated through the Code of Conduct drafted and discussed in Part IV of this thesis.

2.2 World Reserves, Production and Consumption of Oil

The origin of the modern petroleum industry is generally traced to Pennsylvania in 1859.[2] The international petroleum industry has become truly global since the 1950s.[3] The Middle

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1 Yergin D, *The Prize: The Epic Quest for Oil, Money and Power* (Touchstone, New York, 1992) at 795.

2 For an account of the early years of the American petroleum industry, see Anderson R, *Fundamentals of the Petroleum Industry* (University of Oklahoma Press, Norman, 1984); McLean J and Haigh R, *The Growth of Integrated Oil Companies* (Harvard University, Boston, 1954); Sampson A, *The Seven Sisters: The Great Oil Companies and the World They Made* (Hodder and Stoughton, London, 1975); and Yergin D, above n1.

3 Prior to World War I, the international petroleum industry was still in its infancy and primarily involved US, British and Dutch interests. The main oil-producing countries in 1913 were: the United States (33.0m tons), Russia (8.6m tons), Mexico (3.8m tons), Romania (1.9m tons), Dutch East Indies (1.6m tons), Burma and India (1.1m tons) and Poland (1.1m tons). Before WWII, the Middle East supplied less than 5% of the world's oil. The allocation of concessions and access to exploration rights in the Middle East, including Iran, Iraq, Bahrain, Kuwait and Saudi Arabia, took place between WWI and WWII. In 1938,

East has become the centre of world oil production, with the USA, Mexico, Venezuela and the Russian Federation remaining as major centres of production and reserves. Major discoveries in Africa occurred from the 1950s onwards, particularly in Libya, Nigeria and Algeria, and these countries have become large producers of oil. In the 1980s, following the surge in prices as a result of the Iran-Iraq war in 1979, investment in oil exploration and new technology brought previously uncompetitive fields brought into production, including the offshore oil fields of the North Sea and Mexico.

2.2.1 Proved Reserves of Oil

Table 1 shows the percentage of the world's proved reserves of oil held by the major oil-producing regions of the world. "Proved reserves of oil" are "generally taken to be those quantities which geological and engineering information indicates with reasonable certainty can be recovered in the near future from known reservoirs under existing economic and operating conditions".[4] The Middle East dominates the world's proved reserves of oil, holding 64% of the world's proved reserves of oil at the end of 1998. Saudi Arabia dominates world and Middle Eastern proved reserves, holding 24.8% of the world's proved reserves at the end of 1998, followed by Iraq (10.7%), the United Arab Emirates (9.3%), Kuwait (9.2%) and Iran (8.5%).[5] Other countries with large reserves are Venezuela (6.9%), the Russian Federation (4.7%) and Mexico (4.6%).[6] The USA held 2.9% of proved reserves in 1996.[7]

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the main oil-producing countries were as follows: the United States (161.9m tons), Russia (29.3m tons), Venezuela (27.7m tons), Iran (10.2 m tons), Dutch East Indies (7.5m tons), Mexico (5.5m tons) and Iraq (4.4m tons). Hossain K, *Law and Policy in Petroleum Development* (Frances Pinter (Publishers), Nichols Publishing Company, London, New York, 1979) at 2-4; Hartshorn J, *Oil Companies and Governments: An Account of the International Oil Industry in its Political Environment* (Faber & Faber, London, 1967) at 147.

4 *BP Statistical Review of World Energy 1997* (The British Petroleum Company plc, London, 1997) at 4.

5 *BP Amoco Statistical Review of World Energy 1999* (BP Amoco plc, London, 1999), BP Amoco <http://www.bpamoco.com/worldenergy> at 4.

6 Ibid. Figures for Russian proved reserves should be treated with care, as the Russian reserve evaluation method generally includes more than proved reserves: *Oil and Gas Journal*, 7 September 1998, 76.

7 *BP Amoco Statistical Review of World Energy 1999*, above n5 at 4.

Table 1

PROVED RESERVES OF OIL (% OF TOTAL) ◊			
	1998	**1988**	**1978**
North America	8.1	10.7	8.8
South & Central America	8.5	7.4	3.9
Europe	2.0	2.2	4.2
Former Soviet Union	6.2	6.4	11.0
Middle East	64.0	62.3	57.0
Africa	7.2	6.2	8.9
Asia Pacific	4.1	4.9	6.2
OPEC	*76.0*	*73.4*	*68.1*
OECD	*10.2*	*12.9*	*12.9*

SOURCE: *BP Amoco Statistical Review of World Energy 1999* (BP Amoco plc, London, 1999), BP Amoco <http://www.bpamoco.com/worldenergy>, p4.

◊ Percentages may not add due to rounding. Percentages for 1978 and 1988 have been calculated directly from the data provided on the number of barrels held at end 1998.

2.2.2 Production of Oil

Table 2 shows the share of world production of oil of the oil-producing regions of the world. The Middle East produced 31.2% of the world's oil in 1998, rising from around 20% of world production in the mid-1980s and one-quarter of production in the late 1980s. North America produced just under one-fifth of the world's oil, falling from nearly one-quarter in the mid-1980s. The restructuring of the former Soviet Union has seen its share in world production fall from 19.9% to 10.1% over the ten years to 1998. In 1998, the major producers of oil by country were: Saudi Arabia (12.6%), USA (10.9%), the Russian Federation (8.4%), Iran (5.2%), Mexico (4.8%), Venezuela (4.6%), China (4.4%), Norway (4.4%), the UK (3.8%), the United Arab Emirates (3.7%) and Canada (3.7%). [8]

[8] Ibid at 7.

Table 2

WORLD OIL PRODUCTION (% OF TOTAL)◊						
	1998	**1997**	**1996**	**1995**	**1994**	**1988**
North America	19.4	19.8	20.1	20.3	20.6	23.1
South & Central America	9.2	9.0	8.8	8.5	8.0	6.5
Europe	9.4	9.6	9.9	9.7	9.5	7.1
Former Soviet Union	10.1	10.2	10.3	10.7	11.0	19.9
Middle East	31.2	29.9	29.5	29.6	29.7	24.4
Africa	10.3	10.8	10.7	10.5	10.5	9.0
Asia Pacific	10.5	10.7	10.8	10.8	10.7	9.9
OPEC	*42.0*	*41.3*	*40.7*	*40.5*	*40.6*	*33.9*
OECD	*29.5*	*30.2*	*30.7*	*30.6*	*30.7*	*30.8*

SOURCE: *BP Amoco Statistical Review of World Energy 1999* (BP Amoco plc, London, 1999), BP Amoco <http://www.bpamoco.com/worldenergy>, p7.

◊ Percentages may not add due to rounding. Percentages for 1988-1998 have been calculated directly from the data provided on the number of barrels produced per day.

2.2.3 Consumption of Oil

As can be seen from Table 3 and Table 4 the developed or industrialised countries of the world, largely represented by the Organisation for Economic Cooperation and Development (OECD), held only 10.2% of the world's proved oil reserves at the end of 1998, and produced less than one-third of the world's oil in 1998. In the same year, the OECD countries consumed 63.2% of the world consumption of oil, as can be seen from Table 3 below. The USA consumes by far the largest share of oil (24.9% of world oil consumption), followed by Japan (7.8%).[9]

[9] Ibid at 10.

Table 3

WORLD OIL CONSUMPTION (% of TOTAL) ◊						
	1998	**1997**	**1996**	**1995**	**1994**	**1988**
North America	29.9	29.7	29.8	29.6	30.4	31.0
South & Central America	6.5	6.3	6.2	6.1	6.0	5.6
Europe	22.5	22.2	22.4	22.4	22.4	23.3
Former Soviet Union	5.2	5.2	5.4	6.4	7.1	13.1
Middle East	5.9	5.8	5.9	5.8	5.7	4.9
Africa	3.3	3.2	3.3	3.2	3.2	2.9
Asia Pacific	26.7	27.4	27.0	26.4	25.4	19.3
OECD	*63.2*	*63.5*	*63.9*	*63.7*	*64.3*	*62.5*

SOURCE: *BP Amoco Statistical Review of World Energy 1999* (BP Amoco plc, London, 1999), BP Amoco <http://www.bpamoco.com/worldenergy>, p10.
◊ Percentages may not add due to rounding. Percentages for 1988-1998 have been calculated directly from the data provided on the number of barrels consumed per day.

Thus while the industrialised countries account for nearly two-thirds of world consumption of oil, they produce just under one third of all oil. The emerging market economies, who produce two thirds of the world's oil, consume just under 40% of that oil. If we exclude the former Soviet Union and Central Europe, the other emerging market economies of South and Central America, Africa, the Middle East and non-OECD Asia account for approximately one-third of the world's consumption of oil.[10]

2.3 Oil Exploitation and Indigenous Peoples' Lands

The emerging economies hold the majority of the world's proved oil reserves, and account for the majority of the world's production of crude oil. Oil exploration and production in these countries threatens many indigenous peoples and their lands, as can be seen from Map 1. Indigenous peoples in at least 34 emerging economies are threatened by oil activities, including indigenous peoples in Mexico, Guatemala, Argentina, Colombia, Ecuador, Peru, Bolivia, Brazil, Venezuela; Pakistan, India, Bangladesh, Burma, Thailand, Malaysia, Indonesia, Vietnam, Papua New Guinea and China; Angola, Sudan, Nigeria, Cameroon, Gabon, Congo (former Zaire) and Congo; Iraq, Iran, Saudi Arabia and Oman; and Russia, Afghanistan and Kazakhstan.[11]

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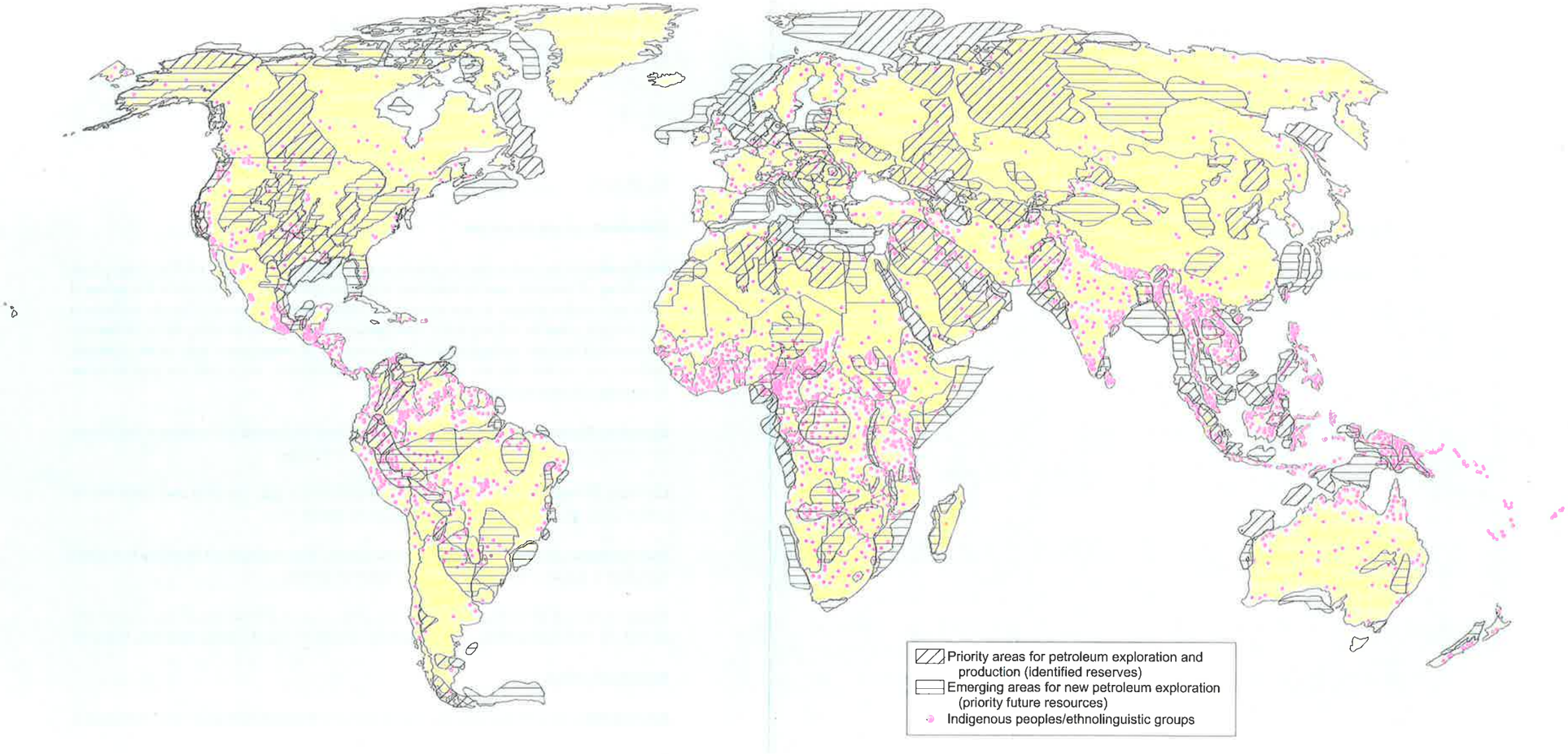
[10] Ibid.
[11] Rainforest Action Network/Project Underground, *Drilling to the Ends of the Earth*, September 1998, at 37.

MAP 1

Indigenous Peoples and Petroleum Exploration

Reproduced with permission of Project Underground

INDIGENOUS PEOPLES AND PETROLEUM EXPLORATION



New exploration for oil and gas threatens indigenous peoples and their homelands around the globe. The industry pollutes and carves up forests, wetlands, tundra, deserts and savanna that local communities hold sacred and depend on for sustenance. The above map overlays the approximate locations of indigenous peoples and ethnolinguistic groups with top petroleum basins. The diagonally slashed regions correspond to areas from which the vast majority of the world's oil and gas has been extracted to date and where geologists calculate that 95 percent of the remaining identified reserves lie. The horizontally slashed regions indicate promising basins for future oil and gas exploration. The oil industry is already exploring for new reserves in many of these areas.

The high correlation between petroleum basins and indigenous communities on every continent tells a story of increasing pressure on indigenous peoples and their homelands to feed the industrialized world's growing appetite for oil and gas. This latest wave of colonialism threatens the rights and survival of native peoples globally.

Data sources found at back of report.
Produced by Rainforest Action Network and Project Underground. Maps designed by Daniel Nielsen.

Within each country, oil exploitation may threaten a number of different indigenous nationalities. For example, at least fifty different nationalities in the Amazon now live within oil and gas concessions, including the U'wa of Colombia, the Kolla people of Argentina, the Harakmbut, Machiguenga, Aguarana and Huambisa of Peru; and the Huaorani, Achuar, Shuar, and Cofán of Ecuador. Petroleum exploitation also affects many different peoples in Africa (for example, the Ogoni, Ijaws and other peoples of the Niger Delta in Nigeria) and Asia (for example, the Fasu of Papua New Guinea, the Tavoyans, Mon and Karen people of Burma/Myanmar and Thailand, the Chi-gu of Taiwan, and the Khanty, Mansi, Yamal and Nenets of Siberia).[12]

Some of the last isolated indigenous peoples with little or no contact with the outside world are now threatened by petroleum exploration and/or production in emerging economies, including the Tagaeri of Ecuador; the Mascho-Piro, Nahua and Kugapakori of Peru; the Nukak of Colombia; and the Baka and Efe of the Congo Basin.[13]

2.4 Oil Operators In The International Petroleum Industry

2.4.1 Majors

The first group of corporations that operate in the international oil industry are the large vertically-integrated transnational oil corporations, historically known as the "majors" or the seven sisters, that controlled and dominated the international petroleum industry for most of the twentieth century.[14] These corporations are: Exxon Corp and Mobil Corp (merged in 1999 to become ExxonMobil), Chevron Corp, Texaco Inc, Gulf Oil Company (now part of Chevron), British Petroleum plc (BP) (now BP Amoco) and Royal Dutch/Shell.[15] These corporations are the largest privately-owned oil companies in the world, operating in many

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[12] Ibid at 21.

[13] Ibid at 21 and 39.

[14] For the history of the seven majors, see Anderson R, above n2; Barrows G, *International Petroleum Industry,* Vols I and II, (International Petroleum Institute Inc, New York, 1967); Hartshorn J, above n3; McLean J and Haigh R, above n2; Yergin D, above n1.

[15] The French firm CFP (now Total) has been known as the eighth major. However, Enrico Mattei, the head of Italy's ENI who coined the phrase the Seven Sisters, "conveniently" omitted CFP because it did not fall under the rubric of "Anglo-Saxon": Yergin D, above n1 at 503.

different countries across the world, and with yearly revenues typically in the billions of dollars (see Table 6, p43).

In the 1980s, a world oil surplus and emergence of an open world market led to a wave of mergers and acquisitions by the large oil companies, including the takeover of Gulf Oil by Chevron Corp.[16] The economic downturn in 1998, accompanied by low oil prices, led to a new wave of mergers and acquisitions as companies that restructured in the 1990s in pursuit of efficiency gains now seek to cut costs further.[17] On 31 December 1998, BP and Amoco merged to create BP Amoco, a corporation with a market capitalisation of over $140 billion.[18] In April 2000, the US Federal Trade Commission approved the merger of BP Amoco with ARCO.[19], Exxon and Mobil merged to form ExxonMobil after receiving approval from the US Federal Trade Commission in December 1999.[20] Other large mergers/takeovers announced in 1999 include Repsol's (Spain) buyout of Argentina's YPF for $13.5 billion; and the merger of France's major oil companies Elf-Aquitaine and TotalFina SA (September 1999).[21]

Royal Dutch/Shell, ExxonMobil, BP Amoco and TotalFina (merged with Elf) now form the world's four top oil majors or "supermajors".[22]

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16 Other acquisitions in the early 1980s included the acquisition of: Getty Oil by Texaco for $10.2 billion; Conoco by Du Pont for $7.8 billion; Sohio (the basis of Rockefeller's Standard Oil empire) by BP for $7.6 billion; and Marathon by USX for $5.9 billion. Yergin D, above n1 at 729-742.

17 Knott D, "Majors' Merger Rash", *Oil and Gas Journal*, 7 December 1998, 42; Knott D, "Supermajors Dance to Different Beats", *Oil and Gas Journal*, 14 December 1998, 29.

18 "BP-Amoco Finish Merger After FTC Approval", *Oil and Gas Journal*, 11 January 1999, 30.

19 "A New No.2: BP Amoco to Merge with ARCO", *Oil and Gas Journal*, 5 April 1999, 38; "BP Amoco-Arco Merger Promises to Change the Oil Industry's Landscape", *Oil and Gas Journal*, 12 April 1999, 22; US Energy Information Administration, *Monthly Energy Chronology*, April 2000, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/monchron.html>.

20 Knott D, "Majors' Merger Rash", above n17 at 42; "Next: Exxon-Mobil", *Oil and Gas Journal*, 11 January 1999, 31; "Exxon, Mobil to Take Vote on Merger May 27, *Oil and Gas Journal*, 22 March 1999, 42; "FTC Finally Clears Exxon-Mobil Merger", *Oil and Gas Journal*, 6 December 1999, 30.

21 On the Repsol-YPF transaction, see United States Energy Information Administration, *Monthly Energy Chronology*, June 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/monchron.html>; "TotalFina Makes $41.2 billion Bid for Elf", *Oil and Gas Journal*, 12 July 1999, 22; "Elf's Counterattack", *Oil and Gas Journal*, 26 July 1999, 40; "Elf Aquitaine Submits to TotalFina Takover Bid", *Oil and Gas Journal*, 20 September 1999, 30.

22 "TotalFina Makes $41.2 billion Bid for Elf", ibid at 22.

2.4.2 Independents

The second group of corporations are known as the "independents". This term has no precise meaning.[23] In the international petroleum industry, this term refers loosely to any corporation other than the majors. The independents began to challenge the dominance of the seven sisters from the 1940s and 1950s. In 1945, only six US companies other than the five majors had any foreign exploration interests.[24] By 1953, 28 American firms other than the five majors possessed foreign exploration rights.[25] Between 1953 and 1972, some 350 privately-owned oil companies and 50 state-owned oil companies had entered the international industry or increased their activity.[26]

The largest US oil companies that became vigorous competitors of the seven sisters included: Amoco Corp (now part of BP Amoco), ARCO (received Federal Trade Commission approval to merge with BP Amoco in April 2000), Conoco Inc (now a subsidiary of E.I. du Pont de Nemours), Occidental Petroleum Corp, Phillips Petroleum Co, Sun Co Inc, Unocal Corp, Marathon (part of USX-Marathon group), Superior Oil (now part of Mobil), Getty Oil (now part of Texaco), Amerada Hess Corp, Aminoil and Sinclair Oil.

Some 25 non-US foreign private firms also emerged, including Petrofina (of Belgium, which merged with France's Total to form TotalFina in 1998), Arabian Oil Company (Japan), and CEPSA (Spain). The leading state-owned companies included YPF (Argentina) (now fully privatised and part of Spain's Repsol); Petrobras (Brazil); EGPC (Egypt); France's Total (formerly CFP or Compagnie Française des Petroles, now part of TotalFina SA); Elf-Aquitaine (taken over by TotalFina in 1999); IOC (India); Pertamina (Indonesia); ENI (Italy); and Japan's JNOC (Japan National Oil Corporation).[27]

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[23] In the domestic industry, the term "independents" refers to non-integrated companies whose activities are largely concentrated in one function of the petroleum industry, such as crude oil production, transport, refining or marketing. Independents comprise a wide and diverse spectrum of operators. Mikdashi Z, *Transnational Oil: Issues, Policies and Perspectives* (Frances Pinter (Publishers), London, 1986) at 9.

[24] Anderson R, above n2 at 53; Hossain K, above n3 at 8.

[25] Ibid.

[26] Ibid.

[27] Hossain K, ibid at 8-9.

2.4.3 Nationalised Oil Companies

The third group of companies comprises the nationalised oil companies of oil-producing developing countries.[28] These corporations were either created, or had their roles significantly expanded, by the nationalisation of domestic foreign-owned assets. Most operated solely within the borders of their own country (distinguishing them from state-owned independent oil companies). The majority of nationalisations of foreign oil company holdings in the oil-exporting countries took place in the 1970s, as can be seen from Table 4. The exceptions are Russia and Mexico, where the oil industry was nationalised following the revolutions in each country, and Iran in 1951, following the conflict with Britain.

Table 4

CREATION OF SELECTED NATIONAL OIL COMPANIES		NATIONALISATION OF FOREIGN COMPANY HOLDINGS	
Date	**Company**	**Date**	**Country**
1938	Pemex (Mexico)	1938	Mexico
1951	NIOC (Iran)	1951	Iran
1960	Kuwait National Petroleum Co	1971	Algeria
1962	Petromin (Saudi Arabia)	1972	Nigeria
1963	Sonatrach (Algeria)		Saudi Arabia
1964	INOC (Iraq)	1973	Libya
1968	Pertamina (Indonesia)	1975	Kuwait
	National Oil Co (Libya)		United Arab Emirates
1971	Nigerian National Petroleum Co	1976	Indonesia
1972	Petroecuador (Ecuador)	1977	Gabon
			Ecuador
			Qatar
		1978	Venezuela

SOURCE: Anderson RO, *Fundamentals of the Petroleum Industry* (University of Oklahoma Press, Norman, 1984) p261; Hossain K, *Law and Policy in Petroleum Development* (Frances Pinter (Publishers), Nichols Publishing Company; London, New York; 1979) p17.

[28] Mikdashi Z, above n23 at 7.

As can be seen from Table 7 on p49, nearly all oil-producing emerging economies have created a national oil company. These nationalised oil companies have grown to be among the largest oil corporations in the world in terms of liquid production and comprise the majority of firms in the Oil and Gas Journal Top 20 Oil Corporations for 1998 (see Table 5). The presence and influence of national oil companies in domestic oil industries means that any proposal to protect the lands of indigenous peoples through regulation of the international petroleum industry must encompass not only the the large private transnational oil companies, but also the state-owned oil companies.

Table 5

TOP 20 OIL CORPORATIONS 1998					
LIQUID PRODUCTION (million bbl)			**LIQUID RESERVES (million bbl)**		
1	Saudi Arabian Oil Co	3021.1	**1**	Saudi Arabian Oil Co	259000.0
2	National Iranian Oil Co	1322.0	**2**	Iraq National Oil Co	112500.0
3	Pemex (Mexico)	1245.0	**3**	Kuwait Petroleum Corp	94000.0
4	China National Petroleum Co	1171.7	**4**	Abu Dhabi National Oil Co	92200.0
5	PdVSA (Venezuela)	1162.5	**5**	National Iranian Oil Co	89700.0
6	Royal Dutch/Shell	850.0	**6**	PdVSA (Venezuela)	71668.9
7	Nigerian National Petroleum Corp	834.8	**7**	Pemex (Mexico)	47822.0
8	Kuwait Petroleum Corp	767.6	**8**	National Oil Corp (Libya)	29500.0
9	Abu Dhabi National Oil Co	708.1	**9**	China National Petroleum Co	24000.0
10	Exxon Corp*	567.0	**10**	Nigerian Nat'l Petroleum Corp	16786.0
11	National Oil Corp (Libya)	519.0	**11**	Royal Dutch/Shell	9681.0
12	Pertamina (Indonesia)	497.9	**12**	Sonatrach (Algeria)	9200.0
13	British Petroleum plc	457.0	**13**	Petrobras (Brazil)	7100.0
14	Iraq National Oil Co	419.4	**14**	Exxon Corp	6174.0
15	Chevron Corp	391.0	**15**	Sonangol (Angola)	5412.0
16	Mobil Corp*	339.0	**16**	Min'y. Petrol. & Min'ls (Oman)	5283.0
17	Egyptian General Petroleum Corp	319.4	**17**	British Petroleum plc	5030.0
18	Texaco Inc	317.0	**18**	Pertamina (Indonesia)	4979.7
19	Sonatrach (Algeria)	311.3	**19**	Chevron Corp	4506.0
20	Min'y. Petrol. & Min'ls (Oman)	308.8	**20**	Oil and Natural Gas Corp (India)	4339.7

SOURCE: "OGJ 200", *Oil and Gas Journal*, 13 September 1999, pp54, 60-61 and 68.
* Merged in 1999 to form ExxonMobil.

Table 6

TOP 20 PRIVATE OIL CORPORATIONS 1998					
TOTAL REVENUE ($ million)			**TOTAL ASSETS ($ million)**		
1	Royal Dutch/Shell (Netherlands)	138274.0	**1**	Royal Dutch/Shell (Netherlands)	110068.0
2	Exxon Corp (USA)*	117772.0	**2**	Exxon Corp (USA)*	92630.0
3	BP Amoco plc †	68304.0	**3**	BP Amoco plc †	84500.0
4	Mobil Corp (USA)*	53531.0	**4**	ENI (Italy)	48391.0
5	Elf Aquitaine (France) ϕ	35918.7	**5**	Elf Aquitaine (France) ϕ	42902.0
6	ENI (Italy)	34028.0	**6**	Mobil Corp (USA)*	42754.0
7	Texaco Inc (USA)	31707.0	**7**	Chevron Corp (USA)	36540.0
8	Chevron Corp (USA)	30557.0	**8**	Texaco Inc (USA)	28570.0
9	Total (France) ϕ	27094.2	**9**	Total (France) ϕ	27027.7
10	Conoco Inc (USA)	23168.0	**10**	ARCO (USA) †	25199.0
11	USX-Marathon Group (USA)	22075.0	**11**	BHP Petroleum Pty Ltd (Aust)	22764.6
12	Repsol (Spain) ◊	21178.2	**12**	Repsol (Spain) ◊	20047.0
13	Petrofina SA (Belgium) ϕ	19023.4	**13**	Conoco Inc (USA)	16705.0
14	BHP Petroleum Pty Ltd (Aust)	15523.5	**14**	Norsk Hydro AS (Norway)	16318.8
15	Norsk Hydro AS (Norway)	12920.7	**15**	Occidental Petrol. Corp (USA)	15252.0
16	Phillips Petroleum Co (USA)	11845.0	**16**	USX-Marathon Group (USA)	14544.0
17	ARCO (USA) †	10809.0	**17**	Phillips Petroleum Co (USA)	14216.0
18	Lukoil (Russia)	8393.0	**18**	YPF SA (Argentina) ◊	13146.0
19	Occidental Petrol. Corp (USA)	7381.0	**19**	Coastal Corp (USA)	12304.1
20	YPF SA (Argentina) ◊	5500.0	**20**	Petrofina SA (Belgium) ϕ	11241.6

* ◊ ϕ Merged or taken over in 1998 or 1999; † awaiting FTC approval to merge as of December 1999.
* = ExxonMobil, ϕ = TotalFina, ◊ = Repsol, † = BP Amoco plc.
SOURCE: "OGJ 200", *Oil and Gas Journal*, 13 September 1999, pp60-61 and 72-75.

2.5 The Privatisation of State-Owned Oil Companies

In the 1990s, there has been a clear trend towards the privatisation of state-owned oil companies. Privatisation may take the form of a sale of a state-owned enterprise, or it may involve allowing other companies to undertake activities that were previously only permitted to be done by the state-owned company.

In OECD Europe, privatisation has been accomplished by the full or partial sale of the oil companies. These include: the complete sale of Elf-Aquitaine and Total by the French government; the sale of 65% of Italy's ENI to the public between 1995 and 1998; and the sale of Spain's Repsol (formed in 1987 by the amalgamation of various domestic upstream and downstream companies) in 1996, barring 10% of shares held by the Spanish

government.[29] Norway's Statoil, formed in 1972 to exploit North Sea oil, is the one major OECD-based European petroleum company to remain entirely state-owned, although it too is slated for privatisation.[30]

The governments of Argentina, Brazil, Peru and Bolivia have sold shares in the state-owned companies. In Argentina, approximately 80% of the state oil company YPF was sold to the public in 1993 (followed in 1999 by the payment of $13.5 billion by Repsol of Spain for 85% of YPF's shares);[31] in Brazil, Bolivia and Peru the state-owned oil companies have been partly sold to the public, but the governments retain a majority shareholding in their respective companies. Privatisation in Venezuela, Ecuador and Colombia has largely taken the form of increased participation in oil activities by foreign oil companies through arrangements such as modern concession contracts, joint ventures, production sharing agreements and service contracts.[32] The exception to the privatisation trend is Mexico, where not only has Pemex remained entirely state-owned, but foreign companies are prohibited from engaging in exploration, production and refining activities.[33]

The major oil companies of the Middle East, the former Soviet Union, Eastern Europe, Africa and the Asia-Pacific region continue to remain state-owned, although a trend towards

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[29] United States Energy Information Administration, *Privatization and Globalization of Energy Markets*, 7 October 1997, ch2, "Profiles of Petroleum Privatisations in OECD Countries", US Energy Information Administration <http://www.eia.doe.gov/emeu/pgem/contents.html>; United States Energy Information Administration, *Country Analysis Briefs: France*, November 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/france.html>; United States Energy Information Administration, *Country Analysis Briefs: Italy*, September 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/italy.html>.

[30] United States Energy Information Administration, *Privatization and Globalization of Energy Markets*, above n29; United States Energy Information Administration, *Country Analysis Briefs: Norway*, November 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/norway.html>.

[31] United States Energy Information Administration, *Monthly Energy Chronology*, June 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/monchron.html>.

[32] The main features of these new petroleum arrangements may summarised according to three points: risk, control and profit sharing. Under the modern concession contract, the concessionaire bears the risks of exploration, has full title to oil and has managerial control, and the government earns revenue through taxes and royalties. Under the production sharing agreement, the foreign oil company bears the risk and has a right to share production with the government. The government has managerial control (in theory) and profits are shared anywhere in the range of 65:35 to 90:10 in the government's favour. Under the risk service contract, the foreign oil company bears the risk and is remunerated for services received, but has no title to oil produced. The government has managerial control and takes 100% of the oil. The nature of hybrid contracts varies, but under a hybrid model of the form employed in China, the contractor bears the risk, while managerial control and production are shared between the contractor and the government. Gao Z, *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman/Martinus Nijhoff, London, 1994) at 201-206.

[33] United States Energy Information Administration, *Privatization and Globalization of Energy Markets*, October 7 1997, above n29, ch3, "Latin American Petroleum Privatisation"; EIA Country Analysis Briefs, various countries, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/>.

greater participation by foreign oil companies in the form modern concession contracts, joint ventures, production sharing agreements and service contracts is occurring.[34]

As can be seen from Table 7 on p49, foreign oil companies participate in the domestic oil industry of nearly every emerging economy. However, the extent and type of foreign involvement varies. In most Middle Eastern countries, foreign company participation is generally still extremely limited, taking the form of exploration contracts. In the Latin American countries where deregulation and privatisation are relatively recent, such as Argentina, Bolivia, Brazil, Chile and Ecuador, the state-owned companies continue to dominate production, but foreign investment in exploration and/or production is expanding, mainly through joint ventures and production sharing agreements. This is also the situation in most of the countries in transition to a market economy in the former Soviet Union and Eastern Europe. Some countries have a history of foreign company participation through joint ventures and production sharing agreements, including nearly all African countries (except Libya and South Africa). In the Asia and Pacific region, state-owned companies generally continue to dominate production, but there is foreign company involvement through exploration contracts, production sharing agreements and joint ventures.

2.6 Oil and Gas Industry Assocations

2.6.1 National and Regional Associations

National oil industry associations exist in most Western countries where oil exploration and production is undertaken by private oil companies. A major purpose of these industry associations is to represent their members' interests to regulatory bodies, although most national associations undertake other functions, such as the formulation of standards and operating guidelines.

The premier national industry association is American Petroleum Institute (API), which is the major industry association of the United States petroleum industry. The API was

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[34] United States Energy Information Administration, *Privatization and Globalization of Energy Markets*, October 7 1997, above n29, ch4, "Privatisation in Socialist and Former Socialist Regions"; United States Energy Information Administration, *Country Amalysis Briefs*, various countries, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/>.

founded in 1919 and currently numbers some 300 oil and gas companies among its members.[35] Because of the history of the dominance of US oil companies in the international oil and gas exploration and production industry, the API has international influence, producing many standards of international application. Other national associations include: the Australian Petroleum Production and Exploration Association (APPEA); the United Kingdom Offshore Operators' Association (UKOOA); the Norwegian Oil Industry Association; the Association of Oil and Gas Producing Companies of Germany; the Netherlands Oil and Gas Exploration and Production Association; and the Irish Offshore Operators Association.

In the Latin American region, the major national oil companies established by states to undertake oil exploration and production formed the Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean (ARPEL) in 1965, which counts among its members all the major producers in South America, including Pemex (Mexico), PetroEcuador, PetroPeru, Petrobras (Brazil), YPFB (Bolivia), Ecopetrol (Colombia), PdVSA (Venezuela), Repsol YPF (Argentina) and the US-based Costal Corp, as well as other private international oil companies operating in the region.[36]

2.6.2 The International Association of Oil and Gas Producers (OGP)

The International Association of Oil and Gas Producers (OGP), formerly known as the Oil Industry International Exploration and Production Forum (E&P Forum), is the primary international body representing the oil and gas exploration and production industry. Its stated purposes are to: provide information to interested bodies on the oil and gas exploration and production industry; represent members' interests at global and regional regulatory bodies; and develop operating guidelines. The aims of the OGP include: contributing to continuous improvements in industry operating standards; working with international regulators to develop workable proposals which take full account of industry views; contributing to continuous improvements in industry operating standards; being a visible and approachable organisation to which governments and others refer on matters relating to the

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[35] American Petroleum Institute, "Standards Safeguard the Environment and Human Health", 30 June 1999, American Petroleum Institute <http://www.api.org/step/standards.htm>.

[36] Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean (ARPEL), "Member Companies", 29 June 2000, ARPEL <http://www.arpel.org>.

industry; maintaining a large, diverse and active membership; and communicating issues affecting members to international bodies and the public.

Membership of the OGP is open to all companies involved in exploration and production (E&P) activities, national associations of OGP companies, and institutes with E&P interests. The current members of the OGP include private and state-owned oil companies, national associations and petroleum institutes. As of 25 January 2000, figures for company-owned production of oil revealed that OGP members produce 51% of daily world oil output (37 million barrels of the world's 72 million barrels of oil produced daily). However, as this figure does not include the millions of barrels produced by OGP members under royalty agreements, the OGP members actually account for a significantly higher percentage of world production of oil.[37]

Most of the major international transnational oil companies and major nationalised oil companies, as listed in Table 5 and Table 6 on pp42 and 43, are direct members of the OGP, including: the Abu Dhabi National Oil Company, BP Amoco, BHP, Chevron, Conoco, Elf Aquitaine, ENI, ExxonMobil, the Greater Nile Petroleum Operating Company Limited, Japan National Oil Corporation, Kuwait Oil Company, Marathon, Norsk Hydro, Occidental, PdVSA, Pertamima, Petrobras, PetroCanada, Petronas, Phillips, Repsol YPF, the Saudi Arabian Oil Company, Shell International, Texaco, Total Exploration and Production, and the Qatar General Petroleum Corporation.

The large industry associations that are members of the OGP include: the American Petroleum Institute; the Association of Oil and Gas Producing Companies of Germany; UK Offshore Operators Association; Norwegian Oil Industry Association; Netherlands Oil and Gas Exploration and Production Association; Irish Offshore Operators Association; and the Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean (ARPEL).[38]

There are gaps in the geographical distribution of membership of the OGP. With the exception of Yukos and the Azerbaijan International Operating Company, the large oil companies of Russia and the FSU are not represented in the OGP; with the exception of the

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[37] International Association of Oil and Gas Producers (OGP), "OGP Members Produce More Than Half the World's Oil", 25 January 2000, OGP <http://www.ogp.org.uk/>.

[38] Ibid.

Greater Nile Petroleum Operating Company Limited, no African companies are members of the OGP; and the Chinese petroleum companies are also not members of the OGP. Of the top 20 oil companies listed in Table 5 on p35, the following oil coporations, which are all state-owned, are not members of the OGP: from the Middle East, the National Iranian Oil Company, the Iraq National Oil Company; and the Oman Ministry of Petroleum and Minerals; from Aisa, the China National Petroleum Company and the Oil and Natural Gas Corporation of India; and from Africa, the Nigerian National Petroleum Corporation, the National Oil Corporation of Libya, Sonatrach (Algeria), and Sonangol (Angola).

Table 7

EMERGING ECONOMIES MAJOR OIL CORPORATIONS AND FOREIGN OIL COMPANY PARTICIPATION, JUNE 1998				
Country	**Company Name**	**Majority State or Private Ownership**	**Sale of Shares in State-Owned Company**	**Foreign Company Activity (upstream)**
S & C America				
Argentina	Yacimientos Petroliferos Fiscales S.A. (YPF SA)	Private	✓	✓
Bolivia	Yacimientos Petroliferos Fiscales Bolivianos (YFPB)	State	✓	✓
Brazil	Petroleo Brasileiro SA (Petrobras)	State	✓	✓
Chile	Empresa Nacional del Petroleo (holding co)	State	×	✓
	Sipetrol (exploration & production unit)	State	✓	
Colombia	Empresa Colombiana de Petroleos (Ecopetrol)	State	×	✓
Ecuador	Petroleos del Ecuador (Petroecuador)	State	×	✓
Guatemala	-	-	-	✓
Mexico	Petroleos Mexicanos (Pemex)	State	×	×
Peru	Petroleos del Peru SA (Petroperu)	State	×	✓
Suriname	State Oil Co Suriname NV	State	×	✓
Trinidad & Tobago	Petroleum Co of Trinidad and Tobago Ltd	State	×	✓
Venezuela	Petroleos de Venezuela SA (PdVSA)	State	×	✓
Africa				
Algeria	Sonatrach	State	×	✓
Angola	Sonangol	State	×	✓
Cameroon	Societe Nationale des Hydrocarbures	State	×	✓
Chad	-	-	-	✓
Congo	Societe Nationale des Petroles du Congo	State	×	✓
Côte d'Ivoire	Petrolieres de la Côte d'Ivoire (Petroci)	State	×	✓
Egypt	Egyptian General Petroleum Corp (EGPC)	State	×	✓
Equatorial Guinea	-	-	-	✓
Gabon	Societe Nationale Petroliere Gabonaise	State	×	✓
Libya	National Oil Corp	State	×	✓
Morocco	Office National de Recherches et d'Exploitation Petrolieres (ONAREP)	State	×	✓
Nigeria	Nigerian National Petroleum Corp	State	×	✓
South Africa	Soeker	State	×	✓
Sudan	Sudapet	State	×	✓
Middle East				
Abu Dhabi	Abu Dhabi National Oil Co	State	×	×
Bahrain	Bahrain National Oil Co	State	×	?
Dubai	Dubai Petroleum Co	State	×	×
Iran	National Iranian Oil Co	State	×	×
Iraq	Iraq National Oil Co	State	×	×
Israel	Ministry of Energy and Infrstructure	State	×	✓
Jordan	National Petroleum Co	State	×	✓
Kuwait	Kuwait Petroleum Corp	State	×	×
Oman	Petroleum Development Oman*	State	✓	✓
Qatar	Qatar General Petroleum Corp	State	×	✓
Saudi Arabia	Saudi Arabian Oil Co	State	×	×
Syria	Syrian Petroleum Co	State	×	✓
Yemen	Yemen Petroleum Co	State	×	✓

Table 7 (cont)

EMERGING ECONOMIES MAJOR OIL CORPORATIONS AND FOREIGN OIL COMPANY PARTICIPATION, JUNE 1988				
Country	**Company Name**	**Majority State or Private Ownership**	**Sale of Shares in State-Owned Company**	**Foreign Company Activity (upstream)**
Asia & Pacific				
Afghanistan	Afghan National Oil Co (to be reinstated)	State	-	×
Bangladesh	Petrobangla	State	×	✓
Brunei	Petroleum Unit	State	×	?
China	China National Offshore Oil Corp	State	×	✓
China	China National Petroleum Corp	State	×	✓
China, Taiwan	Chinese Petroleum Corp	State	×	×
India	Oil & Natural Gas Corp	State	×	✓
Indonesia	Pertamina	State	×	✓
Malaysia	Petronas	State	×	✓
Pakistan	Oil & Gas Development Co	State	×	✓
Phillipines	Phillipine National Oil Co	State	×	✓
Thailand	Petroleum Authority of Thailand	State	×	✓
Vietnam	Petrovietnam	State	×	✓
FSU				
Russian Federation	Lukoil (largest)	Private	✓	✓
	(+ other privatised oil companies)	Private	✓	
Azerbaijan	State Oil Co of Azerbaijan (SOCAR)	State	×	✓
Georgia	Saknaftobi	State	×	✓
Kazakhstan	KazakOil	State	×	✓
	Mangistaumunigaz (+ privatised oil companies)	Private	✓	×
Kyrgyzstan	Kyrgyznaft Association	State	×	×
Turkmenistan	Turkmen National Oil Co/Turkmenneft	State	×	✓
Ukraine	Ukranafta (umbrella organisation)	State	×	✓
	Ukrneftegaz (upstream activities)	State	×	
Uzbekistan	Uzkbeneftegaz	State	×	✓
Eastern Europe				
Albania	Albpetrol	State	×	✓
Bulgaria	Bulgargas	State	×	✓
Hungary	Hungarian Oil and Gas Company (MOL)**	State	✓	✓
Romania	Petrom	State	×	✓

* PDO Ltd is a consortium comprised of: Omani Government (60%); Shell (34%); Total (4%); and Partex (2%). PDO holds over 90% of oil reserves and accounts for 94% of production.

** In 1995 Hungary sold an 18.8% stake in MOL.

SOURCE: United States Energy Information Adminstration, *Country Analysis Briefs*, various countries, US Energy Information Adminstration <http://www.eia.doe.gov/emeu/cabs>.

PART II: CASE STUDIES

INTRODUCTION TO THIS PART

This Part contains case studies of the impact of oil development on three indigenous peoples in three different emerging economies. The experiences of oil development of the Huaorani of Ecuador are discussed in Chapter 3, the Ogoni of Nigeria in Chapter 4 and the Khanty of Western Siberia in Chapter 5.

In each case study I describe the history and culture of the peoples, the structure of the oil exploration and production industry in each country, and the effects of oil exploitation on the environment, culture, lifestyle, and economy of the Huaorani, the Ogoni and the Khanty. I then examine the relevant domestic law pertaining to indigenous peoples' land rights and the environment, including constitutional law, domestic legislation specially addressing indigenous peoples' rights, general land laws, environmental laws and petroleum legislation. Next, I identify and analyse the social, economic and political factors that limit the ability and desire of these countries to protect indigenous peoples from the negative effects of oil exploration and production, thereby undermining the effectiveness of indigenous rights laws and environmental laws.

The conclusions drawn from these case studies are contained in Chapter 6.

CHAPTER 3: THE HUAORANI OF ECUADOR

TABLE OF CONTENTS

3.1 Introduction

Geographically, Ecuador can be divided into four regions: the coastal regions (*costa*); the highlands of the Andes (*sierra*); the eastern jungle or areas of Amazon rainforest (*oriente*); and the Galapagos Islands. The *costa*, largely tropical in climate, comprises one quarter of Ecuador's surface territory, extending over 400 miles in length and 50-150 miles in width. Two major river systems drain toward the Pacific from the Andes: the Guyas in the south and the Esmeraldas in the north. The city of Guayaquil on the Guayas river is an important financial and economic centre.[1] The *sierra* is a mountainous plain of 7,000-9,500 feet elevation situated between the two parallel ranges of the Andes mountain chain which runs North-South across the length of Ecuador. These parallel ranges, the Cordilleras, are divided by mountain spurs running east to west. The basins (*hoyas*) are the setting for the population centres of the *sierra*, including Quito, the capital city of Ecuador.[2] The *oriente* comprises about half of the territory of Ecuador, "extending from the descending slopes of the eastern Andes into dense jungle foliage reaching the headwaters of Amazon tributaries."[3] The *oriente* is the historical home of Ecuador's minority indigenous groups.

Prior to the Spanish conquest in the 16th century, the territory that was to become Ecuador was inhabited by a number of small and diverse groups of indigenous peoples. Ecuador gained independence from Spain on 24 May 1822, becoming part of Simón Bolívar's Grancolombian Federation for eight years, but withdrawing in 1830 to become an independent nation.[4] The first Ecuadorean constitution was promulgated on 23 September 1830 by Ecuador's first President, General Juan José Flores.[5]

Cultural, socioeconomic and political division, intense regional rivalry and periods of extreme political instability have been a feature of Ecuador since independence, as reflected in the existence and provisions of the country's 17 Constitutions.[6] In the period after independence, political power was concentrated in the hands of the social elite of Quito; the

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1 Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress* (Allyn and Bacon Inc, Boston, 1972) at 31-37.
2 Ibid at 19.
3 Ibid at 18.
4 Ibid at 58.
5 Ibid.
6 The number of Constitutions is eighteen, if the Constitution of the Grancolombian Federation of 30 August 1821 is included.

large landowners of white, aristocratic ancestry, whose wealth was strongly tied to land and property. Quito was conservative and maintained strong links with the Roman Catholic Church. Quito was also the stronghold of the Conservative Party, which advocated only minor economic and social reforms, supporting the maintenance of the social status quo in favour of privileged classes. In contrast to the *quiteño* elite, the wealth of the coastal elite, centred in Guayaquil, arose from growth in the financial sector and international trade. Guayaquil was liberal and rebellious, demanding removal of the Church's influence from the state.[7]

The rivalry between the highlands and the coast, in particular between Quito and Guayaquil, and the opposing forces of Conservatism and Liberalism, dominated Ecuadorean politics from independence into the 20th century. The constitutions of the 19th and early 20th centuries reflected Conservative and Liberal views on the relationship between church and state.[8] Since the mid 20th century the traditional battle between the Conservatives and the Liberals has been diluted with the proliferation of many political parties. The four main political parties are: Democracia Popular (centre), Partido Social Cristiano (right-of-centre), Partido Roldosista Ecuatoriano (populist), and Izquierda Democrátia (left-of-centre).[9] The last decade has also seen the rise of the Movimiento Pachakutik-Nuevo Pais, an umbrella organisation that represents indigenous groups, trade unions and social movements.

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7 Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 59 and 94-95.

8 General Flores, the first President, was of conservative persuasion. He remained in office until 1835, when Rocafuerte, a liberal, became head-of-state. Rocafuerte promulgated the second Constitution in 1839, introducing principles of anticlericalism, religious tolerance and individual freedoms. Upon regaining office in 1839, Flores instituted the third Constitution, of Conservative orientation, which proclaimed Catholicism as the only state religion. The Liberals of Guayaquil rose up in opposition, and the coastal rebellion forced Flores' resignation in 1845. After the resignation of General Flores, eleven governments seized and lost power, and three Constitutions were promulgated. The liberals generally held political power, but fell into disrepute after years of civil strife, military rule, border skirmishes with Peru and Colombia, disorder and repression. In 1860 Gabriel García Moreno seized power, establishing Conservative rule until 1895. This era was one of religious fanaticism, repression of freedom of speech and the press, and violation of constitutional order. Moreno was assassinated in 1875. The following twenty years were years of turmoil, division and sectionalism, culminating in a civil war in 1883. In 1895 the liberals took power, and were to rule until 1944. The eleventh and twelfth Constitutions, of 1897 and 1906, were strongly anticlerical, as President Eloy Alfaro attempted to transform Ecuador to a secular state. The years from 1914-1925 were financially unsound. Domestic unrest increased, as the government continued to exhibit insensitivity to the plight of the people. External shocks, such as the collapse in the cocoa market in the 1920s and the Great Depression in the 1930s caused further instability and domestic unrest from 1931-1948. Of the 21 governments that came to power in this period, none served the full term in office. The long dominance of the liberals over this period came to a halt in 1944 with the loss of territory to Peru in 1942. Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 60-79.

9 Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98* (Economist Intelligence Unit Limited, London, 1998) at 9-10. Other political groups include Movimiento Popular Democrátiaco (left-wing), Concentración de Fuerzas Populares (populist), Frente Radical Alfarista (populist), Acción Popular Revolucionaria Ecuatoriana and the Liberación Provincial.

Another feature of Ecuadorean politics since independence has been the personalistic leadership of the Ecuadorean *caudillo*, or "monarch in republican dress".[10] These leaders have pursued their own ambitions in the absence of systematic attention to socioeconomic needs, while the Constitution has been recognised as paramount formally, but ignored or amended in practice in practice for personal reasons.[11]

A third feature of Ecuadorean politics has been the role of the military. The military in Ecuador have never been far from power, but have generally functioned in a defensive style. The tradition of the armed forces in Ecuador has been that of defending constitutional order, remaining in the background until public disorder or political turmoil becomes too extreme.[12] Periods of military rule in Ecuador have been brief and transitory.[13] The last period of military rule finished in 1979, when democratic elections were held, and a new 1979 Constitution took effect, remaining in force until 1998.[14] The military today continues to exert pressure behind the scenes, occupying a type of "moral high ground" from which it criticises the corruption and inefficiency of civilian political institutions.[15]

Civilian governments since the early 1980s have faced extremely difficult economic and political conditions in which to govern. Falling oil prices and an increasing debt burden contributed to a debt crisis in 1982. Since that time, the austerity measures required to

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[10] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 77.

[11] José María Velasco Ibarra is the prototype of the Ecuadorean *caudillo*. First elected in 1933, Velasco Ibarra held the office of President five times and was overthrown four times. Velasco Ibarra was able to build widespread national support through his charismatic personality, but was unable to provide constructive leadership when in power. He amassed popular support for the political system, but then brought disillusionment with his authoritarian leadership and inefficient government. As with other caudillos, Velasco Ibarra, was only able to enjoy unlimited authority when prepared to violate constitutional norms. Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 70-77; Economist Intelligence Unit Limited, *Country Profile: Ecuador 1996-97* (Economist Intelligence Unit Limited, London, 1996) at 3.

[12] Since 1960 the military has been the arbiter of political disputes. For example, military support allowed Carlos Julio Arosema Monroy to take over as President in 1962 after the overthrow of Velasco Ibarra in 1961; and the military ousted Arosema in 1963 and Velasco Ibarra in 1972. More recently in 1996, when President Abdalá Bucaram's "cronyism, authoritarian tendencies and contradictory economic policies" antagonised the electorate and congress, military support was crucial to the success of a constitutionally-dubious congressional vote to dismiss the president from office on the grounds of mental incapacity. Flanz G, "Ecuador" in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, New York, 1975) at 7-9; Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 75-76 and 97-98; Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 6.

[13] The military ruled briefly from 1963-1966, voluntarily withdrawing from power after a loss of public confidence, and from 1972 until 1978. Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 98-100.

[14] Flanz G, "Ecuador", above n12 at 1-2.

achieve economic reform have provoked social and labour unrest and political unpopularity. The diversity in the country, reflected in the proliferation of political parties, has led to the ruling party not having a majority in the legislature, making reform difficult to achieve. Relations between the executive and legislature have deteriorated.[16] Predictions that Ecuador would enter into a period of greater political stability when Mr Jamil Mahaud won the 1998 presidential elections on a platform of free-market policies and reform "coupled with a social element" proved to be overly optimistic,[17] when uprisings organised by the indigenous group CONAIE toppled President Mahaud's government in January 2000.

3.2 The People of Ecuador

Ecuador's population stood at 10.3 million people according to the 1990 census.[18] The urban population was 55.4% in 1990, with Quito, Guayaquil and Cuenca accounting for around 30% of the total population.[19] The majority of the population lives in the *sierra* (45.6%) or the *costa* (49.7%), with only 3.9% of the population living in the Amazon region and 0.8% in the Galapagos Islands.[20]

The inhabitants of Ecuador include the minority indigenous peoples of the Amazon rainforest and the Indian heirs of the Inca civilisation; descendants of black Africans who arrived in Ecuador in the 17th century; Arabs, especially the Lebanese, who arrived at the beginning of the century and form a powerful community, particularly on the coast; Chinese; other Latin Americans; and descendants of the white European settlers.[21] The *mestizo* population comprises descendants of foreign immigrants who have intermarried with the indigenous population. Although there are no reliable statistics on the ethnic composition of the population, rough estimates suggest *mestizos* constitute 40% of the population, indigenous peoples account for 40% of the population, 5%-10% are "whites", and 5%-10% are Afro-Ecuadoreans.[22]

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15 Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 10.
16 Ibid at 4-5.
17 Ibid at 7.
18 Ibid at 19.
19 Ibid.
20 Ibid at 20.
21 Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 2; Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 20.
22 Chinchilla L and Schodt D, *The Administration of Justice in Ecuador* (Centre for the Administration of Justice, San José, Costa Rica, 1993) at 17.

The majority of Indians live in the *sierra*, where they have typically been treated as a subhuman source of cheap labour. The overseers on the haciendas exercised power little short of life and death over the workers. The Indians constitute the bulk of the impoverished *serrano* masses.[23] The lot of the Indians is strongly contrasted with that of the *serrano* elite. The *serrano* social elite is concentrated in the highland urban centres, particularly Quito. Wealth and power are based on land ownership and domination of the Indians. Rigid class distinctions are maintained. Many members of the highland elite have been politically prominent figures. Customary social values are based on the white, Spanish-speaking society introduced under Spanish colonial rule. Between the elite and the impoverished masses lies a small middle class, comprised of professionals, intellects, small business men, bureaucrats and upwardly-mobile *mestizos*.[24]

The population of the *costa* comprises descendants from African Negroes, particularly in Esmeraldas, descendants of once-numerous Indian coastal tribes (now nearly vanished), the coastal peasants of mixed heritage, or *montuvios*, who are descended from the Indians, Europeans and Negroes through intermarriage; and the Arab community. The social elite of the *costa* differs from that of the highlands; membership is based on wealth, lacking the "colonial ancestry and aristocratic aura" of Quito's leading families. The commercial, banking and financial elite of Guayaquil is the wealthiest in Ecuador.[25]

The indigenous peoples of the Ecuadorean Amazon are the Cofán, Siona, Secoya, Huaorani, Záparo, Quichua, Achuar and Shuar. The Quijos Quichua (Napo-Quichua) and the Canelos Quichua (Quichuas of Pastaza), together known as the "jungle Quichua" or "Amazon Quichua", number approximately 60,000 persons.[26] With the "jungle Quichua", the "Jivaroan" peoples (Shuar and Achuar) form the vast majority of the peoples of the Oriente.[27]

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[23] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 27-28.

[24] Ibid at 28-30.

[25] Ibid at 39-40.

[26] Whitten NE Jr, "Amazonia Today at the Base of the Andes: an Ethnic Interface in Ecological, Social and Ideological Perspectives" in Whitten NE Jr (ed), *Cultural Transformations and Ethnicity in Modern Ecuador* (University of Illinois Press, Urbana/Chicago/London, 1981) at 125-131; Paymal N and Sosa C, *Amazon Worlds: Peoples and Cultures of Ecuador's Amazon Region* (Sinchi Sancha Foundation, Quito, 1993) at 186.

[27] The Shuar number approximately 40,000 persons and the Achuar in Ecuador approximately 3,000 persons. The term "Jívaro" is rejected by the indigenous peoples as a "pejorative ethnic designation imposed by nationals and foreigners": Whitten NE Jr, "Amazonia Today at the Base of the Andes", ibid at 134.

The Záparo, Cofán, Siona, Secoya and Huaorani constitute separate language families. Záparoan speakers suffered massive annihilation from disease, missionary reduction and enslavement during the 16th-18th centuries.[28] The Cofán number approximately 500 persons in Ecuador, living along the Upper Aguarico River, the Sinangüe River and on the Ecuadorean-Colombian border.[29] There are approximately 200 Siona and 300 Secoya in Ecuador. The Siona live along the Shushufindi, Aguarico and Cuyabeno Rivers, and the Secoya live along the Aguarico and Cuyabeno Rivers.[30] Culturally, the Cofán, Siona and Secoya are very similar, and the peoples intermarry.[31]

3.3 The Huaorani of Ecuador

The exact number of Huaorani number is uncertain, but a common estimate is around 1,500 to 2,000 persons.[32] The Huaorani are divided into a number of subgroups, including the Toñampere, Quenahueno, Tihueno, Quihuaro, Damuintaro, Zapino, Tigüino, Huamuno, Dayuno, Quehueruno, Garzacocha (Yasuní River), Quemperi (Cononaco River), Mima, Caruhue (Cononaco River) and the Tagaeri.[33]

> This Amazonian people is shrouded in mystery. As recently as two generations ago, its members used axes made of stone and lived in the immense and impenetrable rain forest which has always provided them with a safe haven. Huaorani tradition mentions only that they migrated from "down river" a long time ago, fleeing the "cannibals". Their language has no ties to any other Amazon group and has yet to be classified. In addition, their pottery bears no relation to that of their current or past neighbours.
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> The Huaorani are a people known as fearless warriors and superb hunters, and for their ability to adapt to their environment. Historically, they have been called *Aucas*, a pejorative term that in Quichua means "people of the jungle, savages," because of their aggressive attitude toward other Huaorani and in their dealings with other indigenous groups, colonists and

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28 Ibid at 139. Only 24 people spoke Záparoan in 1991; the few survivors of this group are assimilated into Quichua communities. Paymal N and Sosa C, above n26 at 186.

29 Paymal N and Sosa C, ibid at 184.

30 Ibid at 185.

31 Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 139.

32 See, for example, Paymal N and Sosa C, above n26 at 185. Kimerling estimates the population at about 1580: Kimerling J, *Amazon Crude* (Natural Resources Defense Council, New York, 1991). The Inter-American Commission on Human Rights estimates 1,400-1,500 individuals: Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OAS Doc OEA/Serv.L/V.II.96, doc 10, rev 1, 24 April 1997, (hereafter IACHR *Report on Human Rights in Ecuador*), ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country", Inter-American Commission on Human Rights <http://www.cidh.oas.org/country.htm>. A World Bank Discussion Paper put the population at 850-900 individuals: Hicks J, Daly H, Davis S, and de Lourdes de Freitas M, *Ecuador's Amazon Region: Development Issues and Options* (World Bank Discussion Paper No. 75, The World Bank, Washington DC, 1990) at 30. Whitten estimated the number at 500: Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 137.

33 Paymal N and Sosa C, ibid at 185.

> "whites". They call themselves Huaorani, a word meaning "the people," "human beings," as opposed to the *cowode*, the "non-people", a category that includes everyone who is not Huaorani.
>
> The Huaorani way of life was once marked by constant war. Members of the group lived in inaccessible places, far from rivers, and were able to mobilize quickly. Though they depended on the hunt rather than agriculture, they did grow manioc in various places at the same time. The group's social organization included the practice of polygamy (polygany and, less frequently, polyandry) when conflict led to demographic imbalance. [34]

There are two or three bands of the Huaorani who have resisted all attempts by outsiders to contact them. It is generally accepted that a small group of Tagaeri continue to exist within the *oriente*, and that other uncontacted groups, the Oñamenane, Taromenane and Huiñatare possibly continue to exist in the region.

Hunting, fishing and gathering are the traditional activities of the Huaorani. The Huaorani traditionally used blowguns and poisoned darts to hunt monkeys and birds, and spears to kill larger animals such as wild pigs.[35] Huaorani families also possess gardens on which they plant manioc, a common food source, and plantain. The gardens are usually depleted within three to four months. The Huaorani employ a method of shifting agriculture, replant depleted gardens and then migrating to areas where crops have been previously planted, hunting, gathering and fishing along the way.[36] The gardens are built around longhouses, built on hilltops, that serve as their base camps.[37]

The Huaorani are known for their ferocity and isolation. Until recently, they avoided all continuous and peaceful contact with outsiders. A traditional longhouse is led by a polygamous couple who live with their married daughters and unmarried children. Although the longhouses are autonomous and dispersed over a large area, they share hunting grounds and strong alliances with two or three other longhouses, while maintaining hostile relations

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[34] Ibid at 69.

[35] Under the influence of missionaries the Huaorani have changed their hunting techniques and now prefer to use guns and harpoons. Brady J, "The Huaorani Tribe of Ecuador: a Study in Self-Determination for Indigenous Peoples" (1997) 10 *Harv Hum Rts J* 291 at 293, citing Rival l, "Huaorani y Petroleo" in Giovanni Tassi (ed) *Náufragos Del Mar Verde: La Resistencia de los Huaorani a Una Integrácion Impuesta* (1992) 130-131.

[36] Mannina J, "The Human Rights Implications of Economic Development: a Case Study of the Huaorani People of Ecuador" (1992) 5 *Geo Int'l Envtl L Rev* 117 at 121.

[37] Kimerling J, "Dislocation, Evangelization, and Contamination: Amazon Crude and the Huaorani People" in Espach R (ed), *Ethnic Conflict and Governance in Comparative Perspective* (Woodrow Wilson Center, Washington DC, 1995) at 73.

with others. However, tribal warfare is punctuated by periods of peace, feasting and intermarriage.[38]

The environment has profound spiritual value for the Huaorani, with natural features such as lakes, trees and wildlife "animated by religious and cultural forces which protect and mystify indigenous communities".[39] The Huaorani hunters ask animal gods for permission to kill, and the interpretation of unsuccessful hunting expeditions, dreams and accidents regulates the relationship with the environment. Living within the rainforest is inseparable from the Huaorani's spiritual life.[40]

3.4 The Huaorani and Oil Exploitation

3.4.1 The Ecuadorean Oil Industry

Most oil production is in the rainforests of the Amazon. Commercial quantities of crude oil were first discovered in the region on 29 March 1967, when the Texaco-Gulf consortium discovered a rich field of crude oil in Lago Agrio.[41] Despite the activity of other petroleum companies in Ecuador, by late 1973 the Texaco-Gulf consortium dominated oil exploration and production.[42] In 1971, President Velasco Ibarra signed the *Ley de Hidrocarburos*,[43]

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38 Ibid at 73-74.

39 Shutkin W, International Human Rights Law and the Earth: the Protection of Indigenous Peoples and the Environment" (1991) 31 *Virg JIL* 479 at 494.

40 Mannina J, above n36 at 121-122.

41 In 1921, Standard Oil of New Jersey (Exxon), as the Leonard Exploration Company, received a 50-year concession covering 2.5 million hectares in the *oriente*. On 25 March 1931, a new contract between Standard Oil and the government was signed over the same 2.5 million hectares of land. However, in 1937 the relation between Standard Oil and the government turned sour when the company was turned out of its *oriente* concessions for having failed to pay outstanding debts and for having produced no exploratory findings after six years of exploration. In August 1937 the government signed a contract with Royal Dutch/Shell, by which the British multinational obtained concession rights over 10 million hectares in the *oriente*. Shell conducted a series of surveys deep in the Amazon, but returned many of its holdings to the government in 1948, declaring that the *oriente* lacked commercial petroleum. Later in 1948 Shell joined Standard Oil in a consortium which received a new concession of 4 million hectares from the newly-installed government of Galo Plaza Lasso. However, in 1950 Shell withdrew from the country. From 1948 to the 1960s, many Ecuadoreans shared Galo Plaza's view that the "the oriente is a myth". The official government attitude favoured contracts which might provide a modest but immediate contribution to the treasury. There was little anticipation of the wealth to be found. Martz J, *Politics and Petroleum in Ecuador* (Transaction Inc, New Brunswick, New Jersey, 1987) at 46-55.

42 Ibid at 109.

43 Codified, No. 2967, R.O. 711, 15.11.78. Amended by: Decree 2463, R.O, 583, 2.5.78; No.101, R.O. 306, 13.8.82; No.45, R.O. 283, 26.9.89; No.44, R.O. 326, 29.11.93; No. 49 P.C.L., R.O. 346, 28.12.93; No.809, R.O. 694, 12.5.95.

which went into effect in 1972, and continues to be the main statute regulating oil development in Ecuador.

In common with many developing countries, the Ecuadorean government moved to assert control over the domestic oil industry in the 1970s.[44] Article 1 of the *Ley de Hidrocarburos* declared that deposits of hydrocarbons in the Ecuadorean territory belong to the state. On 23 June 1972 the government established a national oil company, CEPE, to undertake oil activities on behalf of the state.[45] In 1976 CEPE assumed Gulf Oil's position in the Texaco consortium.[46]

In 1979, Article 46(1) of the new Constitution affirmed state ownership of oil resources, and gave the state a monopoly over the economic exploitation of "the nonrenewable natural resources and, in general, the products of the subsoil and the minerals and substances whose nature is different from that of the soil".[47] Although the industry was liberalised in the 1980s and 1990s to allow some foreign participation through such vehicles as risk service agreements, it was not until 1998 that the State's monopoly over the economic exploitation of nonrenewable natural resources was repealed. Article 247 of the 1998 Constitution, while declaring that nonrenewable natural resources to be the property of the State, now permits "their rational exploraiton and exploitation ... by public, mixed or private businesses".[48]

After the collapse of the world oil market in the early 1980s, the government reformed the Hydrocarbons Law in order to encourage foreign investment in the oil industry.[49] The first Risk Service Contract, with Occidental Exploration Company, was signed on 25 January 1985. In 1986, Texaco's ownership of the Trans-Ecuadorean pipeline (SOTE)[50] was handed over to the Ecuadorean government, although Texaco remained in operational control.[51] In

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44 Ecuador became a full member of OPEC in November 1973, but resigned its membership in 1992.

45 Corporación Etstatal Petrolera Ecuatoriano. CEPE's nominal foundation in 1971 by the *Ley de Hidrocarburos* was "replete with procedural errors", and the organisation was legally re-established on a legitimate base pursuant to Decree No. 522 of 23 June 1972. Martz J, *Politics and Petroleum in Ecuador*, above n41 at 104. CEPE was expanded and reorganised as Petroecuador in 1989 pursuant to *Ley de Petroecuador y de sus Empresas Filiales*, No. 45, RO 283, 26 September 1989.

46 Martz J, ibid at 168.

47 1979 Constitution, Article 46(1).

48 The 1998 Constitution is translated by Reka Koerner and published in Inter-University Associates Inc, "Republic of Ecuador" in Flanz G (ed), *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, New York, 1999).

49 Law No.44, R.O. 326, 29.11.93.

50 Sistema del Oleoducto Trans-Ecuatoriano.

51 Friends of the Earth, *Crude Operator: the Environmental, Social and Cultural Effects of Texaco Oil Operations in the Tropical Forests of Ecuador* (Friends of the Earth Ltd, London, 1994) at 19.

1989 CEPE was restructured and renamed Petroecuador,[52] and operational control of SOTE passed from Texaco to Petroecuador.[53] Petroecuador took over the operational rights of the Texpet consortium's facilities in July 1990. On 6 June 1992, Texaco relinquished its shareholding in the Texpet facilities to Petroamazonas, a subsidiary of Petroecuador.[54]

In 1993, Ecuador amended the Hydrocarbons Law, introducing Production Sharing Contracts, pursuant to which the operators bear all the risks and costs of exploration, take title to all the oil produced and can export all production tax-free.[55] Since 1993, many foreign companies have begun operating in the Oriente. Major foreign company involvement in production includes Oryx, Occidental, Elf-Aquitaine, Maxus Energy-YPF, City Investing and Espol. Tripetrol, an Ecuadorean company, also produces oil. In 1994, Texaco pulled out of the country after twenty years of production. Despite increased foreign involvement, the Ecuadorean oil industry is still dominated by the national oil company Petroecuador, which oversees all state operations and accounts for 80% of the country's production. Petroecuador produces over 300,000 bbl/d and private companies produce approximately 90,000 bbl/d.[56]

3.4.2 Effects of Oil Exploitation on the Huaorani

3.4.2.1 Expropriation of land

One consequence of the development of the Oriente and the influx of outsiders has been the displacement of indigenous peoples from their traditional lands, which has made it impossible for them to meet basic living conditions.[57]

> Oil exploitation activities have proceeded through indigenous territory with little attention to the placement of facilities in relation to existing communities: production sites and waste pits have been placed immediately adjacent to some communities; roads have been built through

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52 *Ley de Petroecuador y de sus Empresas Filiales*, No. 45, RO 283, 26 September 1989.

53 Friends of the Earth, *Crude Operator*, above n51 at 19.

54 Ibid.

55 United States Energy Information Administration, *Country Analysis Briefs: Ecuador*, April 1996, Energy Information Administration <htpp://www.eia.doe.gov>.

56 United States Energy Information Administration, *Country Analysis Briefs: Ecuador*, December 1998, US Energy Information Administration <htpp://www.eia.doe.gov>.

57 IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country"; "Fuelling Destruction in the Amazon: An Interview With Luis Macas", *Multinational Monitor*, April 1994, at 21.

> traditional indigenous territory; seismic blasts have been detonated in areas of special importance such as hunting grounds; and areas regarded as sacred, such as certain lakes, have been trespassed.[58]

The rainforest region has a low population density, but has experienced high rate of population growth since petroleum exploitation began. As of 1982, almost 50% of the population was born outside the region, with two-thirds of the immigrants coming from the *sierra*. Seventy percent of total immigrants to the Amazon region as of 1982 had established residence there after 1972, when significant petroleum development began.[59] Most colonists are poor *campesinos* who migrated "from rural areas where growing populations, ecological deterioration, periodic droughts, and a long history of abuse by the wealthy few who control most of the productive land, leave them with little or no means to feed their families".[60]

The road networks created by the petroleum industry made significant migration to the Amazon region possible, and provided a natural determinant of the location of settlement.[61] The poor settlers have followed the oil roads into the Amazon with little or no regard being paid to the ability of the soil around the petroleum sites to support agriculture, or for the land rights of the indigenous peoples in these areas.[62] The agricultural techniques used by the settlers are generally unsuitable for the poor tropical forest soils, leading to rapid soil degradation, and the need to farm new lands or look for seasonal labour. As the colonists force indigenous peoples from their traditional hunting and fishing grounds and degrade the soils and resource, the indigenous peoples are unable to find the food, medicines and materials on which their traditional lifestyles depend. The result has been conflict and violence between the poor settlers and the indigenous communities.[63]

It is feared the Huaorani, particularly the uncontacted Tagaeri, will suffer the same fate as other indigenous peoples who have been forced from their lands as a result of oil exploration and land settlement activities. The last of the indigenous Tetetes were driven away from

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58 IACHR *Report on Human Rights in Ecuador*, ibid.

59 Hicks J et al, above n32 at 1.

60 Kimerling J, *Amazon Crude*, above n32 at 39; Kimerling J, "Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon" (1991) 14 *Hastings Int & Comp L Rev* 849 at 856.

61 Hicks J et al, above n32 at 16.

62 Kimerling J, *Amazon Crude*, above n32 at 40; Kimerling J, "Disregarding Environmental Law", above n50 at 857.

63 Kimerling J, *Amazon Crude*, ibid at 75; Kimerling J, "Disregarding Environmental Law", ibid at 875-876. The Inter-American Commission on Human Rights has reported on the negative effects of oil exploitation on the indigenous peoples of the Amazon region of Ecuador in its *Report on the Situation of Human Rights in Ecuador*, above n32. This report is discussed in detail in Chapter 8.

their lands near Lago Agria when oil development began there, a circumstance which is believed to have hastened their extinction as a people.[64] The Cofán, Secoya and Siona have been pushed into small pockets of land that are entirely surrounded by outsiders. "These lands cover only a fraction of their traditional lands, straining the subsistence base of the people and severely limiting their range for hunting, fishing, gathering and gardening activities."[65] The Cofán suffered

> cataclysmic change when the Texaco-Gulf consortium established its base camp at Santa Cecilia ... Within months oil bases with new airstrips, more planes and helicopters, and then oil drilling equipment followed, after which came rigs and then a road and a 315-mile pipeline cutting the Cofán territory into ribbons of nationalized infrastructure. [66]

Although the Cofán had been granted some 9000 acres in this zone, demarcated accordingly, a road was constructed right through the titled lands.[67] The Cofán, who now number only a few hundred individuals, were displaced from their traditional lands along the Upper Aguarico River, and now occupy a very few, geographically-separate, communities in a small part of their former territory.[68] This reduced area is "hardly sufficient to maintain them and poses a threat to their survival as a distinct cultural and ethnic group".[69] Almost every aspect of their culture has changed; today they are dependent on external markets and forced to over-exploit their forest habitat to survive and obtain cash income.[70] "Given the devastation of Cofán culture and territory ... it is nothing short of remarkable that anything exists today of the Cofán."[71]

The uncontacted Huaorani band, the Tagaeri, have been driven from their homelands by oil exploration. Named after their leader, Taga, who was killed by an oil worker in 1984, the Tagaeri were the last clan to use spears to defend their territory against oil exploitation.[72] Unable to resist the encroachment of Texaco's oil activities, the Tagaeri were forced to flee

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64 IACHR *Report on Human Rights in Ecuador*, ibid ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".
65 Kimerling J, *Amazon Crude*, above n32 at 77.
66 Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 134.
67 IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".
68 Ibid.
69 Hicks J et al, above n32 at 33.
70 Ibid.
71 Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 135.
72 Kimerling J, "Dislocation, Evangelization, and Contamination", above n37 at 91.

from their traditional lands and are now believed to live about 250 kilometres south of their traditional lands in part of the concession known as Block 17.[73]

In 1987 the Tagaeri speared to death two missionaries who had entered Tagaeri lands on behalf of the Petroecuador in an attempt to establish peaceful contact. After the killings, Petrobras, the Brazilian oil company operating a consortium of foreign oil companies holding the concession rights to Block 17, suspended oil activities for six months. When work resumed, it was initially restricted to areas outside the vicinity of the killings, called the "Red Zone", pursuant to an agreement negotiated with the government. In October 1989, in violation of the agreement, an anthropologist working for Petroecuador returned to the Red Zone with 25 armed civilians. The group was allegedly financed by the Petrobras consortium and allowed to pass freely by the military. The mercenaries were ostensibly brought in to protect seismic studies, but a number of people suspect the real purpose was to provoke a confrontation with the Tagaeri.[74] The Petrobras consortium subsequently cancelled its exploration contract in Block 17.

The Tagaeri perceive all attempts at contact as aggressive and hostile. They have been threatened by company workers or bands of armed men hired to seek them out or harm them or intimidate them, and continue to be threatened by adventure travellers, authors, photographers, tour guides and missionaries[75] So many Tagaeri have been killed that the Tagaeri now live with the Taromenane.[76] According to Kimerling, the Tagaeri-Taromenane

> clearly live on the edge of physical and cultural survival. They have been driven far away from their ancestors' chonta groves. They have been at war with oil companies, missionaries, adventurers, and other Huaorani for decades, primarily because they want to live in the forest as their grandparents did before them. ... [T]hey live under siege, almost certainly under great stress, and in constant fear of discovery.[77]

The threats to the future existence of the Tagaeri are so serious that the Inter-American Commission on Human Rights, reporting on the situation of human rights in Ecuador in 1997, recommended that

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[73] Ibid at 91; IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".

[74] Kimerling J, ibid at 92.

[75] Ibid at 93; IACHR *Report on Human Rights in Ecuador*, above n32, IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".

[76] This was discovered in 1993 when a Huaorani man kidnapped a Tagaeri woman: Kimerling J, ibid at 94.

[77] Ibid at 94.

> the State take whatever measures are necessary to guarantee the lives and physical integrity of the Tagaeri, and any Taromenane and Oñamenane who may survive in the forest, such as the establishment of some form of legal protection for the lands they inhabit, as their very extinction as peoples is at issue.[78]

3.4.2.2 Environmental degradation

Oil exploitation in the Amazon has had a devastating impact on the fragile environment of the rainforest.[79] Luis Macas, the President of CONAIE, has stated that "the oil companies have not only caused the decomposition of our communities and the decomposition of our culture but also the destruction of the ecology. The fight for land is thus extended to the struggle for maintaining the ecology".[80]

The production of oil has affected the Amazon environment at all stages of industry operation. First, seismic studies have impacted negatively on the environment. Noisy helicopters invade the forests and indigenous communities, while workers "fell trees, clear trails and heliports, destroy crops, drill holes, and detonate explosives, typically without regard for the presence of homes, gardens, streams, lakes, or sacred areas".[81] Seismic activities have involved the detonation of underground explosives at regular intervals to detect the presence of oil reserves by monitoring the movement of resulting sound waves. These detonations frighten the wildlife. Indigenous people have complained that the seismic activity degrade sacred lakes by driving away the spirits who guarded the ecological balance of the lakes; these spirits were offended by the explosions that kill fish and aquatic life, by the noise, and by garbage and erosion that contaminated the waters. In addition, clearing the forest destroys food, medicines, wood, and allows uncontrolled hunting and fishing by seismic workers.[82]

Second, exploratory wells are drilled by the oil companies to test underground liquids and gas for their oil, gas, and water content. Wells in the Ecuadorean Amazon have been drilled

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78 IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".

79 For an account of the environmental effects of oil exploitation in the Amazon, see Kimerling J, *Amazon Crude*, above n32 at 55-73; Kimerling J, "Disregarding Environmental Law", above n50 at 860-875; Friends of the Earth, *Crude Operator*, above n51; Jochnick C, Normand R and Zaidi S, *Rights Violations in the Ecuadorian Amazon: the Human Consequences of Oil Development* (The Center for Economic and Social Rights, New York, 1994).

80 "Fuelling Destruction in the Amazon", above n57 at 21.

81 Kimerling J, *Amazon Crude*, above n32 at 55.

82 Ibid at 56.

without regard for the presence of indigenous homes and gardens. Environmental degradation has occurred as a result of the unsafe methods of disposal of drilling wastes in the Ecuadorean Amazon. Drilling wastes include drilling muds; industrial cleaning solvents; cuttings from the hole; and petroleum, natural gas and formation waters. Drilling wastes typically contain significant amounts of toxic pollutants. In Ecuador, these wastes has been discharged into open waste pits.[83]

> Typically, pits are unlined and poorly constructed. The sides of pits sometimes give way, spilling their contents into the environment. Spills also occur as rainwater and wastes fill the pits and overflow. Most of the spilled wastes drain into small rivers or streams. Wastes that remain in the pits, together with contaminated rainwater, eventually seep into the groundwater, threatening freshwater aquifers and nearby surface waters. Waste oil from the testing process ... is usually burned in an open fire, without temperature or air pollution controls.[84]

The toxic wastes pollute streams and rivers long after they have been dumped in the water, persisting in sediments that continue to pollute the water column. Some toxic wastes accumulate in the food chain. Pollution from drilling wastes robs streams and rivers of the oxygen the aquatic life forms need to survive.[85] Some foreign oil companies have "landfilled" drilling wastes instead of discharging them in open pits. However, the landfills are not acceptable by Western standards, with "no pretreatment, no liners, no leachate collection systems, no monitoring, no cap design or maintenance".[86] In the wet rainforest environment, this has serious implications for further contamination of the environment over time.

Third, production wells have contaminated the environment. During production, oil is extracted in a mixture with formation water and gas, and is typically pumped from a group of wells to a central separation facility. Separated oil is transported from there through a pipeline. "Each of the environmental problems associated with exploratory drilling is repeated many times over during production, as new lands are cleared and more wells are drilled."[87] Harmful environmental practices associated with production wells in the *oriente* include: the generation of millions of gallons of toxic liquid wastes that are discharged without treatment into unlined production pits; the daily flaring of associated gas without any air pollution controls; routine oil leaks from wells and flowlines as a result of bad welds or

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[83] Ibid at 56-59.
[84] Ibid at 59.
[85] Ibid at 61.
[86] Ibid.
[87] Ibid at 63.

valves that have not been properly closed; oil spills from tanks caused by accidents, carelessness or lack of maintenance; and oil spills from flow lines, which alone dump an estimated 17,000-21,000 gallons of oil into the *oriente* every two weeks.[88]

Fourth, oil spills from the Trans-Ecuadorean Pipeline (SOTE) have had devastating effects on the environment, destroying fish, plant and animal life, including animals and crops upon which the indigenous people rely for food and subsistence activities, and causing health problems.[89] By 1992, an estimated 16.8 million gallons of oil had been spilled from SOTE in approximately 30 major spills.[90]

The environmental degradation associated with oil pollution detrimentally affects the life of the indigenous peoples. Fish and aquatic life have died; the pollution of waters used for drinking, bathing and cooking have caused severe health problems among indigenous peoples; animals have died after drinking contaminated water; oil slicks set on fire generate plumes of black smoke that leaves a blanket of ash on crops, animals, water and clothing, destroying plants and causing human health problems; and other toxic emissions from burning oil and gas lead to respiratory problems.[91]

Finally, road construction has had negative environmental effects, including: the destabilisation of soils, leading to landslides; the damning of natural waterways by roads and dumped soils, causing forests to die and altering the flow of streams and rivers; the creation of barriers to the migration of fish, birds and animals; and the reduction in habitat for animals.[92] Roads have been built through indigenous gardens, destroying crops and resources.[93]

The Inter-American Commission on Human Rights, reporting on the situation of human rights in Ecuador in 1997, "noted the concern expressed by some government officials over the seriousness and scope" of oil and oil-related contamination in the Amazon, and the threat it poses to the lives and health of the indigenous peoples, and recommended that the State

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88 Ibid.
89 Ibid at 72.
90 Ibid at 71.
91 Ibid at 68-69.
92 Ibid at 76-77; Kimerling J, "Disregarding Environmental Law", above n50 at 876.
93 Kimerling J, *Amazon Crude*, ibid at 76-77; Kimerling J, "Disregarding Environmental Law", ibid at 876.

"adopt the measures necessary to translate this concern into preventive and remedial action".[94]

3.4.2.3 Oil and missionaries

The first peaceful contacts between the Huaorani and outsiders occurred in 1958. In 1956, five missionaries, from the US-based Summer Institute of Linguistics/Wycliffe Bible Translators, Inc (SIL) and Christian Missions in Many Lands, were speared to death. Rachel Saint, the sister of one of those missionaries, pioneered the evangelisation of the Huaorani. With the help of a Huaorani woman named Dayuma,who had been a slave on a plantation, Saint and the SIL undertook a campaign to evangelise the Huaorani and relocate them in a permanent settlement on the western edge of Huaorani territory on the Tihueno River.[95]

In 1967 Texaco discovered commercial quantities of petroleum in the Amazon, on Cofán and Tetetes land, north of traditional Huaorani territory. As Texaco expanded to the south, its camps were systematically robbed and several oil industry workers and Huaorani were killed. The "Ecuadorean personnel would flee" when two crossed spears, the standard Huaorani warning of an impending attack, were found. However, Texaco and the government were determined to develop the oil reserves. Texaco looked to the Ecuadorean government for assistance, which in turn looked to the SIL.[96] The SIL relocation campaign was speeded up and extended.

> Pressure was brought to bear on the SIL to contact and relocate Huaorani who lived in the path of Texaco's exploration crews. The company was within just a few miles of a Huaorani longhouse, and an oil worker had been speared to death. Relocation efforts intensified in that area, this time using aircraft supplied by Texaco. It was during this period, in the early 1970s, that most Huaorani were finally contacted by the *cowode*.[97]

Missionaries called out to the people from the aircraft, using loudspeakers or radio transmitters hidden in baskets lowered from the air. They dropped goods such as mirrors, beads, metal pots, machetes, axes, rice, sugar and salt to pacify the Huaorani. The SIL also

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94 IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".

95 Kimerling J, "Dislocation, Evangelization, and Contamination", above n37 at 74-75. See also Iten O, "Indians and Oil in Ecuador" (1991) 41(6) *Swiss Rev World Affairs* 17.

96 Kimerling J, ibid at 76-77; Iten O, ibid at 18.

97 Kimerling J, Ibid at 77-78.

used family relations, the availability of spouses, harassment, and fear to convince the Huaorani to join their relatives at Tihueno.[98]

According to Dayuma's son, the missionaries worked with "an open checkbook from the oil company" to relocate the Huaorani.[99] "Oil companies and missionaries have collaborated to pacify indigenous peoples and make their land hospitable to oil company activists" as their interests in the Amazon have clearly coincided.[100] The oil companies desired to subdue the indigenous population to ensure exploitation of the oil reserves. The missionaries desired to bring the word of God to the "savages" and "civilize" them.[101] Furthermore, the Ecuadorean government has permitted and sometimes assisted pacification activities in order to gain revenue from oil exploitation, "conquer the frontier", and assimilate indigenous peoples into the national culture.[102] The collaboration has been succinctly described by Petroecuador as a "hybrid process of religious interests mixed with oil company ambitions, that assured an effective cultural-religious subjugation in order to dominate indigenous peoples and use their labour and explore the riches of their land".[103]

3.4.2.4 Gifts and trinkets

Oil companies have encouraged the process of assimilation and destruction of culture by gifts of soft drinks, chainsaws and machetes. The Huaorani have criticised the practice of approaching individual leaders or communities directly, offering cash, goods, services, and "gifts of no value" to obtain consent for development, a practice described as "bribery and deceit", the purpose of which is to divide and weaken the Huaorani people.[104] These gifts, as well as temporary jobs for Huaorani men in seismic crews, have introduced new tensions and divisions in Huaorani communities by providing individuals with unequal access to cash and

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98 Ibid at 78; Iten O, above n95 at 17.
99 Kimerling J, ibid at 79.
100 Kimerling J, *Amazon Crude*, above n32 at 77.
101 Iten O, above n95 at 18.
102 Kimerling J, "Dislocation, Evangelization, and Contamination", above n37 at 79.
103 J.F. Sandoval Moreano, "Pueblos Indígenas y Petróleo en la Amazonía Ecuatoriana" (CEPE, 1988), cited in Kimerling J, ibid.
104 Organización Nacionalidad Huaorani Amazónica del Ecuador (ONHAE), "Huaorani People Rise up in Defense of Their Rights", ONHAE Press Advisory, 20 April 1995, <http://www.maxwell.syr.edu/nativeweb/abyayala/cultures/ecuador/amazon/huaorani/huao10.html>; Supplemental Report to the Petition by the Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana and the Sierra Club Legal Defense Fund on Behalf of the Huaorani People Against Ecuador (January 1993), cited in O'Connor T, " "We are Part of Nature": Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin" (1994) *5 Colo J Int'l Envt L & Pol'y* 193 at 210.

goods that the community cannot produce. Such gifts create new needs for cash income, and a relationship of dependency between the community and the oil companies.[105]

3.4.2.5 Deliberate killing of indigenous people

There are reports that the Tagaeri and other uncontacted Huaorani groups have been deliberately sought out and killed.[106] The Huaorani and other witnesses have spoken of

> a purposeful attempt from sectors of government and oil companies to exterminate the 'non-civilized' Huaorani. The free clans in the forest constitute an interference to oil operations, as they have on occasion robbed the oil camps and are known to kill with spears if they feel threatened. Those Huaorani who could not be 'pacified' by missionaries had to be eliminated. Attempts to kill the Tagaeri and others are said to continue today .[107]

At the least, the Tagaeri have been the subject of attempts at intimidation; furthermore, the government "has not attempted to control the efforts by journalists, explorers and the oil industry to find the Tagaeri, dead or alive".[108]

3.5 The Role of the Law

3.5.1 Land Tenure Systems and Land Law

The three geographical regions of mainland Ecuador present different land tenure institutions based on their particular historical, economic and ethnic characteristics. Farming and agriculture have been the mainstay of life in the *sierra* from the time of the Incas. In the *sierra*, rural landholdings are divided into two categories: *latifundios* (large holdings)[109] and *minifundios* (small holdings). Land has been unevenly distributed, with large holdings concentrated in the hands of a few. The family estates of the landed elite, the *hacienda*, is a

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[105] Kimerling J, *Amazon Crude*, above n32 at 77.

[106] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country"; Fabra A, "Indigenous Peoples, Environmental Degradation, and Human Rights: a Case Study" in Boyle A and Anderson M (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, New York, 1996) at 250; Iten O, above n95 at 18.

[107] Fabra A, ibid at 250-251.

[108] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country"; Fabra A, ibid at 251.

common production unit in the *sierra*. Productive and accessible land is controlled by *hacendados*, many of whom are absentee landowners.[110]

Historically, the *haciendas* were commonly operated by a mestizo overseer, with field labour provided for by the Indian peasants (*campesinos*). The system of *concertaje* and *huasipungaje* required tenant farmers (*huasipungueros*) to work most of the week on the hacienda for the landowner, with compensation consisting of partial pay or the right to work one's own subsistence plot of land (*huasipango*), which were usually too small and not very productive.[111] Other forms of land tenure arrangements included temporary occupancy institutions, such as *arrendamiento*, where lands of the hacienda are rented for cash, and *aparceria*, where land is rented in return for payment in kind such as crops, or by a certain amount of hours worked.[112]

*Munifundo*s are held by the majority of the rural population for subsistence activities. Size varies from one-eighth to five hectares, but such landholdings tend to diminish over time as they are divided among heirs.[113] The shortage of land in Ecuador has resulted in increased migration to cities and to the Oriente.

The *costeno* pattern of land tenure differs from that of the highlands. Coastal production has been generated by export demand, particularly for bananas and cacao. The need to meet external market demands gave rise to a new social class of entrepreneurs who displaced traditional land owners. The plantation is the main characteristic of land tenure in the *costa*. These latifundios are smaller than the traditional haciendas, and are distinguished by the use of wage labour, reliance on capital and technological inputs, and in many cases, foreign ownership. The demand for labour is seasonal, and there is little social relationship between labourers and owners.[114]

Until the discovery of petroleum in the late 1960s, the *oriente* was populated largely by the indigenous peoples who had lived in the Amazon rainforest for many centuries. The

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[109] The *latifundio* was prohibited under the 1979 Constitution, article 51.
[110] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 24-25.
[111] Ibid at 25.
[112] Quintana L, *Deforestation in Ecuador With Special Attention to Land Tenure Systems and Oil Companies* (Thesis (M.S.), State University of New York, Syracuse, 1994) at 54-55.
[113] Ibid at 55.
[114] Ibid at 56-57.

indigenous communities inhabiting the Amazon region have been affected by efforts made by governments to reform agriculture and land tenure arrangements in the *sierra*.[115] The legislation relating to land and natural resources in the Amazon refers to the land rights of indigenous peoples, but only within the framework of their increasing integration into national agrarian reform, land settlement and forestry development programs.[116]

> The major problem faced by the indigenous groups of the Amazon region, and one which has created tension between the government and the native communities, is that of the recognition, titling and protection of native lands... [T]here is a legal vacuum in Ecuador in terms of native land rights, especially in relation to the indigenous groups who occupy the lowland forest region and whose traditional land tenure and use systems are different from those of the indigenous peasant communities in the Sierra region. [117]

3.5.1.1 *Ley de Reforma Agraria y Colonizacion* (1964)

The *Ley de Reforma Agraria y Colonizacion* (1964) superseded all legislation relating to land tenure, and established the Instituto Ecuatoriano de Reforma Agraria y Colonizacíon (IERAC) with responsibility for land reform.[118] IERAC was assigned the objectives of eliminating land tenure practices such as *huasipungo*, improving agricultural wages, providing credit and technical services, legalisation of land titles, curtailing absentee ownership, and colonisation.[119] The *Ley de Reforma Agraria y Colonizacion* (1964) abolished the fuedalistic arrangements of the highlands.[120] The law also set a ceiling on landholding size, of 2,500 hectares for the *costa* and 800 hectares for the *sierra*. In addition, impersonal wage relations were introduced into the agriculture of the highlands.[121]

The *Ley de Reforma Agraria y Colonizacion* (1964) was intended to redistribute the large haciendas of the coast and the highlands, and promote colonisation of the Amazon region. Although some land redistribution took place in haciendas held by the government and the Catholic Church, very few haciendas were expropriated from the landed elites in the coastal and highland regions. Under the *Ley de Reforma Agraria y Colonizacion* (1964),

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[115] The 1973 Agrarian Reform Law contained various provisions to improve productivity and efficient land use on farmland that was not expropriated for redistribution or awarded to peasants by colonisation.
[116] Hicks J et al, above n32 at 17.
[117] Ibid.
[118] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 171.
[119] Ibid.
[120] The Agrarian Reform Law of 1964 formally abolished all fuedalistic arrangements of the highlands, including *huasipangoo*, *arrendamiento*, *aparceria* and other arrangments, referred to under the generic name of *precaristas*. Quintana L, above n112 at 60.
[121] Ibid.

"colonisation projects received top priority, for their implementation did not strike directly at the interests of large landowners".[122] As the government realised it was easier to give "free" land in the *oriente* rather than alienate the powerful landowners, the *Ley de Reforma Agraria y Colonizacion* was relegated to strictly promoting colonisation of the Amazon.[123]

From 1964 to June 1975, 28,264 families received 155,442 hectares of land through agrarian reform/redistribution; in contrast, 11,808 families received 415,802 hectares of land through colonisation programs, which were centred primarily on the eastern slopes of the Andes (part of the *oriente*) and along the coastal plains.[124] IERAC, charged with protecting indigenous peoples of the Amazon, was more concerned with colonisation, awarding peasant colonists in the lowlands 75% of the land under its jurisdiction between 1964 and 1973, when the next reform law was initiated.[125]

Not only did the *Ley de Reforma Agraria y Colonizacion* (1964) promote colonisation at the expense of the indigenous inhabitants of the *oriente*, but its also promoted integrationist policies with respect to the indigenous communities. Under the law, indigenous communities could only receive title to land if they organised themselves in ways which are similar to those of non-indigenous settler occupations, such as into cooperative organisations and converting land to pasturage or other "productive" purposes. The Ecuadorean government "promised what they knew the indigenous nations wanted most, land tenure, in order to achieve what they most desired, a national society united in its quest for modernization".[126]

In respect of the people of the *sierra*, the history of agrarian reform under the Law was "one of effusive public pronouncements but limited accomplishment. It had done little for the vast majority of the rural populace, land tenure practices were not greatly changed, and overall agricultural productivity had not grown significantly".[127] In respect of the peoples of the *oriente*, the law detrimentally affected their rights to traditional lands and their culture by

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[122] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress* (Allyn and Bacon Inc, Boston, 1972) at 171.

[123] Hereid-Moser B, *Exploring the Land Rights of Indigenous Peoples in Domestic and International Law: the Case of the Quichua in Ecuador and Peru* (Thesis (M.A.), University of South Carolina, 1994) at 40.

[124] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 173.

[125] Macdonald T Jnr, Irvine D and Aranda L, "The Quichua of Eastern Ecuador" in Davis S (ed), *Indigenous Views of Land and the Environment* (World Bank Discussion Paper No. 188, The World Bank, Washington DC, 1993) at 15.

[126] Hereid-Moser B, above n123 at 41.

[127] Martz J, *Ecuador: Conflicting Political Culture and the Quest for Progress*, above n1 at 173.

actively encouraging settlement in the region and making land titles conditional on reorganisation of the indigenous economy.

3.5.1.2 *Ley de Tierras Baldías y Colonización*

The *Ley de Tierras Baldías y Colonización*[128] defines the "tierras baldias" or "unoccupied land" which constitutes the principal land for settlement under the jurisdiction of IERAC. "Unoccupied lands" are those that:[129]

(a) being part of the nation's territory, have no other owner;
(b) have been returned to the state due to any legal cause; or
(c) have been uncultivated for more than 10 years.

Because of the infertility of the Amazon soil, most indigenous groups practice swidden agriculture, allowing plots to lie fallow for as long as thirty years to allow the soil to rejuvenate. By this definition, IERAC legally owns most of the land in the Amazon rainforest region and may dispose of it as it considers proper.

The law provides that a settler must clear the forest and replace it with crops or pasture to show domain and use of the land, as a requirement for obtaining title to land.[130] The definition of "unoccupied" is controversial because it does not recognise that indigenous peoples have occupied the Amazon region for centuries; that forest land that is fallow is used periodically by the indigenous people; and that forest land fulfils important ecological functions.[131] Indigenous communities have been under pressure to either change traditional practices, which are not recognised as "productive" for the purposes of the law, or risk losing their traditional lands. For example, the indigenous community of Pasu Urcu in eastern Ecuador abandoned their periodic fallowing scheme when IERAC agents informed them that fallow lands could be claimed by agricultural colonists who were 50 kilometres away at the time.[132]

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[128] No. 2712, RO 342: 22.9.64.
[129] Hicks J et al, above n32 at 36.
[130] Ibid.
[131] Ibid.
[132] Quintana L, above n112 at 65.

At the time of the visit of the Inter-American Commission on Human Rights (IACHR) to the *oriente* in 1995, approximately 3 million hectares had been legally recognised in favour of the indigenous peoples of the Ecuadorean Amazon, benefiting approximately 55% of the total indigenous population.[133] The IACHR noted that "many interior indigenous communities and groups continue to experience difficulty in legalizing their claims to territory. Indigenous leaders spoke particularly about the continuing designation of traditionally indigenous lands as "tierra baldias", and about the bureaucratic obstacles which continue to hinder claimants seeking action or redress."[134] In its comments on the IACHR's Report, the Ecuadorean government stated that proposals to amend the definition of "tierra baldias" for the purpose of the *Ley de Colonizacion de la Region Amazonica* were under consideration.[135]

3.5.1.3 *Ley de Reforma Agraria y Colonizacion* (1973)

In 1973, a second set of agrarian reform laws was passed. The *Ley de Reforma Agraria y Colonizacion*[136] further limited the ability of indigenous people to claim title to traditional lands. The law provided that landholdings would no longer be limited by size but by productivity. According to article 25, a farm was "inefficient" and liable to expropriation if it failed to meet the following requirements:[137]

(a) By January 1976 at least 80% of the land appropriate for agriculture had to be properly used in accordance with the geographic and ecological conditions of the zone;
(b) Productivity of farms had to reach the government-established average for the zone; and
(c) Farms were to be equipped with the physical infrastructure necessary for its economic utilisation.

Article 30 stipulated that all lands not directly inhabited and administered by its owners are considered *tierras baldias* or unoccupied lands, and subject to expropriation and

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[133] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".
[134] Ibid.
[135] Ibid.
[136] No. 1172. Updated by *Ley de Reforma Agraria*, RO 877, 18.7.79.
[137] Hereid-Moser B, above n123 at 42; Quintana L, above n112 at 62.

redistribution by IERAC.[138] Because of the infertility of the Amazon soil, most indigenous groups practice swidden agriculture, allowing plots to lie fallow for as long as thirty years to allow the soil to rejuvenate. Under this law, land left fallow was regarded as unoccupied and eligible for redistribution.[139]

3.5.1.4 *Ley de Colonizacion de la Region Amazonica* (1978)

The *Ley de Colonizacion de la Region Amazonica* (1978)[140] is the law on which settlement of the Amazon has been based. The general spirit of the Act is to foster intensive use of the Amazon region. The law has the status of "special law", which means it takes precedence over any other legislation pertaining to the same matter.[141] The law declares settlement of the Amazon region to be an urgent national priority. All local authorities and administrative bureaus are required to work together to facilitate an organised settlement process in the region. Policy formulation and coordination of settlement is undertaken by the Instituto Nacional de Colonizacion de al Region Amazonica Ecuatoriana (INCRAE), although IERAC is still responsible for issuing settlers with land titles.[142]

Under the *Ley de Colonizacion de la Region Amazonica*, the lands occupied by indigenous communities are classified as unoccupied lands and under the ownership and regulation of the state (see *Ley de Tierras Baldias*). IERAC is supposed to set aside and title such lands for the indigenous communities, but only if they organise themselves in ways which are similar to those of non-indigenous settler occupations, such as into cooperative organisations and converting land to pasturage or other "productive" purposes.[143]

The *Ley de Colonizacion de la Region Amazonica* contains conflicting objectives with respect to indigenous peoples: preservation of the their cultures, and assimilation into the national culture. Although one of the objectives is the "promotion and preservation of indigenous culture", the law also establishes that the State, through the Ministry of Agriculture and Livestock, will select those territories that are to be used for the settlement

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[138] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country", at n30; Hereid-Moser B, ibid at 42.
[139] Hereid-Moser B, ibid at 43; Macdonald T Jnr, Irvine D and Aranda L, above n125 at 16.
[140] No. 2092, 12.1.78.
[141] Hicks J et al, above n32 at 35.
[142] Ibid.

and development of indigenous peoples, to protect their culture, and "to promote their full integration into the national culture".[144] The law is also supposed to conserve natural resources, while also promoting agriculture, agribusiness, urban development, oil exploitation and mining.[145] However, as the legislation does not promote a clear priority among the competing interests for land, the decision regarding conflicts is left to the implementing institutions.[146] The conflicting objectives have favoured development and degradation over indigenous peoples land rights and conservation: the law has "ended up favouring intense deforestation of the region, leaving most of the control of the colonization process with untrained and often corrupt military personnel, and completely ignoring environmental considerations and the rights of indigenous peoples".[147]

3.5.1.5 1979 Constitution of the Republic of Ecuador

Prior to amendments in 1995, the 1979 Constitution encouraged the settlement of land in the Amazon, with no regard for the indigenous inhabitants. Article 51 provided that: [148]

> The State guarantees ownership of land that is directly and efficiently worked by its owner.
> ...
> Settlement shall be organised and promoted so that the farming frontier may be extended and well balanced reestablishment of the population in the national territory may be obtained.

3.5.1.6 Agrarian Development Law (1994)

The provisions of the *Agrarian Development Law* were passed on 26 July 1994,[149] after the initial text approved in June 1994 (Law No 54), which was extremely "disrespectful of indigenous forms of territorial organization and harmful to indigenous livelihoods", had provoked a widespread uprising in indigenous communities throughout the country.[150] The law had been rushed through congress and approved by the President without the required

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[143] Ibid at 18.
[144] Article 3. Hicks J et al, ibid at 37; Fabra A, above n106 at 247.
[145] Articles 5 and 8.
[146] Hicks J et al, above n32 at 36.
[147] Fabra A, above n106 at 247 and n15.
[148] Flanz G, "Ecuador", above n12.
[149] *Codificacion de la Ley de Desarrollo Agrario*, RO No. 55, 30 April 1997. Copy obtained from TransLegal Inc, Tuscan, Arizona, <translegal@earthlink.net>.
[150] Fabra A, above n106 at 253.

16-day congressional review period, "let alone any national debate".[151] The Tribunal of Constitutional Guarantees declared Law 54 unconstitutional, a ruling rejected by the president Sixto Durán-Ballén. After the indigenous protests, which left at least 5 protesters dead and another 35 wounded, the government appointed a commission, including representatives from the indigenous and *campesino* sectors, to re-examine and reformulate some of the reforms.[152]

The Agrarian Development Law provides for more representation of affected social sectors in the process of implementing agrarian development policy. IERAC has been replaced by the National Institute of Agrarian Development (Institutio Nacional de Desarollo Agrario - INDA). INDA is to include two representatives each from the indigenous, *montubio*, Afro-Ecuadorean and *campesino* social sectors to supervise the application of agrarian development policy.[153]

The law recognises the right of indigenous peoples to continue their traditional forms of life, including inhabiting or managing their traditional forest areas. However, the law permits the State to expropriate land that has been left fallow for more than two years, a requirement that is inconsistent with the land use systems of indigenous which are based on a system of rotating cultivation of small gardens.[154]

3.5.2 Land Titles of the Huaorani

The Huaorani traditionally occupied approximately 2 million hectares of land between the Napo and Curaray Rivers in the *oriente*. Largely as a result of the efforts of missionaries, most of the Huaorani were centralised in a small area on the western edge of their traditional lands in the 1950s. This area, comprised of 66,570 hectares, was officially designated as a "protection zone" in 1959 and a Huaorani Protectorate in 1983.[155] The protectorate was enlarged in 1990 with an additional 612,560 hectares.[156] The original grant of lands

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[151] Collins J, "Indigenous Protests Sweep Ecuador: Repeal of New Agrarian Law Sought" (1994) 26 (24) *Latinamerica Press* 1.

[152] Ibid; Dubly A, Granda A, Garzón E and Ortiz P, "Indigenous Peoples' Rights in Ecuador" (1995) 5(13) *Beyond Law* 9 at 28-32; IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country"; Fabra A, above n106 at 253.

[153] IACHR *Report on Human Rights in Ecuador*, ibid.

[154] Ibid.

[155] Ibid.

[156] IERAC granted the land title to the Huaorani by Order of 3 April 1990. Fabra A, above n106 at 252.

comprised only 3.3% of the lands traditionally inhabited by the Huaorani; the additional grant in 1990 amounted to approximately 33% of their traditional lands.[157]

There are restriction or limitations on the title to land that the Huaorani received. First, the land granted to the Huaorani in 1990 excludes "an extensive wedge" of land belonging to colonists who, following the oil roads into Huaorani territory, settled on land in the Amazon, and were subsequently granted legal title to that land pursuant to the *Ley de Colonizacion de la Region Amazonica* (1978).[158]

Second, pursuant to Article 247 of the 1998 Constitution,[159] and Article 1 of the *Ley de Hidrocarburos*, deposits of hydrocarbons in the Ecuadorean territory continue to belong to the state. Although the 1998 Constitution repealed Article 46(1) of the 1979 Constitution, which gave the State a monopoly over the economic exploitation of subsurface resources, the State retains the right to regulate the exploration and production process. The licensing procedure under the Hydrocarbons Law affects the traditional territories of indigenous peoples in the Amazon, but the indigenous peoples have no input into the licensing process.[160]

The terms of the 1990 grant specifically preclude the Huaorani from impeding the exploitation of oil or minerals by the Government or Government-authorised operations.[161] Conditions to the title also forbid the Huaorani to carry out any mining or oil exploration or exploitation; give concessions to others to explore their territory for sub-surface resources; or

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[157] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country".

[158] Iten O, above n195 at 20. Similar restrictions are contained in land titles granted to the Quichua, Shuar and Achuar peoples on 13 May 1992 to a little over one-half of the lands occupied by indigenous peoples. To gain the titles, the indigenous peoples conceded the right of the State to continue oil activities in the region without any restriction, and to undertake construction of any kind, and the right of non-indigenous peoples living in the region to remain. On the history of oil exploitation and the struggle for the land titles in Pastaza Province, see Dubly A et al, above n152 at 24-26; Sabin P, "Searching for Middle Ground: Native Communities and Oil Extraction in the Northern and Central Ecuadorian Amazon, 1967-1993" (1998) 3(2) *Environmental History* 144 at 161; "March on Quito: Amazon Indians Demand to be Heard", South and Meso American Indian Information Center, *Newsletter*, vol 6(3), Spring and Summer 1992, 5; Farah D, "Ecuador Cedes Amazon Land to Indians: President Issues Titles Following Heated Conflict", *Washington Post*, 15 May 1992, <http://www.maxwell.syr.edu/nativeweb/abyayala/cultures/ecuador/apr92/apr92_10.html>, McManus P, "Ecuadorean Indians March for Land and Life", 8 June 1992, <http://www.maxwell.syr.edu/nativeweb/abyayala/cultures/ecuador/apr92/apr92_11.html>.

[159] 1979 Constitution, Article 46(1).

[160] "Fuelling Destruction in the Amazon", above n57 at 21.

[161] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country", at n27.

dispose of any part or the whole of the territory without the authorisation of IERAC. The Huaorani are also unable to receive any royalties for oil that is taken from their lands.[162].

On 1 February 1999, the President Jamil Mahaud issued a decree banning oil drilling, mining and colonisation in the Cuyabeno-Imuya and Yasuní National Parks. Although this provides welcome protection for the Huaorani groups inhabiting areas of the Yasuní National Park, the government still controls mining in the Huaorani reserve.[163]

As a consequence of these limitations on the title of the Huaorani, "the grant of territory in 1983 to the Huaorani people has been an illusory victory, as the oil companies continue to invade and destroy their lands".[164] "Despite the fact that indigenous lands are legalized - with written land title - the government still hands over the rights to take oil out of these lands to multinationals, claiming government ownership of what is under the land."[165]

3.5.3 New Guarantees for Indigenous Peoples in the 1998 Constitution

In 1998, Ecuador adopted a new Constitution which, for the first time, included a specific section on the collective rights of indigenous peoples. Article 83 provides that "indigenous peoples, that define themselves as nationalities with ancestral roots, and black and Afro-Ecuadoran peoples, form part of the sole and indivisible Ecuadoran State".[166] Article 84 sets out a list of 15 rights, specifically stated to be collective rights, that the State recognises and guarantees to indigenous peoples "in conformity with the Constitution, the law, and respect for the public order and human rights". The list of rights includes the following rights particularly relevant to the issue of land and the exploitation of oil and gas resources:

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[161] IACHR *Report on Human Rights in Ecuador*, above n32, ch IX, "Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country", at n27.

[162] Fabra A, above n106 at 253 and n45.

[163] Project Underground, "Ecuador Communities Win National Resource Extraction Ban" *Drillbits and Tailings*, v 4(3), 7 February 1999, Project Underground <http://www.moles.org/>. Furthermore, in January 2000 the environmental NGO Accion Ecologica reported that the City Investing oil company entered the Cuyabena Animal reserve to conduct seismic activities in pursuance of a resolution by the Ministry of the Environment authorising the company to do so. Oilwatch Europe, "Ecuador: National Parks Still Under Threat", *Pipeline*, vol 3(1), January 2000.

[164] Smith L, "Indigenous Land Rights in Ecuador" (1992) 33(3) *Race and Class* 102 at 104.

[165] "Fuelling Destruction in the Amazon", above n57 at 22.

[166] Translated in Inter-University Associates Inc, "Republic of Ecuador", above n48.

- the right to conserve communal lands as imprescriptible property, which shall be inalienable, unattachable and indivisible, except for the power of the State to declare their public use. These lands shall be exempt from the payment of predial taxes (Article 84(2));
- the right to maintain ancestral possession of the communal lands and to obtain their adjudication free of charge, in conformity with the law (Article 84(3));
- the right to be consulted on plans and programs of exploration and exploitation of non-renewable resources that can be found on their lands and may affect them environmentally or culturally; to participate in the benefits that these projects report, when that is possible, and receive indemnification for the socio-environmental damages that these projects cause them (Article 84(5));
- the right not to be displaced as peoples, from their land (Article 84(8)); and
- the right to maintain, develop and strengthen their spiritual, cultural, linguistic, social, political and economic identity and traditions (Article 84(1)).

These are far-reaching provisions that entrench in the Constitution the rights of Ecuador's indigenous peoples to be consulted regarding oil exploitaiton on their lands; to participate, where possible, in the benefits of oil exploitaiton; to be compensated for damage suffered as a result of oil exploitation; and the right not to be displaced in order for oil exploitation to proceed. However, the effectiveness of these Constitutional provisions remains to be seen.

3.5.4 Environmental Law

The oil industry operated in the *oriente* for years with virtually no environmental and public health controls.[167] The approach to environmental protection in the Ecuadorean oil and gas industry, as with many other countries in Latin America, has been to adopt sector-specific legislation, administered by the Ministry for Energy and Mines, rather than empowering a separate environmental protection authority.[168] This has led to "conflicting regulations, lack

[167] Kimerling J, *Amazon Crude*, above n32 at 48.

[168] Rosencranz A, Campbell C and O'Neil D, "Rio Plus Five: Environmental Protection and Free Trade in Latin America" (1997) 9 *Geo Int'l Envtl L Rev* 527 at 573; Wagner J, "Oil and Gas Operations and Environmental Law in Latin America" (1998) 16(2) *J Energy & Nat Resources L* 153 at 159.

of coordination and monitoring and poor enforcement".[169] Inadequate enforcement led to "a lack of compliance and contributed to serious environmental degradation".[170]

It is only since 1992 that specific legislation controlling the activities of oil companies on the environment has existed. The 1992 Environmental Regulations for Hydrocarbon Activities in Ecuador provides detailed regulations on exploratory activities (seismic surveys, drilling) in sensitive and protected areas.[171] The Decree "sets out controls on vegetation removal, road and pipeline construction and social impacts, particularly vis-a-vis indigenous peoples, which must be incorporated into a company's environmental management plan". Consultations with neighbouring and other affected people are part of this process.[172] The Ministry of Energy and Mines is responsible for the implementation and enforcement of the decree.

Prior to 1992, the legal framework was extremely fragmented, and provisions were weak. The Law of Hydrocarbons, prior to its codification in 1978, contained two environmental provisions relevant to oil operations.[173] Articles 24(s) and 24(t) respectively required oil operators "to adopt all necessary measures for the protection of flora and fauna and other natural resources" and "to prevent pollution of water, the atmosphere and land". Similarly, upon its codification in 1978, articles 28(s) and 28(t) of the Hydrocarbons Law respectively required oil operators to "adopt the measures necessary for the protection of flora and fauna and other natural resources" and "avoid polluting waters, the atmosphere and land".[174] Later amendments to the Law placed a requirement upon oil operators to "perform the petroleum operations as per the Law and Regulations"[175] and to

> present for the approval of the Ministry of Energy and Mines, the forecasts, programs and projects with the respective financial support in order to avoid damages to the social and economic organisation of the settled people around the above-mentioned activities [exploration, production, refining, transport, marketing] and all kinds of natural resources. [176]

The legislation forming the basis for contracts in the oil industry also contained provisions for environmental protection. Texaco-Gulf's contract, contained in the Decreto Supremo

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[169] Wagner J, ibid.
[170] Wagner J, ibid at 163.
[171] No. 2982, R.O. 888, 6.3.92.
[172] Wagner J, above n168 at 169.
[173] Hydrocarbons Law, No. 1459 (1971), translated in Friends of the Earth, *Crude Operator*, above n51 at 42.
[174] Hydrocarbons Law, Codified by No. 2967, R.O. 711, 15.11.78; translated in Friends of the Earth, ibid.
[175] Hydrocarbons Law, Codified by No. 2967, as amended by Law 101 (No. 101, R.O. 306, 13.8.82) and No. 44, R.O. 326 of 29.11.93, articles 31(t).
[176] Hydrocarbons Law, Codified by No. 2967, as amended by Law 101 (No. 101, R.O. 306, 13.8.82) and No. 44, R.O. 326 of 29.11.93, articles 31(s).

No. 925, Ch. IX, cl.46.1 (1973) provided that "the contractors [Texaco and Gulf] shall adopt suitable measures to protect the flora, fauna and other natural resources and to prevent contamination of water, air and soil under the control of pertinent organs of the State".[177] A similar provision was contained in clause 33 of the law Basis for Service Contracts in Exploration and Exploitation of Hydrocarbons, which provided as follows:

> Preservation of Natural Resources: Contractors will adopt the measures necessary for protecting the flora, fauna and other natural resources and, at the same time, will avoid polluting the air, water and soil as per the respective legal provisions and international agreements.[178]

Until 1982 the provisions of the Hydrocarbons Law and the provisions of the Gulf-Texaco contract used ill-defined and vague phrases such as "necessary" and "fitting" measures. It was only after 1982 that the laws relating to service contracts and the Hydrocarbons Law required compliance with international practice. The environmental protection provisions were tightened under the Model for Service Contracts in Exploration and Exploitation of Hydrocarbons, which required oil operators to

> perform all of the services which are the object of this contract, according to the best techniques, equipment and generally accepted international practices for the hydrocarbon industry. Said services must be performed preserving the environment, without damaging public and private property. If pollution is caused by the contractors operations, then the latter must perform the corresponding decontamination work notwithstanding his responsibilities to third parties and the competent authorities. [179]

A further innovation was included in Ecuador's 1994 Model Contract, which requires all bids to include a minimum of $500,000 for environmental baseline studies and on-going environmental protection.[180]

In addition to the Law on Hydrocarbons, Ecuador has passed various laws that regulate protection of the environment in general. The 1979 Constitution was amended in 1984 to provide for a constitutional right to an environment free from contamination (article 19(2)).[181]

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[177] Decreto Supremo No. 925, Ch IX, cl.46.1 (1973), translated in Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?" (1994) 17 *Harv Hum Rts J* 199 at 208.

[178] No. 1775 (1983), translated in Friends of the Earth, *Crude Operator*, above n51 at 42.

[179] No. 1779 (1983), cl. 7.1.5, translated in Friends of the Earth, ibid.

[180] Wagner J, above n168 at 166; United States Energy Information Administration, *Country Analysis Briefs: Ecuador*, April 1996, above n55.

[181] Title II, sec 1, art 19 para 2, translated in Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields", above n177 at 207. Article 19(2) also imposed a duty on the State "to ensure that this right is not infringed upon and to promote the preservation of the natural world" and required the law to "establish restrictions on the exercise of selected rights or liberties in order to protect the environment".

Articles 86-91 of the 1998 Constitution contain a number of collective rights of the environment. Article 86 provides that the State "shall protect the right of the population to live in a healthy and ecologically balanced environment, that guarantees sustainable development. It shall provide oversight to make sure that this right is not affected and shall guarantee the preservation of nature". Article 86 also declares the following to be "of public interest" and shall be regulated in conformity with the law: the preservation of the environment, the conservation of ecosystems, biodiversity and the integrity of the genetic patrimony of the country; the prevention of environmental pollution, recuperation of degraded natural spaces, the sustainable management of natural resources and the requirements that public and private activities should comply with to achieve these goals; and the founding of a national system of protected natural areas that guarantee the conservation of biodiversity and the maintenance of ecological services, in conformity with international agreements and treaties.

The 1998 Constitution contains other environmental provisions, including: the right of the community to be duly informed on, and to participate in, state decisions affecting the environment;[182] the duty of the states to adopt measures aimed at achieving the promotion of clean and alternative sources of energy, and to establish tax incentives for those who complete healthy environmental actions;[183] a declaration that the law "shall classify and determine procedures to establish administrative, civil and criminal consequences corresponding to the acts or omissions of natural or juridical or national or foreign persons that violate the norms of environmental protection;[184] and a duty on the State to provide norms for the production, importation and use of those substances that, notwithstanding their utility, are toxic and dangerous to the people and their environment.[185]

Article 91 provides that the "State, its representatives and concessionaries, are responsible for environmental damage under the conditions indicated in Article 20 of this Constitution". Article 20 declares the institutions of the State and the persons to whom powers are delegated to indemnify private parties for damages incurred as a consequence of the deficient provision of public services of the acts of their functionaries and employee while carrying out their provisions". Thus, under the 1998 Constitution, Petroecuador may be liable for environmental damage caused, and the people suffering damage are entitled to compensation

[182] Article 88.
[183] Article 89.
[184] Article 87.

for damage. Article 91 the 1998 Constitution provides that "without prejudice to the rights of those directly affected, any natural or juridical person, or human group, may exercise the actions foreseen in the law for the protection of the environment". The Constitution thus gives standing to public interest groups such as environmental groups and indigenous organisations to tale legal action to protect the environment.

Finally, Article 240 of the 1998 Constitution states that "in provinces of the amazon regions, the State shall give special attention to sustainable development and ecological preservation, with the goal of maintaining biodiversity. Policies that compensate for its lesser development and consolidate the national sovereignty shall be adopted".

The 1976 Law for the Prevention and Control of Environmental Pollution declares "the protection of air, water and soil resources, and the conservation, improvement and reclamation of the environment ... to be in the public interest".[186] It contains various provisions on contamination, defined as "the presence in the environment of one or more pollutants that are harmful to human life, health or well-being, or to the flora and the fauna, or constitute a nuisance or degrade the quality of air, water, soils or other public or private property".[187] In relation to oil exploitation, the law requires oil operators to "prevent the escape and waste of hydrocarbons in order to avoid loss, damage and pollution".[188] In addition, article 41 provides that "the operator should take all necessary measures and precautions in order to avoid damages or injuries to persons, properties, natural resources and to locations of religious, archaeological or tourist interest."[189]

Ecuador has also adopted sector-specific legislation that prevents particular resources from environmental pollution, including pollution from oil activities. For example, the 1972 Law of Waters prohibited "all water contamination that could affect human health or the development of flora or fauna".[190] The 1973 General Regulations for the Application of the Law of Waters contained detailed definitions of the terms "contaminated water" and

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[185] Article 90.
[186] No. 374, R.O. No 97, 31.5.76, Ch. I, para 1, translated in Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields", above n177 at 207.
[187] Ch. I, para 1, translated in Kimerling J, ibid at 208.
[188] Ch. IV, Production (b), translated in Friends of the Earth, *Crude Operator*, above n51 at 42.
[189] Friends of the Earth, ibid.
[190] No 69, 30 May 1972, art 22, translated in Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields", above n177 at 216.

"harmful change".[191] These laws have been superseded by various regulations made under the 1976 Law for the Prevention and Control of Environmental Pollution and the 1989 Regulation for the Prevention and Control of Environmental Pollution Related to Water Resources.[192] Legislation also exists regarding the conservation of special areas, such as the 1981 Law on Forests and Conservation of Natural Areas and Wildlife and the 1988 Provisions to Prevent, Control and Rehabilitate the Environment in Activities of Exploration and Exploitation in National Parks or Equivalents.[193]

The introduction of increasingly detailed environmental requirements has been a positive trend in Ecuadorean environmental laws in the 1990s. However, the effectiveness of the laws in practice has been limited by "poor law enforcement and compliance".[194] This point will be examined in more detail in the next section.

3.6 Social, Economic and Political Factors

3.6.1 Economic

Ecuador is a lower-middle income country, with a GNP per capita of just over $US 1000 per year.[195] Ecuador's economic performance has varied considerably since the early 1970s, and the country is currently experiencing difficult economic and political conditions. In the mid 1990s, the costs of the conflict with Peru, political uncertainty following the flight of the vice president Alberto Dahik after corruption charges, rising interest rates, lower liquidity and bad debts caused major difficulties for which the major export products, oil and agriculture, facing poor international trading conditions, were unable to compensate.[196] In 1998-1999, in the wake of spiraling inflation rates, a currency collapse, a banking crisis, and social unrest, plans by then-President Mahuad to replace the sucre with US dollars in mid-January 2000 led

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[191] No 233, 26 January 1973, arts 89 and 90 respectively, translated in Kimerling J, ibid at 216-217, nn 87 and 88.
[192] No. 2144, R.O. 204, 5.6.89.
[193] No. 1743 (1988).
[194] Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields", above n177 at 215.
[195] Figure for 1987-1992. World Bank, *Social Indicators of Development 1994* (The John Hopkins University Press, Baltimore, 1994) at 100.
[196] Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 17.

to a national uprising orchestrated by the indigenous groups and the military, which force Mahuad out of office in late January 2000.[197]

Improving political instability, redressing fiscal problems and achieving structural reform remain constant challenges for Ecuador. Inflation remains a major problem of the Ecuadorean economy, with year annual average inflation figures standing at 54.6% in 1992, 22.9% in 1995, 30.5% in 1997, and just under 44% for the year to October 1998.[198] Ecuador also labours under a considerable foreign debt. Total external debt stood at $14.4 billion in 1996, with a ratio of total external debt to GNP of 82.1%. Ecuador has been unable to fully service its external debt, meeting about 30% of its interest obligations since 1989 and negotiating with debtors to reschedule its debt.[199] In 1999, the Ecuadorean government expected 40% of its budgeted outlays would go to debt servicing.[200]

Oil is a crucial source of government revenue and foreign exchange in Ecuador.[201] Although agriculture has traditionally been of prime importance to Ecuador's economy, accounting for 17.7% of GDP and 30.6% of export revenue in 1997, the oil sector has become extremely important since exploitation began in 1972, and attracts most foreign investment. As can be seen from Table 8, the oil and mining sector accounted for 14.2% of GDP in 1997. Crude oil comprised 26.8% of export earnings in 1997 (see Table 9) and accounted for nearly half of all government receipts (see Table 10).[202]

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[197] United States Energy Information Administration, *Country Analysis Briefs: Ecuador*, July 2000, US Energy Information Administration <htpp://www.eia.doe.gov>.

[198] Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 18.

[199] Ibid at 35; Lerner R and Meldrum T, "Debt, Oil and Indigenous Peoples: the Effect of United States Development Policies in Ecuador's Amazon Basin" (1992) 5 *Harv Hum Rts J* 174 at 176.

[200] "Market Pointers", *Latin America Weekly Report*, 15 December 1998, at 586.

[201] Arthaud V, "Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?" (1994) 7 *Geo Int'l Envtl L Rev* 77 at 206-207.

[202] Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 12-13 and Reference Table 23 at 47.

Table 8

GROSS DOMESTIC PRODUCT BY SECTOR, ECUADOR (% of total)					
	1993	**1994**	**1995**	**1996**	**1997**
Agriculture, forestry and fishing	16.9	16.7	17.2	17.5	17.7
Oil and mining	13.6	14.4	14.6	14.0	14.2
Manufacturing	15.3	15.3	15.2	15.4	15.5
Commerce and tourism	14.9	14.8	14.7	15.1	15.0

SOURCE: Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98* (Economist Intelligence Unit Limited, London, 1998) Reference Table 23 p47.

Table 9

EXPORT EARNINGS, ECUADOR						
	1995		**1996**		**1997**	
	($m)	**% of Total**	**($m)**	**% of Total**	**($m)**	**% of Total**
Primary Products	**3556**	**80.6**	**3809**	**77.7**	**4253**	**80.8**
agriculture	1258	28.5	1398	28.5	1610	30.6
crude oil	1395	31.6	1521	31.0	1412	26.8
Industrialised goods	**850**	**19.3**	**1091**	**22.2**	**1011**	**19.2**
Total	**4411**	**100.0**	**4900**	**100.0**	**5264**	**100.0**

SOURCE: Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98* (Economist Intelligence Unit Limited, London, 1998) Reference Table 23 p47.

Table 10

GOVERNMENT RECEIPTS, ECUADOR										
	1992		**1993**		**1994**		**1995**		**1996**	
	Su bn	%	Su bn	%	Su bn	%	Su bn	%	Su bn	%
Petroleum receipts	1538	49.1	2070	47.9	2345	41.5	3051	37.9	5008	47.0
Non-petroleum receipts	1592	50.9	2245	52.1	3302	58.5	4980	62.1	5626	53.0
Total revenue	3130	100	4315	100	5648	100	8030	100	10634	100

SOURCE: Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98* (Economist Intelligence Unit Limited, London, 1998) Reference Table 1 p39.

In Ecuador, nearly all reserves of crude oil, which is so crucial to the nation's economy, are located in the Amazon within the traditional lands of the indigenous peoples. As a consequence, it has been stated that "hardly anyone in Ecuador believes that oil production in Amazonia can be halted. That would mean instant bankruptcy for the country's economy; fully half the national budget is covered by oil revenues."[203]

> Given the negative effects of economic development on the indigenous peoples of Ecuador's Amazon Region ... it is tempting to conclude that the traditional lands of the Amazonian indigenous population should be immune from the development process. Such a conclusion, however, ignores the real economic exigencies facing Nation States such as Ecuador throughout the world. Large scale development projects, especially oil activities, provide Ecuador with desperately needed foreign exchange earnings and fiscal revenues. [204]

Ecuador is also under continuing pressure to encourage oil production from the international community, as oil development provides one of the major sources for the capital to meet its external debt. International lending institutions encourage the exploitation of oil to meet debt payments. "Short-term IMF and World Bank strategies, emphasizing timely debt service payments, encourage the Ecuadorean government to rapidly exploit oil resources, overriding concerns of pollution, dislocation, impoverishment and starvation".[205]

> To win bilateral debt forgiveness from the United States of favourable debt rescheduling agreements with the IMF, Ecuador must swallow free-market reforms which have failed to meet social and economic needs in the past. Alternatively, Ecuador can move oil production deeper into the rain forest to obtain loans to repay foreign oil companies' investments and to made debt service payments. The existing debt situation essentially compels Ecuador to bulldoze the jungle without concern for indigenous rainforest dwellers. [206]

Dr Luis Macas, the President of CONAIE, has also criticised the role of international lending institutions, stating that:

> the government follows the directives of the World Bank and the IMF very closely, and these are policies that impact indigenous peoples throughout Latin America. The Ecuadorian government has to accept the conditions of the IMF and World Bank in order to obtain new credit. And it doesn't matter if this negatively affects a great majority of Ecuadorians. What matters is that they do what is necessary to obtain credit. These are policies imposed form outside, but they create problems inside our country.
>
> ... We want multilateral development banks to see the impact of projects that are carried out in Ecuador. Loans for the modernization of the oil sector, for example, directly affect indigenous peoples by encouraging hazardous oil development on their lands.[207]

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[203] Iten O, above n95 at 22.
[204] Mannina J, above n36 at 118.
[205] Lerner R and Meldrum T, above n199 at 177.
[206] Ibid at 182.
[207] "Fuelling Destruction in the Amazon", above n57 at 22.

3.6.2 Inadequate Institutional Capacity

Not only has substantive Ecuadorean environmental law been described as "confusing, ambiguous and weak", but the laws that do exist have been inadequately enforced and monitored.[208] The shortcomings of Ecuador's legal enforcement mechanisms, which have undermined the effective operation of laws dealing with indigenous land tenure and the environment, arise in part from the country's inadequate institutional capacity. It has been stated that

> Ecuador is a poor country with a weak and highly politicized judiciary and inept enforcement agencies. The environmental consequences of oil development receive little political attention, primarily because Ecuador depends on oil revenues for roughly forty percent of its export earnings and national budget. ... The administrative agencies with jurisdiction to enforce environmental laws suffer from a severe lack of human and financial resources, political and technical support, and coordination. Consequently, implementing regulations are underdeveloped and enforcement mechanisms limited. [209]

It was not until 1984 that an environmental bureau, the Dirección General de Medio Ambiente (DIGEMA) was created within the Ministry of Energy and Mines. In 1990 DIGEMA was renamed the Dirección Nacional de Medio Ambiente (DINIMA) and placed within the jurisdiction of a new environmental department within the Ministry of Energy and Mines, the Subsecretario de Medio Ambiente (SMA). Thus the same Ministry in charge of oil development policy has is responsible for environmental protection. The environmental bureau has been restricted by a lack of political support from ministry officials, and a correspondingly low annual budget, inadequate staff numbers, salaries, transportation and technical equipment.[210] In 1996 that Ecuador set up a Ministry of Environment, although thus far it exists in little more than name only.[211] The Ministry of Environment is intended primarily to fulfil a coordinating function, with environmental permitting and EIA remaining within the purview of the Ministry of Energy and Mines.[212]

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[208] Jochnick C, Normand R and Zaidi S, above n79 at 21.
[209] Kimerling J, "The Environmental Audit of Texaco's Amazon Oil Fields", above n177 at 208.
[210] Kimerling J, *Amazon Crude*, above n32 at 48; Jochnick C, Normand R and Zaidi S, above n79 at 25.
[211] Presidential Decree No 195-A/1996 of October 26 1996: Wagner J, above n168 at 157.
[212] Wagner J, ibid at 160.

3.6.3 Government Policy Regarding the Amazon

The attitude of government officials and the non-indigenous population of Ecuador to the Amazon region and the culture of the peoples of the *oriente* has contributed to the invasion of the lands of the indigenous peoples of the *oriente*, including intrusions onto their lands attendant upon oil exploitation, and the difficulties experienced by indigenous peoples attempting to gain legal titles to their traditional lands.

Before significant petroleum development in the Amazon region, government policy towards the indigenous peoples was that of assimilation through the delegation of acculturation to missionary groups. Since the discovery and development of oil, official policy has changed to that of integration with national society through agricultural land settlement policies.[213] Government policy has encouraged migration to the Amazon region for a number of reasons. In stark contrast to the indigenous ideologies of the Amazon, the government has viewed the land of the Amazon as an unexploited natural resource, surrounded by unwanted forest. The Amazon has been seen as a huge area with almost infinite resources, that can provide an "escape valve" for socioeconomic pressures, such as population growth, natural disasters such as droughts, and the shortage of land in the *sierra* and *costa* for the poor peasant population. The Amazon has been seen to offer "a land without people" to "a people without land".[214] Settlement in the Amazon region was seen as a method of relieving land demand pressures without the need for major reform of existing land ownership patterns, by supplying the peasant indigenous population of the *sierra* with land without upsetting the property rights of the powerful and wealthy minorities of the highlands. In other words, colonisation provided an alternative to land redistribution.

Native cultures of the orient, including the Huaorani, are characterised by "permanent settlement swidden cultivation". Swidden horticulture "utilises the Oriente's lush natural vegetation to release the nitrogen, phosphoric acid, and potash through decay of leaves, stems, vines, and wood, to planted crops, while allowing other forest ares to restore themselves in a cyclical fallow".[215] Swidden horticulture has been viewed as something to be destroyed by developers of the *oriente*. The common, general stereotype of the indigenous

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[213] Hicks J et al, above n32 at 6.
[214] Ibid at 16.
[215] Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 143.

people in the oriente is that they know nothing of agriculture, and that their agricultural knowledge is recently acquired, crude and primitive.[216] Along with the notion that there is no shortage of land for cultivation in the *oriente*, developers of the oriente have embraced the planning ideology that the land of the *oriente* must be brought under technological control by a system of continuous cultivation of cash crops. National development schemes in the oriente favour large-scale cash crops such as sugar and tea, the cultivation of which relies on large-scale capitalisation and intensive, cheap, continuous labour.[217] Indigenous lifestyles are antithetical to the national policies of large-scale "development", so that

> as native people demonstrate their superior nutritional base, propaganda mounts that they suffer brain damage through inadequate nutrition; as their horticultural system is written about and discussed in the world's centers of tropical ecology, nationalist planners envision its ultimate destruction.[218]

Finally, national sentiment has seen the Amazon as a frontier to be conquered.[219] There is still shame among the Ecuadorean elite that the jungle has not been fully conquered. "Conquest of Amazonia has long been an Ecuadorian dream, one in which frustration and continuous loss to other nations has been an overriding feature."[220] The empowerment of indigenous peoples, in a real sense and symbolically, stands in the way of realising this dream. Self-determination of indigenous peoples provides a fundamental confrontation on this ideological front.

> This is why ... no agency in Ecuador can bring itself to the final solution of a land problem involving native peoples, unless that solution involves obliteration of indigenous adaptability and creative environmental exploitation. Any current ruling in favour of such peoples would demonstrate national or agency weakness, and open the door to new alliances and dynamics of local level politics.[221]

These factors have worked to encourage settlement of the Amazon by colonists at the expense of the indigenous peoples. "In general, the building of roads and the settlement of the Amazon by migrants have been given greater priority by IERAC and other government agencies than the demarcation and titling of native lands."[222] Government policies, especially of agencies such as IERAC, have moved away from the "regularization and granting of

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[216] Ibid at 146.
[217] Ibid.
[218] Ibid at 149.
[219] Kimerling J, *Amazon Crude*, above n32 at 39.
[220] Whitten NE Jr, *Ecuadorian Ethnocide and Indigenous Ethnogenesis: Amazonian Resurgence Amidst Andean Colonialism* (International Work Group for Indigenous Affairs, Document No 23, Copenhagen 1976) at 27.
[221] Ibid.

communal titles for lands which were "self-demarcated" by native communities", resulting in the "paralysis of practically all indigenous land regularization".[223]

3.6.4 Racism

Racism on the part of non-indigenous Ecuadoreans to the people of the oriente has hindered the latter in their efforts to gain legal titles to their traditional lands and protect their lands, cultures and traditional lifestyles from the negative effects of oil exploitation.

It has been stated that "racism in Ecuador is institutionalized to a degree that would shock even black Americans."[224] The landed, wealthy elite of the Ecuadorean coast and highlands are called the *blanco* (white). Beneath the *blanco* in the "racial and ethnic stratification" are the *mestizo* (mixed heritage) and the *indio* (Indians). There is a caste-like division between the Indian and non-Indian sectors in Ecuadorean, with the *indio* occupying the lowest strata of society.[225] The attitude of white and mestizo population to Indians was to view them as children held at a developmental stage lower than that of a full adult human being, or as brutes little better than animals.[226] Racism has been institutionalised in Ecuador through such measures as the hacienda system and the inability of illiterate people to vote until 1979, a constitutional prohibition that allowed white and mestizo society to dominate the indigenous people.[227]

As colonisation of the Amazon proceeded in the wake of oil exploitation, the *indio-blanco* contrast was brought to the Amazon. In the Amazon, where there are no elite families, the term *blanco* refers to those who identify as non-Indian. To be national is to be *blanco*; to be other than blanco is to be *indio*, or Indian.[228] The former is categorised as *gente*, or person; the latter as *infrahumano*, or subhuman. Indigenous peoples of the forests are often referred to as being "lower than the animals", in a reference to the cultural adaptation made to the

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[222] Hicks J et al, above n32 at 18.
[223] Ibid.
[224] Whitten NE Jr, *Ecuadorian Ethnocide and Indigenous Ethnogenesis*, above n220 at 20.
[225] Ibid at 9 and 19-20.
[226] Ibid at 21.
[227] De la Torres C, "Everyday Forms of Racism in Contemporary Ecuador: the Experiences of Middle-Class Indians" (1999) 22(1) *Ethnic and Racial Studies* 92 at 97.
[228] Whitten NE Jr, *Ecuadorian Ethnocide and Indigenous Ethnogenesis*, above n220 at 9.

jungle; from the perspective of non-indigenous peoples, animals live in the forest and are conditioned by the natural environment.[229]

The military government of the 1970s which undertook the development of the oil industry in the Amazon embraced a policy of "mestizaje", or ethnic homogeneity. The ideal of one national culture was codified under the National Law of Culture, established by executive decree. The policy of "one national culture" was to be achieved through the progressive "whitening" and Westernising of the population. This ideology excluded the possibility of incorporating indigenous peoples with their own identity into national society.[230] The ideal became the formal permissible cultural emphasis for those seeking to participate in development under the military government. Under the government policies of colonisation and mestizaje, "everything having to do with development and progress was equated with IERAC, a dynamic national bureaucracy aimed at opening new land claims for people self-identifying as non-Indian".

> all national agencies and organisations direct their attention toward maintenance of a basic antithesis between themselves, as "developed," progressive," "civilized," or "white," and peoples who are of the rainforest-riparian-swidden zone, viewed as "undeveloped," "backward," "uncivilized," or "Indian."[231]

The issue of unresolved land claims is partly explained by the contempt for the cultures of indigenous peoples. The grant of lands to indigenous peoples and the recognition of different cultures were not compatible with the national policy of *mestizaje*. The Indian uprisings of 1990 and 1994 have seen a transformation in the mechanisms of racial and ethnic domination, as state officials were forced into dialogue with indigenous communities. Although institutional or formal forms of racism have been transformed, such as the Constitution, which allows for recognition of the different cultures, de facto discrimination still continues.[232]

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[229] Ibid at 26.
[230] De la Torres C, above n227 at 97.
[231] Whitten NE Jr, "Amazonia Today at the Base of the Andes", above n9 at 148.
[232] For examples, see De la Torres C, above n227.

3.6.5 The Power of the Landowning Class

Opposition from powerful landowners has held up land reform in the coast and highlands for decades. Smith describes the difficulties faced by the indigenous peoples in gaining land titles from redistribution in the *sierra* and the coast:[233]

> [A]pplications by peasant associations are persistently paralysed by landowner opposition. Estate owners bribe or otherwise pressure the state land reform body, IERAC, use threats and violence against applicants, and imprison leaders on false criminal charges. Where cases succeed at first instance, they are almost always overturned on appeal by an executive-appointed committee. Land is declared 'immune' from redistribution.

The oppposition of powerful landowners to land redistribution has put pressure on the indigenous peoples of the Amazon as the people of the *sierra* and the coast have migrated to the *oriente* in search of land and/or employment in the oil industry.

3.6.6 Personal Ties and Networks

Indigenous peoples in the *oriente* seeking to gain title to land from those in government have encountered difficulties because of favouritism based on a network of personal relationships between colonists and government officials and the maintenance of *blanco* supremacy. Whitten presents the example of the Puyo Runa, a territorial grouping of Canelos Quichua culture, who had lived on a comuna (indigenous commune) encompassing 17,000 hectares near the town of Puyo. In 1972 the Puyo Runa sought to gain legal protection of their rights to this land, part of which, a segment called the island, had been under illegal colonist invasion for ten years.[234]

Members of the indigenous group travelled to Quito to meet with officials from the Ministry of Social Security, while others visited the governor of the Province. The governor sent them away to the *Jefe Político* in Mera Canton. The Ministry sent a delegate to Puyo, who consulted only with the colonists, not the indigenous people. On his return to Quito, the delegate reported that the indigenous people had given up their land to the colonists, not understanding its worth. The Ministry decided the comuna would have to buy back the land

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[233] Smith L, above n164 at 103.
[234] Whitten NE Jr, *Ecuadorian Ethnocide and Indigenous Ethnogenesis*, above n220 at 4 and 9.

at an increased price; except that purchase of comuna land was illegal. Colonists approached the government to ask that comuna land be opened for sale. Although the comuneros were willing to lose some ground, they feared the precedent would be set that would put the rest of their land in jeopardy.[235]

In 1973 the governor appointed a military lawyer to settle all issues pertaining to the comuna. The lawyer heard a series of cases for the purpose of drawing up a list of specified agreements. After a number of meetings, the lawyer ruled that about a dozen colonists would gain permanent rights to their land, but that rest of the colonists would have to leave.[236] The Ministry of Social Security turned the rights for actual settlement over to IERAC. Up to August 1974 no land had been transferred, the powerful colonists were still in control of their land, but the poorer colonists had left.[237]

In their struggles to gain protection for their land, the Puyo Runa had to fight the network of family relations existing between members of the *blanco* class. Both the *Jefe Político* in Mera Canton and the representative of the Ministry of Social Security responsible for comuna affairs, had "enduring co-parent ties" with prominent land renters of the island. In this context, where disputes over land challenged *blanco* supremacy, the "dispersed network built around a few colonists and two officials" came together into a set of people dedicated to blocking the native claims. The officials supported colonists, with whom they had personal ties; the colonos supported each other and the officials; the people responsible to the *Jefe* Político stood firmly behind him; and the lawyer from Quito used his office staff, who did not care about the outcome of a case involving land and people so distant. Thus the "interlocked personnel in strategic positions" prevented comunero access to resources within the local political structure and within the national bureaucratic structure. It was "painfully apparent" that at every stage the native peoples were excluded from seeking their guaranteed judicial and political rights.[238]

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[235] Ibid at 14.
[236] Ibid at 16-17.
[237] Ibid at 18.
[238] Ibid at 15 and 18.

3.6.7 National Security and the Role of the Military

Frontier settlement has been perceived as contributing to national security, as unoccupied lands in the remote Amazon regions has been viewed as a threat to Ecuador's physical integrity. The loss of territory to Peru after the war of 1941, recognised by the USA and other Latin American countries in the 1942 Rio de Janeiro Protocol, was seen as a national disgrace, and never accepted by Ecuador. The *Ley de Seguridad Nacional*, which regulates the defence of Ecuador's borders and sovereignty, encourages the establishment of frontier settlements aimed at demonstrating Ecuadorean presence in remote territories.[239]

The military has viewed the indigenous struggle for control of land and resources as contrary to the law of national security, "so indigenous peoples have remained under constant threat" of military repression.[240]

> In the 1960s and 1970s, Ecuadorian policymakers had little intention of entrusting the valuable petroleum region to the Siona-Secoya, Cofánes, or Huaorani, native peoples whose national allegiance they did not trust. Only a few decades before, in 1941, Ecuador had lost almost half of its claimed Amazon territory to Peru. The military feared further losses in this resource-rich region that still remained outside effective national control. The native residents did not participate actively in national political life and remained largely unknown to highland Ecuadorians. Most of these indigenous people did not speak Spanish, and many lacked national identification. Some, like the Siona-Secoya, crossed freely over the borders between Peru and Ecuador, with relatives living on both sides. Others practiced shifting cultivation and thus rotated their village sites throughout their territory. The government did not know their number and did not recognize the extensive territorial claims made by these villagers. [241]

National security has been given priority over resource use and indigenous protection. For example, land titles to a little over one-half of the lands occupied by indigenous peoples granted to the Quichua, Shuar and Achuar peoples in 1992 excluded a strip of land measuring 25 by 120 miles along the southeastern border of Pastaza province, as the government claimed that the border area, adjacent to Peru, is necessary for security reasons.[242] The military continues to have unlimited access to the lands.

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[239] Hicks J et al, above n32 at 38.
[240] "Fuelling Destruction in the Amazon", above n57 at 23.
[241] Sabin P, above n158 at 150-151.
[242] "March on Quito: Amazon Indians Demand to be Heard", above n158 at 5; Dubly A et al, above n152 at 26.

Since an outbreak in fighting over a tract of border land in January-February 1995, which left over 100 dead on both sides, Peru and Ecuador entered negotiations for a peace treaty.[243] After negotiations stalled over the demarcation of a section of the frontier, the Presidents of Peru and Ecuador agreed on 9 October 1998 to submit to a binding arbitration by the guarantors of the 1942 Rio Protocol (Chile, Argentina, Brazil and the United States).[244] On 15 October 1998, the legislatures of the two countries authorised the guarantors to establish the definitive demarcation of the border.[245] The final peace treaty was signed by the Presidents on 26 October 1998.[246]

Key provisions of the agreement include: broad confirmation of the Peruvian position regarding the disputed 78 kilometres of common border; and the establishment of an ecological protection area as a demilitarised zone, to run both sides of the border, bearing the same name on both sides, and administered separately with the coordinating bilateral body.[247] The potentially positive effect on indigenous peoples of the peace treaty, given the demilitarisation of the border area, remains to be seen. A potential difficulty lies in the fact that the formerly-disputed region is rich in oil, which will raise questions about the future development of oil and the division of wealth between the countries.[248]

In addition to the concerns of the Ecuadorean military over national security, there are reports that the military has been used to quell resistance by the indigenous peoples in the Amazon and guard the security of oil company operations.[249] For example, oil company contractors building roads are accompanied by army escorts for protection. ARCO and

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[243] Chauvin L, "Rocky Road to Peace" (1998) 30(22) *Latinamerica Press* 1.

[244] Chauvin L, "Peace Process Enters Final Stage" (1998) 30(39) *Latinamerica Press* 1.

[245] Ibid.

[246] "Presidents Secure Investment Pledges", *Latin America Weekly Report*, 9 February 1999, 68.

[247] "What the Peace Treaty Says: Ecuador Gets Concessions; Peru's Position Vindicated", *Latin America Weekly Report*, 27 October 1998, 498. The agreement also grants Ecuador private, untransferable ownership over, and access to, Tiwintza, an Ecuadorean military base where one of the engagements of the 1995 war was fought. Peru retains sovereignty over Tiwintza. Other aspects of the agreement, to be ratified by the legislatures, include: a treaty regarding a border integration scheme, whereby $3 billion will be provided by the World Bank, the IBD and the Corporación Andina de Fomento (CAF) for development of the formerly disputed frontier region; a treaty regarding trade and navigation, whereby Ecuador gave up its longstanding claim to a sovereign outlet to the Amazon in return for free navigation along the Amazon and the right to construct port and storage facilities; and a treaty regarding security, particularly the establishment of a bi-national security commission.

[248] Chauvin L, "Peace Process Enters Final Stage", above n244 at 8.

[249] "Fuelling Destruction in the Amazon", above n57 at 23; Gedicks A, *The New Resource Wars: Native and Environmental Struggles Against Multinational Corporations* (South End Press, Boston, 1993) at 35.

Unocal have been reported as using the military to defend their sites from native peoples protesting the invasion of their homelands.[250]

3.6.8 Access to Justice

There a number of barriers facing indigenous peoples in the protection of their land rights via the judicial system. The most severe impediments to the right to judicial protection have been identified by the Inter-American Commission on Human Rights (IACHR) as:

> first, pervasive delay throughout the judicial system; second, barriers to the impartial and independent administration of justice which includes corruption within the system and the impermanence of certain judicial positions; and third lack of access to judicial recourse due to factors such as the absence of public defenders and the unresponsive distribution of courts in rural sectors.[251]

The IACHR described the performance of the judiciary in Ecuador as a "serious problem", with "consequences affecting the realisation of a wide range of rights and freedoms".[252]

The judicial function is regulated in Title VIII of the 1998 Constitution.[253] The organs of the judicial function are the Supreme Court of Justice; any courts, tribunals and other judicial forums established by the Constitution and the law; and the National Council of the Judicature.[254] Justice and regulatory bodies in Ecuador have traditionally been highly politicised, with Parliament appointing justices to the Supreme Court for a fixed term of six years,[255] and also appointing officials to the Supreme Electoral Tribunal,[256] the Tribunal of Constitutional Guarantees, superintendents of banks and companies, the state attorney-general, the procurator-general and the comptroller-general. In July 1997 Parliament voted to dismiss all 31 members of the Supreme Court following popular support in the 1997 referendum for modernisation of the judiciary. A new Supreme Court was appointed,

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[250] Gedicks A, ibid.

[251] IACHR *Report on Human Rights in Ecuador*, above n32, ch III, "The Right to Judicial Recourse and the Administration of Justice in Ecuador"; Chinchilla L and Schodt D, above n22; Jochnick C, Normand R and Zaidi S, above n79 at 25-28.

[252] IACHR *Report on Human Rights in Ecuador*, ibid.

[253] Previously Title III of Part II of the 1979 Constitution.

[254] Under Article 98 of the 1979 Constitution, the organs of the judicial function were stated to be the Supreme Court of Justice, the superior courts, the courts and tribunals subordinate to the Supreme Court; the Fiscal Tribunal; the Contentious-Administrative Tribunal; and any other tribunals or courts established by the law.

[255] Article 101 of the 1979 Constitution.

comprised of judges with life tenure. These judges were selected by Parliament from a shortlist presented by a commission, which received nominations from 12 electoral colleges representing individuals and civic groups.[257] Now, Article 202 of the 1998 Constitution specifically states that the magistrates of the Supreme Court of Justice shall not be subject to a fixed term in the exercise of their posts; and the Supreme Court is itself to designate a new magistrate should a vacancy arise.

Judicial independence in Ecuador is severely limited. The Ecuadorean judiciary "has been subservient to the executive and legislative branches throughout much of its history".[258] In particular, with the return of democracy in 1978, the overt politicisation of the judiciary began. The Supreme Court in particular became part of the patronage system whereby political parties used judicial appointments to reward loyal members and build majority coalitions in Parliament. Party control of the Court has been perceived as a way of preventing political persecution of government members by the opposition.[259] Furthermore, despite constitutional and legal mandates awarding the judiciary independence in regarding the judicial budget, the judiciary has been dependent on Congress and the Ministry of Finance for funds.[260]

In addition, poor salaries and the general inefficiency of the justice system has induced corruption, which is aggravated by the absence of controls and sanctions for official misconduct.[261] In consequence, although "according to the Constitution there is an independent judiciary, "in reality, it is weak, inefficient, vulnerable to political and economic pressure, lacking in human and economic resources, and characterised by a high level of corruption and ill-repute".[262]

These problems have plagued the performance of the Tribunal of Constitutional Guarantees (TCG), now the Constitutional Court, established under the 1979 Constitution to hear cases concerned with violations of the human rights provisions in the Constitution. First, because members of the Tribunal were appointed by Congress, most of its opinions were politicised,

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[256] The Supreme Electoral tribunal is responsible for directing, overseeing and guaranteeing the electoral process. Article 109 of the 1979 Constitution.
[257] Economist Intelligence Unit Limited, *Country Profile: Ecuador 1997-98*, above n9 at 9.
[258] Chinchilla L and Schodt D, above n22 at 76.
[259] Ibid at 76-77.
[260] Ibid at 77.
[261] Ibid at 81. See also Jochnick C, Normand R and Zaidi S, above n79 at 26.
[262] Jochnick C, Normand R and Zaidi S, ibid.

particularly those in regard to oil development.[263] Second, the TCG decisions were often ignored and the Tribunal did not have its own effective enforcement mechanisms. Because Congress had the ultimate authority to interpret a legal measure declared unconstitutional by the Tribunal, the power to change the fate of indigenous peoples rested with the same legislative branch that enacted laws that violated or disregarded their rights. Third, serious budget shortages have restricted the Tribunal's effectiveness.[264]

Another barrier operating against the protection of indigenous rights is that Ecuadorean public interest lawyers are reluctant to bring environmental or indigenous people's rights suits,

> as they distrust the effectiveness of the legal system in this area. For the Huaorani, the difficulties of obtaining effective access to justice are insurmountable because their distinct culture and limited contact with mainstream society hamper adequate defence of their rights; most Huaorani have no knowledge or understanding of the Ecuadorian legal system, do not speak the language in which the laws are written, and have a completely different set of values than other Ecuadorians.[265]

Furthermore, the Ecuadorean civil code places significant procedural barriers before potential plaintiffs of environmental law suits. Courts lack jurisdiction over defendants with foreign domiciles, which means that foreign oil companies, forcing plaintiffs to sue foreign oil companies outside Ecuador.[266] Plaintiffs may not join together to bring class action environmental suits, making the costs of court action prohibitive for individual plaintiffs.[267] Compelled document production is extremely limited in Ecuador. Plaintiffs may only request documents whose existence is known of in advance, and refusal to produce results

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[263] Fabra A, above n106 at 254. An oft-cited example of the susceptibility of the Tribunal to political pressures is the ruling of the Tribunal in response to a petition sent to it in August 1989 by CORDAVI, an Ecuadorean NGO, alleging violations of Article 19(2) of the Constitution (the right to a environment free from contamination) and the Forestry Law, which prohibited exploitation in protected areas. In 1990, the Tribunal held that plans by Petroecuador and Conoco to exploit oil in the National Park violated Article 19(2) of the Constitution, and directed the government not to award oil development concessions in protected natural areas in the future. However, one month later, the Tribunal reversed its decision, without explanation, and directed the government to take the utmost care to protect the environment, in a ruling interpreted to mean that oil activities were lawful in protected areas. It was subsequently alleged by one of the judges that the reversal was due to threats made by foreign oil companies to Ecuadorean officials. See Jochnick C, Normand R and Zaidi S, above n79 at 26-27; Chinchilla L and Schodt D, above n22; Kimerling J, "Disregarding Environmental Law", above n50. However, a paper produced by Harvard Business School has pointed out that there were several ambiguities in the judgement that made its application unclear, for example, references to "concessions" and not "risk service contracts", and second, that Conoco was subsequently cleared of any wrongdoing: Hall S, *Conoco's "Green" Oil Strategy (A)* (Harvard Business School, Boston, 1992).

[264] Fabra A, above n106 at 256.

[265] Ibid at 255.

[266] Article 25, Ecuadorean Civil Procedure Code: Jochnick C, Normand R and Zaidi S, above n79.

[267] Articles 47 and 78, Ecuadorean Civil Procedure Code: Jochnick C, Normand R and Zaidi S, ibid at 25.

only in a nominated fine.[268] Finally, plaintiffs may not call their own expert witnesses, but must rely on a court-appointed expert whom they may not cross-examine orally, with the attending difficulty that "most Ecuadorian experts in the oil industry and environmental science are affiliated with or dependent upon either the government or oil companies.[269]

The cost of justice also impedes indigenous peoples from obtaining access to justice. Indigenous peoples generally lack the resources necessary to bring a law suit against projected developments on their land. There are some measures in Ecuador that provide for free access to justice. The 1979 Constitution provided that "the administration of justice is free" and that "the Supreme Court shall issue the pertinent regulations".[270] However, the obligation to regulate the freedom of justice as not been implemented, and no authorities have been obliged to provide their services to indigenous people.[271] The 1996 Constitutional amendments restricted this provision so that justice became free in only five classes of cases: criminal, labor, nutrition, minors, and concerning public order.[272]

The 1979 Constitution also provided that "the state shall install public defenders for the protection of indigenous communities, workers' communities, and all persons who lack economic means".[273] However, this can be considered an empty measure, since the mandate to assign a salary to defenders has not been implemented and there are inadequate resources to support their work.[274] Furthermore, the number of public defenders is inadequate for the population. In 1990 there were only 21 defenders for the entire country.[275] In 1996 there were only four public defenders in Quito and Guayaquil respectively, and two dozen public defenders in the whole country.[276]

The poor geographical location of courts impedes access to justice for indigenous peoples in the Amazon. The administration of justice is centred around urban areas. Although the law

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[268] Articles 68-69 and 121-123, Ecuadorean Civil Procedure Code: Jochnick C, Normand R and Zaidi S, ibid.
[269] Articles 254, 258, 261 and 267, Ecuadorean Civil Procedure Code: Jochnick C, Normand R and Zaidi S, ibid.
[270] Flanz G, "Ecuador: 1975-1981" in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, New York, 1981) Article 94.
[271] Fabra A, above n106 at 255, n.61.
[272] IACHR *Report on Human Rights in Ecuador*, above n32, ch II, "Introduction".
[273] Article 107, translated in Flanz G, "Ecuador: 1975-1981", above n270; Chinchilla L and Schodt D, above n22 at 53.
[274] Fabra A, above n106 at 255 and n61; Chinchilla L and Schodt D, ibid at 89.
[275] Chinchilla L and Schodt D, ibid at 53.
[276] IACHR *Report on Human Rights in Ecuador*, above n32, ch III, "The Right to Judicial Recourse and the Administration of Justice in Ecuador".

requires each province to have a Superior Court, six provinces do not have one; the Provinces of Napo, Sucumbíos, Pastaza, Morona, Zamora and Galapagos.[277] Napo, Sucumbíos and Pastaza are the three provinces encompassing the *oriente*.

Those affected by oil development are also severely disadvantaged by the lack of available information. While the law requires oil companies to provide environmental impact statements to state environmental agencies, the agencies are not obliged to make the environmental impact statement public. Government departments and agencies and oil companies have "created a veil of secrecy around their operations, bolstered by claims of national security".[278] Indigenous communities affected by oil activities had no access to information regarding development plans, the quantity and types of chemicals used and discharged during operations, or potential health hazards resulting from exposure to oil and related toxic wastes.[279] Without such information it is more difficult to hold companies accountable for their actions.

The difficulties of obtaining justice in the Ecuadorean courts prompted the indigenous peoples of the Amazon, including members of the Cofán, Huaorani, Secoya and Quechua communities, to file a class action suit in the United States against Texaco seeking $1.5 billion damages for pollution of the Ecuadorean Amazon.[280] The plaintiffs argued that the Ecuadorean courts are incapable of fairly hearing the case, because of widespread corruption, racism and incompetence. As of 1998, the U.S. Federal Court for the Southern District of New York had yet to decide whether the case would be heard in the US or in Ecuador.[281]

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[277] Chinchilla L and Schodt D, above n22 at 81.

[278] Jochnick C, Normand R and Zaidi S, above n79 at28.

[279] Ibid.

[280] *María Aguinda et al v Texaco*, DC SNY, No. 93-7257-CIV, 3 November 1993.

[281] The class action suit was filed on 3 November 1993 against Texaco in the U.S. Federal Court for the Southern District of New York, under the Aliens Tort Victims Act, which allows non-United States citizens to bring lawsuits against US entities for injuries sustained as a result of an entity's actions. The defence argued that the case would be appropriately heard in Ecuador. Sixto Durán Ballen's government intervened on Texaco's behalf, arguing that the case was a violation of Ecuadorean sovereignty. In 1994 Judge Vincent Broderick denied Texaco's petition for dismissal, ruling that he would agree to hear the case if the plaintiffs could show that decisions made at Texaco's company headquarters in New York directly led to environmental and health problems in Ecuador. During the discovery process, Judge Broderick died. Federal District Court Judge Barrington Parker was assigned, and allowed the discovery process to proceed along Judge Broderick's guidelines.
On 9 May 1995 the Ecuadorean government and Texaco signed an agreement regarding the clean-up of the Amazon. The agreement was criticised as inadequate by environmentalists and indigenous peoples. In September 1996 the plan was suspended by the Ecuadorean government on the grounds that the clean-up activities were insufficient to undo the environmental damage.
On the 13 November 1996 the third judge assigned to the case, Judge Jed Rakoff, dismissed the case, deciding that the US courts did not have jurisdiction over the claim. The judge decided that the case,

The IAHCR has reported on the difficulties in obtaining justice for indigenous peoples, and made the following recommendation to the Ecuadorean government:

> Given that the American Convention requires that all individuals of the Oriente have access to effective judicial recourse to lodge claims alleging the violation of their rights under the Constitution and the American Convention, including claims concerning the right to life and to live in an environment free from contamination, the Commission recommends that the State take measures to ensure that access to justice is more fully afforded to the people of the interior.[282]

3.6.9 The Role of Ecuador's Indigenous Organisations

The indigenous peoples of Ecuador have formed local, regional and national organisations to fight for their rights. Among the oldest organisations representing the indigenous peoples include: the Federación Centros Shuar-Achuar (Shuar-Achaur Federation), formed in 1964; the Federación Organizaciones Indígenas de Napo (FOIN), formed in 1975 to represent the indigenous peoples of Napo province; the Federacion Organización de Pueblos Indígenas de Pastaza (OPIP), formed in 1979 to represent the indigenous peoples of Pastaza province; and the Organizacion Indigena Secoya del Ecuador (OISE), which represents the Secoya

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which should involve Petroecuador and the Ecuadorean government, should be heard in Ecuadorean courts. However, the Judge's decision was also based in part on the attitude of the Ecuadorean government. Judge Rakoff reasoned that as an order awarding damages against Texaco would be unenforceable in Ecuador, this would be "an open invitation to an international political debacle". After this decision, the new Ecuadorean government led by Abdalá Bucaram changed its position, and announced it would intervene on behalf of the plaintiffs. The plaintiffs filed a motion for reconsideration based on new circumstances, and the Ecuadorean government filed its papers seeking to intervene. In February 1999 the case came before the courts again, regarding the question as to whether the suit should be filed in the US or in Ecuador.
Cruse S, "Recent Developments in Biodiversity: Case Study: Ecuador" (1994) *1 Buff J Int L* 57; Switkes G, "The People vs. Texaco", (1994) 38(2) *NACLA Report on the Americas* 6; Jochnick C, "Amazon Oil Offensive", *Multinational Monitor*, January/February 1995, 12; "Ecuador Seeks U.S. Justice Dept. Intervention in Texaco Oil Spill Case", *Business Wire*, 22 January 1997 (Lexis/Nexis, NEWS library, ASAPII file); Project Underground, "Ecuador Suspends Texaco's Environmental Restoration Work", *Drillbits and Tailings*, v 1(5), 5 October 1996, Project Underground <http://www.moles.org/>, 3; Chatterjee P, "Environment: Ecuador Commmunitites Suffer Major Setback in U.S. Courts", *InterPress Third World News Agency*, 15 November 1996, <http://abyayala.nativeweb.org/ecuador/amazon/oil/texaco6.html>; Project Underground, "US Court Supports Environmental Racism Abroad: Ecuadorean Government Reacts by Reversing Position and Joining Suit", *Drillbits and Tailings*, v 1(8), 15 November 1996, Project Underground <http://www.moles.org/>, 1; Rainforest Action Network, "Amazon Communities, Indigenous and Environmental Leaders Reject Ecuador-Texaco Agreement", 16 May 1995,<http://abyayala.nativeweb.org/ecuador/amazon/oil/texaco3.html>;
Rainforest Action Network, "Ecuador, Texaco Sign Weak Cleanup Pact", 14 July 1995, <http://abyayala.nativeweb.org/ecuador/amazon/oil/texaco4.html>;

[282] IACHR *Report on Human Rights in Ecuador*, above n32, ch VIII, "The Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities: Recommendations".

people.[283] The Organización Nacionalidad Huaorani Amazónica del Ecuador (ONHAE), founded in 1990 to represent the Huaorani people, is a relatively young organisation.

In 1980 the Shuar-Achaur Federation, OPIP and FOIN formed the Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana (CONFENIAE) to represent the peoples of the Amazon region. In 1986 the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) was formed by CONFENIAE and ECUARUNARI (the regional organisation representing the peoples of the *sierra*) to represent the indigenous peoples of Ecuador at the national level.

While a number of factors impede the Huaorani and other indigenous peoples of the Amazon from protecting their traditional lands against the negative effects of oil exploitation, Ecuador's indigenous organisations have played a key role in promoting indigenous land rights and gaining indigenous titles to land, and are a crucial force in ensuring that indigenous interests are taken into account by the government. For example, the indigenous organisations arranged a major indigenous uprising in 1990 that led to the formal legal recognition of an increased area of the Huaorani's traditional lands; their opposition to the first draft of the proposed Agrarian Reform Law in 1994 led to the redrafting of the law;[284] demonstrations and protests organised by CONAIE and other indigenous groups led to the revision of the Constitution in 1998 to include extensive recognition of indigenous rights, and toppled the government of President Jamil Mahaud in January 2000; and action taken by OISE in 1999 led the Occidental Exploration and Production Company to sign a Code of Conduct with the Secoya regarding the conduct of negotiations over oil exploitation on their lands.[285]

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[283] Other indigenous organisations include: the Federación de Comunas Unión de Nativos de la Amazonía Ecuatoriana (FCUNAE), representing the Quichua; the Associación de Comunidades Indígenas de la Nacionalidad Cofán (ACOINCO), representing the Cofán; the Organización Indígena Siona-Secoya del Ecuador (OISSE), representing the Siona and Secoya; the Federación de Organizaciones Indígenas de Sucumbiós, Ecuador (FOISE); and the Federación Independiente del Pueblo Shuar del Ecuador (FIPSE). Kimerling J, *Amazon Crude*, above n32 at 111 and n7; Confederación de Nacionalidades Indígenas del Ecuador (CONAIE), "CONAIE: a Brief History", December 1992, <http://conaie.nativeweb.org/conaie1.html>.

[284] Dubly A et al, above n152 at 19-23 and 28-32 respectively.

[285] *Code of Conduct for a Discussion Process Between la Organizacion Indigena Secoya del Ecuador - OISE - and Occidental Exploration and Production Company - OEPC* (hereafter the OISE-OEPC Code of Conduct) of 29 October 1999, Quito (on file with the author). This Code is discussed further in Chapter 12.

CHAPTER 4: THE OGONI OF NIGERIA

TABLE OF CONTENTS

4.1 Introduction

Prior to its colonisation by Britain in the nineteenth century, the land that was to become Nigeria was made up of a number of independent kingdoms, peoples and city-states.[1] Nigeria was first formally constituted as a single country with its own Constitution on 1 January 1914 under British administration, eventually gaining its independence on 1 October 1960. The current Federal Republic of Nigeria is a federation comprised of thirty-six states.

The political history of Nigeria since independence has been one of military rule (1966-1979, 1983-August 1993, November 1993-1999) punctuated with brief periods of civilian rule (1960-1966, 1979-1983, August-November 1993, 1999-2000). From 1993 until the return to democracy on 29 May 1999, the Constitution of the Second Republic, the 1979 Constitution, operated in Nigeria, but the military government suspended the application of its human rights provisions.[2] Since the return to democratic rule a new Constitution (the 1999 Constitution) came into force, based on the 1979 Constitution, but with amendments.[3]

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1 Africa Policy Information Center, "Nigeria: Country Profile", 26 April 1997, Africa Policy Information Center <http://www.igc.apc.org/apic/index.shtml>.

2 The Constitution of the Second Republic, the 1979 Constitution, was suspended upon return to military rule in 1983. In 1993 the military government of General Sani Abacha restored the provisions of the 1979 Constitution but suspended the application of its human rights provisions through the Constitution (Suspension and Modification) Decree 1993.

3 In 1995 General Abacha announced a transition program for a return to civilian rule to terminate on 1 October 1998. Following a national conference in 1994, a draft Constitution was presented to General Abacha in 1995 (the 1995 Constitution) in preparation for the promised return to civilian rule. After the death of General Abacha in June 1998, the new Head of State, General Abdulsalam Abubakar, oversaw the return to civilian rule on 29 May 1999, with Olusegun Obasanjo as the new President. Before then, on 11 November 1998, General Abubakar inaugurated a 25-member Constitution Debate Co-ordinating Committee to collate comments on the draft 1995 Constitution in order to determine whether the 1979 or 1995 Constitution would be approved by the military government. Many Nigerians are unhappy with the 1999 Constitution which was ratified by the military government rather than adopted by a democratic vote of the people. The Constitution has also been criticised for its failure to address some of the fundamental problems facing the country, including revenue allocation and political power-sharing. In response to these concerns, President Obasanjo formed the Presidential Technical Committee to review the 1999 Constitution. "A New Constitution for Nigeria" (2000) 44(1) *J Afr L* 129; Akinola W and Bakere J, "FG's Committee Okays National Confab", *Sunday Vanguard*, 2 July 2000, Essential Action <http:lists.essential.org/mailman/listinfo/shell-nigeria-action>; "Comments and Viewpoints on the Nigerian Constitution", Submitted by the Association of Nigerian Scholars for Dialogue to the Constitution Debate Co-ordinating Committee (1998), Association of Nigerian Scholars for Dialogue <http://nigerianscholars.africanqueen.com/debates/constitution/cdd.htm>; "Constitutional Debate: Comments on Terms of Reference", Submitted by the Association of Nigerian Scholars for Dialogue to the Constitution Debate Co-ordinating Committee (1998), Association of Nigerian Scholars for Dialogue <http://nigerianscholars.africanqueen.com/debates/constitution/cdd.htm>.

4.2 The Ogoni of Nigeria

Nigeria is one of the largest and most ethnically diverse societies in the world, with 51 distinct nations comprised of 250 ethnic/linguistic groups making up a population in the order of 100 million people.[4] The three largest nations, the Hausa-Fulani, the Igbo and Yoruba make up around 50-65% of the total population.[5] There are another 7 nations with populations of at least 2 million: these are the Kanuri, Tiv, Efik/Ibibio/Anang, Ijaw, Edo, Urhobo and Nupe.[6] The nine largest ethnic groups account for 80% of the population.[7]

The Ogonis are one of the twenty or so minority peoples of the Niger delta. Ogoniland, an area of 404 square miles or 1000 square kilometres, is situated in the Niger Delta region in the Rivers State of Nigeria.[8] Archaeological and linguistic evidence suggests the Ogoni have inhabited this region of the Niger delta for up to 500 years.[9] Ogoniland is spread across three local government areas - Gokana, Khana and Tai-Eleme - with the town of Bori considered the capital of Ogoniland. The three localities roughly coincide with three sub-groups of the Ogoni which speak different dialects of the Ogoni language.[10] The 1963 census reported the number of Ogoni people to be 231,513, divided into the Khana (ca. 120,000), Gokana

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4 International Commission of Jurists, *Nigeria and the Rule of Law: A Study* (International Commission of Jurists, Geneva, 1996) at 29. Population statistics in Nigeria are contentious and unreliable, with wide discrepancies in estimates of the population over time and between different sources. A census held in November 1991 showed a total of 88.5 million people, a figure that has been described as "surprisingly long way below previous estimates": Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97* (Economist Intelligence Unit Limited, London, 1996) at 17. The government put the population at 94.1 million at the end of 1994. In contrast, the UN estimated the population to be 108.5 million in mid-1994. Earlier censuses, with the exception of 1964 which showed a total of 55.7 million, were largely discredited among allegations of massive overcounting: Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, id at 17. Overstatement of population figures has occurred because electoral competition and the allocation of federal revenue is based on population numbers: Ikporukpo C, "Federalism, Political Power, and the Economic Power Game: Conflict Over Access to Petroleum Resources in Nigeria" (1996) 4 *Env & Planning C: Govt & Pol'y* 159.

5 International Commission of Jurists, ibid at 30.

6 The International Commission of Jurists, ibid, estimates 50%; the US Central Intelligence Agency puts the proportion at 65%: Central Intelligence Agency (US), "Nigeria", World Factbook, July 1997, <http://www.odci.gov/cia/publication/nsolo/factbook/rs.htm#Government.

7 Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, above n4 at 17.

8 Robinson D, *Ogoni: The Struggle Continues* (World Council of Churches, Geneva, 2nd ed, 1996) at 23; Shell Petroleum Development Company, "The Ogoni Issue", 1995, Royal Dutch/Shell <http://www.shellnigeria/issues/ogoni.html>. Prior to the creation of the Rivers State in 1967, Ogoniland was part of the Eastern Region.

9 Saro-Wiwa K, *Genocide in Nigeria: The Ogoni Tragedy* (Saros International Publishers, Port Harcourt, Nigeria, 1992) at 11; Boele R, *Ogoni: Report of the UNPO Mission to Investigate the Situation of the Ogoni of Nigeria February 17-26, 1995* (Unrepresented Nations and Peoples Organization, Netherlands, 1995) at 7.

10 Osaghae E, "The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State" (1995) 94 *Afr Aff* 325 at 327.

(94,000) and the Eleme (29,000).[11] The population figure commonly cited today is approximately 500,000, representing about 0.05% of the total Nigerian population.[12]

There are six kingdoms in Ogoniland: Eleme, Tai, Nyo-Khana, Ken-Khana, Gokana and Babbe.[13] A leading traditional chief or king, the *Gbenemene*, heads each kingdom. All other chiefs owe allegiance to the Gbenemene in Council.[14] The Ogoni do not have a myth of common origin, but constitute an ethnic group on the basis of sharing "common language, custom, tradition, farming methods and similar attitudes".[15] The Ogoni have a distinct culture, language and history, and traditional religious and political systems that differ from their close neighbours, the Okrikas, Andonis, Opobos and Ndokis.[16] The Ogoni have preserved their traditional political structures despite the incursions of Western civilisation.[17]

The majority of the Ogoni are traditionally farmers, fishermen and hunters. To the Ogoni, the land on which they live and the rivers which surround them are a spiritual inheritance.

> The land is god and is worshipped as such. The fruit of the land, particularly yams, are honoured in festivals and, indeed, the Annual Festival of the Ogoni is held at the yam harvest. The planting season is not a mere period of agricultural activity: it is a spiritual, religious and social occasion. "Tradition" in Ogoni means ... the honouring of the land (earth, soil, water). This respect for the land means that forests are not merely a collection of trees and the abode of animals but also, and more intrinsically, a sacred possession ...
>
> To the Ogoni, rivers and steams do not only provide water for life - for bathing and drinking etc; they do not only provide fish for food, they are also sacred and are bound up intricately with the life of the community, of the entire Ogoni nation ... In some cases, they are deified, and erring human action can desecrate them and therefore bring disaster upon the people who are regarded as their custodians.
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> In modern times, this translates to a deep awareness of the importance of the environment and the necessity to protect and preserve it.[18]

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11 Welch C Jnr, "The Ogoni and Self-Determination: Increasing Violence in Nigeria" (1995) 33(4) *J Modern Afr Stud* 635 at 639.

12 Cayford S, "The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria" (1996) 34(2) *Africa Today* 183; Da Costa G, "Nigeria: Oil First, Ogonis Second", *New African*, September 1994, 19; Ezetah C, "International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma" (1997) 19 *Loyola Los Ang Int'l & Comp LJ* 811; Osaghae E, "The Ogoni Uprising", above n10; Robinson D, above n8; Rowell A, "Oil, Shell and Nigeria: Ken Saro-Wiwa Calls for a Boycott" (1995) 25(6) *The Ecologist* 210; Sachs A, "Dying for Oil" (1996) 9(3) *World-Watch* 10; SPDC, "The Ogoni Issue", above n8; Vidal J, "Black Gold Claims a High Price", *Guardian Weekly*, 15 January 1995, 7; Robinson D, above n8 at 23.

13 Robinson D, ibid; Ezetah C, "International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma" (1997) 19 *Loyola Los Ang Int'l & Comp LJ* 811 at 813.

14 Ezetah C, above n12 at 814.

15 Osaghae E, "The Ogoni Uprising", above n10 at 328.

16 Ezetah C, above n12 at 814.

17 Ibid.

18 Saro-Wiwa K, *Genocide in Nigeria*, above n9 at 12.

4.3 The Ogoni and Oil Exploitation

4.3.1 The Nigerian Oil Industry

The oil industry in Nigeria is dominated by six transnational companies who exploit the country's oil resources in cooperation with the government through the state-owned Nigerian National Petroleum Corporation (NNPC).[19] These companies are Shell Petroleum Development Company of Nigeria (SPDC), Mobil Producing Nigeria Unlimited, Chevron Nigeria Limited, Nigeria Agip Oil Company Limited, Elf Petroleum Nigeria Limited, and Texaco Overseas Petroleum Company Limited. The six majors account for approximately 97% of Nigeria's oil reserves and production (see Table 11).[20] There are several companies comprised only of Nigerian shareholding that operate in Nigeria, but these have made little impact on the industry to date.[21]

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[19] From 1907 until 1958, Shell-BP had a monopoly on oil exploration and production in Nigeria. Until the 1970s, government activity in the oil industry was limited to the collection of taxes, royalties and lease rentals. In 1969 ownership of oil was vested in the government. In 1971 the government established the state-owned Nigerian National Oil Corporation (NNOC) to acquire assets and liability in existing oil companies and participate in the oil industry on behalf of the Nigerian government. Nigeria joined OPEC in 1971. In 1977 the (NNPC) was formed to replace the NNOC. Akinjide & Co, "A Guide to the Nigerian Energy Sector - Oil", *Business Monitor*, January 30 1997 (Lexis/Nexis, WORLD library, ALLWORLD file); Itsueli U, "Nigeria: Privatisation Legislation and Contracts in the Petroleum Sector" (1993) 11(2) *J Energy & Nat Resources L* 90; Omorogbe Y, "The Legal Framework for the Production of Petroleum in Nigeria" (1987) 5(4) *J Energy & Nat Resources L* 273. See also United States Energy Information Administration, *Country Analysis Briefs: Nigeria*, August 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/nigeria.html>.

[20] Akinjide & Co, ibid.

[21] These companies include Dubril Oil Company; Consolidated Oil Limited; Yinka Folawiyo Petroleum; Cavendish Petroleum; Amni International Petroleum Development Company Limited; Alfred James Petroleum Limited; Peak Petroleum Limited; Amalgamated Oil Limited; Atlas Petroleum International Limited; Express Petroleum and Gas and Summit Oil Limited. The companies have difficulty attracting the necessary foreign funding and technical capability because of restrictions on foreign participation.

Table 11

NIGERIA'S OIL PRODUCING VENTURES APRIL 1997		
Operator	**Joint Venture Partners**	**Production (000 b/d)**
Shell (30%)	NNPC (55%), Elf (10%), Agip (5%)	965
Mobil (40%)	NNPC (60%)	477
Chevron (40%)	NNPC (60%)	414
Agip (20%)	NNPC (60%), Phillips (20%)	140
Elf (40%)	NNPC (60%)	135
Texaco (20%)	NNPC (60%), Chevron (20%)	82
Ashland*	NNPC (100%)	25
Agip †	NNPC (100%)	10
NPDC-NNPC (80%)	British Gas (15%), Sun (5%)	7
Pan Ocean (40%)	NNPC (60%)	4
Others		31
Total		**2290**

* Production-sharing contract † Risk service contract
Source: Frynas J, "Political Instability and Business: Focus on Shell in Nigeria" (1998) 19(3) *Third World Quarterly* 457 at 463, Table 2.

The Petroleum Act 1969 provides for the grant of exploration, prospecting and production rights by the Minister of Petroleum Resources. An oil exploration licence (OEL) is necessary to conduct preliminary exploration surveys. An oil prospecting licence (OPL), which allows for more extensive exploration surveys, is issued to an international oil company with a covenant that the OPL will be assigned to the NNPC upon the discovery of commercial quantities of oil. The foreign company then enters into an operating contract with the NNPC. An oil mining lease (OML) allows the full-scale commercial production of oil.[22]

The operating contracts that exist between the six major oil companies and the NNPC are participatory joint ventures (PJV).[23] The Nigerian PJV is an unincorporated vehicle with the

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[22] Akinjide & Co, above n19.

[23] In addition to the converted concessions of the majors (PJVs), two other contractual forms exist within the industry. These are production service contracts (PSCs) and service contracts. Ashland Oil operates under a PSC and Agip Energy and Natural Resources operates a risk service contract with the NNPC. PSCs have become more favoured since Nigeria's economic problems have led to an inability to meet its cash call obligations to fund joint venture obligations. Recent offshore acreages are PSCs. Companies that have entered into PSCs with NNPC over offshore areas include Agip, Esso, Mobil, SNEPCO (Shell Nigeria Exploration and Production Company) and Statoil/BP Alliance. In the 1996 Budget, the government announced it will in future embark on PSCs with oil corporations. In addition to the PJV, PSC and service contracts, a few indigenous oil producing companies operate sole risk concessions without any form of government participation. The indigenous companies conduct operations as independent operators. They hold title to the oil prospecting licence and oil mining lease, the terms and conditions of which determine

NNPC as a majority partner and the international oil company as the operator of the joint venture. A Participation Agreement sets out the respective interests of the oil companies and Nigeria in the concessions. Joint operating agreements, signed with the major oil producers in 1991, govern the parties' administrative and financial relations. Commercial terms are governed by the Memorandum of Understanding (MOU).[24]

The joint venture between SPDC and NNPC is that in which has been of particular concern to the Ogoni people. Commercially-viable oil was first discovered in Ogoniland by SPDC in 1956, and production began in 1958.[25] The first oil refinery was established at Alesa Eleme in Ogoniland in 1965.[26] SPDC and its joint venture partners have 5 oilfields yielding 96 wells hooked up to five flowstations in Bomu, Korokoro, Yorla, Bodo West and Ebubu.[27] The total oil amount of oil extracted from Ogoniland from 1958 to 1994 has been estimated at 634 million barrels.[28] Ogoni grievances arising from oil exploitation on their lands by SPDC include: the expropriation of land; environmental degradation; underdevelopment in Ogoniland; and the allocation of oil revenues within the Federation.

4.3.2 Ogoni Grievances

4.3.2.1 Expropriation of land

The question of land use and ownership is central to the Ogoni issue. The Ogoni complain that they have lost large tracts of land to oil exploration, and have been forced into smaller areas. The Ogoni have a limited land area of 1000 square kilometres and a typical subsistence economy that depends heavily on the traditional farming methods of bush burning and shifting cultivation. The expropriation of land, by forcing more people onto smaller areas and increasing population density, places pressure on otherwise fallow land to

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their relationship with the government. Akinjide & Co, above n19; Atsegbua L, "Acquisition of Oil Rights Under Contractual Joint Ventures in Nigeria" (1993) 37(1) *J Afr L* 10; Emole C, "The Interrelationship of Law and Policy in the Petroleum Industry in Nigeria" (1997) 3 *Oil & Gas L & Tax Rev* 88; Itsueli U, above n19.

24 Akinjide & Co, ibid.

25 Ezetah C, above n12 at 814; Kretzmann S, "Nigeria's 'Drilling Fields': Shell Oil's Role in Repression", *Multinational Monitor*, January/February 1995, 8 at 9.

26 Osaghae E, "The Ogoni Uprising", above n10 at 329.

27 SPDC, "The Ogoni Issue", above n8.

28 Ibid.

be pulled into production and leads to overfarming.[29] The lands of the Ogoni and other groups of the Niger delta regions have been taken away by force for oil activities, without consultation with the peoples concerned, and without adequate compensation.[30]

> Exploration and exploitation have permanently alienated large tracts of land and accentuated land scarcity. Virtually the entire land and off-shore areas of the Delta area are covered by oil mining leases or exploration licences, entitling the oil companies to encroach on inhabitants' land and fishing grounds. These licences are granted directly by the federal government without consultation with the local communities. Application for right-of-way for pipelines is also made directly to and granted by the federal government, with little effective right of challenge by the local communities. [31]

The community lands were either seized outright or acquired through the Land Use Act of 1978, which appropriated all lands in the State and converted owners into occupiers and holders of occupancy.[32] Under the Land Use Act "it is possible for the government to acquire a vast area of land for petroleum purposes [and] grant an operator a lease over a large area, yet the villagers will know nothing about the acquisition."[33] Members of the community or village who regard the land as their property may unknowingly be farming and trespassing on areas on which a right of occupancy has been lawfully acquired by the oil operator.

Where compensation has been paid, there have been frequent complaints regarding the inadequacy of compensation paid for the lands and crops of landowners acquired by the oil companies, and the delays in payment.[34] Compensation for land acquired in the Delta for oil exploitation purposes is payable only for improvements on land and loss of the use of land, and not for the loss of land itself.[35] The landlords have no voice of representation in the matter of fixation of rates for compensation.[36] There are no alternative income generating

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29 Ezetah C, above n12 at 815.

30 *Ogoni: Trials and Travails* (Civil Liberties Organisation, Lagos, 1996) at 6-8.

31 Okonmah P, "Right to a Clean Environment: the Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 *J Afr L* 43 at 57-58.

32 Ibid.

33 Adewale O, "Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria" (1989) 33(1) *J Afr L* 91 at 95.

34 United Nations Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Situation of Human Rights in Nigeria*, Report Submitted by the Special Rapporteur of the Commission on Human Rights, Mr. Soli Jehangir Sorabjee, UN Doc E/CN.4/1999/36, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>, (hereafter *CHR Report on the Situation of Human Rights in Nigeria 1999*), para 68.

35 Rowell A, "Oil, Shell and Nigeria", above n12 at 210; Rowell A, *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria* (Greenpeace International, Netherlands, 1994), <http://www.greenpeace.org>; Robinson D, above n8 at 39; Oguine I, "Nigeria's Oil Revenues and the Oil Producing Areas" (1999) 17(2) *J Energy & Nat Resources L* 111 at 113.

36 *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, para 68. The rates of compensation are specified by the Department of Petroleum Resources (DPR). DPR instituted a major

measures put in place to cushion the loss of farmlands and crops.[37] Many Ogoni claim that if compensation was offered by the SPDC, it was either inadequate, accepted under duress or simply not paid.[38] "The refusal to pay adequate compensation for farmlands and crops destroyed for pipelines has continued to be a source of distress, frustration and anger, causing unmitigated hardship to the Ogoni people."[39]

4.3.2.2 Environmental degradation

There are many reports that describe the widespread environmental damage caused by the activities of SPDC and other oil companies in Ogoniland.[40] Environmental degradation has occurred from a number of sources. First, gas flaring has caused enormous environmental damage in Ogoniland. Nigeria is the largest gas-flaring country in the world, with over 16.8

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review of the rates involving valuers, community leaders, local government chairmen and others. These rates are yet to be released.

37 *Ogoni: Trials and Travails*, above n30 at 6; Ikein A, *The Impact of Oil on a Developing Country* (Praeger Publishers, New York, 1990) at 38.

38 Boele R, above n9 at 8.

39 *Ogoni: Trials and Travails*, above n30 at 8.

40 In 1998 the UN Commission on Human Rights reported that "the Nigerian Government is indifferent towards the right to development and to a satisfactory environment" and that "issues relating to environmental degradation in the River Delta region alleged to be caused by the operations of the Shell Petroleum Development Company have received insufficient attention." United Nations Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Situation of Human Rights in Nigeria* , Report Submitted by the Special Rapporteur of the Commission on Human Rights, Mr. Soli Jehangir Sorabjee, UN Doc. E/CN.4/1998/62, United Nations High Commissioner for Human Rights <http://www.unhchr.ch>, (hereafter *CHR Report on the Situation of Human Rights in Nigeria 1998*), para 102. In 1999 the UN Commission on Human Rights reported that "deep concerns about widespread and severe environmental damage in the River Delta region on account of oil exploration and other operations of the Shell Petroleum Development Company of Nigeria (SPDC) continue." *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, para 65. See also United States Energy Information Administration, *Nigeria: Environmental Issues*, April 2000, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/nigenv.html>; *Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta*, Report of a U.S. Non-Governmental Delegation Trip Report, September 6-20, 1999 (Global Exchange/Essential Action, Washington DC, 1999), Essential Action <http://www.essentialaction.org/shell/report>; Human Rights Watch/Africa, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch, New York, 1999), <http://www.hrw.org/hrw/reports/1999/nigeria/index.htm>; Dutch Youth Coalition, *Major Cleanup in Nigeria: to a Green Delta Model* (Dutch National Youth Council for Environment and Development, Utrecht, 1998); Eaton J, "The Nigerian Tragedy: Environmental Regulation and Transnational Corporations, and the Human Right to a Healthy Environment" (1997) 15 *Bost U Int LJ* 262; Ezetah C, above n12; Okonmah P, above n31; *Ogoni: Trials and Travails*, ibid; Robinson D, above n8; Cayford S, above n12; Hammer J, "Nigeria Crude: a Hanged Man and an Oil-Fouled Landscape", *Harper's Magazine*, June 1996, 58; "A Call to End the Shelling of Nigeria: an Interview with Dr. Owens Wiwa", *Multinational Monitor*, July/August 1996, 27; Saro-Wiwa K, *A Month and a Day: A Detention Diary* (Penguin Books, London, 1995); Osaghae E, "The Ogoni Uprising", above n10; Rowell A, "Oil, Shell and Nigeria", above n12; Vidal J, above n12; Rowell A, *Shell-Shocked*, above n35; Da Costa G, above n12; Ene E, "Oil and the Environment in Nigeria", *OPEC Bulletin*, November/December 1994, 20.

billion cubic metres of gas flared annually.[41] Flared gas contains a wide range of dangerous chemicals that have devastating effects on the environment, including the reduction of soil fertility and arable land, and the pollution of agricultural land and water used for drinking and fishing.[42] Gas flares also emit bright light, noise and heat.[43] Emissions lead to respiratory diseases, asthma, tuberculosis, bronchitis and lung cancer.[44] Gas flares have burned close to human habitations, sometimes no more than 100 feet from Ogoni houses.[45]

Second, oil spills are a major cause of environmental destruction in Ogoniland.[46] There were 111 oil spills in Ogoniland between 1985 and 1994.[47] In the Funiwa-5 oil blow-out of 1980

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41 Da Costa G, ibid at 19. In Nigeria, 76% of natural gas is flared, compared with 20% in Libya, Saudi Arabia or Iran; 4.3% in the UK; and 0.6% in the US: Hammer J, ibid at 62. Until Shell pulled out of Ogoniland, seven gas flares burned 24 hours a day for 35 years: Vidal J, above n12.

42 *Ogoni: Trials and Travails*, above n30, at xv; Ezetah C, above n12 at 815. Dangerous chemicals emitted by gas flaring include hydrocarbons, sulphur oxides, nitrogen oxides, carbon oxides, ozone, ash and hydrogen sulphicide. Each year, gas flares in Nigeria emit 34 million tons of carbon dioxide and 12 million tones of methane: Cayford S, above n12; Hammer J, ibid. An estimated 0.2% of global carbon dioxide emissions comes from Nigeria's gas flaring alone: Da Costa G, above n12 at 19.

43 Ezetah C, above n12 at 815.

44 "A Call to End the Shelling of Nigeria", above n40 at 29.

45 Da Costa G, above n12 at 19; Rowell A, "Oil, Shell and Nigeria", above n12 at 210. SPDC, responding to criticism over gas flaring at close range, has stated that: flares are usually located far from human habitation and protected by earth bunds; the close proximity of gas flares to human habitation is a result of communities expanding into the vicinity of oil operations, and that when this happens, the gas flares are located away from populous areas; and that all gas flaring in Ogoniland has ceased. However, the Ogoni maintain that SPDC has never relocated a gas flare: Rowell A, *Shell-Shocked*, above n35. After visiting Ogoniland in 1996, the World Council of Churches reported that there is still a gas flare at the Eleme flowstation: Robinson D, above n8 at 29.

46 Between 1976 and 1980, Nigeria recorded a total of 784 spills involving 1,336,875 barrels of crude oil, with most of these spills occurring in the Rivers State: Robinson D, ibid at 28. From 1982 to 1992, Shell spilled 1.6 million gallons of oil from its Nigerian operations in 27 separate incidents. Of the total number of spills recorded from Shell worldwide, 40% occurred in Nigeria: Rowell A, *Shell-Shocked*, above n35. The main causes of pollution in Nigeria are flow line leaks, over-pressure failures; hose failures on loading systems; failures along pump discharge manifolds; and sabotage to well-heads and flowlines: Ikein A, above n37 at 133. There are regular reports of oil spills in the Niger delta: for example, see "Shell's Well in Ogoni Area Goes Aflame", *The Guardian* (Nigeria), 27 July 1999 (reporting a fire from a dormant Shell well at Yorla flow station in Khana area); "Shell Spillages in Ogoni Continue", Press Release, Movement for the Survival of the Ogoni People, 30 September 1999 (reporting 3 spills in Ogoniland, on 13 September 1999, 17 September 1999 and 26 September 1999); "Further Oil Spill in Niger Delta", *The Vanguard* (Nigeria), 7 October 1999 (reporting a major oil spill in Delta state); "Oil Spill Sacks 10,000", *PMNews/Africa New Online*, 21 October 1999 (reporting a major spill affecting communities in Edo and Delta states); Environmental Rights Action (Nigeria), "Six Years After Abandonment, Shell Facilities Spew Oil", ERA Field Report No. 50, December 1999 (reporting a spill from a flow line in Ogoniland in December 1999); Environmental Rights Action (Nigeria), "Shell Spill in Eresegbene", ERA Brief, 27 January 2000 (reporting a spill in the Warri are of Delta state on 27 January 2000); "Cheerless 'Oily' Return to Ogoniland", *Guardian* (Nigeria), 4 April 2000 (reporting a blowout, spill age and fire in late January in B-Dere, Ogoniland); Environmental Rights Action (Nigeria), "Disaster at Amukpe", ERA Brief, 12 February 2000 (reporting a leak from an NNPC pipeline in Delta State in February 2000); Environmental Rights Action (Nigeria), "Another Petrol Pipeline Explosion", ERA Field Report No. 55, 10 February 2000 (reporting a fire caused by a leak from an NNPC pipeline in Abia State on 4 February 2000). Copies of these articles are available from Essential Action <http:lists.essential.org/mailman/listinfo/shell-nigeria-action>.

47 Hammer J, above n40 at 61.

over 146,000 barrels of oil were spilled, causing extensive damage to the ecology, and rendering 321 villages uninhabitable and 230,000 people homeless.[48] A team of scientists that visited Ogoni communities at Botem, Tai, Bori, Kpite, Gokana, Kanns, and Ighogho in July 1994 and January 1996 saw "multiple ecological problems arising from land degradation and oil spillage", reporting that "in some of the communities and villages visited, thick carpets of crude oil spillage which has polluted both land and waterways were clearly visible and uncleared, posing a serious threat to the environment and constituting health hazards which threaten the existence of the Ogoni people".[49] High pressure pipelines, which have a "significant presence throughout Ogoniland" are old, corroded and badly maintained, and "frequently give way, causing environmental degradation and pollution".[50] The poorly placed pipelines "haphazardly criss-cross through villages", in some cases running through people's homes and inside or along farmlands.[51]

Environmental degradation has arisen from the use of open and unlined pits to store toxic drilling wastes, such as drilling mud and cuttings, which contain a mixture of complex organic and inorganic chemicals.[52] Finally, oil exploration and drilling on wetlands have had a number of negative environmental effects including: the interruption and obstruction of irrigation routes; the removal of vegetation which invariably causes habitat degradation; and the destruction of animal populations and support for migratory species.[53]

Environmental degradation has disrupted the economic and cultural life of the Ogoni people. Oil spills, disposal of industry by-products, and gas flares have reduced the availability and productivity of farming land, disrupting traditional modes of production.[54] Cultural sites have been destroyed by seismic surveys and pollution.[55] Cultural activities that occurred at night, without light, have been stopped because gas flares eliminated the distinction between night and day.[56] Carvers and craftsmen are no longer passing on skills to children or

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48 In addition, many people contracted diseases from drinking and bathing in polluted waters, and 180 people were reported to have died. Okonmah P, above n31 at 54.

49 *Ogoni: Trials and Travails*, above n30 at xiv. Similar reports have been released in 1999 from delegations to Ogoniland: see *Oil for Nothing*, above n40.

50 *Ogoni: Trials and Travails*, ibid at 7.

51 Ibid; Kretzmann S, above n25 at 10; Rowell A, *Shell-Shocked*, above n35; Shehu Othmen, oil analyst, Oxford University, quoted in Kretzmann S, above n25 at 10; Robinson D, above n8 at 24 (includes photographs); *Oil for Nothing*, above n40 (includes photographs).

52 Rowell A, *Shell-Shocked*, above n35; *Ogoni: Trials and Travails*, ibid at 6; Okonmah P, above n31 at 54.

53 Ene E, above n40 at 20-21.

54 Robinson D, above n8 at 28.

55 "A Call to End the Shelling of Nigeria", above n40 at 29.

56 Ibid.

apprentices. Because the trees are gone, carvers and craftsmen cannot make masks for traditional dances, drums or xylophones.[57]

> Apart from the diminution of economic well-being, oil pollution also disrupts the social and cultural life of the people. Like their counterparts in other parts of Nigeria, the people of the oil-producing communities judicially managed their natural resources for food, shelter, medicine, tools and cultural enrichment. They lived in productive harmony with the land, but pollution from the oil industry activities has desecrated their shrines and other venerated objects, putting their cultural heritage and even their very survival in jeopardy. [58]

4.3.2.3 Underdevelopment

Statistics on the socio-economic development of Ogoniland reveal that there is one doctor per 70,000 of the population;[59] there is one hospital for 500,000 people;[60] the unemployment rate is 85%;[61] literacy rates are estimated at 10%[62] to 20%;[63] and the average monthly net income in Ogoniland is between N 250-1,000.[64] The villages lack basic social amenities such as piped water, electricity and good roads. Most people live in cement brick houses, but many live in mud and thatch huts.[65]

The UN Commission on Human Rights has reported that the Nigerian government has failed to address the plight of the Ogoni and protect their economic and social rights.[66] The

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57 Ibid.
58 Okonmah P, above n31.
59 Da Costa G, above n12; Vidal J, above n12.
60 Vidal J, ibid.
61 Da Costa G, above n12; Vidal J, ibid.
62 Da Costa G, ibid.
63 Hammer J, above n40 at 61; Vidal J, above n12.
64 Robinson D, above n8 at 24.
65 Ibid.
66 The Report of the Fact-Finding Mission of the Secretary-General to Nigeria recommended the establishment of a committee comprised of representatives of the Ogoni community and other minority groups in the region, to be chaired by a retired judge of the High Court, for the purpose of introducing improvement in the socio-economic conditions of these communities, enhancing employment opportunities, health, education and welfare services, to act as ombudsman in any complaint/allegations of harassment at the hands of the authorities, and make recommendations for the government to take into account: *Report of the Fact-Finding Mission of the Secretary-General to Nigeria*, UN Doc A/50/960, 28 May 1996, Annex 1, para 77. Despite the recommendations, the UN found that in 1998 "the Nigerian Government had failed to address the plight of the Ogoni peoples and to protect their human rights" and that "the recommendation of the Secretary-General's fact-finding mission concerning the appointment of a committee for introducing improvement in the socio-economic conditions of minority communities has been ignored": *CHR Report on the Situation of Human Rights in Nigeria 1998*, above n40, para 101. In 1998 and again in 1999 the Special Rapporteur recommended that measures should promptly be initiated to alleviate the plight of the Ogoni people, including the implementation of the recommendation of the Secretary-General's fact-finding mission that a committee be appointed for the purpose of introducing improvement in the socio-economic conditions of these communities: *CHR Report on the Situation of*

situation in Ogoniland reflects the socio-economic development of oil-producing villages in Nigeria generally.

> Despite the huge revenues derived by Nigeria from oil resources, there has been no effective plan to develop these areas. ... [T]he mining of oil in Nigeria strips the inhabitants of their natural wealth and uses it to better the socioeconomic conditions of distant lands, while the mostly rural inhabitants of the oil areas remain, despite their endowment with such a precious resource, in a state of abject poverty, neglect and degradation. [67]

4.3.2.4 Control of resources and revenue allocation

Of the thirty-six States in Nigeria, only six produce oil. Four of these - Rivers, Delta, Edo and Akwa-Ibom - account for virtually all of the production. In a country where four states produce the commodity that earns revenue on which the entire nation depends, the question of access to petroleum resources and revenue allocation has become extremely contentious and is one of the major issues facing the nation today.[68]

Pursuant to s1 of the Petroleum Act 1969, the entire ownership and control of all petroleum in or upon any lands, territorial waters or the continental shelf of Nigeria is vested in the state of Nigeria.[69] Section 44(3) of the 1999 Constitution (identical to s40(3) of the 1979 Constitution) also vests mineral ownership in the government, providing as follows:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Currently, the Nigerian federal government collects all the revenue from oil production and places it with other federal government revenue in the Federation Account.[70] The federal government distributes 24.0% of revenue in the Federation Account (of which oil accounts

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Human Rights in Nigeria 1998, id, recommendation (r); *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, para 115.

67 Ikein A, above n37 at 39 and 44.

68 Oguine I, above n35.

69 The Petroleum Act 1969 and the Petroleum (Drilling and Production) Regulations of 1969 establish the regulatory and administrative framework for the petroleum industry. Section 14(1) of the Petroleum Act 1969 defines petroleum to mean "mineral oil (or any related hydro-carbon) or natural gas as it exists in its natural state in strata, and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation".

70 Robinson D, above n8; Ikporukpo C, above n4.

for over 80%) to the State governments and 20% to local governments.[71] The oil-producing communities have received only 3% of revenue directly from the federal government via the Oil Mineral Producing Areas Development Commission (OMPADEC).[72] In March 1995 the federal government established the Petroleum Special Trust Fund to identify key projects in such areas as education, health and water supply, in all parts of the federation to bring about equitable development of all communities.[73]

Since 1990, revenue has been allocated among the states according to the following criteria and weightings: population 30%: land area 10%; social development (education, health and water requirements) 10%; internal revenue generation efforts of States 10%; and "balanced development/equality" 40%.[74] Given the fact that the main oil-producing states of Akwa-Ibom, Delta, Edo and Rivers are some of the smallest and least populous states, their allocations are relatively small.[75] The Ogoni, who are not only a national minority but a minority within the Rivers State, have seen little of this state funding. The factors of population, equality of States, internal revenue generation, land mass, terrain and population density are now enshrined in Article 162(1) of the 1999 Constitution as principles to be taken into account in the allocation of revenue. However, the "principle of derivation" is also enshrined in the 1999 Constitution, with Article 162(2) now guaranteeing that not less than 13% of the revenue accruing to the Federation Account "directly from any natural resources" will be allocated to the States in which the revenue was earned.

The Ogoni demand control over their own land and oil resources. They argue that the oil producing areas/communities should be the rightful recipients of revenue, not the states or local governments.[76] These demands pose a major challenge to the structure and operation of the Nigerian state, as the control of oil revenue is the basis of political power in Nigeria. By

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[71] Pursuant to the Allocation of Revenue Act No. 1 of 1982, as amended. Suberu R, "The Travails of Federalism in Nigeria" in Diamond L and Plattner M (eds), *Nationalism, Ethnic Conflict and Democracy* (The John Hopkins University Press, Baltimore, 1994) at 62.

[72] Established by the Oil Mineral Producing Areas Development Commission Decree, No. 23 of 1992. The objectives of the Commission, set out in s2, include: receiving and administering the sums from the allocation of the Federation Account for the rehabilitation and development of oil mineral producing areas; tackling ecological problems that have arisen from the exploration of oil minerals; and embarking on development projects properly agreed upon with the local communities of the oil mineral producing areas.

[73] It is funded from increases in federal government revenue from fuel prices. Petroleum (Special) Trust Fund, Decree No. 25 of 1994. The PSTF became operational in 1997.

[74] Ikporukpo C, above n4 at 167.

[75] Ibid at 168.

[76] Osaghae E, "The Ogoni Uprising", above n10 at 340.

claiming the right to control the oil resources situated within their traditional lands, the local community leaders challenge the fundamental principles of centralised government.[77]

4.4 The Role of the Law

4.4.1 Land Law

Prior to British colonisation, land law applying in Nigeria was either Islamic land law in the Muslim societies of what came to be Northern Nigeria, or non-Islamic indigenous customary law, which applied in Southern Nigeria and the non-Moslem areas of Northern Nigeria. The British adopted a different approach to land law in the Northern Protectorate and the Southern Protectorate.[78] In the South, the lands of the indigenous peoples were not expropriated by the British, and the law governing land tenure remained essentially the customary law of each particular community.[79]

Tenure in Southern Nigeria as regulated by customary law had its roots in the traditional conception of land as a sacred institution given by God for the sustenance of all members of the community, to be held by the living in a "trust" for themselves and generations yet unborn.[80] Title to communal land under customary law is vested in the community, tribe,

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[77] Welch C Jnr, above n11 at 637.

[78] Yakubu M, *Land Law in Nigeria* (Macmillan Education Ltd, London, 1985) at 13-20. In the North, the Land and Native Rights Proclamation of 1910 and the Land Tenure Law of 1962 abolished individual ownership of land under customary law, introducing in its place an indefinite or perpetual right of occupancy. This position continued until 1978, when the military government promulgated the Land Use Decree of 1978 (now the Land Use Act 1978). The Land Use Act reproduced in large part the provisions of the Land Tenure Law 1962.

[79] With the reception and application of English land law in Nigeria, interests unknown to customary law were introduced into Nigerian law. Prior to the Land Use Act 1978, the fee simple and a registered system of land titles ran as a dual system of landholding with customary law. Other forms of interests in land such as mortgages and leases also came to be known. The complications caused by the duality of the received English law and customary law operating in Nigeria are beyond the scope of this thesis, but are examined in books and articles on the subject of land law in Nigeria. See for example Elias T, *Nigerian Land Law* (Sweet & Maxwell, London, 4th ed, 1971); Nwabueze B, *Nigerian Land Law* (Nwamife Publishers Limited/Enugu and Oceana Publications Inc, Dobbs Ferry, New York, 1972); Yakubu M, above n78; Oshio P, "The Indigenous Land Tenure and Nationalization of Land in Nigeria" (1990) 10 *Bost C Third World LJ* 43; Agbosu L, "The Land Use Act and the State of Nigerian Land Law" (1988) 32(1) *J Afr L* 1.

[80] Nwabueze B, *Nigerian Land Law* (Nwamife Publishers Limited/Enugu and Oceana Publications Inc, Dobbs Ferry, New York, 1972) at 53.

town, village or extended family.[81] Under the traditional concept of land, it is inconceivable for an individual to own land in the accepted English sense.[82]

A unique aspect of customary land tenure is the role of the traditional leader or ruler: the "chiefs", village head, or, in the case of family land, the family head.[83] The traditional ruler, with his or her councillors, manages and controls communal land for the benefit of the people.[84] The head of the community embodies the spirits of the ancestors, and is a physical embodiment of the corporate life of the community and a physical symbol of the unity of the community.[85] The position of traditional ruler carries with it certain rights and powers. The traditional ruler is the proper person to: exercise the ownership rights of the community or village; allocate land to members and strangers; ensure no person tries to encroach on community land without the community's consent; and take action for the protection of communal land.[86] The traditional ruler represents the community in all land disputes, and can sue and be sued for any matter connected with the communal land.[87] The traditional ruler receives income from communal lands, including tributes, rent, and today, proceeds of sale and compensation for compulsory acquisition.[88]

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81 Yakubu M, above n78 at 59.

82 Oshio P, above n79 at 46. Individual ownership of land in the English sense was unknown to customary law. However, individual ownership in land has gained in prevalence as a result of the introduction of the cash economy; the increased activities of modern government leading to the emergence and growth of urban centres, which attracted large populations in search of employment, and a demand for more permanent individual interests in land for use in industry and in housing; and the introduction of English ideas about individual ownership of land, which received a ready acceptance mong the population of the urban centres, was extended through decisions of English-trained judges who administered customary law courts, and became a "pervasive influence upon the educated classes generally". Nwabueze B, above n80 at 36-37.

83 The principles of family land ownership are very similar to community land ownership. Elias T, above n79 at 112. While the term "traditional leader" covers all categories of traditional authority, it is not generally used in Nigeria, with "traditional ruler" the more common term. While some traditional leaders use the title "Chief", others view the term "chieftancy" as a "levelling and diminutive concept introduced by colonial authorities to underline the lowering of the status of monarchies", and prefer the term "traditional ruler": Osaghae E, "The Role and Functions of Traditional Leaders and Indigenous Groups" in De Villiers B (ed), *The Right of Indigenous Peoples: A Quest for Coexistence*" (HSRC Publishers, Pretoria, 1997) at 106.

84 The chief is to some extent in the position of a trustee. However, unlike a trustee under English law, legal title to community land is not vested in the chief. Nwabueze B, above n80 at 149.

85 Ibid at 54.

86 Ibid at 151-153; Yakubu M, above n78 at 13.

87 Yakubu M, ibid.

88 Nwabueze B, above n80 at 153.

Individual members of the community have rights over the land.[89] Each member has the right to an allotment, that is, a right to share in the use of community land. The right is a right of user during the individual's lifetime, and cannot be disposed of by sale or gift.[90] It is inherent by virtue of membership of the community, and is not dependent on the pleasure of the chief.[91] The chief and the community cannot alienate a member's land and thereby extinguish the member's right of occupancy. Forfeiture is very seldom invoked against a family or community member. Dispossession was unknown except for very rare cases of overriding public interest.[92] In the communities of Eastern Nigeria and the non-Muslim north, where there is little political centralisation of land, the community has no power to acquire land compulsorily. If land is required for a public purpose, the community must approach the family for a voluntary grant of the land.[93]

In the Southern Region, where the lands of the indigenous peoples were not expropriated by the British, the individual had complete security of land tenure under customary law, provided the individual uses the land in a beneficial way. The issue of concern to the Ogoni and other indigenous minorities today is not the recognition of land rights previously suppressed by the colonial authority, but the security of land tenure under the Land Use Act 1978, which nationalised land and introduced a system of occupancy rights administered by the government.

The Land Use Act was first promulgated as the Land Use Decree on 29 March 1978 by the Head of the Federal Military Government, Lieutenant-General Olusegun Obasanjo, in response to the need for land reform.[94] In 1960s, as people became aware of the commercial

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89 Other rights of community members include: the right to share in surplus income; the right to participate in management of community land; and the right to act in certain circumstances where the chief or village head refuses or neglects to exercise his or her powers of management.

90 Nwabueze B, above n80 at 161. In modern times, customary law allows the alienation or sale of family land with the consent of a substantial majority of the family, including the consent of the family head or chief, and the principle elders.

91 Ibid at 156. Strangers may acquire "possessory rights" to communal land through customary tenancies, pledge, and loan or borrowing of land. Under these arrangements, ownership of land remains with the family or community. Yakubu M, above n78 at 30-32 and 36-37.

92 Members could be dispossessed of farm land if it was necessary for a house. The conditions under which an individual may lose their rights to land under customary law include; express surrender or release; abandonment; failure of effectual occupation or user; alienation or attempted alienation; denial of title of the land-owning family; refusal to pay the customary dues; and "bad behaviour" to the chief or family head. In all these cases, the courts have wide equitable jurisdiction to grant relief against forfeiture, and to "purge" the offence by imposing a punishment other than forfeiture, such as a fine. Elias T, above n79 at 87-96 and 139-146.

93 Nwabueze B, above n80 at 31-32.

94 The military government ended on 30 September 1979, and the new Constitution of the Federal Republic of Nigeria took effect on 1 October 1979. The Land Use Decree was retitled the Land Use Act by the

potential of land, speculators purchased land from rural communities cheaply, and sold it to others at exorbitant prices. Governments had to pay heavy compensation costs for acquired land. Some government officials connived with land speculators to make a profit.[95] Chiefs and other individuals saw the opportunity to enrich themselves by selling the same piece of land to different persons at different times, resulting in increased litigation spanning many years. In Northern Nigeria, the wealthy used their influence to obtain land under the Land Tenure Law 1962, while poorer people were landless.[96] The system of customary tenancies in the South, under which entitlement to land depended on kinship ties and community consent was required for alienation, not only made land acquisition difficult, but discriminated against groups of peoples such as former slaves.[97]

The purposes of the Act were to: increase the availability of land for federal and state governments for public sector housing, infrastructure developments and the implementation of conservation and planning schemes; avoid land speculation; secure for every Nigerian a portion of land for use, within their financial means; and achieve a substantial reduction in the "transactional costs" of securing land to those in need.[98] These objectives were intended to be achieved by the implementation of a number of principles, one of which is the nationalisation of land. This principle is contained in s1 of the Act as follows:

> Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

Title to land is vested in the State governments.[99] Land is comprised of "urban" land and "other" land. All land in urban areas is under the control and management of the Governor of each State.[100] All other land is under the control and management of the Local

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Adaptation of Laws (Re-Designation of Decrees etc.) Order of 1980. Its continued existence was entrenched in the Constitution, which required that it should continue to have effect as a federal enactment "as if it related to matters included in the exclusive legislative list". Constitution of the Federal Republic of Nigeria s274.

95 Kassim-Momudu M, "Impact of the Land Use Act on Petroleum Operations in Nigeria" (1990) 8(4) *J Energy & Nat Resources L* 291 at 293-294.

96 Oshio P, above n79 at 49-51.

97 Agbosu L, above n79 at 17.

98 James R, *Nigerian Land Use Act: Policy and Principles* (University of Ife Press Ltd, Ile-Ife, 1987) at 28.

99 The Lands (Title Vesting) Decree No. 52 of 1992 reaffirmed government ownership of all land in Nigeria, including land within 100 metres of the shoreline and other land reclaimed from any lagoon, sea, or ocean on or bordering Nigeria. Ezetah C, above n12 at 820.

100 Land Use Act 1978 s2(1)(a).

Government within the area of jurisdiction in which the land is situated.[101] "Urban" land is not defined in the Act, but is designated by the State Governors by order published in the Gazette.[102] For convenience, I shall refer to "other" land as "rural" land.

The greatest interest in land recognised by the Act is a right of occupancy. This is not defined in the Act. There are two types of rights of occupancy: a statutory right of occupancy and a customary right of occupancy. A statutory right of occupancy is a right of occupancy granted by the Governor, and may be over urban or non-urban land, and for any purpose.[103] A customary right of occupancy is "the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local Government under this Act".[104] The Local Government may grant a customary right of occupancy for the use of land in the local Government Area for agricultural, residential and other purposes, and for such purposes ancillary to agricultural purposes as may be customary in the Area.[105]

The Act contains transitional provisions regarding rural land held or occupied by any person immediately before the commencement of the Act. Section 36(2) provides that:

> Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall, if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil.

Section 36 gives indigenous peoples, such as the Ogoni, the right to continue to occupy their traditional farmlands for the purpose of agriculture as if a customary right of occupancy had been granted by the Local Government. The Act provides for the registration of the holder or occupier "as one to whom a customary right of occupancy had been issued on respect of the land in question".[106]

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[101] Land Use Act 1978 s2(1)(b).
[102] Land Use Act 1978 s3.
[103] Land Use Act 1978 s5 and s51.
[104] Land Use Act 1978 s51.
[105] Land Use Act 1978 s6(1). Section 51 of the Land Use Act 1978 defines "agricultural purposes" as "includes the planting of any crops of economic value".
[106] Land Use Act 1978 s36(2).

Unlike traditional customary law in the South, where compulsory acquisition of an individual's interests in land by the community for public purposes was rare, the Land Use Act provides for the revocation of a right of occupancy by the Governor for "overriding public interest".[107] Section 28 defines "overriding public interest" partly as follows:

> (2) Overriding public interest in the case of a statutory right of occupancy means -
> ...
> (b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation;
> (c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.
>
> (3) Overriding public interest in the case of a customary right of occupancy means -
> ...
> (a) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation;
> (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith; ...

Sub-sections 28(2)(b) and 28(3)(a) enable the compulsory acquisition of land by the Local, State and Federal governments for "public purposes".[108] "Public purposes" includes "obtaining control over land required for or in connection with mining purposes", but is not limited to those purposes.[109] In contrast, s28(2)(c) and s28(3)(b) limit the revocation of a right of occupancy for "mining purposes or oil pipelines or for any purpose connected therewith", but as the revocation is not confined to the "requirement of the land by the Government", the revocation can be used to obtain land for the use of private oil and mining companies.

The Land Use Act makes provision for compensation for the compulsory acquisition of land. Where a right of occupancy is revoked under s28(2)(a) or s28(3)(b) for "mining purposes or oil pipelines or for any purpose connected therewith", the holder or occupier of land is entitled to compensation under the Minerals Act or the Petroleum Act 1969.[110] Although the Petroleum Act requires the holders of oil licences and leases to pay "fair and adequate

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[107] Land Use Act 1978 s28(1).
[108] The Governor must revoke a right of occupancy in the event of an issue of a notice by or on behalf of the President if such notice declares such land to be required by the Government for public purposes: Land Use Act 1978 s28(4).
[109] Land Use Act 1978 s51.
[110] Land Use Act 1978 s29(2).

compensation for the disturbance of surface or other rights", it does not make any provision for compensation for the loss of land itself.[111]

Where a right of occupancy is revoked under s28(2)(b) or s28(3)(a), the occupier is entitled to compensation for "the value at the date of revocation of their unexhausted improvements", the amount of which is assessed according to the method set out in s29(4).[112] Again, there is no compensation for the loss of land itself. The amount of compensation payable for improvements such as buildings and crops is determined by the "appropriate officer".[113] If the amount is below the market value for crops and improvements, this may conflict with s44(1) of the 1999 Constitution which provides as follows:

> **44.**—(1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things—
>
> (a) requires the prompt payment of compensation therefore; and
>
> (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

Section 44(1) of the 1999 Constitution is identical to s40(1) of the 1979 Constitution. Although neither Constitution contains qualifying adjectives in relation to compensation, such as "fair" or "adequate", the courts have interpreted s40 of the 1979 Constitution to mean the "money value into which property might be converted in the open market".[114] It has been argued that, in conformity with constitutional interpretation, the market value should be used in assessing compensation under the Land Use Act 1978.[115]

Despite the good intentions of the Land Use Act 1978, it has had devastating consequences for poor rural communities such as Ogoniland, where land is appropriated under the Act for oil development without payment for the loss of the land.[116] Because the Ogoni no longer

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[111] Adewale O, above n33; Petroleum Act s36. Reg 17(c)(ii) of the Petroleum (Drilling and Production) Regulations, made under the Act, provide that before entering or occupying private land, oil companies must pay "fair and adequate" compensation to the lawful occupiers, presumably in respect of the rights mentioned in the Act. Human Rights Watch/Africa, *The Price of Oil*, above n40 at n.178.

[112] Land Use Act 1978 s29(1).

[113] The appropriate officer is the Chief Lands Officer of a State, and, in the case of the Federal Capital Territory Abuja, the Chief Federal Lands Officer. Land Use Act 1978 s29(4)(b) and (c) and s51.

[114] James R, above n98 at 150.

[115] Yakubu M, above n78; James R, ibid.

[116] The Ogoni and other groups of the Niger Delta have made repeated calls for repeal of the Land Use Act. For example, see the *Communiqué of the Conference of Ethnic Nationalities of the Niger Delta on Sustainable Development and Conflict Resolution in the Niger Delta*, Port Harcourt, February 4-6, 1999, Association of Nigerian Scholars for Dialogue internet site

own their land according to the Land Use Act, but only occupy it, they are not entitled to compensation for its loss when it is expropriated for oil exploitation. The conceptual argument is that as the communities are not the owners in law, they should not be compensated for loss of ownership; only the loss of use and the value of developments. This ignores the fact that when land was nationalised by the Land Use Act in 1978, the government acquired title to all land, without compensation being paid to property owners for the transfer of title at the time. The lack of compensation has become a problem for the rural communities at the point in time when the government desires to use or sell the land, often years after the Land Use Act was passed. In effect, the land of the people has been compulsorily acquired by the government without compensation for the transfer of title.

Despite s44(1)(b) of the 1999 Constitution, the people have no recourse to the Courts to determine questions of compensation. The Land Use Act deprives the courts of jurisdiction to hear any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act.[117] The responsibility for determining disputes as to the amount of compensation payable under the Act for improvements on land lies with the Land Use and Allocation Committee, established under s2 of the Act[118] There is no appeal to a court from the decision of the Officer or the Committee. However, the Committee is not a tribunal of the kind envisaged by the 1999 Constitution s44(1)(b), being an agency of the Executive, consisting of "such number of persons as the Governor may determine", including "not less than two persons qualified for appointment to the civil service as estate surveyors or land officers, and a legal practitioner".[119] The Committee does not meet the constitutional requirement of an independent tribunal "established by Law" and constituted in such a manner as to ensure its independence and impartiality. Furthermore, no state has established review tribunals to review compensation payments made under the Act.[120]

Furthermore, the people have been unable to challenge the validity of the Land Use Act itself. In Nigeria, the Constitution is the supreme law of the land, and any statute or

<http://www.nigerianscholars.africanqueen.com/opinion/delta/htm>, para 7, recommending the "repeal of all laws/decrees that deprive the people of their right to land and control of their natural resources, such as the Land Use Decree and the various Petroleum Laws".

[117] Land Use Act 1978 s(47(1)(d).

[118] Section (2)(c).

[119] Section (3).

[120] James R, above n98 at 186.

enactment conflicting with it is invalid to the extent of the inconsistency.[121] The sections of the Land Use Act that conflict with the Constitution should be invalid to the extent of the inconsistency. However, provisions contained in the Constitution itself attempt to place the Land Use Act above the Constitution. Section 315(5) of the 1999 Constitution (identical to s274(5) of the 1979 Constitution) provides that the provisions of the Land Use Act are required to "have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution", implying that the provisions of the Land Use Act are of equal status with the Constitution. Section 47(1) of the Land Use Act also states that Act "shall have effect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federal Republic of Nigeria". This puts the Land Use Act in a position of supremacy over the Constitution. Furthermore, the Act is entrenched in the Constitution and cannot be altered or repealed except by the stringent provisions contained in s9(2) of the Constitution.[122] There is no justification for asserting the supremacy of legislation of the Constitution, particularly in a country which adheres to the rule of law.[123] The supremacy of the Land Use Act over the Constitution leads to a denial of fundamental rights regarding compensation.

While the rural poor have suffered from the provisions of the Land Use Act in relation to expropriation of land for oil activities, the wealthy and privileged have benefited from the Land Use Act. The wide areas of administrative discretion in the Act, combined with endemic corruption, have led to abuses of the system, including the charging of exorbitant fees for administrative services; the exercise of power by State Governors for improper political motives; the exercise of power in an arbitrary and unjustified fashion; and the preferential treatment of those with wealth and close connections to State Governments, who have become the overwhelming beneficiaries of land allocation programmes.[124]

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[121] 1999 Constitution s1(1) and (3); 1979 Constitution s1(1) and (3)

[122] 1999 Constitution s315(5); 1979 Constitution s274(5).

[123] James R, above n98 at 183.

[124] Ibid at 51; Williams D, "Measuring the Impact of Land Reform Policy in Nigeria" (1992) 30(4) *J Modern Afr Stud* 587; Sholanke O, "Is the Grant of Governor's Consent Under the Nigerian Land Use Act Automatic?" (1990) 34(1) *J Afr L* 42; James R, above n98; Yakubu M, above n78.

4.4.2 Oil Law

The construction of pipelines is dealt with under Part 4 of the Oil Pipelines Act.[125] Under the Act, an oil pipeline licence is required to construct, lay down and operate a pipeline.[126] Notice of proposed pipelines is to be given to landowners by a licence applicant by publication in the State Gazette of each State through which the route of the projected pipeline passes, or by publication in such newspapers circulating in the areas through which the route of the projected pipeline passes as the Minister may require, or by

> publication in areas likely to be affected by the licence in such other manner as the Minister may direct, and by delivering to administrative officers having responsibilities in the area or to such other officers as the Minister may specify such numbers of copies of such notice as the Minister may require for distribution to the occupiers or owners of land in the area so affected who might not other wise become aware of such notice. [127]

The Act provides the opportunity for objections to be given to persons appointed by the Minister, on a day fixed for the hearing of objections, and a report of the objections must be made to the Minister "without delay". If, after consideration of the report, the Minister considers that a licence should not be granted in respect of the proposed route or any part of it, he shall inform the applicant and the objector or objectors concerned. [128]

This procedure offers little protection for the minority groups in oil producing areas. The publication in the Gazette or newspapers is of little value to rural peoples such as the Ogoni where illiteracy rates are as high as 80%. Although s8(5) provides for additional notice in the area likely to be affected, the section is couched in discretionary terms. Furthermore, although the minority groups may give their objections, the Minister need only "consider" the report. There are no obligations upon the Minister to refuse a licence if environmental standards are not met. Under the provisions of this legislation it is not surprising the Ogoni and other peoples simply found their lands destroyed for oil pipelines without prior notification of the proposed pipelines.

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[125] No. 31 of 1956, as modified by the Land Use Act of 1978, Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.
[126] The Oil Pipelines Act 1956, Parts II and III respectively.
[127] The Oil Pipelines Act 1956 s8(5).
[128] The Oil Pipelines Act 1956 s10(1).

4.4.3 Environmental Law

4.4.3.1 Environmental impact assessment (EIA)

Before the enactment of the Environment Impact Assessment Decree in 1992, detailed analysis of the environmental impacts of major development projects were ad hoc, fragmented, or non-existent.[129] The Decree provides that the public or private sectors of the economy shall not undertake, embark upon or authorise projects or activities without prior consideration, at an early stage, of their environmental effects.[130] An EIA must be undertaken in accordance with the Decree where the extent, nature or location of a proposed project or activity is such that it is likely to significantly affect the environment.[131] The Federal Environmental Protection Agency (FEPA) is charged with administering and enforcing the Act.

EIA is mandatory for oil and gas field development, construction of offshore pipelines in excess of 50km in length, construction of oil and gas separation, processing, handling and storage facilities, construction of oil refineries and the construction of production depots for storing petrol, gas and diesel located within 3km of any commercial, urban or residential areas and which have a combined storage capacity of 60,00 barrels or more.[132] Oil developments of the type above, of a smaller size or capacity, but located in environmentally sensitive areas, are also subject to full-scale EIA.[133]

The EIA Decree is subject to a number of criticisms, including the following: [134]

- The legislation is reactive in nature, with the EIA process commencing only after notice of a proposed project has been given.

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[129] Olokesusi F, "Legal and Institutional Framework of Environmental Impact Assessment in Nigeria: an Initial Assessment" (1998) 18 *Environ Impact Assessment Rev* 159 at 160. The Environmental Impact Assessment Decree 1992 is available at the Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.

[130] Environmental Impact Assessment Decree 1992 s2(4).

[131] Environmental Impact Assessment Decree 1992 s2(2). Section 4 lists the matters that must be included as a minimum in the EIA.

[132] Environmental Impact Assessment Decree 1992 s13 and Schedule.

[133] Olokesusi F, above n129 at 163-165.

[134] Ibid at 170-172.

- The Decree contains exclusion clauses that be misused by the ruling classes. EIA is not required where:

> (a) in the opinion of FEPA, the project is in the list of projects where the President, Commander in Chief or the Armed Forces or the Federal Environment Protection Council is of the opinion that the environmental effects of the project are likely to be minimal;
> (b) the project is carried out during a national emergency for which temporary measures have been taken by the Government; and
> (c) the project is to be carried out in response to circumstances that in the opinion of FEPA, the project is in the interests of public health or safety. [135]

- The provisions for public participation are not broad enough. For example, public involvement only takes place after submission of the draft final EIA report, and public access to EIA reports are often restricted.
- In practice, there is little enforcement of the requirements to carry out EIAs and virtually no quality control of the EIAs that are conducted, as government institutions lack the funding, trained staff, technical expertise, information and analytical ability to implement comprehensive reviews.[136]

4.4.3.2 Gas flaring

The Associated Gas Reinjection Act 1979 required all oil companies to submit to the Minister a preliminary programme, followed by detailed programmes and plans, for the viable utilisation or reinjection of all associated gas.[137] The Act banned companies from flaring gas after 1 January 1984 without the permission of the Minister.[138] The penalty was to be the forfeiture of all concessions.[139] These provisions were later eased by the Associated Gas Reinjection (Continued Flaring of Gas) Regulations 1984 and the Associated Gas Reinjection (Amendment) Act 1985. The 1984 Regulations provided a range of exemptions that effectively exempted 86 out of 155 oilfields.[140] The remaining oilfields were subject to

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[135] Environmental Impact Assessment Decree 1992 s15.
[136] Human Rights Watch/Africa, *The Price of Oil*, above n40.
[137] Associated Gas Reinjection Act 1979 ss 1 and 2.
[138] The deadline was shifted twice, to 1 April 1984 and then to 1 January 1985.
[139] Omorogbe Y, "Law and Investor Protection in the Nigerian Natural Gas Industry" (1996) 14(2) *J Energy & Nat Resources L* 179 at 181.
[140] Exemptions were provided in the following circumstances:
(a) where more than 75% of the produced gas is effectively utilised or conserved;
(b) where the produced gas contains more than 75% impurities, rendering it unsuitable for industrial purposes;
(c) where an ongoing utilisation programme is interrupted by equipment failure;

an relatively insignificant penalty which made it far more economical to flare gas than reinject it.[141] The 1985 (Amendment) Act further relaxed the circumstances under which gas may be legally flared. Under this law the Minister may issue a certificate to the oil company when he is "satisfied" that utilisation or reinjection of the produced gas is not appropriate or feasible in a particular field or fields. A company engaged in the production of oil and gas in Nigeria is permitted to continue to flare gas subject to payment of such sums as the Petroleum Minister may from time to time prescribe for every 28.317 standard cubic metres (scf) of flared gas.[142]

Despite gas flaring legislation, 75-80% of produced gas is flared in Nigeria.[143] The exemptions relating to flaring and low penalties provide little incentive to reinject gas, a procedure that is significantly more expensive than flaring. Also, the limited demand for gas and the high costs of gathering and treatment make gas utilisation an economically unattractive alternative in Nigeria.[144] "Because the penalty for gas flaring is paltry, and because the economic cost of gathering gas in Nigeria is not matched by high domestic prices and level of use, there has not been much incentive for the [oil companies] to become involved in gas utilisation projects."[145]

Because most companies are legally able to flare gas, the Ogoni have not been paid compensation for the resulting environmental damage. SPDC has never paid compensation for the effects of gas flaring in Ogoni or any part of Nigeria.[146] Where flaring is not legal, the

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(d) where the ratio of the volume of gas produced per day to the distance from the nearest gas line or possible utilisation point is less than 50,000 scf/km: provided that the gas to oil ration of the field is less than 3500 csf/bbl, and that it is not technically advisable to reinject the gas in that field;
(e) where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.

Omorogbe Y, "The Legal Framework", above n19 at 285.

141 Okonmah reports the cost of flaring as 2.5 US cents per 1,000 cubic feet of gas flared: Okonmah P, above n31 at 51. Gulf Oil stated that flaring would cost the company $1 million, whereas switching from to gas injection would cost $56 million: Omorogbe Y, "Law and Investor Protection", above n139 at 181.

142 Associated Gas Reinjection Act 1979 s3(2)(b).

143 Omorogbe Y, "Law and Investor Protection", above n139 at 179. In 1995, Shell still flared almost all its associated gas, amounting to over 1,100 million scf per day. SPDC, "The Ogoni Issue", above n8. Shell aims to reduce flaring by 35% in the year 2004, and is working to eliminate gas flaring in the Bonny River region, letting a $65 million Odidi Gas Gathering Project 30 km West of Warri, and constructing a $42 million plant to recover natural gas liquids and naphtha near SPDC's Cawthorne Channel production facilities: *Oil and Gas Journal*, 27 April 1998, 32.

144 Because the international natural gas market is complex and inflexible, the utilisation of associated gas depends on the capacity of the domestic gas market, and on the economics of utilisation in the domestic market as compared to flaring. The commercial usage of gas within a domestic setting requires levels of technology, infrastructure and investment that are not normally found in developing countries. Omorogbe Y, ibid at 180.

145 Emole C, "The Interrelationship of Law and Policy", above n23 at 95.

146 Robinson D, above n8 at 39.

companies have paid a relatively small sum, as a fine, to the government, not the communities.

4.4.3.3 Prevention of oil spills

A number of Acts regulate the prevention of oil spills. First, the Petroleum Act 1969 provides that the Petroleum Minister may revoke an oil mining licence or lease if, in the minister's opinion, the licensee or lessee is not conducting operations in accordance with good oilfield practice.[147] However, there is no definition of "good oilfield practice", which could mean minimising economic costs of production without regard to environmental care; nor is the revocation of licences feasible in every case.[148]

Second, the Petroleum (Drilling and Production) Regulations 1969 contain provisions regulating the prevention of pollution of water courses and the atmosphere.[149] The most significant of these is Reg 36, which requires an oil licensee or lessee to control the flow and to prevent the escape of petroleum; to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and cause as little damage as possible to the surface of the relevant area and to trees, crops, buildings, structures and other property thereon.[150] An oil licensee or lessee must

> adopt all practical precautions including the provisions of up-to-date equipment approved by the Chief Petroleum Engineer, to prevent the pollution of the inland waters, rivers, water courses, the territorial waters of Nigeria or high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs, or has occurred, shall take prompt steps to control and if possible end it.

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147 Petroleum Act Schedule 1, para 24(1)(a).

148 Ekpu A, "Environmental Impact of Oil on Water: a Comparative Overview of the Law and Policy in the United States and Nigeria" (1995) 24 *Denver J Int L Pol'y* 55 at 79. Reg 7 of the Mineral Oils (Safety) Regulations 1963, made under the predecessor to the Petroleum Act 1969, states that good oilfield practice "shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes". Operators observing these international standards will thus be fulfilling the requirement of good oilfield practice. Human Rights Watch/Africa, *The Price of Oil*, above n40, Part V, "The Environment".

149 Made under s 9(1)(b) of the Petroleum Act 1969.

150 Other regulations regulate the storage and disposal of crude oil, petroleum and waste products. For example, Regulation 39 prohibits the confinement of petroleum in an earthen reservoir, except with the consent of the Director of Petroleum Resources; and Regulation 40 requires licensees to drain wastes into proper receptacles, and dispose of wastes in an approved manner.

The Regulations have been criticised for failing to clearly assign responsibility for cleaning the environment in the event of an oil spill. The operator is merely required to control the spill and "if possible, end it".[151] Second, the Regulations do not impose any sanction for the violation of any obligations placed upon the operators, apart from the power of the Minister to revoke licence or lease, a course of action which is not feasible in every case.[152] Third, the offending company cannot be compelled to pay compensation.[153]

Third, the Oil in Navigable Waters Act 1968 prohibits the discharge of oil from a Nigerian ship into a part of the sea that is a prohibited sea area.[154] It is an offence punishable by fine to contravene the prohibition. The amount of the fine is unspecified, except where the fining court is the magistrates court, in which case the fine must not exceed two thousand Naira (approximately US$18.50).[155] It is also an offence to discharge oil or a mixture containing oil from a vessel, whether Nigerian-owned or not, from any place on land or from any apparatus used for transferring oil from or to any vessel, into the territorial waters of Nigeria, and all other waters, including inland waters, which are within the territorial waters and are navigable by sea-going ships.[156]

Section 4 provides for special defences under s1 and s3. It is a defence under s1 to prove that the oil or its mixture in question was discharged for the purpose of securing the safety of any vessel, or preventing damage to an vessel or cargo, or saving life; or if it established that the oil or its mixture accidentally escaped because of damage to the vessel or leakage therefrom, and that all urgent or reasonable steps were taken to contain the discharge and reduce the effect on the environment.[157] Where a person is charged with an offence under s3 in respect of a discharge of a mixture containing oil from a place on land, it is an additional defence to prove:

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[151] Emole C, "Nigeria: Regulation of Oil and Gas Pollution" (1998) 28(2) *Envtl L & Pol'y* 103; Okonmah P, above n31; Ekpu A, above n148.

[152] Ekpu A, ibid at 81; Emole C, ibid at 106.

[153] Emole C, ibid.

[154] Oil in Navigable Waters Act 1968 s1. "Oil" is crude oil, fuel oil, lubricating oil, heavy diesel oil, or any mixture containing not less than 100 parts of oil. "Prohibited sea areas" are defined in s2. The prohibition is not applicable to the Nigerian Navy or government ships in service of the Nigerian Navy: s16(1). The Act was passed to implement the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, as amended in 1962. The Act is available at the Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.

[155] Oil in Navigable Waters Act 1968 s6. The value in US$ is calculated at the exchange rate of US$1=N108.

[156] Oil in Navigable Waters Act 1968 s3.

[157] Oil in Navigable Waters Act 1968 s4(1) and s4(2).

> (a) that the oil was contained in an effluent produced by operations for the refining of oil;
> (b) that it was not reasonably practicable to dispose of the effluent otherwise than by discharging it into waters to which the last preceding section applies; and
> (c) that all reasonably practicable steps had been taken for eliminating oil from the effluent.[158]

The Act has been criticised because the "numerous defences to offences under the Act have rendered it impotent" as it is "almost impossible for a person charged under the Act not to find a defence under which he can be exonerated."[159] Furthermore, the 2,000 N fine in the magistrates court has been criticised as "negligible in relation to the costs of oil pollution clean up operations".[160]

Fourth, the Federal Environmental Protection Agency Act prohibits "the discharge in such harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the joining shorelines, except where such discharge is permitted or authorised under any law in force in Nigeria".[161] The discharge of hazardous substances is a criminal offence punishable by fine or imprisonment.[162] A person convicted of an offence is liable for government costs and compensation, and must begin immediate clean-up operations following the best available clean-up practice and removal methods as may be prescribed, except where the spill was cause solely by a natural disaster, an act of war, or sabotage.[163]

The Act has been subject to a number of criticisms. First, the exemption from liability contained in the phrase where "such discharge is permitted or authorised under any law in force in Nigeria" reduces the potency of the provision, as, for example, flaring of gas is permitted under the various gas laws examined above. This phrase can also be construed to effectuate the defences provided by the Oil in Navigable Waters Act 1968.[164] Second, in the case of water pollution by oil, the scope of FEPA is restricted to the waters of Nigeria as defined under the Act, which does not include many of the small interstate rivers, steams and creeks which serve the needs of the oil producing communities, and which are in dire need of

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[158] Oil in Navigable Waters Act 1968 s4(15).
[159] Emole C, "Nigeria: Regulation of Oil and Gas Pollution", above n151 at 105; Ekpu A, above n148.
[160] Emole C, ibid.
[161] Federal Environmental Protection Agency Act No. 58 of 1988, as amended by the Federal Environmental Protection Agency (Amendment) Decree 1992, s20, Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.
[162] Federal Environmental Protection Agency Act s20(3).
[163] Federal Environmental Protection Agency Act s21.
[164] The Oil in Navigable Waters Act 1968, Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.

protection.[165] Third, the high degree of ministerial control over FEPA means that the Agency "lacks the political autonomy crucial to the efficient performance of its task".[166] For example, FEPA is subject to general directives or directives on particular matters emanating from the minister.[167] The Act also provides that FEPA must play such supportive role as the Ministry of Petroleum Resources may request from the Agency.[168] This subordinates the role of the Agency to that of the Petroleum Resources Department, which used to be part of the NNPC, reducing the ability of FEPA to police the oil industry.[169] Fourth, the exceptions regarding liability for spills caused solely by sabotage provides an incentive for oil companies to claim spills are caused by sabotage in order to avoid clean-up costs.[170]

4.4.3.4 Compensation for pollution

Despite "several oil spill incidents which have had devastating effects on human life and property", Nigeria is "yet to have a legislative and administrative framework which will systematically deal with the issue of compensation claims arising from petroleum operations".[171] The legal framework is "plagued by problems of due process and difficulties in interpreting a series of overlapping statutes, combined with rules developed through the common law".[172]

(1) legislative requirements

The Petroleum Act requires oil companies to pay "fair and adequate compensation for the disturbance of surface or other rights" to the owner or occupier of any land or property affected by exploration or production.[173] This requirement has been held to apply to oil spills.[174] There is no definition of "fair and adequate compensation", but in the landmark 1995 case of *Shell v Farah*, the Nigerian Court of Appeal held that compensation should

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[165] Ekpu A, above n148 at 85-86.
[166] Adekunle A, "The Federal Environmental Protection Agency Protection Decree 1988, Decree No. 58" (1992) 36(1) *J Afr L* 100 at 101.
[167] Federal Environmental Protection Agency Act No. 58 of 1988 s6.
[168] Federal Environmental Protection Agency Act No. 58 of 1988 s23.
[169] Okonmah P, above n31 at 48; Fagbohun L, "Foul Fuel in Nigeria's Air: Nigerian Environmental Law" (1999) 17(3) *J Energy & Nat Resources L* 251 at 257.
[170] Eaton J, above n40 at 286.
[171] Adewale O, above n33 at 104.
[172] Human Rights Watch/Africa, *The Price of Oil*, above n40.
[173] Petroleum Act 1969 s36.
[174] *Shell Petroleum Development Company v Farah* [1995] 3 NWLR (Pt 382) at 148 (hereafter *Shell v Farah*).

restore the person suffering the damage as far as money can do that to the position he was in before the damage, or would have been but for the damage.[175]

The Petroleum (Drilling and Production) Regulations 1969, made under the Petroleum Act 1969, place an obligation upon an operator to pay "adequate compensation" to any person whose fishing rights are interfered with by the unreasonable exercise of the operator's rights.[176] This has been criticised because: it does not clearly give a right of action to the victim; the concept of "adequate compensation" is vague and undefined; the victim is not entitled to compensation unless it is established that the operator exercised its rights "unreasonably", a difficult task for illiterate and poor fishermen; and the scope of the regulation is too restrictive, applying only to fishing rights.[177]

The Federal Environmental Protection Agency Act also deals with compensation for oil spillages. A person convicted of discharging a hazardous substance is liable for "the costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by the Agency from time to time", except where the discharge was cause solely by a natural disaster, an act of war or sabotage.[178] These provisions have been criticised because the compensation to be paid is only as "as may be determined by FEPA". Compensation thus turns on how FEPA discharges this trust. Ekpu writes that although it is probably too early to pass judgment, "after nearly seven years, victims of oil pollution in Nigeria continue to go without any form of compensation, and where any is paid, it is usually inadequate".[179] This is exacerbated by the absence of clear provisions in the statutes giving victims a clear right of action which can be enforced directly against the polluter.[180] Furthermore, the exemption of liability for acts of sabotage provides an incentive for oil companies to claim spills resulted from sabotage in order to avoid paying compensation.[181]

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[175] *Shell v Farah* at 192. This case arose from a blowout in Ogoniland in 1970, but the case did not commence until 1989. Shell has appealed to the Supreme Court. Human Rights Watch/Africa, *The Price of Oil*, above n40, Part V, "The Environment"; Frynas J, "Legal Change in Africa: Evidence From Oil-Related Litigation in Nigeria" (1999) 43 *J Afr L* 121.

[176] Petroleum (Drilling and Production) Regulations 1969 Regulation 23.

[177] Ekpu A, above n148 at 80.

[178] Federal Environmental Protection Agency Act No. 58 of 1988 s21.

[179] Ekpu A, above n148 at 87.

[180] Ibid.

[181] Robinson D, above n8 at 39.

Compensation is also dealt with under Part 4 of the Oil Pipelines Act.[182] Under the Act, an oil pipeline licence is required to construct, lay down and operate a pipeline.[183] Section 11(5) provides that the holder of a licence shall pay compensation:

> (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and
> (c) to any persons suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of compensation is not agreed between any such person and the holder, the court shall award such compensation as it considers just having regard to:[184]

> (a) any damage done to buildings, crops or profitable tees by the holder of the licence in the exercise of the rights conferred by the licence; and
> (b) any disturbance caused by the holder in the exercise of such rights; and
> (c) any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence; and
> (d) any damage suffered by any person (other than stated in subsection 5 of this section) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation; and
> (e) loss (if any) in value of the land or interests in land by reason of the exercise of the rights as aforesaid.

The effectiveness of the Oil Pipelines Act has been criticised because "there is laxity in the enforcement of this Act, and it lacks legislative clarity in terms of the liabilities of oil companies for these damages".[185] Furthermore, the exemptions for sabotage provide an incentive to companies to claim spills are caused by sabotage to avoid compensation payments.[186] Communities complain that it is common for companies to blame spills on sabotage, although the companies are rarely able to provide evidence to support the accusations.[187]

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[182] Oil Pipelines Act (No. 31 of 1956), as modified by the Land Use Act 1978, Pace University Virtual Environmental Law Library <http://www.law.pace.edu/env/nigerian.html>.
[183] Oil Pipelines Act 1956, Parts II and III respectively.
[184] Section 20(2).
[185] Ikein A, above n37 at 195.
[186] Robinson D, above n8 at 39.
[187] *Oil for Nothing*, above n40 at 12.

(2) official compensation rates

In addition to the legislative requirements, the Department of Petroleum Resources has set uniform compensation rates. However, the adequacy of compensation is the subject of constant dispute. The oil companies claim first, that the communities inflate their claims to achieve more money, and second, that that they pay higher rates which are agreed across the industry, and which are claimed to "be calculated at on-going market prices. Loss of revenue for the period and inconveniences are also incorporated into the compensation paid".[188] The communities claim the compensation does not reflect the true costs of spills; that the payment of uniform rates does not take into account the loss suffered in each individual case; and that although the usual form of compensation is cash, the payment of a sum of money will not always comprise adequate compensation for oil pollution.[189]

(3) common law

The *Farah* case[190] is an important judicial precedent regarding the quantum of compensation for damage caused by oil spills in Nigeria. In the case, several families sued Shell for a well blow-out in 1970. The court awarded 4,621,307 Naira in compensation, an amount that was subsequently confirmed by the Court of Appeal. The Nigerian Court of Appeal held that the plaintiffs were entitled to receive "fair and adequate" compensation, as stipulated in the Petroleum Act. "Fair and adequate" meant that compensation should restore the person suffering the damage as far as money can do that to the position he was in before the damage, or would have been but for the damage. The judge defined the basis of adequate compensation to be the market value of the property when taken, which may "include interest and the cost or value of the property in the owner for the purpose for which he designed it", that is, compensation must also be paid for the loss of future income.[191] In addition, for the first time, the court ruled that compensation should be paid for the suffering of individuals as a result of damage to the land caused by the oil spill. The plaintiffs were awarded compensation under multiple heads, including the loss of income (2,371,307 Naira

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[188] Shell International Ltd, Letter to Human Rights Watch, 8 May 1998: Human Rights Watch/Africa, *The Price of Oil*, ibid, Part V, "The Environment".
[189] Adewale O, above n33 at 103.
[190] *Shell v Farah*, above n174.
[191] *Shell v Farah* at 199.

for loss of income over a period of 19 years), rehabilitation of the land (2 million Naira) and for the "social effect/general inconvenience" of the damage.[192]

The compensation award in *Farah* was a "marked departure" from earlier cases in a number of respects. First, in earlier cases, oil companies relied on legislation to limit the amount of compensation payments; in *Farah*, the court objected to the use of official compensation rates and to the application of legislation in determining the compensation sum, and for the first time including such factors as individual suffering in the quantum of compensation. Second, in line with earlier cases, Shell, having paid a small sum for damage to crops, argued that the plaintiffs should not receive further compensation. The Court in *Farah* dismissed this argument, holding that if a claim is made in respect of different items of assessment, compensation for damage could be paid more than once in respect of the same cause of damage. Further , the mere paying of an amount of compensation (in this case, 2,000N for damage to land) was not sufficient; the compensation had to be fair and adequate. In other words, it is no longer acceptable for an oil company to pay a paltry amount of compensation in lieu of its duty to pay fair and adequate compensation.

In the wake of this case, substantial compensation payments have been awarded in a number of court cases between oil companies and litigants. In *Shell v Tiebo VII*[193] and *Shell v Isaiah*[194] the courts awarded 6 million N (approx US$55,000) and 22 million N (approx US$200,000) respectively.[195] In June 2000, the Rivers State Court in Port Harcourt ordered Shell to pay 4 billion Naira (approx US$37m) in compensation for an oil spill that occurred in Ogoniland in 1970, nine years after the lawsuit was filed.[196] While these are positive developments for plaintiffs, other barriers to receiving fair and adequate compensation still remain, including barriers to accessing courts, strict standards of scientific evidence, statutes of limitation, rules of standing, some judicial bias in favour of oil companies, and statutory bias in favour of oil companies.[197]

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[192] Frynas J, above n175 at 139.
[193] (1996) 4 NWLR 657.
[194] (1997) 6 NWLR 236.
[195] Frynas J, above n175 at 141-142. The value in US$ is calculated at the exchange rate of US$1=N108.
[196] The value of US$37million is calculated at the exchange rate of US$1=N108. "Nigerian Court Fines Shell $40 Million for 1970 Oil Spill", *Environment News Service*, 26 June 2000, Essential Action <http://www.essentialaction.org>; "Nigeria Fines Shell £26m for 1970 Spill", *Guardian UK*, 27 June 2000. Shell is appealing against the judgment.
[197] Frynas J, above n175.

4.4.5 Oil Mineral Producing Areas Development Commission (OMPADEC)

OMPADEC was established in 1992 to address problems relating to infrastructure, jobs, education and the environment in the Niger Delta region. While OMPADEC's major role was seen as developmental, the Commission also had the following environmental objectives: receiving and administering the sums from the allocation of the Federation Account for the rehabilitation and development of oil mineral producing areas and for tackling ecological problems that have arisen from the exploration of oil minerals; consulting with the relevant Federal and State governments on the control and effective methods of tackling the problem of oil pollution and spillages; and liaising with the various oil companies on matters of pollution control.[198] However, the years of neglect in the Niger Delta region meant that OMPADEC was overwhelmed by demands for infrastructure and development projects, greater than its expected allocation for many years, so that its mandate to tackle environmental problems was all but forgotten; and with no power to make or enforce regulations, no power to impose sanctions, an inadequate budget, no representatives from the oil-producing communities, and dogged by accusations of corruption and incompetence, OMPADEC failed to address the environmental problems of the Niger Delta and increased the level of frustration and anger among local communities.[199]

In July 1999 President Obasanjo presented a bill to the Senate to abolish OMPADEC and establish a new Niger Delta Development Commission (NNDC) "with a reorganised management and administrative structure for more effectiveness; and for the use of the sums received from the allocation of the Federal Account for tackling ecological problems which arise from the exploration of oil minerals in the Niger-Delta area".[200] The functions and powers of the proposed NNDC include: tackling ecological problems that arise from the exploration of oil minerals in the Niger-Delta area by oil producing companies; advising the Federal and member States on the prevention and control of oil spillages and environmental pollution; and liaising with the various oil mineral prospecting companies on all matters of pollution prevention and control; and to assist member States in the formulation and implementation of policies to ensure the sound and efficient management of the resources of the Niger Delta area.[201] However, the bill has been subject to severe criticism from

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[198] Oil and Mineral Producing Area Development Commission Decree, No 32, s2.
[199] Oguine I, above n35 at 115-116; Eaton J, above n40.
[200] *A Bill for a Law to Establish the Niger Delta Development Commission*, 10 July 1999, copy obtained from the Delta Information Service of the Environmental Rights Action, Nigeria, <eraction@infoweb.abs.net>.
[201] *A Bill for a Law to Establish the Niger Delta Development Commission*, s6(1).

community groups and State governments.[202] President Obasanjo has since vetoed the bill, and then when his veto was overridden by the National Assembly which passed the bill into law, has refused to sign and implement the Act, leaving the establishment of the NNDC in limbo.[203]

4.5 Social, Economic and Political Factors

4.5.1 Economic

As can be seen from Table 12, agriculture is the principal economic activity of Nigeria. However, since its discovery in 1956, oil has become of overwhelming importance to Nigeria in terms of revenue, accounting for over 95% of total merchandise exports (see Table 13 on p144) and over 75% of federal government revenue.[204]

Table 12

GROSS DOMESTIC PRODUCT BY SECTOR, NIGERIA (N bn)					
	1990	**1991**	**1992**	**1993**	**1994a**
Agriculture	35.28	36.25	37.27	37.78	38.70
Crude petroleum	11.65	12.72	13.06	12.72	11.96
Wholesale and retail trade	11.49	11.86	12.22	12.59	12.59
Finance and insurance	7.88	8.20	8.52	8.85	9.11
Government services	7.60	7.91	8.90	10.12	11.12
Manufacturing	7.36	8.05	7.66	7.34	6.97
Other	9.10	9.62	9.79	10.31	10.53
GDP at 1984 factor cost	90.36	94.61	97.42	99.66	100.98

a Provisional

Source: Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, (Economist Intelligence Unit Limited, London, 1996), Reference Table 7, p44.

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[202] MOSOP extensively criticised the Bill, concluding that it would worsen rather than improve the situation of the Ogoni: MOSOP, "The Position of the Ogoni People on the Proposed Niger Delta Development Commission Bill", Communiqué of a One-Day Workshop Held on Saturday 24th July 1999, Bori. The Rivers State House of Assembly was so disenchanted with the bill that it passed a unanimous resolution asking the State Attorney-General to institute a suit against the National Assembly and the President to restrain them from enacting the Niger Delta Development Commission Bill: "Rivers Assembly to Sue Government Over Niger Delta Bill", *The Guardian* (Nigeria), 31 July 1999, Essential Action <http://www.essentialaction.org>.

[203] Obasi J and Egbulefu V, "Obasanjo in Rivers Today Visits Ogoni", *The Guardian* (Nigeria), 20 September 2000, Essential Action <http://www.essentialaction.org>.

[204] Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, above n4 at 11.

Table 13

KEY EXPORTS, NIGERIA (N m)					
	1990	**1991**	**1992**	**1993**	**1994a**
Petroleum	106,627	116,857	201,384	213,779	200,936
Cocoa Beans	1,319	2,001	1,558	1,684	1,816
Rubber	545	669	875	876	699
Fish & Shrimps	149	308	213	235	312
Textiles	172	329	280	202	140
Cocoa Butter	180	100	n/a	n/a	110
Cocoa Cake	n/a	n/a	91	242	81
Total (incl. others)	109,886	121,534	205,612	218,801	206,285
Petroleum: (% of Total)	**97.03**	**96.15**	**97.94**	**97.70**	**97.41**

a Provisional

Source: Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, (Economist Intelligence Unit Limited, London, 1996), Reference Table 20, p49.

Despite its rich resources, Nigeria is one of the twenty poorest countries worldwide, with a GNP (Gross National Product) per capita of only US$260 in 1995.[205] In 1992, 34% of the population lived in poverty, a figure that is are believed to have deteriorated in recent years.[206] The incidence of poverty is worst among the rural population, the old, and the uneducated. Many Nigerians do not have adequate access to housing, health care and education, with 43% of the population aged over 15 being illiterate.[207] Nigeria has an onerous foreign debt, with the level of total external debt at the end of 1994 standing at $33.5 billion, representing just over 100% of Nigeria's GNP.[208]

The economic situation prevailing in Nigeria affects the ability of the Ogoni to protect their traditional lands. First, "it is clear that the quest to generate funds through reliance on oil

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[205] World Bank, *Trends in Developing Economies 1996* (The World Bank, Washington DC, 1996) at 379.

[206] Ibid.

[207] Ibid at 381. Many Nigerians have either no house at all, or dwell in shacks, slums or dilapidated dangerous structures. The health sector is drastically underfunded, with less than 100 Naira ($1.20 US) per person allocated to health care in 1988, and only 40% of the population having access to health care in the period 1980-1985. *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, paras 48 and 53.

[208] Economist Intelligence Unit Limited, *Country Profile: Nigeria: 1996-97*, above n4 at 35. Nigeria has consistently failed to meet its schedule of payments, with debt service due averaging $5.7 billion in 1990-94 but only $1.9 billion being repaid. Nigeria has paid an average rate of interest of 7.8% on loans taken out between 1985 and 1991, compared to the 4.3% paid by the rest of Africa south of the Sahara. Nigeria has been treated relatively more harshly than other African countries south of the Sahara because of the assumption Nigeria is a rich country as a result of oil production. In fact, the net oil revenue of $8 billion per year is not enough to provide for the country's essential needs and for the "colossal" rate of debt repayment the country made prior to 1992. Dent M and Peters B, *Poverty and Debt in the Third World: Confronting a Global Crisis* (Research Institute for the Study of Conflict and Terrorism, United Kingdom, June/July 1998) at 10-11.

exports has created an excess burden for the oil producing areas."[209] The almost complete reliance on oil exports to meet repayments on foreign debt and fund social services means that calls for control by the Ogoni of their lands, and the oil resources on their lands, are likely to remain unheeded. The government is unlikely to relinquish the control over a commodity that is overwhelmingly important to the country in terms of taxation and export revenue. Oil is simply too crucial for those in power to relinquish control over its production. The reliance on oil as negative effects on the enforcement of environmental regulations, first, because the substantial costs of pollution control and cleanup, if borne by the NNPC (which has a majority share in all joint ventures), would decrease revenue received by the government; and second, the government may fear the flight of oil companies, or failure to attract new investment, if it requires oil companies to be liable for huge environmental costs.[210]

The reliance on oil revenues is accompanied by fears by the majority groups that calls for self-determination and control of resources by the minorities are really calls for secession. This fear is rational in the context of the history of Nigeria, where, from the 1950s until the end of the civil war, the majority ethnic groups used the threat of secession from Nigeria as a tool to make political gains.[211] Prior to the discovery of oil, this was possible in the North because the majority groups controlled agricultural resources and revenue. The prospect of oil-rich lands funding Biafra was one of the reasons that the Eastern region felt able to secede from Nigeria in 1967. Now, the existence of oil on the lands of the indigenous minorities has quietened the majority groups' calls for secession, as they obtain revenue from oil distributed to the states from the Federation Account. Ironically, the majority groups now fear that the indigenous minorities living on oil-rich lands will secede from the Federation, which would deny the majority groups access to oil revenues.

Second, the poverty and lack of education of the individuals present special problems. For example, illiteracy has caused "landowners" to miss government and company notifications of land acquisitions printed in Port Harcourt newspapers.[212] The Ogoni contend that original agreements with Shell, where they exist, were not negotiated on equal terms.[213] Because of

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[209] Ikein A, above n37 at 35.
[210] Eaton J, above n40 at 291.
[211] Osaghae E, "Ethnic Minorities and Federalism in Nigeria" (1991) 90 *Afr Aff* 237 at 145.
[212] Boele R, above n9 at 8.
[213] Human Rights Watch/Africa, *The Ogoni Crisis: A Case Study of Military Repression in Southeastern Nigeria*, vol 7(5), July 1995, at 8.

illiteracy, Ogoni villagers could not understand the forms they had to sign.[214] However, Shell has denied that the company takes advantage of "illiterate landowners" in negotiations, regarding such allegations as "insulting to the communities". The company has stated that "in our experience the people with whom we negotiate are well educated, well informed and aware of their rights".[215]

Oil companies pay compensation for polluted lands and waters, but this only after protected negotiation and expensive law suits. The time and cost impedes subsistence farmers from being able to follow a case through to completion. "[H]istory shows that oil companies will appeal repeatedly until the plaintiffs run out money, give up or die".[216] The local communities are often unable to afford the necessary experts, and, lacking the professional expertise to support their claims, cases have been dismissed on the pretext that they are frivolous.[217] Furthermore, in 1993 the Federal High Court Act was amended so that State High Courts located in the local government areas were divested of jurisdiction over petroleum mining, seismographic activities and other related matters, and was vested exclusively in the High Courts. There are fewer than 10 Federal High Courts in the country. It is far more difficult for the subsistence farmers to travel to the High Courts than a local government court.[218] However, in *Shell v Isaiah,* the Court of Appeal held that this does not apply to oil spillage matters.[219]

Third, Nigeria has lacked the necessary institutional capacity to adequately enforce environmental laws. A "dearth of quality environmental information", together with a lack of experienced personnel, training, technology and financial resources, has "crippled enforcement by state agencies".[220]

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[214] Rowell A, "Oil, Shell and Nigeria", above n12 at 210.
[215] SPDC, "The Ogoni Issue", above n8.
[216] *Oil for Nothing*, above n40 at 12.
[217] Adewale O, above n33 at 104.
[218] Robinson D, above n8 at 37-39.
[219] (1997) 6 NWLR 236; Frynas J, above n175 at 145.
[220] Eaton J, above n40 at 290.

4.5.2 Ethnicity

Ethnicity, which has become a "very relevant, ubiquitous and potent factor" in Nigeria",[221] has also undermined the efforts of the Ogoni to obtain environmental justice and control over their lands in the face of the enormous wealth accruing to the country from oil exploitation. In order to fully understand the nature and extent of the "ethnic minority problem", and its effect on the Ogoni, it is necessary to provide some background information on Nigeria's history.

The beginning of direct British influence in Nigeria was marked by the establishment of a consulate on the coast of West Africa in 1849.[222] Nigeria was formally constituted as a single country on 1 January 1914, when the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated to form the Colony and Protectorate of Nigeria.[223] The country was divided into three administrative regions; the Colony of Nigeria (Lagos), the Northern Provinces, and the Southern Provinces.[224] In 1939 the Southern Provinces were further divided into the Eastern and Western Provinces. A new Constitution enacted in 1946 retained the identity of the three groups of provinces which it formally renamed the Eastern, the Western and the Northern Regions.[225]

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[221] Ikeazor C, *The Ethnic Factor: a Treatise and a Tale* (New Millenium, London, 1996) at 33.

[222] Ewezukwa D, "Nigeria" in Blaustein A and Flanz G, *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, NY, 1984) (updated 1983-1984 by Steven Lessick) at 1.

[223] The British first ruled Nigeria as distinct administrative units, adopting different approaches to the colonisation of Lagos and the Bight of Benin; the Bight of Biafra/the Oil Rivers; and northern Nigeria. Lagos was invaded by a British naval expedition in 1851, and formally constituted a crown colony in 1852 and then a Protectorate in 1901. In 1849 the Bight of Biafra was constituted a consular district. In 1882 Britain entered into treaties of friendship and protection with the chiefs and people of the Oil Rivers, including the banks of the Niger delta, declaring a protectorate over the Niger Districts in 1895. This eventually became the Protectorate of Southern Nigeria in 1900. In 1906 the Colony and Protectorate of Lagos and the Protectorate of Southern Nigeria were amalgamated to form the Colony and Protectorate of Southern Nigeria. Ewezukwa D, ibid at 2-12.

The history of the acquisition and administration of Northern Nigeria is bound up with the Royal Niger Company Chartered and Limited. In 1886 a Royal Charter was granted to the company to allow it to establish a government on the Niger and administer the territories to the north of the Protectorate of Southern Nigeria and on either banks of the Niger to the sea. In 1899 the Charter of the Royal Niger Company was revoked, and in 1900 the Protectorate of Northern Nigeria was established. Ewezukwa D, id at 10-11.

[224] Ewezukwa D, ibid at 13-14.

[225] Lagos retained its separate identity as the federal capital. When Nigeria became independent on 1 October 1960, the 1960 Constitution made provision for a Federation consisting of the Northern, Western and Eastern Regions and the Federal Territory of Lagos. The country became the Federal Republic of Nigeria in 1963. The 1963 Constitution created an extra Region, the Mid-West. Ewezukwa D, ibid at 22-27.

The division of the country into the Northern, Western and Eastern Regions has been described as the "cradle of the ethnic minority problem in Nigeria",[226] although differing policies employed by the British in the North and South of Nigeria before this time had already reinforced disparities in culture between the North and South.[227] The majority-minority ethnic group distinction arose when disparate groups that spoke dialects of the same generic language and had similar cultures were integrated in the Regions. For example, when the Western Region was formed, the Ekiti, Ijesha, Ijebu, Egba and others, each with a claim to being distinct groups, banded together as Yorubas because of the realisation that political power in the Region lay in the force of numbers. The Igbo and Hausa-Fulani emerged in the same way.[228] Within each region, one of the three major ethnic groups in Nigeria came to dominate; the Hausa-Fulani in the Northern Region, the Yoruba in the Western Region and the Igbo in the Eastern Region.

In the central government, only political groups led by the majority groups became relevant. At the time of the first national elections in 1951, the three parties to emerge were structured along regional and ethnic lines: the NCNC, dominating support in the East, representing the Igbos; the NPC dominating the North, representing the Hausa-Fulani; and the AG dominating the West, representing the Yoruba. At the time of these elections it was thought that a strong national identity would evolve from the recognition and respect for mutual differences between the three major ethnic groups. However, the opposite took place as ethnic consciousness became strong, fuelled by mistrust and suspicion.

Nigeria became a federation with three largely autonomous regions, with a core comprising the majority group in each Region, and a periphery comprising the minority groups who

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[226] Osaghae E, "Ethnic Minorities", above n211 at 239.

[227] Although the North and South were formally consolidated in 1914, disparities of education and religion were reinforced. Until 1946, Britain maintained a closed door policy in Northern Nigeria, barring all Christian missionaries and strictly limiting official contact with the South. The pattern in the more "homogenous" Muslim north was that of centralised "states" ruled by powerful monarchs. In the South, exposure to Western influence had created more vocal, Western-educated, politically-conscious populations. The more diversified South had increasingly embraced Western influences and culture introduced by missionaries since the 1840s and Portuguese and British traders since the 16th century. The South was allowed a certain degree of direct government by the British, and became heavily involved in trade, the liberal professions and the civil service.

The closed door policy in the North deprived the Northerners of contact and association, and access to Western-style education opportunities. The policy divided the North and South "so thoroughly and effectively that the two were divergently and irreconcilably oriented". The 1956 motion for independence from Britain was defeated by the Northerners who feared that the South, who dominated the civil service and the economy, would completely take over the country. After this, the Northern rulers encouraged young men to join the army to counter-balance the absence of Northerners in the civil service. International Commission of Jurists, above n4 at 16-17; Africa Policy Information Center, above n1.

were marginalised from political power.[229] Since that time, ethnicism has become firmly entrenched in Nigeria. Official state policies relating to employment and education discriminate against "non-indigenes" in each State.[230] The failure of government to provide basic social amenities has led to self-help by communities based on clan or ethnic lines. Town and tribal unions provide funds for social security, water, electricity, schools, hospitals etc.[231] An appreciable degree of education is generally obtained by the collective efforts of the family, village or community, not by free education or scholarships.[232] Family and clan have become relevant, providing mutual aid, welfare, security and credit.[233] Members of one ethnic group favour members of the same ethnic group in the search for scarce employment, education and social services.

> A feeling of belonging and rejection becomes the basis for distinguishing individuals in the city and at the national level. Under these circumstances, each member of X ethnic group fears that he is regarded as an X by any member of Y or Z ethnic group and would, therefore, be discriminated against by them in the struggle for the scarce socioeconomic resources. He believes that he can expect preferences from any member of X in a position to help him, and perceives it to be in his interest to promote the activities of all Xs in competition with Ys and Zs. If any X or Z does not favour his own kind, he gets no preference from his kind in return, and no one of the other groups would give him preference over their own people. As a result, anyone who finds himself outside the syste m of ethnic preferences is lost.[234]

As ethnic consciousness increases in scope and intensity, it assumes "a self-fulfilling and self-sustaining dynamic of its own. Ethnic hostility, loyalty and identification are passed on to successive generations, and the family, press, private and public conversation become infected by ethnicity."[235]

Ethnicity is a tool used by the political elites to maintain access to political power and resources. Since the first division of the country into three regions, various historical incidents and social and economic factors, particularly the discovery of oil, have raised the stakes of socio-economic confrontation. Certain groups in society, in wanting to exclude others from the socio-economic benefits arising from production (particularly oil wealth) have used ethnicity to entrench the social power base from which they successfully compete. "Oil production gives rise to large state revenue. The very existence of these large sums

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[228] Osaghae E, "Ethnic Minorities", above n211 at 237-239.
[229] Ibid at 240-41.
[230] Suberu R, above n71 at 63; Ikeazor C, above n221 at 22.
[231] Ikeazor C, ibid at 23 and 30.
[232] Ibid at 20.
[233] Ibid at 22-23.
[234] Nnoli O, *Ethnic Politics in Nigeria* (1980), cited in International Commission of Jurists, above n4 at 31.
[235] Nnoli O, *Ethnic Politics in Nigeria* (1980), cited in ibid at 33.

gives impetus to class and factional struggle to control the state and preside over the spending of this oil revenue."[236]

The political elites have no wish for the impoverished rural majority, including the Ogoni, to attain their share of the national wealth. "[T]he inclusion of their numbers in the distribution of such national wealth would mean the reduction of the already disproportionate share of the national wealth in the hands of the privileged classes".[237] The ruling political classes have instilled divisive ethnic prejudice in the majority of peoples to hide their own corruption and lack of care for the poor people, and, "in order to sustain their positions, confuse their various people with conflict-generating ethnic theories and explanations in the face of social and political questions facing them".[238] For politicians concerned with self-enrichment, "ethnic sentiments and arguments offer cheap alternatives" to policy platforms offering real economic and social reform.[239]

In addition, the majority ethnic groups have used state power to safeguard their interests and gain access to oil revenues through the abandonment of the derivation principle, and the introduction of a revenue allocation formula based on state distribution of oil moneys.[240] Through this revenue allocation formula the majority ethnic groups have denied the wealth-generating units (minorities) developmental goals and compensation for land loss and ecological destruction.

The use of state power has also included the creation of new states primarily in the non-oil producing areas of the ethnic majorities. The initial creation of 12 states in 1967 was seen as a way of satisfying minority interests. In later years, when the economic benefits of states were well-known, the creation of states became a question of access to revenue, not a question of minority interests.[241] It was highly resented by the oil-producing minorities such as the Ogoni, who viewed it as a deliberate strategy to transfer resources away from oil-producing minorities to the ethnic majorities of other areas.

> The way and manner in which the states and local governments were created were an affront to truth and civility, a slap in the face of modern history; it was robbery with violence. What

[236] Ikein A, above n37 at 29 and 31.
[237] Ikeazor C, above n221 at 49.
[238] Ibid at 15.
[239] Ibid.
[240] Ikporukpo C, above n4 at 174; Oguine I, above n35 at 114-115.
[241] Osaghae E, "Ethnic Minorities", above n211 at 249.

> Babangida was doing was transferring the resources of the delta, of the Ogoni and other ethnic minorities to the ethnic majorities - the Hausa-Fulani, the Igbo and the Yoruba - since most of the new states and local governments were created in the homes of these three. None of the local governments or states so created was viable: they all depended on oil revenues. [242]

There is also evidence that ethnicity has been exploited by the military government to repress the Ogoni people by inciting and staging violent clashes between communities. The involvement of the military in violent incidents alleged to be communal disputes between the Ogoni and neighbouring ethnic groups has been documented in various reports.[243] The Nigerian government has publicly claimed that outbreaks of violence in Ogoniland prior to May 1994 were the result of ethnic clashes between the Ogoni and neighbouring ethnic groups, including the Andoni in July 1993, the Okrika in December 1993 and the Ndoki in April 1994. However, evidence suggests the government played an active role in encouraging the violence and that some of these attacks were carried out by soldiers in plainclothes. The intensity of the fighting and the sophistication of the weaponry suggests the conflict was more than merely communal. In the attack on the Ogoni town of Kaa on 5 August 1993 by the Andonis, the list of weaponry included automatic weapons, grenades, mortars and dynamite.

> Reports on the conflict have note the scale and systematic nature of the destruction as well as the sophistication of the operations. These features raise questions about whether the conflict is merely communal and also the possibility that the two communities might have been victims of some other forces exploiting a local situation. [244]

Following the Kaa incident many other Ogoni villages were attacked. Other evidence adduced in support of the contention the clashed were not merely communal, include the facts that: prior to these attacks, most Ogoni police were drafted out of Ogoniland; Nigerian troops stationed at Bori, 15 km from Kaa, failed to react to calls for help; MOSOP appeals to the Rivers State Governor were ignored; it took two months and a direct appeal to Abuja before federal troops were despatched and the situation abated; and that despite calls from representatives of both sides, there has been no judicial inquiry into the attacks, and no-one has ever been charged in relation to the attacks.[245]

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[242] Saro-Wiwa K, *A Month and a Day*, above n40 at 100. See also Saro-Wiwa K, *Genocide in Nigeria*, above n9 at 8.

[243] *Ogoni: Trials and Travails*, above n30; Robinson D, above n8; Boele R, above n9; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213.

[244] Letter to Chief Rufus Ada George, Executive Governor of Rivers State, October 19 1993. Cited in Boele R, ibid at 25.

[245] Boele R, ibid at 24.

In some cases, the absence of evidence of the "normal causes" of communal clashes, such as disputes as to territory, fishing rights, access rights, and discriminatory treatment threw into doubt the government claims that the violence was a result of ethnic feuds. Interviews carried out by Human Rights Watch/Africa with Nigerian soldiers, who described their participation in secret military raids on Ogoniland that were designed to appear like intercommunal clashes, support the inference of government involvement.[246]

4.5.3 Corruption and Administrative Abuse

Corruption is institutionalised in Nigeria.[247] In a system extremely susceptible to large-scale corruption, all major financial transactions passed through the presidency, making auditing by independent state institutions ineffectual. General Abacha ignored measures of financial accountability, insisting on direct access to, and control over, federal finance, particularly oil revenues. It has been estimated that as much as $4 billion disappeared from the exchequer in the weeks leading up to his death.[248] Other military officials in the government, who have been more concerned with the acquisition of personal wealth than the social and economic development of the country, have become millionaires by "milking the treasury" and handling lucrative oil contracts.[249] As well as the problems of official corruption existing at the highest levels, "corruption, political interference, cronyism and incompetence" are entrenched at all levels of the state system.[250]

This corruption has negatively affected minority indigenous peoples such as the Ogoni in their struggle to protect their traditional lands and environment. For example, revenue allocated to OMPADEC for the development of oil-producing communities, and compensation payments for loss of land and ecological damage do not reach the people for

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[246] Human Rights Watch/Africa, *The Ogoni Crisis*, above n213 at 12-13.

[247] Rake A, "An Economy on the Emergency Ward", *New African*, 8 April 1999, 13.

[248] Economist Intelligence Unit Limited, *Country Report: Nigeria: 3rd Quarter 1998* (Economist Intelligence Unit Limited, London, 1998) at 23. In November 1998, the Federal government reported that it had recovered nearly US $750 million from the family of General Abacha, and US $1.4 billion in total from the Abacha family and the Security Advisor to the Head of State. Unaccounted federal revenue of some $12.4 billion is still uninvestigated. *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, paras 60-61.

[249] Economist Intelligence Unit Limited, ibid at 8; Rake A, above n247; Dibie R, "The Rhetoric of Military and Development in Two Oil Producing/Developing Nations" 1998 14(2) *Journal of Developing Sciences* 233 at 250; Eaton J, above n40 at 291.

[250] Economist Intelligence Unit Limited, ibid at 11.

whom they are intended as the money is siphoned off by state officials and "middlemen".[251] Companies can utilise political connections to evade the payment of compensation or to pay reduced amounts.[252] In addition, the massive appropriation of state revenue by public officials into personal coffers reduces the funds that can be spent on the provision of basic social services and amenities, such as housing, food, education, health care, potable water, to the Ogoni and other communities. The US $1.4 billion recovered by the federal government surpasses the federal budget for education, health, social welfare, transportation and power generation for two consecutive years.[253] Because of corruption and mismanagement, Nigeria remains one of the poorest countries in the world, despite the country's rich endowment of natural resources.

4.5.4 Human Rights Violations and the Military

The violation of basic human rights in Nigeria is widespread.[254] Despite Nigeria's ratification of a number of international human rights treaties,[255] and the incorporation of the provisions of these treaties into the domestic legal order,[256] the adherence to international human rights norms has suffered major setbacks under military governance in Nigeria, through the

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[251] Stanley W, "Socioeconomic Impact of Oil in Nigeria" (1990) 22(1) *GeoJournal* 67 at 77; Boele R, above n9 at 17; Human Rights Watch/Africa, *The Price of Oil*, above n40, Part V, "The Environment".

[252] Robinson D, above n8 at 37-38.

[253] *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, para 60.

[254] The right to the life is insufficiently protected; the right to liberty and security of persons is violated on a massive scale; hostage-taking is prevalent; due process and fair trial are conspicuously absent in criminal trials; long delays are inherent in the disposal of criminal cases; prison conditions are harsh and life-threatening; the government suppresses freedom of expression and freedom of the press; freedom of assembly and association continues to be violated; freedom of movement is violated; the government is indifferent towards the right to development and to a satisfactory environment; the violation of women's rights continues in law and in practice; and violation of children's rights occurs. *CHR Report on the Situation of Human Rights in Nigeria 1998*, above n40, paras 86-104.

[255] Nigeria is a party to the following instruments of international law: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Prevention and Punishment of the Crime of Genocide; and the African Charter on Human and Peoples' Rights. *CHR Report on the Situation of Human Rights in Nigeria 1998*, ibid para 22

[256] These include the right to life (s30); the right to dignity of the human person (s31); the right to personal liberty (s32); the right to a fair hearing (s33); the right to private and family life (s34); the right to freedom of thought, conscience and religion (s35); the right to freedom of expression and the press (s36); the right to peaceful assembly and association (s37); the right to freedom of movement (s38); the right to freedom from discrimination (s39); and provisions regulating the compulsory acquisition of property (s40). Provisions which guarantee the observance of fundamental human rights contained in the ICCPR were first included in the 1963 Constitution of the "First Republic" of Nigeria (1963-1966), although the military governments from 1966-1979 promulgated numerous decrees and edicts that derogated from human rights. Okeke C, "International Law in the Nigerian Legal System" (1997) 27 *Calif Western Int LJ* 311 at 337.

promulgation of decrees that derogate from human rights norms, and through the actual physical abuse of human rights.[257]

In the particular case of the Ogoni, the response of the military government to the Ogoni struggle to obtain control over their lands and resources, and gain environmental justice, has been one of violent repression of all political activity through the widespread use of force. The official complaints of the Ogoni people to the government date back to at least 1970, when Ogoni leaders petitioned the Military Governor of Rivers State to assist the Ogoni people in the wake of the destruction brought about by Shell's oil activities.[258] The failure of the state to respond positively to repeated petitions led to an uprising of the Ogoni people in 1990 under the auspices of the Movement for the Survival of the Ogoni People (MOSOP).

The initial stages of the uprising took the form of "passive resistance".[259] In October 1990 leaders of MOSOP and traditional heads of Ogoni clans presented the Ogoni Bill of Rights to the federal government demanding: political control of Ogoni affairs by the Ogoni people; the right to control and use a fair of Ogoni economic resources for Ogoni development; and the right to protect the Ogoni environment and ecology from further devastation (see Appendix 1). In 1992 an addendum was added to the Bill of Rights demanding "political autonomy as a distinct and separate unit within the Nigerian nation", with full right to control Ogoni affairs, use at least 50% of Ogoni economic resources for Ogoni development, protect

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[257] Although provisions which guarantee the observance of fundamental human rights contained in the ICCPR were entrenched in Part IV of the 1979 Constitution and Part IV of the 1999 Constitution, many attacks on basic human rights provisions in the 1979 Constitution were made in the period of military rule from 1983-1998. For example, the Constitution (Suspension and Modification) Decree 1993 suspended the application of the human rights provisions of the 1979 Constitution. The provisions of the African Charter on Human and Peoples' Rights, which were incorporated into the domestic law of Nigeria by the African Charter Ratification and Enforcement Act of 1983, were repealed by s13(12) of the Political Parties (Dissolution) Decree No. 114 of 1993. Numerous other decrees and edicts have derogated from human rights and the rule of law.

[258] Reprinted in Saro-Wiwa K, *Genocide in Nigeria*, above n9 at 44-50. The current solidarity of Ogonis had its beginnings in the civil war. Many non-Igbo peoples who were forced to join the "Republic of Biafra" felt oppressed by Igbos. The Ogonis in particular suffered from the forcible removal of their people into Igboland by the Biafran authorities. Saro-Wiwa has estimated 30,000 or 10% of the ethnic group died during the war. Saro-Wiwa K, *Genocide in Nigeria*, above n9 at 43. At the end of the war an elite group of traditional Ogoni leaders formed KAGOTE, a non-political cultural organisation. KAGOTE eventually gave rise to MOSOP, the Movement for the Survival of the Ogoni People. Welch C Jnr and Sills M, "The Martyrdom of Ken Saro-Wiwa and the Future of Ogoni Self-Determination", *Fourth World Bulletin*, Spring/Summer 1996, 5 at 9.

[259] MOSOP and NYCOP (National Youth Council of Ogoni People) raised the awareness of the injustices suffered by the Ogonis through tours to various clans; secured the support of clan heads and traditional leaders; mounted a media campaign; and promised the Ogoni people shares in oil payments and compensation for ecological damage. Osaghae E, "The Ogoni Uprising", above n10 at 334.

the Ogoni environment and ecology from further degradation, and ensure the full restitution of harm caused by oil pollution.[260]

In December 1992, following the failure of the government to respond to the Bill of Rights, MOSOP leaders wrote to Shell, Chevron and NNPC, threatening mass action if certain demands were not met.[261] The oil companies responded by tightening security. The government banned all public gatherings and demonstrations and issued a decree aimed at the Ogonis which made demands for self-determination and disruption of oil activities acts of treason punishable by death.[262]

The Ogoni defied the ban and decree and 300,000 Ogoni attended a mass demonstration at Bori on 3 January 1993. The government responded with violent military repression. The height of the uprising was reached when the Ogoni refused to vote in the presidential election of 12 June 1993. The Government dispatched a special armed unit comprised of soldiers and riot police called the Rivers State Internal Security Task Force to Ogoniland. In May 1994, Major Paul Okuntimo, the head of the ISTF wrote an infamous memo to the Military Administrator of Rivers State in which he wrote that "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence" and that "wasting operations during MOSOP and other gatherings" were making the military presence justifiable".[263] The military operations included attacks and burning of villages, looting, extortion, torture, rape and extrajudicial killings.[264] The ISTF intimidated villagers to prevent them from asserting their legal rights with respect to compensation claims. In particular, there are reports the ISTF tried to coerce villagers into withdrawing from compensation cases.[265]

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[260] The presentation to the government of the Ogoni Bill of Rights was followed by a campaign at the international level. The Ogoni case was presented to: the 10th Session of the United Nations Working Group on Indigenous Populations in 1992; the 45th Session of the United Nations Sub-Committee on Human Rights on the Prevention of Discrimination Against and Protection of Minorities in 1993; the 43rd Session of the United Nations Committee for the Elimination of Racial Discrimination; and the African Human Rights Commission. Osaghae E, "The Ogoni Uprising", above n10 at 335; Ezetah C, above n12 at 818.

[261] These demands included: payment of $6 billion in rents and royalties for oil exploration since 1958; $4 billion for compensation for environmental damage; a halt to environmental degradation, particularly gas flaring; the coverage of all exposed high pressure pipelines; and initiation of negotiation with the Ogoni people.

[262] The Treason and Treasonable Offences Decree No. 29 of 1993. Osaghae E, "The Ogoni Uprising", above n10 at 336.

[263] Reprinted in Robinson D, above n8; Boele R, above n9.

[264] Robinson D, ibid; Boele R, ibid; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213.

[265] Robinson D, ibid at 38.

On 21 May 1994, four conservative Ogoni leaders were killed by a mob. In the course of "finding suspects", the ISTF unleashed overt military operations against the Ogoni. In early 1995, the President of MOSOP, Ken Saro-Wiwa, together with eight other prominent Ogoni activists, was arrested, tried and convicted for the murder by a military tribunal according to proceedings that have been called "a travesty of justice".[266] Despite international pleas for clemency, Saro-Wiwa was executed in November 1995. The Nigerian government was condemned by governments and organisations from around the world. Nigeria was expelled from the Commonwealth, the United States and European Union recalled their ambassadors, and limited sanctions were imposed.[267]

After the events of 1993 and 1994, Shell was forced to withdraw from Ogoniland and suspend all operations. At the time of General Abacha's death in 1998, access to Ogoniland was restricted. Twenty Ogonis were being held without trial since 1994 on the same murder charges for which Saro-Wiwa was hanged, despite a High Court ruling to release 15 of the detainees on bail.

Many of these human rights violations occurred in the context of government by the military.[268] The suppression of indigenous peoples has been one aspect of the military imperative of crushing dissent against the incumbent regime. When the military government usurps political power for itself, the Constitution is treated as simply another law of the land. The military government imposes its will on the people by force, irrespective of objections on the part of the people. Such regimes entrench themselves by routinely superseding constitutional limitations and abusing civil liberties, while justifying constitutional violations in the name of "national security", "the interest of the state" and "economic development". To consolidate their hold on power, military regimes promulgate decrees conferring on themselves plenary powers to ignore or dismantle existing legal and political institutions. The continuance of institutions such as the judiciary depends on the dictates of the federal military government, not on a pact between the people as embodied in the Constitution.

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[266] *Ogoni: Trials and Travails*, above n30.

[267] Welch C Jnr and Sills M, above n258 at 13.

[268] Nigeria has been under military rule for all but 10 of the years (1960-1966, 1979-1983) since independence was granted in 1960. Reasons adduced by the military for overthrow of incumbent governments include government mismanagement; corruption; abuse of office; massive election rigging with violent interparty disturbances attendant upon it; and the need to avert a breakup of the country. Mbachu O, "Democracy and the Rule of Law: a Case Study of Nigeria" (1992) 53(3) *Indian J Polit Sci* 374 at 381; Oko O, "Lawyers in

Although the human rights situation in Nigeria has generally improved since the return to democratic rule, with the release of many political prisoners, including the Ogoni 20,[269] and the removal of the ISTF troops in Ogoniland, the situation in the Niger delta has deteriorated, with violence in the region escalating in 1999-2000. In the oil-producing areas of the Niger delta, communities still face the threat of political reprisals for protests or campaigns against oil companies and/or government policies, with police and soldiers responding to peaceful protests with arbitrary arrests, beatings and sometimes killings, including summary executions.[270] While some communities have turned to violence and criminal acts, such as kidnapping oil workers, the government has responded through military crackdowns rather than the arrest and trial of the people concerned.[271] The occupation of areas of the Niger delta by military personnel has exacerbated tensions and resulted in ongoing human rights violations.

In the year 2000, moves by Shell to resume operations in Ogoniland have led to bitter in-fighting between members of MOSOP and to the first violent confrontation to take place between the mobile police and local Ogoni communities since the end of military rule in Nigeria. Police attacks on the village of K-Dere led to the deaths of at least five people, the burning of at least 20 houses, while others were injured and taking into detention, and others forced to flee. While the Rivers State authorities claim that police were sent in to quell "inter-communal unrest", reports from MOSOP, local communities and human rights

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Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes" (1997) 10 *Harv Hum Rrts J* 257 at 258.

269 Project Underground, "The Ogoni 20 Are Free!", *Drillbits and Tailings*, 7 September 1998, vol 3(17), Project Underground <http://www.moles.org>, 1; *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, paras 2 and 16.

270 *CHR Report on the Situation of Human Rights in Nigeria 1999*, ibid para 16; Human Rights Watch, *Nigeria: Crackdown in the Niger Delta*, vol 11(2)(A), May 1999; Human Rights Watch/Africa, *The Price of Oil*, above n40; *Oil for Nothing*, above n40 at 17. Recent examples documented in these publications include the military crackdowns in Bayelsa and Delta States in December 1998 and January 1999, where many people died or were injured when soldiers attacked unarmed protesters.

271 In November 1999 Nigerian soldiers destroyed an entire village, Odi, in Bayelsa State, in an assault on an ethnic Ijaw gang held responsible for the murder of 12 policemen. It was reported that during the attack the army destroyed all but a few buildings, killed dozens of people, and caused thousands more to flee: "Situation Report on Odi Massacre", *The News* (Lagos), 6 December 1999, Essential Action <http://www.essentialaction.org>; "It was Shocking", *The News* (Lagos), 6 December 1999, Essential Action <http://www.essentialaction.org>; "Nigerian Army Told to Leave Ruined Delta Town", *Reuters*, 4 December 1999, Essential Action <http://www.essentialaction.org>; "Nigeria to Rebuild Delta Town Sacked by Troops", *Reuters*, 6 December 1999, Essential Action <http://www.essentialaction.org>; "Genocide in Odi", Text of a Press Conference by Leaders of Human Rights and Civil Society Groups Who Visited Odi, Bayelsa State on Wednesday 8th December 1999, Essential Action <http://www.essentialaction.org>; *The Destruction of Odi and Rape in Choba*, Human Rights Watch Background Paper, 22 December 1999, Human Rights Watch http://www.hrw.org>.

organisations claim the raid was an unprovoked attack on K-Dere following opposition by its residents to work on a road construction project conducted by a company contracted to Shell. After the incident, more police were sent in to occupy the area from which journalists were barred.[272]

It is feared that further violence between the military and local people is set to occur since the federal government has dispatched military personnel to protect oil pipes and installations in the Niger Delta region against oil pipeline vandalisations. At a special meeting on 4 September 2000, the Federal government threatened to deploy the military to the oil-producing states of the Niger Delta if state governments whose areas have witnessed "incessant oil pipeline vandalisations" did not redress the situation within 14 days. This ultimatum followed a report by the Nigerian National Petroleum Company to the meeting that the nation had lost $4.4 billion Naira since January 2000 because of pipeline vandalisations. The federal government has created a fresh division for the Nigerian army, to be known as the 83rd mechanised division. The army command is to cover Edo, Ondo, Delta, Bayelsa and Rivers States, the areas regarded as the core Delta region, with its headquarters in Benin City.[273]

While the government alleges "irate youths" are vandalising the pipelines as a form of political protest, others have argued that the sophisticated equipment and expertise used to cut the high-pressure pipelines and transport the oil is evidence of involvement by organised crime. It is feared that the real purpose of the army deployment is to deal with the protests of

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[272] Amnesty International, *Nigeria: At Least One Dead and Tensions Increase in Ogoniland*, AI Index AFR 44/04/00, 13 April 2000; Amnesty International, *Nigeria, Fear of Ill Treatment*, AL Index AFR 44/05/00, 14 April 2000; Letter from Kegbara Dere Community to The Rivers State Governor, 14 April 2000 (detailing facts of the K-Dere crisis); MOSOP, "Chronology of Events K-Dere Village, Monday 9th April to Wednesday 12th April", 14 April 1999; "MOSOP Condemns Fabricated Police Excuses for Violence", MOSOP Press Release, 13 April 1999; "Mobile Police Assault on K-Dere", MOSOP Emergency Report, 11 April 2000; "Shell's Forced Re-Entry into Ogoniland", MOSOP Press Release, 12 April 1999; Letter from MOSOP in the Americas to Mark Moody, Chairman, Royal-Dutch Shell (protesting the return of Shell to Ogoniland); "Killings in Nigeria's Ogoniland", BBC News, 11 April 2000, BBC <http://www.news.bbc.co.uk>; "Nigeria: Shell Shocks Ogoni", *Tempo* (Lagos), 6 April 2000; "MOSOP Condemns Shell's Violent Attempted Return to Ogoni", MOSOP Press Release, 27 March 2000; "News of Shell Oil "Breakthrough" in Ogoni Region is False and Misleading", MOSOP Press Release, 23 January 2000; "Shell's Re-Entry into Ogoniland Breeds Crisis", *The Tide* (Nigeria), 30 December 1999. All documents are available from Essential Action <http:lists.essential.org/mailman/listinfo/shell-nigeria-action>.

[273] Emerole J, "Justice in Service of Community", *Post Express News* (Nigeria), 5 September 2000; Ikhariale M, "FG's Ultimatum to Niger Delta", *Comet Newspaper*, 13 September 2000; Sowunmi A, "The Oil Bunkering Mafia", *Newswatch*, 18 September 2000, Okoli A , "Troops Deployment: Fresh Tension Grips Niger-Delta", *The Vanguard* (Nigeria), 7 October 2000; all documents are available from Essential Action <http://www.essentialaction.org>.

the Niger-Delta in military fashion, rather than seeking a peaceful resolution to the problems of the Niger Delta by addressing issues such as the degradation of the environment and the allocation of oil revenue.[274]

4.5.5 The Absence of the Rule of Law

The abuse of the Ogonis and other oil-producing communities occurs in a country where the rule of law does not prevail.[275] The infringement of human rights and attack on the rule of law in Nigeria has been documented by numerous organisations and individuals including the United Nations,[276] the International Commission of Jurists,[277] Human Rights Watch,[278] Amnesty International,[279] the Civil Liberties Organisation (Nigeria)[280] and academics and journalists.[281]

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[274] Ikhariale M, ibid; Sowunmi A, ibid; Okoli A , ibid.

[275] *CHR Report on the Situation of Human Rights in Nigeria 1998*, above n40, paras 86 and 88.

[276] *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, *CHR Report on the Situation of Human Rights in Nigeria 1998*, ibid; *Report of the Fact-Finding Mission of the Secretary-General to Nigeria*, above n66, Annex 1.

[277] International Commission of Jurists, above n4.

[278] Human Rights Watch/Africa, *Permanent Transition: Current Violations of Human Rights in Nigeria*, vol 8(3)(A), September 1996; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213.

[279] Amnesty International, *Nigeria: No Significant Change - Human Rights Violations Continue*, AI Index AFR 44/20/97, 22 September 1997; Amnesty International, *Nigeria: Human Rights Defenders Under Attack*, AI Index AFR 44/16/96, 6 November 1996; Amnesty International, *Nigeria: A Summary of Human Rights Concerns*, AI Index AFR 44/03/96, March 1996; Amnesty International, *Nigeria: A Travesty of Justice: Secret Treason Trials and Other Concerns*, AI Index AFR 44/23/95, 26 October 1995; Amnesty International, *Nigeria: The Ogoni Trials and Detentions*, AI Index AFR 44/20/95, 15 September 1995; Amnesty International, *Nigeria: Military Clampdown on Opposition*, AI Index AFR 44/13/94, 11 November 1994.

[280] *Ogoni: Trials and Travails*, above n30.

[281] Oko O, above n268; Vukor-Quarshie G, "Criminal Justice Administration in Nigeria: *Saro-Wiwa* in Review" (1997) 8(1) *Criminal LF* 87; Brunner M and Suntinger W, "Nigeria" in Baehr, Hey, Smith and Swinehart (eds) *Human Rights in Developing Countries* (Kluwer Law International & Nordic Human Rights Publications, Netherlands, 1995); Mbachu O, above n268; Ajibola B, "Human Rights under Military Rule in Africa: the Nigerian Experience" in Bello E and Ajibola B (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Martinus Nijhoff Publishers/Kluwer Academic Publishers, Dordrecht/Boston/London, 1992); Jinadu Y, "Fundamental Human Rights, the Courts, and the Government, Particularly in a Military Regime in Nigeria" in Bello E and Ajibola B (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Martinus Nijhoff Publishers/Kluwer Academic Publishers, Dordrecht/Boston/London, 1992); Mwalimu C, "Police and Human Rights Practices in Nigeria: a Primer Case Study Toward Complete Enjoyment of Fundamental Human Rights in Sub-Saharan Africa" (1991) 5 *Em Int'l LJ* 515; Ikhariale M, "The Independence of the Judiciary under the Third Republican Constitution of Nigeria" (1990) 34(2) *J Afr L* 145; Olowofoyeku A, "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary" (1989) 33(1) *J Afr L* 55.

In Nigeria, the administration of justice and the rule of law have been undermined through: rule by decree,[282] the features of which have included legislative judgments,[283] retroactivity;[284] ouster clauses,[285] and the prohibition of judicial appeal;[286] decrees which violate the right to liberty through, for example, permitting indefinite or incommunicado detention without trial;[287] and the non-observance of requirements of due process.[288]

The observance of the rule of law has also suffered through measures designed to undermine the independence of the judiciary. The independence of the judiciary has been drastically

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[282] For many years, under military rule, Nigeria has been governed by executive decrees, despite the existence of the Constitution. The question of the supremacy of the Constitution over decrees remains a contentious issue. Despite initial attempts by the judiciary to maintain the supremacy of the Constitution over decrees, judges now obey, support and respect military decrees. The Federal Military Government (Supremacy and Enforcement of Powers) Decree (No. 12 of 1994) s12(b)(i) prohibits legal challenge to any military decrees, by ousting the jurisdiction and competence of the courts to inquire into the validity of decrees. Most courts cite it as a reason for declining jurisdiction to inquire into the validity of decrees, particularly in cases involving human rights violations by the military. Cases in which the courts have held that they lack the competence to question the validity of a decree include *Council of the University of Ibadan v Adomolekun* (1967) 1 *All NLR* 213; *Ogunlesi and Ors v Attorney-General of the Federation* (1970) LD/28/69; Uwaifo v Attorney-General of Bendel State and Ors (1982) 7 S.C. 124; *Barclays Bank of Nigeria Limited v Central Bank of Nigeria* (1976) 6 S.C. 175; *Attorney-General of Imo State v Attorney-General of Rivers State* (1983) 8 S.C. 10; and *Ojokolobo and Ors v Alamu and Anor (1987)* 3 *NWLR* (Pt.61) 377. International Commission of Jurists, above n4 at 49-51.

[283] Legislative judgments occur when decrees pass judgments aimed at specific individuals or situations, and are used by the executive to influence the outcome of judicial proceedings. International Commission of Jurists, ibid at 56.

[284] In Nigeria, decrees are often backdated to legitimise illegalities or to make certain persons culpable for specific actions which did not constitute offences at the time they were carried out. An example of this was the conviction and execution of three men under the Special Tribunal (Miscellaneous Offences) Decree, who had been charged before the Decree was promulgated in 1984 when the offence in question was not subject to the death penalty. International Commission of Jurists, ibid at 53.

[285] Ouster clauses, or clauses that deprive the civil courts of jurisdiction to regulate matters contained within a decree, have been used by military governments to subvert the power of judicial review. For example, s5 of the Constitution (Suspension and Modification) Decree 1993 (No. 107 of 1993), which restored the 1979 Constitution while suspending the human rights provisions of the Constitution, removed the jurisdiction of the courts to enquire into the validity of the Decree. In 1994 the government promulgated the Federal Military Government (Supremacy and Enforcement of Powers) Decree (No. 12 of 1994), s2(b) of which prohibits legal challenge to *any* military decrees by ousting the jurisdiction and competence of the courts to inquire into the validity of any decree. International Commission of Jurists, ibid at 55. See also Oko O, above n268 at 274-284.

[286] In Nigeria, the right of an individual to have his or her conviction and sentence reviewed by a higher court according to law is often removed by decree. In particular, decrees that establish special military tribunals do not provide for appeal to the regular courts. International Commission of Jurists, above n4 at 56. See also Oko O, ibid at 272-274.

[287] The rights of individuals to liberty and security are "flagrantly violated" in Nigeria. International Commission of Jurists, ibid at 58. See also Brunner M and Suntinger W, above n281 at 262-263; Amnesty International, *Nigeria: No Significant Change*, above n279 at 9-19; Amnesty International, *Nigeria: A Summary of Human Rights Concerns*, above n279 at 1-3; Human Rights Watch/Africa, *Permanent Transition*, above n278 at 17-20; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213 at 18; *CHR Report on the Situation of Human Rights in Nigeria 1998*, above n40, paras 38-46.

[288] The violations of due process included violation of the right to be presumed innocent, the right to a fair trial, the right to appeal and the right to legal assistance.

curtailed by ouster clauses.[289] In recent times appointments to the judiciary have been made from the civil service by the military authorities, so that the judicial bench is comprised of people unwilling to offend the authorities.[290] There is no security of tenure.[291] "Recalcitrant" judges are subject to coercion and harassment.[292] The judiciary's budget is entirely dependant on funds provided in the absolute discretion of the executive, and can be withdrawn if judges deliver opinions that are unfavourable to the government. Judges are poorly paid and are dependent upon the government for the continued payment of their salaries.[293] The executive has provided "gifts" to judges presiding over cases in which the result could be unfavourable to the government.[294] There is now a general lack of confidence in the judiciary because of public perceptions of corruption, lack of integrity, and incompetence on the part of the judiciary.[295]

The independence of lawyers has also come under severe attack from the Nigerian authorities, who have "frustrated, humiliated and trivialised lawyers".[296] In Nigeria, independent lawyers who battle for the human rights of their clients have been repeatedly harassed, denied access to their clients, detained without charge and subject to torture. The military leadership has also attempted to diminish the role of lawyers by offering bribes and by dispensing political patronage to members of the bar.[297]

A combination of all these factors, in conjunction with repression by miliary regimes, has impeded Ogoni activists in the fight to protect their lands and resources. For example, the establishment of a special military tribunal for the sole purpose of trying Ken Saro-Wiwa and the other Ogoni activists in November 1995 was a legislative judgment.[298] The Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, under which Ken Saro-Wiwa and other Ogoni activists were tried and executed in 1995, was amended in 1994 to become retrospectively effective as of 10 December 1993.[299] The Civil Disturbances (Special

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[289] *CHR Report on the Situation of Human Rights in Nigeria 1998*, above n40, para 28; Brunner M and Suntinger W, above n281 at 265.
[290] International Commission of Jurists, above n4 at 84. See also Ikhariale M, "The Independence of the Judiciary", above n281 at 155.
[291] International Commission of Jurists, ibid at 89; Olowofoyeku A, above n281 at 59-62; Ikhariale M, ibid.
[292] Olowofoyeku A, ibid at 63.
[293] Ibid at 63-65.
[294] International Commission of Jurists, above n4 at 84-85. See also Olowofoyeku A, ibid at 56-57.
[295] Olowofoyeku A, ibid at 67-70.
[296] Oko O, above n268 at 260.
[297] Ibid at 265.
[298] Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, as amended by the Special Tribunal (Offences Relating to Civil Disturbances) Edict 1994, retrospectively effective as of 10 December 1993.
[299] Ibid.

Tribunal) Decree also prohibited Ken Saro-Wiwa and other Ogoni activists from having their death sentences reviewed by a court of law. The trials of Ken Saro-Wiwa and the other Ogoni activists were generally held to be undertaken without the observance of the requirements of due process of law.[300]

Also, pursuant to the State Security (Detention of Persons) Decree No. 2 of 1984, which permits indefinite or incommunicado detention without trial, many Ogoni activists and members of their families have been detained without charge at the Upor detention camp in Ogoni, the State Intelligence and Investigation Bureau and at the prison in Port Harcourt.[301]

Since the death of General Abacha, there has been "a noticeable change in the political atmosphere and in the attitude of the administration".[302] Some decrees restricting freedom of assembly and association have been repealed. However, other decrees incompatible with the rule of law still exist, including the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, the State Security (Detention of Persons) Decree No. 2 of 1984, and the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987.[303] While the current government is not utilising provisions relating to ouster clauses, detention without trial, and special tribunals to try particular offences, their continued existence poses a threat to political activity.[304]

4.5.6 The Role of Transnational Oil Companies in Military Repression

Oil companies in Nigeria, particularly Shell and Chevron, have been accused of complicity in human rights abuses by accepting assistance from the military and police to protect oil installations, and importing weapons for the police, rather than engaging in constructive dialogue with communities in order to resolve community grievances.[305]

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[300] For a discussion of the Ogoni trials see Vukor-Quarshie G, above n281; *Ogoni: Trials and Travails*, above n30 at 101-271; International Commission of Jurists, above n4 at 93-106; Birnbaum M, QC, "A Travesty of Law and Justice: An Analysis of the Judgement in the Case of Ken Saro-Wiwa and Others", December 1995, Movement for the Survival of the Ogoni People (Canada) <http://www.mosopcanada.org/text/info/mosop0950.html>; Amnesty International, *Nigeria: The Ogoni Trials and Detentions*, above n279; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213 at 26-32.

[301] International Commission of Jurists, ibid at 57-59.

[302] *CHR Report on the Situation of Human Rights in Nigeria 1999*, above n34, para 73.

[303] Ibid paras 78-83.

[304] Ibid para 13.

[305] *Oil for Nothing*, above n40; Human Rights Watch/Africa, *Permanent Transition*, above n278; Human Rights Watch/Africa, *The Ogoni Crisis*, above n213; Boele R, above n9. In 1996 the families of Ogoni

Shell executives acknowledge that they have hired members of the Nigerian police to provide internal security and that they have contacted the police in the event of disturbance and sabotage. The company is required by law to contact the authorities when operations are disrupted. If a disturbance presents a threat to security or may lead to the closure of one of SPDC's facilities, SPDC is required by law to contact the military administrator of Rivers State, the State police commissioner, the Department of Petroleum Resources and Shell's joint venture partners. The military and the mobile police have responded to calls for assistance with a "reckless disregard for lives and property", firing on peaceful demonstrators with teargas and gunfire, and destroying houses, crops and other property.[306] Examples of such incidents occurred at Umuechem, in October (1990), where some eighty people were killed, and 495 houses either destroyed or badly damaged by the mobile police, and at Korokoro, Ogoniland, in October 1993.[307]

SPDC asserts that its compliance with Nigerian laws requiring the company to request assistance does not make the SPDC responsible for the action the authorities then take, nor does it imply the company condones the use of violence. Human Rights Watch argues that because the abuses set in motion by Shell's reliance on the military in Ogoniland continue, the company cannot absolve itself of responsibility for the acts of the military.[308] "The Nigerian military's defence of Shell's installations is so entwined with its repression of minorities in the oil-producing areas that Shell cannot reasonably sever the two."[309] Shell has since stated that the experience of Umuechem "has influenced subsequent policy and today the company does not suggest a police response ... the experience of this incident and the

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activists Ken Saro-Wiwa and John Kpuinen instituted a law suit in the federal court of Manhatten, USA, against Royal Dutch Petroleum Co, accusing the affiliated Shell Petroleum Development Co of Nigeria of complicity in human rights violations in Nigeria, including the torture and murder of environmental activists by the Nigerian government, and of taking land for oil development in Ogoniland without adequate compensation, and subsequently polluting the air and water. On Thursday 14 September 2000, the 2nd US Circuit Court of Appeals held that the case could be heard in the New York federal court, reversing the finding of US District Court Judge Kimba Wood that the case should be tried in England. Appleson G, "US Court to Hear Ogoni Rights Case Against Shell", *Reuters News*, 14 September 2000, Essential Action <http:lists.essential.org/mailman/listinfo/shell-nigeria-action>; Neumeister L, "Nigerian Case Can be Heard in U.S.", *Associated Press Report*, 14 September 2000, Essential Action <http:lists.essential.org/mailman/listinfo/shell-nigeria-action>;

306 Human Rights Watch/Africa, *The Ogoni Crisis*, ibid at 9.

307 Ibid; Boele R, above n9. Human Rights Watch/Africa gives further examples of incidents at Rumuobiokani (21 February 1994) and Nembe Creek (8 February 1994).

308 Human Rights Watch/Africa, ibid at 38.

309 Ibid at 41.

Korokoro incident has helped redefine the company's policy and it will not accept protection from soldiers again".[310]

SPDC has also been implicated in the negotiation for the import of arms for use by the Nigerian police. Human Rights Watch/Africa states as follows:

> In January 1996, in response to allegations relating to the import of weapons, Shell stated that it had in the past imported side arms on behalf of the Nigerian police force, for use by the "supernumerary police" who are on attachment to Shell and guard the company's facilities (and other oil company facilities) against general crime. The last purchase of weapons by Shell was said to be of 107 hand guns, fifteen years before ... However, court papers filed in Lagos in July 1995 and reported in the British Press in February 1996 revealed that Shell had as late as February 1995 been negotiating for the purchase of weapons for the Nigerian police. Shell acknowledged ... it had conducted these negotiations but stated that none of the purchases had been concluded. The weapons on order - Beretta semi-automatic rifles, pump-action shotguns and materials such as tear gas clearly designed for crowd control - do not seem appropriate for protection from armed robbers and "general crime," as Shell has claimed.[311]

UNPO had heard allegations that SPDC supplied communications equipment in the form of walkie-talkies, radios and mobile phones to the Internal Security Task Force during May 1994, but was unable to confirm the information.[312]

Other examples where the military have sought to protect SPDC's operations including: the use of soldiers to intimidate Ogoni people to withdraw from pending court actions against Shell for compensation; and efforts by the Rivers State Internal Security Task Force to force the Ogoni to sign documents calling for the return of SPDC. Examples of the latter efforts include the summoning of paramount chiefs in Kpor and Bori by the ISTF to meetings where they were force to sign documents calling for Shell's return; and the waylaying and threatening of chiefs by ISTF soldiers in order to coerce them into signing documents supporting the return of SPDC.[313]

Shell has also been criticised for its failure to publicly protest against the trials of Ken Saro-Wiwa and the other Ogoni activists and for its failure to use its influence with the government of Nigeria to prevent the execution of Ken Saro-Wiwa and the other Ogoni activists. The company has been criticised for standing by when Ogoni leaders became

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[310] SPDC, "The Ogoni Issue", above n8.

[311] Human Rights Watch/Africa, *Permanent Transition*, above n278 at 50-51. Shell's claims regarding the purchase of firearms into Nigeria are contained in Shell Petroleum Development Company, "Issues Background", 1995, RoyalDutch/Shell <http://www.shellnigeria/issues/issback.html>.

[312] Boele R, above n9 at 34.

targets of government harassment, accepting the use of violence to suppress dissent, refusing to act on the legitimate grievances of the Ogoni community, acting in a way that deepened divisions within the community, and for denunciating international non-governmental organisations who campaigned to prevent the executions.[314]

Shell defended its silence by arguing that the trials of Ken Saro-Wiwa and the other Ogoni activists were political matters and not legitimate business concerns of the company, and that it would be improper to attempt to influence the government in this area. The trial and execution of the Ogoni nine, and Shell's perceived inaction in this regard, was a major influence in bringing government and corporate attention to the question as to the proper role and response for companies operating in countries where there are large-scale violations of human rights.

[313] Robinson D, above n8 at 42.
[314] PEN Center USA West, *Findings and Recommendations: Shell and Nigeria*, March 1997, at 7 and 9.

CHAPTER 5: THE KHANTY OF WESTERN SIBERIA

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5.1 Introduction

The land of Siberia in northern Asia stretches for some 2,800 miles east-west from the Ural mountains to the Pacific Ocean, extending a further 950 miles eastwards in its most northerly locations. Average winter temperatures over much of the territory range between -30°C and -40°C, although in the coldest places the temperatures can fall as low as -70°C. In summer temperatures may rise as high as +34°C.[1] The territory of Siberia falls into three sections from east to west; Western Siberia, Central Siberia, and the Far East. From the Ural mountains the land descends to the wide plain of Western Siberia, which permanently features numerous lakes and marshes. East of the West Siberian plain lie the uplands of Central Siberia. East of Lake Baikal and the river Lena lie the mountains and plateaux of the Far East.[2]

Siberia is part of the Russian Federation. The Russian Federation consists of 21 republics,[3] 6 territories (*krais*),[4] 50 provinces (*oblasts*),[5] 2 federal cities (St. Petersburg and Moscow), and 10 autonomous regions (*okrugs*), which are all "equal subjects of the Russian Federation".[6] In Siberia there are 4 republics,[7] 4 krais,[8] 11 oblasts,[9] and 10 autonomous okrugs.[10] The autonomous okrugs are situated within the krais and oblasts.[11] The Russian Federation has its

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1 Forsyth J, *A History of the Peoples of Siberia: Russia's North Asian Colony 1581-1990* (Cambridge University Press, Cambridge, 1992) (hereafter *A History of the Peoples of Siberia*) at 6-7.

2 Ibid at 6-8.

3 Republic of Adygeya (Adygeya), Republic of Altai, Republic of Bashkortostan, Republic of Buryatia, Republic of Dagestan; Ingush Republic, Kabardin-Balkar Republic; Republic of Kalmykia-Khalmg Tangch, Karachayevo-Cherkess Republic, Republic of Karelia, Republic of Komi, Republic of Mari El, Republic of Mordovia, Republic of Sakha (Yakutia), Republic of North Ossetia, Republic of Tatarsan (Tatarsan), Republic of Tuva, Udmurt Republic, Republic of Khakasia, Chechen Republic and Chuvash Republic.

4 Altai, Krasnodar, Krasnorarsk, Maritime, Stavropol, and Khabarovsk Territories.

5 Amur, Arkhangelsk, Astrakhan, Begorod, Bryansk, Chelabinsk, Chita, Irkutsk, Ivanovo, Kaliningrad, Kaluga, Kamchatka, Kemerovo, Kirov, Kostroma, Kurgan, Kursk, Leningrad, Lipetsk, Magadan, Moscow, Murmansk, Nuzniy Novgorod, Omsk, Orel, Orenburg, Penza, Perm, Pskov, Rostov, Ryazan, Sakhalin, Samara, Saratov, Smolensk, Sverdlovsk, Tambov, Tula, Tver, Tyumen, Ulyanovsk, Vladimir, Volgograd, Vologda, Voronezh, Yaroslav, and the Jewish Autonomous Oblast.

6 Aginski Buryat, Chukchi, Evenk, Khanty-Mansi, Komi-Peryak, Koryak, Nenets, Taimyr (Dolgan-Nenets), Ust-Ordynsky Buryat, and Yamal-Nenets Autonomous Okrugs.

7 The Buryat, Altai and Khakass Republics, and the Republic of Sakha (Yakutia).

8 The Altai, Krasnoyarsk, Primorsky and Khabarovsk krais.

9 The Irkutsk, Novosibirsk, Omsk, Tomsk, Tyumen, Kemerovo, Amur, Kamchatka, Magadan, Chita and Sakhalin oblasts.

10 The Aginski Buryat, Chukchi, Evenk, Khanty-Mansi, Koryak, Nenets, Taimyr (Dolgan-Nenets), Ust-Ordynsky Buryat, and Yamal-Nenets Autonomous Okrugs; and the Jewish autonomous okrug. The Komi Republic and the Komi-Peryak Autonomous Okrug are situated in the Urals.

11 With the exception of Chukotka.

own Constitution and federal legislation.[12] The republics, krais, oblasts and autonomous okrugs have their own charters and legislation.[13] The Constitution also provides for local self-government, with each "subject" of the Russian Federation being divided into local district administrations or *raions*.[14] For example, Surgut raion lies within the Khanty-Mansi Autonomous Okrug, which is itself situated within the Tyumen Oblast in the Russian Federation.

Siberia was inhabited by many different peoples for thousands of years before Russian colonisation.[15] The tundra, stretching across the far north of Siberia, with its permanently frozen subsoil and sparse plant and animal life, provided a home to the reindeer-herding nomadic peoples. Indigenous peoples, whose lifestyle depended on hunting sea mammals, lived along the coast.[16] The forests south of the tundra and Arctic circle ("taiga") were home to nomadic or semi-nomadic peoples, who lived largely by hunting, fishing and gathering, and to the reindeer nomads of the forest.[17] South of the taiga lie the open grasslands of Inner Asia, where the natural economy (nomadic pastoralism with horses, cattle, sheep and livestock) supported the largest groups.[18]

There are 26 groups of indigenous peoples who are officially recognised by the Russian government as indigenous to Siberia and as "Northern Minorities" or "the Small Peoples of

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12 Constitution of the Russian Federation 1993.

13 Constitution of the Russian Federation 1993, Articles 5(2) and 76(4). The scope of authority and power of bodies of state authority of the Russian Federation (ie the federal authorities) and the bodies of state authority of the subjects of the Russian Federation (regional authorities) are determined by the Constitution and various Treaties on the delimitation of the scope of authority and powers entered into between the federal and regional authorities in 1992. Constitution of the Russian Federation 1993, Article 11(3). Treaty on the Delineation of Spheres of Jurisdiction and Authority Between Federal Government Bodies of the Russian Federation and the Government Bodies of the Sovereign Republics Belonging to the Russian Federation, Moscow, 31 March 1992; Treaty on the Delineation of Spheres of Jurisdiction and Authority Between Federal Government Bodies of the Russian Federation and the Government Bodies of Krais, Oblasts, and the Cities of Moscow and St.Petersburg of the Russian Federation, Moscow, 31 March 1992; Treaty on the Delineation of Spheres of Jurisdiction and Authority Between Federal Government Bodies of the Russian Federation and the Government Bodies of the Autonomous Oblast and Autonomous Okrugs Belonging to the Russian Federation, Moscow, 31 March 1992; reproduced in Blaustein A, "The Russian Federation" in Blaustein A and Flanz G (eds), *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, New York, 1994).

14 Constitution of the Russian Federation 1993, Article 12, translated in Blaustein A, ibid.

15 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 7.

16 Ibid; see also Forsyth J, "The Indigenous Peoples of Siberia in the Twentieth Century" in Wood A and French R (eds), *The Development of Siberia: Peoples and Resources* (St. Martin's Press, New York, 1989) at 74-75.

17 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 8-10; Forsyth J, "The Indigenous Peoples of Siberia in the Twentieth Century", above n 16 at 75.

18 Forsyth J, "The Indigenous Peoples of Siberia in the Twentieth Century", ibid at 75-76.

the North", and who have been the subject of special legislation over the decades.[19] The Northern Minorities and their populations levels are given in Table 14 on p170. This list does not recognise some indigenous peoples at all, such as the Alyutor, Kerek, Taz, Chulimtsy and Todzha.[20] The larger groups, including the Siberian Tatars, the Altai Turks (Teleut, Tuba and Shor), the Khakass, the Buryats and the Yakuts, who have their own republics, are not included in the "Small Peoples of the North". The Komi and Yakut, who numbered over 300,000 in 1989, are not officially recognised as Small Peoples of the North, despite the fact that they share many characteristics with the Small Peoples.[21]

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[19] The term "Northern Minorities" was first introduced into Soviet legislation by two decrees of the Central Executive Committee and the Council of People's Commissars of the USSR in 1925 and 1926.

[20] Fondahl G, "The Status of Indigenous Peoples in the Russian North" (1995) 36(4) *Post-Soviet Geography* 215 at 216, Table 1.

[21] Vakhtin N, *Native Peoples of the Russian Far North* (The Minority Rights Group, London, 1992) at 8; Leksin V and Andreyeva Y, "The Small Peoples of the North: Ethnic Relations and Prospects for Survival Under New Constitutions" (1995) 19(1) *Polar Geography and Geology* 36 at 41 and 47.

Table 14

POPULATION NUMBERS SMALL PEOPLES OF THE NORTH RUSSIA				
Peoples	**1926**	**1959**	**1979**	**1989**
Aleuts	353	421	546	702
Chuckchi	12221	11727	14000	15184
Chuvans	705	-	-	1511
Dolgans	656	3932	5053	6945
Enets	482	-	-	209
Eskimos	1293	1118	1510	1719
Evenks	38805	24151	27294	30163
Evens	2044	9121	12523	17199
Itelmens	859	1109	1370	2481
Kets	1428	1019	1122	1113
Khants	17334	19410	20934	22521
Koryaks	7439	6287	7879	9242
Mansi	6095	6449	7563	8474
Nanais	5860	8026	10516	12023
Negidals	683	-	504	622
Nenets	13217	23007	29894	34665
Nganasans	867	784	867	1278
Nivkhi	4076	3717	4397	4673
Orochi	647	782	1198	915
Oroks	162	-	-	190
Saami	1720	1792	1888	1890
Selkups	1630	3768	3565	3612
Tofalars	413	586	763	731
Udege	1357	1444	1551	2011
Ulchi	723	2055	2552	3233
Yukagirs	443	442	835	1142

Source: Bogoyavlinsky D, "Peoples of Russia's North: Demographic Information" in Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996) p40; Fondahl G, *Gaining Ground? Evenkis, Land, and Reform in Southeastern Siberia* (Allyn & Bacon, Boston, 1998) Appendix I, p36.

5.2 The Khanty of Western Siberia

The Khanty are a minority people in Siberia and the Russian Federation, numbering 22,521 people in 1989.[22] In the 16th century, prior to the invasion of Siberia by the Russians, the

[22] This number is cited in Bogoyavlinsky D, "Peoples of Russia's North: Demographic Information" in Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996) at 40; Fondahl G, *Gaining Ground? Evenkis, Land, and Reform in Southeastern Siberia* (Allyn & Bacon, Boston, 1998) (hereafter *Gaining Ground*), Appendix I, at 36; *Indigenous Peoples of the Soviet North* (International Work Group for Indigenous Affairs, Document No. 67, Copenhagen, 1990) at 13; and Vakhtin N, above n21 at 8. However, Harris C, "A Geographic Analysis of Non-Russian Minorities in Russia and its Ethnic Homelands" (1993) 34(9) *Post-Soviet Geography* 543

territory inhabited by the Khants lay to the east of the Ural mountains along the River Ob and its tributaries, extending north from the mouth of the Ob and the northern Urals for 400 miles to the confluence of the Irtysh, and from there a further 400 miles east into Siberia.[23] Archaeological evidence indicates that the Khants occupied their traditional territory for at least 5,000 years.[24]

In 1989, over 90% of the Khanty lived in the Tyumen Oblast, with some 53% living in the Khanty-Mansi Autonomous Okrug.[25] The Khanty-Mansi Autonomous Okrug covers an area of approximately 523,100 square kilometres in Western Siberia, with a population density of 2.5 persons per square kilometre.[26] The Khanty comprised only 1% of the population in the Khanty-Mansi Autonomous Okrug in 1989.[27] Nearly one-third of the Khanty lived in the Yamal-Nenets Autonomous Okrug in the Tyumen Oblast. About 5% lived in Tyumen Oblast proper (that part of the Tyumen Oblast not being the Khanty-Mansi or Yamal-Nenets Autonomous Okrugs). Less than 10% of the Khanty lived outside the Tyumen Oblast.[28]

Three groups of the Khanty — Northern, Southern and Eastern — can be distinuguished by differences in dialect, subsistence patterns and matieral culture. The Khant and Mansi languages, together with Hungarian, comprise the Ugrian group of Finno-Ugric languages. The Khant language has three groups of dialects, which are the Northern (Obdor, Shuryshkar-Berezov, Kazym and Sherkaly), Southern (Altym, Leusha and Irtysh Konda) and Eastern dialects (Surgut, Salym and Vakh-Vas-Yugan).[29] The differences between dialects are so great it is difficult for speakers of one dialect to understand another.

The traditional economy and culture of the Khanty combines fishing, hunting, and the trapping of sable and fox with reindeer-herding or pastoralism. Among the Khants living on the Ob and on the lower reaches of its tributaries (the Kazym, Sosva, Vakh, Yugan and

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at 574 and Leksin V and Andreyeva Y, "The Small Peoples of the North: Ethnic Relations and Prospects for Survival Under New Constitutions", above n21 at 43 cite a population figure of 22,283.

23 Forsyth J, *A History of the Peoples of Siberia,* above n1 at 11.

24 Wiget A, "Sacred Trust: Preserving Land and Culture Among the Khanty of Western Siberia", 8 February 1996, New Mexico State University <http://www.nmsu.edu/~english/hcsactrust.html#relationship> (hereafter "Sacred Trust").

25 Leksin V and Andreyeva Y, "The Small Peoples of the North: Ethnic Relations and Prospects for Survival Under New Constitutions", above n21 at 43-44, Table 1.

26 Harris C, above n22 at 551.

27 Ibid at 556, Table 4.

28 Leksin V and Andreyeva Y, "The Small Peoples of the North: Ethnic Relations and Prospects for Survival Under New Constitutions", above n21 at 43-44, Table 1.

29 Prokofyeva E, Chernetsov V and Prytkova N, "The Khants and Mansi" in Levin M and Potapov L (eds), *The Peoples of Siberia* (University of Chicago Press, Chicago, 1964) at 512.

Agan), fishing was the chief occupation. The inhabitants of the upper reaches of these rivers engaged chiefly in hunting.[30] In the 15th century, nomadic reindeer-herding was adopted by the Khanty living in areas of the Far North of Western Siberia from their neighbours, the Nenets. Along with reindeer-herding, the Khants adopted Nenets production techniques, clothing, nomadic dwellings, and reindeer-herding terminology.[31]

Traditionally the Khanty did not live in villages but in widely extended family settlements. Khanty social organisation is based on extended families or patrilineages, with related lineages grouped into clans, each with its own hereditary chieftain.[32] There is evidence that still today,

> different Khanty clans claim traditional use rights to different river systems tributary to the Ob, in part because they believe their lineage was founded by divine ancestors who were responsible for the creation of the river systems on which the majority of the clan lives. Most Khanty live on traditional family hunting territory, protected by family gods who are considered offspring of the lineage's founding deities. [33]

The Khanty believe that sacred power has been historically invested in both the landscape and the lineage:[34]

- The High Gods - Sky, Earth Surface, Underworld generally;
- Their Children - Patrons of the Major Tributary River System, and Lineage Founding Deities; and
- Their Children's Children - Patrons of Individual Family Hunting Territories.

The Khanty kinship system is linked to land use and religion at multiple levels, since the Patrons of the Major Tributary Systems are also Lineage Founding Deities. To the Khanty, all natural phenomena such as rocks, rivers, lakes, trees and animals, had spiritual

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30 Ibid at 516-517.

31 Ibid at 521.

32 Wiget A, "Sacred Trust", above n24; Forsyth J, *A History of the Peoples of Siberia,* above n1. The Khants living in the basins of the lower Ob and Irtysh had their principalities such as Koda, Lapin, Kazym and Kunowat. The chieftains wielded considerable power over their subjects and enjoyed a certain amount of wealth. In some places, such as the Koda "Princedom", relations developed which can be regarded as patriarchal feudal: Prokofyeva E, Chernetsov V and Prytkova N, above n29 at 534; Forsyth J, "The Siberian Native Peoples Before and After the Russian Conquest" in Wood A (ed), *The History of Siberia: From Russian Conquest to Revolution* (Routledge, London, 1991) at 81.

33 Wiget A and Balalaeva O, "National Communities, Native Land Tenure and Self-Determination Among the Eastern Khanty", 2000, New Mexico State University <http://www.nmsu.edu/~english/hc/OBSCHIN3.html> (hereafter "National Communities").

34 Wiget A, "Sacred Trust", above n24.

significance. Each clan had a sacred clan site. An effigy of the ancestor-spirit was contained at the sacred clan site, which was believed to be inhabited by the ancestor spirit.[35] In these sanctuaries, special rituals were performed, and sacrifices were offered to the ancestors. Tribal priests or shamans presided over these ceremonies.[36] Despite the efforts of the Orthodox church and the suppression of native religion by the Soviets, traditional belief and ritual still flourish.[37]

Since the time of Yermak's campaign across Siberia in 1581 to the Russian revolution, the Khanty and other indigenous peoples were either forcibly dispossessed of their traditional lands or fled to new lands to avoid the oppressive, abusive and exploitative behaviour of the Russians.[38] From the from the 16th century until its abolition in the early twentieth century, many Khanty migrated north into remote forest and tundra areas to escape the fur tribute or yasak requirements, which they were often unable to fulfil, despite hunting for sables at the expense of their traditional economic activities.[39] From the early 18th century, many Khanty fled from their traditional lands to the north in the face of religious persecution.[40] The Khanty were forced from their traditional lands by peasant farmers and merchants from Russia who took over the best fishing and hunting grounds.[41] More deviously, the Khanty

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35 Prokofyeva E, Chernetsov V and Prytkova N, above n29 at 532-533.

36 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 15.

37 Wiget A, "Sacred Trust", above n24; Wiget A and Balalaeva O, "National Communities", above n33.

38 Yermak's defeat of Kuchum, the Khan of Sibir in 1582, opened the gates to Northern Asia for the Russians. The hunters and trappers led the way, followed by Cossacks, military administrators (*voyevodas*), merchants and Russian peasant farmers. Although the Khanty and Mansis resisted foreign occupation for some time, by 1620 the annexation of Western Siberia was complete. For the history of the Russian conquest of the Khanty and other peoples of Siberia, see Balzer M, "Ethnicity Without Power: the Siberian Khanty in Soviet Society" (1983) 42(2) *Slavic Review* 633 at 636; Forsyth J, *A History of the Peoples of Siberia*, above n1; Prokofyeva E, Chernetsov V and Prytkova N, above n29; and Slezkine Y, *Arctic Mirrors: Russia and the Small Peoples of the North* (Cornell University Press, Ithaca, New York, 1994).

39 The Muscovites used force to extract *yasak* from the native peoples, taking hostages from clans and holding them in Russian forts until their kinsmen brought in the required number of pelts. It was common practice for the *voyevodas*, Cossacks and local state officials to collect 2 or 3 times the official tribute set by Moscow and demand personal "gifts" from the indigenous peoples in order to supplement their income. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 41-42.

40 Missionaries of the Orthodox Church were sent to convert the Khanty-Mansi in the early 18th century. Officials were sent along the northern tributaries of the Ob to burn native "idols" and "sacrilegious temples". Imperial decrees laid down the death penalty to any who opposed the conversion of the natives. Gifts and remission of yasak were offered to the natives as inducements to become baptised. However, many Khanty rejected conversion, and fled to the north, taking their religious artefacts with them and hiding them in secret places. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 154-155.

41 Prokofyeva E, Chernetsov V and Prytkova N, above n29 at 515. As the Russian colonisation of Siberia proceeded with its influx of people, the adequacy of the food supply began to worry the Russian authorities, who decided to make the colony self-sufficient in food by encouraging the flow of peasant farmers to Siberia. The colonists viewed the indigenous peoples as nuisances and menaces, and took the land they required "without the least concern as to its previous ownership or economic use". This expropriation of

and Mansi were deprived of their lands through unfair commercial contracts and usury by the Russians, with interest rates as high as 300% for goods bought in advance. Having no concept of debt, the Khants accepted cash loans against their lands, but being incapable of repaying the money when it became due, forfeited the leased land.[42]

The Khanty also suffered greatly during the Soviet period, with industrialisation, collectivisation and forced relocation being particularly devastating for indigenous peoples.[43] The massive industrialisation programmes began in the North in the 1930s,[44] with State-run enterprises moving onto the traditional lands on which indigenous peoples lived and forcibly removing them with no compensation.[45] Collectivisation, first imposed against the Khanty in

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indigenous lands continued well into the 19th century. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 43 and 158.

42 The Russian peasants and traders obtained forest produce such as nuts and honey by "giving the natives loans against the value of the crop in future years, imposing iniquitous rates of interest, and taking full possession of the given area of forest when the debt, inevitably remained unpaid". The indigenous peoples were deprived of their last means of subsistence as the forest crop was removed and the breeding-grounds of animals on which they relied for food and furs were raided by the Russian settlers. Furthermore, as the pressure to hunt foxes and sable to pay yasak and trading debts disrupted the traditional economy, so the indigenous hunters became more vulnerable to the harsh climate and reliant on bread for survival, and the Russian traders were able to charge them exorbitant prices for grain and flour. As well as forfeiting their land, the Khanty were frequently held to their debts, always increasing through interest, so that eventually they could be deprived entirely of access to their traditional lands for hunting, fishing and gathering, and could only pay their debts by working as slaves for those who had taken their lands. Many native debtors in the nineteenth century were the victims of mortgages contracted by their ancestors 200 years ago. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 159-160. See also Prokofyeva E, Chernetsov V and Prytkova N, above n29.

43 The situation of the indigenous peoples worsened despite desperate efforts to protect them by the Committee for Assisting the Peoples of the Far North ("Committee of the North"), established on 20 June 1924 with the task of "determining and reserving the territory necessary for the habitation and cultural development of every ethnic groups in accordance with its way of life". Slezkine Y, above n38 at 154. Various Statutes were passed in an attempt to protect the lifestyles of the indigenous peoples of the North. For example, the 1926 "Provisional Statute of the Administration of the Native Peoples and Tribes of the Northern Borderlands of the RSFSR" and the 1927 decree "On the Judicial Functions of the Bodies of the Native Administration of the Peoples and Tribes of the Northern Borderlands of the RSFSR" obliged the local soviets and party organs to initiate a system of self-government of indigenous peoples through native congresses and native soviets (councils), and provided the native soviets with judicial functions. However, these and other measures all failed in practice. The Committee of the North was formally abolished in 1935, although it had lost much of its power prior to that time. For further information, see Forsyth J, *A History of the Peoples of Siberia*, above n1; Pika A, "The Small Peoples of the North: From Primitive Communism to 'Real Socialism' " in Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996); Sergeyev M, "The Building of Socialism Among the Peoples of Northern Siberia and the Soviet Far East" in Levin M and Potapov L (eds), *The Peoples of Siberia* (University of Chicago Press, Chicago, 1964) at 249-49; Slezkine Y, above n38; Vakhtin N, above n21.

44 Vakhtin N, above n21 at 11.

45 Huge industrial enterprises such as the Ural State Fur Company were allotted monopoly rights to exploit natural resources, including fish, timber and minerals. State farms (*sovkhozy*) heavily exploited natural resources which formed the basis of the indigenous economy. State reindeer-breeding farms arbitrarily used any pastures they wished; State fishing farms blocked rivers with nets, and violated seasonal fishing restrictions and other rules with impunity. The indigenous peoples had no stake in the industrial

1929, had a devastating effect on their traditional lifestyles, as land and animals were seized from their owners and became the property of the state.[46] This was most distressing for the more northerly Khants engaged in reindeer herding, as communities who regarded Soviet orders to sell reindeer for money as a sin slaughtered deer en masse as a sacrifice to the spirits, leading to starvation and death.[47] In the 1950s and 1960s, the policy of amalgamating collective farms (*kolkhozy*) to form larger, state-owned units (*sovkhozy*) forced the Khanty in some areas to move to large settlements as the *sovkhozy* and *kolkhozy* in their villages were closed, schools, hospitals and shops were shut, and some small villages were closed completely.[48]

Of all the negative effects of colonisation on the Khanty and Mansi of Siberia, the discovery of oil and gas on their lands in the mid 1960s has probably posed the greatest threat to their cultural survival. "Protected by their isolation, and having survived the colonisation of the

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enterprises, but were expected to welcome the newcomers and help them by transporting company workers and housing the newcomers. Legislation aimed at protecting the indigenous peoples against industrial expansion ("On Nomadic Soviets in National Okrugs and Northern Areas of the Russian Federation", Decree of the Supreme Executive Committee and Council of Ministers, August 1933) proved ineffective as political, economic and military power in the North was transferred to the huge, central industrial ministries. Vakhtin N, above n21 at 16; Slezkine Y, above n38 at 268-276.

46 Collectivisation proceeded most quickly on the settled fishing communities of the lower Ob and Irtysh, where the indigenous peoples had already been drawn into the Russian commercial network before the revolution. The scattered communities of the relatively remote forests and marshes were harder to absorb into the Russian system. For example, the Vakh River Khants did not learn of the Bolshevik revolution until 1927, and even in the 1950s, the administrative centre of the Ostyak Vogul National Region, Khanty-Mansiysk, could only be reached by paddle steamer or sea plane. In the dense coniferous forests the Khanty were able to continue their traditional occupations. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 246 and 390. For further information on hunting and fishing cooperatives, and their effects on the indigenous people, see Pika A, "The Small Peoples of the North: From Primitive Communism to 'Real Socialism' ", above n43 at 20; Prokofyeva E, Chernetsov V and Prytkova N, above n29 at 537.

47 At the centre of the collectivisation campaign was the notion of confiscating the property of "kulaks" or rich peasants. The Soviets demanded that the "rich" nomads sell their reindeer or it would be confiscated. Those indigenous communities who regarded the sale of reindeer for money as a sin would have preferred to give the reindeer away, but as this was deemed to be "a counter-revolutionary activity and deception" and "a way of luring the poor onto their side", the people slaughtered the reindeer instead. In the years of collectivisation (1932-1934) the number of reindeer in the Soviet Union was reduced by one-third. Pika A, "The Small Peoples of the North: From Primitive Communism to 'Real Socialism' ", above n43 at 29-31; Slezkine Y, above n38 at 200-203.

48 In response to the Resolution of March 1957 "On the Measures for Further Economic and Cultural Development of the North", which instructed the Provincial, Regional and Raion administrations to "consider the question of simplifying the structure and improving the work of the economic, Soviet and Party administration in the North", local administrations shut down *sovkohzy* and *kolkohzy* in smaller villages, dismantled local administrative bodies, and merged smaller village into larger ones. As the suitability of new large settlements for traditional indigenous occupations was rarely considered, many of the Khants found themselves without any means of support. Vakhtin N, above n21 at 18-19. The amalgamations and forced relocation evoked the same responses from the indigenous peoples as collectivisation, including the slaughter of reindeer. Forsyth J, *A History of the Peoples of Siberia,* above n1 at 362.

Tsars, the missionising of the Orthodox Church, and the repression and stagnation of the Soviets, Western Siberia's native peoples may not survive oil".[49]

5.3 The Khanty and Oil Exploitation

5.3.1 Structure of the Russian Oil Industry

The 1960s brought a massive intrusion into the lands of the Khanty and Mansi that had previously been relatively neglected. Prior to the 1960s the major demands on the region were for fish and timber. Geological exploration took place in the 1950s. Oil was first discovered in Western Siberia in the Shaim field in 1960, but large-scale production did not occur until the supergiant Samotlor field was discovered in 1968.[50] Western Siberia is Russia's largest oil-producing area, containing over 70% of Russia's recoverable reserves and producing approximately 69-73% of Russia's crude oil from 1987 to 1994.[51] Most oil has been found in the region of the middle reaches of the Ob, in the Khanty-Mansi Autonomous Okrug.

Until the 1990s, exploration work was undertaken by the state-owned geological company Glavtyumengeologiya, which administered a number of exploration associations.[52] These enterprises were part of the Ministry of Geology in the Soviet era, but after 1991 came under the jurisdiction of the Russian State Committee on Geology (Roskomnedra).[53] The geology companies are producers in their own right. There are now 10 geology exploration enterprises active in Western Siberia, now producers in their own right, and with specific territorial responsibilities.[54] Table 15 shows these companies and the administrative areas in which they work.

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49 Wiget A, "Sacred Trust: ", above n24.

50 Wilson D, "The Siberian Oil and Gas Industry" in Wood A (ed), *Siberia: Problems and Prospects for Regional Development* (Croom Helm Publishers Ltd, New York, 1987) at 97. The big gasfields of Tyumen Oblast were discovered during the period 1965-1970. These include the world's largest deposit, Urengoy, and other giant deposits such as Medvezhe, Yamburg and Zaporlyarne. The majority of gas is in the Yamal-Nenets Autonomous Okrug, in the Nadym-Pur Zone and on the Yamal Peninsula. Sagers M, "West Siberian Oil Production in the Mid-1990s" (1994) *36 Int Geol Rev* 997 at 999; Wilson D, id, at 97.

51 Sagers M, ibid at 997. For further information on Russia's energy industries, see United States Energy Information Administration, *Country Analysis Briefs: Russia*, February 2000, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/russfull.html>.

52 Wilson D, above n50 at 100.

53 Sagers M, above n50 at 1009.

54 Ibid.

Table 15

GEOLOGICAL ENTERPRISES OPERATING IN WESTERN SIBERIA 1994	
Company	**Administrative Region**
Obneftegazgeologiya	Khanty-Mansi Autonomous Okrug
Khanty-Mansiyskneftegazgeologiya	Khanty-Mansi Autonomous Okrug
Megionneftegazgeologiya*	Khanty-Mansi Autonomous Okrug
Aganneftegazgeologiya	Khanty-Mansi Autonomous Okrug
Krasnoleninskneftegazgeologiya	Khanty-Mansi Autonomous Okrug
Tyumennedra (formerly Tyumengeologiya)	Tyumen Oblast proper
Purneftegazgeologiya	Yamal-Nenets Autonomous Okrug
Urengoyneftegazgeologiya	Yamal-Nenets Autonomous Okrug
Zapolyarneftegazgeologiya	Yamal-Nenets Autonomous Okrug
Yamalneftegazgeologiya	Yamal-Nenets Autonomous Okrug
Tomskneftegazgeologiya	Tomsk Oblast

* Now part of Slavneft.
† Now part of the Eastern Oil Company.
SOURCE: Sagers M, "West Siberian Oil Production in the Mid-1990s" (1994) *36 International Geology Review* 997 at 1010.

Until mid-1990, there were only two official oil production enterprises in Western Siberia: Glavtyumenneftegaz (Main Administration for Petroleum and Gas Production in Tyumen Oblast) and Tomskneft. Glavtyumenneftegaz was so large it was not run as a single unit, but had subordinate production units or administrations.[55] Since the collapse of the Soviet Union, the production side of the oil industry has been reorganised in a process involving the merging of the production units into a few large, vertically-integrated oil companies, and their subsequent privatisation. Lukoil, Yukos and Surgutneftegaz were established as vertically-integrated companies in 1993; Slavneft, Sidanko and VOC were formed in 1994; and the Tyumen Oil Company and the Siberian Oil Company were formed in 1995. A holding company, Rosneft, was formed to hold the states shares of the Soviet oil production associations until all could be merged into the new vertically-integrated enterprises. Rosneft became an independent oil company in 1995.[56]

Each oil company has specific territorial responsibilities. Table 16 shows the new oil companies operating in Tyumen Oblast, the former production units they control in that Oblast, selected fields worked in the Oblast and the administrative region:

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[55] Seven of these existed in early 1990: Nizhnevartovskneftegaz, Yuganskneftegaz, Surgutneftegaz, Krasnoleninskneftegaz (now Kondpetroleum), Noyabrskneftegaz, Varyegganneftegaz and Purneftegaz. Each production association was based on different oil fields, that is, the Nizhnevartovsk, Yugansk, Noyabrsk oil fields etc. Sagers M, ibid at 1002.

[56] Sagers M, ibid at 1003.

Table 16

VERTICALLY-INTEGRATED OIL COMPANIES OPERATING IN TYUMEN OBLAST, 1994		
Company	**Production Units**	**Administrative Regions**
Tyumen Oil Company	Nizhnevartovskneftegaz Tyumenneftegaz	Khanty-Mansi A.O. Yamal-Nenets A.O. Tyumen Oblast proper
Sidanko	Chernogorneft Varyegan neftegaz Kondpetroleum	Khanty-Mansi A.O.
Surgutneftegaz	Surgutneftegaz	Khanty-Mansi A.O
Yukos	Yuganskneftegaz	Khanty-Mansi A.O
Lukoil	Langepasneftegaz Kogalymneftegaz Urayneftegaz	Khanty-Mansi A.O
Slavneft	Megionneftegaz	Khanty-Mansi A.O
Rosneft	Purneftegaz Sibneftegazpererabotka	Khanty-Mansi A.O
Siberian Oil Company	Noyabrskneftegaz	Yamal-Nenets A.O.

SOURCE: Sagers M, "West Siberian Oil Production in the Mid-1990s" (1994) *36 International Geology Review* 997 at 1004-1009.

In recent years, a number of small independent Russian oil companies have emerged. These companies were formed for the express purpose of exploiting the smaller oilfields that the large companies have ignored.[57]

Since the collapse of the Soviet Union, there has been an increase in investment by foreign oil companies in the Russian oil industry. In mid-1994 there were over 51 joint ventures identified with crude oil extraction across Russia, of which 19 were involved in upstream activities.[58] Western Siberian joint ventures accounted for nearly 75% of joint-venture output in Russia in 1994.[59] Joint ventures in the Khanty-Mansi AO include Vanyoganneft (Chernogorneft and the U.S. company Occidental Petroleum), White Nights (Varyegan neftegaz, and the U.S.-based companies Anglo-Suisse and Phibro Energy Production Inc), Yugraneft (Chernogorneft and the Canadian company Nowsco), Manoil (Yuganskneftegaz, its field directorate Mayskneft, and Mechenterpresoil of the Netherlands)

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[57] Among these companies are Magma, RITEK, Sibeko, Epek, Sinco and Evikhon. Ibid at 1010-1011.
[58] Ibid at 1011.
[59] Ibid at 1012.

and Chernogorskoye (Chernogorneft and the U.S.-based company Anderman/Smith).[60] In addition to joint ventures, other large projects in Western Siberia that involve international participation include the development of the Priobskoye field in the Khanty-Mansi Autonomous Okrug by Amoco and Yuganskneftegaz[61] and the development of the Salym oilfields by Shell and Evikhon.[62]

Total oil production in Western Siberia in 1994 was 220.7 million metric tonnes (mmt). Of this figure, the West Siberian geology enterprises operating in Tyumen and Tomsk Oblasts produced 1.8 mmt of crude oil in 1994, or about 0.8% of total West Siberian production. The vertically-integrated oil companies produced 206.1 mmt of crude oil, approximately 93% of total West Siberian oil production. Joint ventures and Russian independents produced 9.5 mmt of crude oil, or 4.3% of total West Siberian oil production.[63] The vertically-integrated oil companies, with the former production associations as their subsidiaries, remain dominant in the West Siberian (and Russian) oil industry.

5.3.2 Khanty Grievances

5.3.2.1 Loss of land

The largest oil deposits in Siberia lie in the lands of the Khants, but they have received no compensation for the oil taken from the land, or for the loss of the land itself. The indigenous peoples were unable to oppose the exploitation of oil during the Soviet period because they had no legal structures they could use and no legal rights of redress. The land could be alienated from the indigenous peoples by a decision of the Moscow administration with no consultation, compensation or possibility of opposition.[64]

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60 Ibid at 1012-1015.

61 The project has been shelved indefinitely due to a breakdown in negotiations between the Russian principals and Amoco. Personal communication with Mr. Charles McPherson of the World Bank, 16 March 1999.

62 Both of these are among the earliest tenders announced after approval of the Law on Underground Resources in 1992. Sagers M, above n50 at 1015.

63 Ibid at 1002, Table 1. A number of factors, including the complex and continually changing tax regime, bureaucratic delays, deal reversals and political uncertainty, have made Russia "a tough place to invest" and deterred foreign oil companies from engaging in joint venture agreements, so that in 2000 joint ventures still accounted for a small share of Russian oil and gas production: Gaddy D, "Yukos Priobskoye Project Litmus Test for Foreign Investment in Russian E&P", *Oil and Gas Journal*, 6 March 2000, at 25-31.

64 Vakhtin N, above n21 at 24-25.

> The worst features of these grandiose industrial projects in Siberia was that they proceeded without regard for the local people, whose whole livelihood could be destroyed by them. Not only had the Khantys and Nenets of Western Siberia ... been ousted from their devastated homeland by the oil and gas industry, but they received no compensatory benefits from the "development'.[65]

Resettlement and relocation programmes have taken many Khanty off their traditional hunting grounds, which have been expropriated for oil.

> By the late 1980s all but a few areas (Kazim River, Yugan) had been seized for production by the Ministry of Energy and the government oil monopoly, and the region virtually supported a collapsing Soviet economy by providing a cheap domestic petroleum supply and petrodollars generated from export. This period was marked by the forcible relocation of Khanty families from their traditional family hunting territories. [66]

In addition to these official relocation schemes, the natural resource degradation accompanying oil development has forced many Khant families to "voluntarily" relocate away from their traditional family hunting terrritories.[67]

5.3.2.2 Environmental destruction

Along with the loss of land came environmental destruction on a massive scale. Pika has described the effects of oil exploitation on the Khants near Lake Pyaku-ot as follows:

> It is difficult to recognise the place. Where there was a realm of virgin land, where one would only seldom meet a fisherman's hut or a deer-breeder's or a hunter's tent, a city has been built. One sees settlements, cross-roads of asphalt highways stretching as far as the eye can see. And between them - black patches of burned forests, vast spaces of man-made caterpillars, oil overflows surrounding oil rigs, gas torches burning day and night, the smoke of forest fires. [68]

The development of the oil fields of the Ob basin involved large-scale tree felling and earth-moving works which devastated large areas of West Siberian forest.[69] Infrastructure development has contributed to environmental degradation.

> Forest and swamp are now criss-crossed by roadways, railways, seismic lines, power transmission lines, and right-of-way. This vast but fragile network has contributed to

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[65] Forsyth J, *A History of the Peoples of Siberia*, above n1 at 395-396.
[66] Wiget A, "Sacred Trust", above n24.
[67] Ibid.
[68] Pika A, (1990) 3 *Severnye Prostory* at 27; cited in Vakhtin N,above n21 at 25.
[69] Forsyth J, *A History of the Peoples of Siberia*, above n1 at 359.

> significant habitat disturbance for fish, furbearers, domestic reindeer and migratory birds on which the Khanty traditional economy depends.[70]

Air pollution is a major problem in Western Siberia. The Tyumen Oblast has the highest per capita index of pollution among the northern regions, with 962 kg of pollutants emitted per person per year.[71]

> Depositions of sulphur and nitrogen form chemical discharges proven to be 2 to 3 times the maximum permissible level, and the incidence of acid rain and snow is destroying the taiga, often in areas far removed form production sites. The effect of local atmospheric temperature increases of 2-3 degrees Centigrade in the heat shadow of the gas flares have not been studied.[72]

Inevitably, with oil exploitation came oil spills. Oil and gas spillage in Western Siberia, where one million tonnes per year has been spilled into rivers and lakes, is one of the most notorious ecological disasters in Siberia.[73] There are over 3,000 pipeline breaks per year in Western Siberia, which are often "cleaned up" by burning the spilled oil.[74] Soil pollution from pipeline breaks and settling pits has ruined large areas. Surface waters in this wetlands environment typically contain 7 to 20 times the maximum permissible amount of petroleum hydrocarbons.[75] Between the early 1960s and the late 1980s the total fishable waters (measured in terms of surface area) in the Khanty-Mansi Autonomous Okrug had been depleted by 96%.[76] In 1989, the Khant writer Yeremy Aipin estimated that oil development in the Tyumen Oblast had deprived indigenous peoples of 28 rivers formerly used for commercial fishing, 17,700 hectares of spawning and feeding grounds and 11 million hectares of reindeer pasture.[77]

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70 Wiget A, "Black Snow: Oil and the Eastern Khanty", 2000, New Mexico State University <http://www.nmsu.edu/~english/hc/IMPACTOIL.html> (hereafter "Black Snow").

71 Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy" (1994) 18(4) *Polar Geography and Geology* 296 at 309.

72 Wiget A, "Black Snow", above n70.

73 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 395; Has M and Zaochnaia T, "The Present Situation of Indigenous Peoples in Siberia" in Bothe M, Kurziden T and Schmidt C (eds), *Amazonia and Siberia* (Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1993) at 277.

74 Wiget A, "Black Snow", above n70.

75 Ibid.

76 Slezkine Y, above n38 at 373.

77 Aipin Ye, "Not by Oil Alone", reprinted in International Work Group for Indigenous Affairs Newsletter No. 57 (1989) at 137-143.

5.3.2.3 Mass migration

Oil development in Western Siberia spawned mass migration. In 1989 only 1,646 of the 1.2 million residents in the Khanty-Mansi Autonomous Okrug (0.1%) reported that they had been born in the Okrug.[78] The Khanty-Mansi Autonomous Okrug

> provides the most striking example of natives overwhelmed by massive recent immigration driven by economic development of a valuable resource (oil and gas fields with enormous reserves). As economic development has surged, the 12 thousand Khanty and the 7 thousand Mansi have been overwhelmed by the immigrant flood of Russians, Ukrainians, Tatars, and others, as the population rose rapidly to nearly 1.3 million in 1989. [79]

Table 17 shows the huge increase in population in the major oil cities, in particular those of Surgut and Nizhnevartovsk. The inflow of over a million immigrants to the oil and gas fields has resulted in severe linguistic pressure on the Khanty and Mansi living within the borders of the Khanty-Mansi Autonomous Okrug. Outside the Autonomous Okrug, in the northern forests, the Khanty form small communities less subject to demographic, linguistic and economic pressure.[80]

Table 17

POPULATION IN THE LARGEST CITIES, KHANTY-MANSI AUTONOMOUS OKRUG				
	1959	**1970**	**1979**	**1989**
Surgut	6,031	34,011	107,343	247,843
Nizhnevartovsk		15,663	108,740	241,457
Nefteyugansk		19,675	52,393	93,930
Nyagan				54,061
Kogalym				44,297
Raduzhnyy				43,726
Megion		6,431	23,629	39,783
Uray		17,385	21,519	37,198
Khanty-Mansiysk	20,667	24,754	28,266	37,198
Langepas				25,618
Beloyarskiy				20,534

SOURCE: Harris C, "A Geographic Analysis of Non-Russian Minorities in Russia and its Ethnic Homelands" (1993) 34(9) *Post-Soviet Geography* 543 at 592, Table 15.

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[78] Harris C, above n22 at 567.
[79] ibid at 558.
[80] Ibid at 573.

As in the earliest times of the colonisation of Western Siberia, individual immigrants contribute to the destruction of the way of life of the indigenous peoples. The incoming oil workers, who were temporary residents attracted by good wages, had little interest in the land as a natural environment or as the homeland of the Khanty-Mansi and other indigenous peoples.[81] Such temporary workers "not only on occasion destroyed all the fish in a lake or felled whole cedar trees to obtain a few nuts, but, for instance, desecrated the storehouses and burial places of the Khantys and Nenets, or simply robbed them of the clothes they wore".[82] There are still incidents of personal attacks, criminal trespass and theft, poaching of fur and game, attacks on reindeer herds for "sport" and other crimes against the Khanty and their resources.[83]

Oil exploitation has had severe negative sociopolitical and cultural impacts on the indigenous peoples. The result of the resettlement and relocation programmes have taken many Khanty off their traditional hunting grounds

> is that after 5,000 years of occupancy, there are today virtually no traditional Khanty family settlements of Vakh, Agan, Salim and Vas-Yugan Rivers though these were all well-populated area, rich in terms of traditional economy, twenty years ago. Other river systems like Pim and Trom-Agan are heavily impacted and the Khanty marginalised. Only the Khanty families on Lamin and Yugan River systems have been minimally impacted. [84]

The religious practices of the Khanty have been detrimentally affected by oil development. This does not only include the direct desecration and destruction of places of burial and sacrifice, but also violation of other features of the environment with religious significance. For example, The Khanty have several kinds of divinely-established features of the physical environment, such as high places, embankments and promontories, sandbars, scared groves of trees, headwaters and confluences of river systems. Despite the public objections of the Khanty, one sacred hill, called Imi Yagoun, or Mother of the Rivers, was leveled and then excavated to obtain materials for construction associated with oil development.[85] In addition, key animal and fish species, such as moose and bear, and sturgeon and pike, which are believed to be divinely ordained as incarnational mediators between this world the sky and the underworld, are threatened by pollution and encroachment on their habitat.[86]

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81 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 391; Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n71 at 299.
82 Forsyth J, *A History of the Peoples of Siberia*, above n1 at 396.
83 Wiget A, "Black Snow", above n70.
84 Wiget A, "Sacred Trust", above n24.
85 Wiget A, "Black Snow", above n70.
86 Ibid.

5.4 The Role of the Law

5.4.1 Constitutional Law

The current Constitution of the Russian Federation, which entered into force on 25 December 1993, contains an unprecedented number of references to international law.[87] The former USSR never considered international law as something that could be invoked and enforced by domestic courts. As a general constitutional principle the Soviet legal system was closed to international law.[88] With the advent of perestroika, it became clear that Russia could not hope for further economic and social development through integration with the international community unless Russia became transformed into a modern state based on the rule of law.[89] In particular, acceptance into the international community would be conditioned upon Russia's adoption of international human rights standards.

Article 15(4) provides that:

> The commonly recognised principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.

This article clearly states that all international law is part of the Russian domestic legal system. This formulation incorporates not only treaty law, but also the "commonly recognised principles and norms of the international law", in particular sources of general international law such as general customary law.[90] Pursuant to Article 15(4), the existing "commonly recognised principles and norms of international law" relating to indigenous peoples are a component part of the Russian legal system. Article 15(4) allows the courts to take into account future developments in international law, including developments relating to indigenous peoples.

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87 Danilenko G, "The New Russian Constitution and International Law" (1994) 88 *AJIL* 451 at 452.
88 Ibid at 458.
89 Ibid at 459.
90 Ibid at 465.

The Constitution further guarantees the protection of specified civil, political, economic, social and cultural human rights based on international human rights norms. Article 17, which opens the chapter on human rights in the Constitution, states that:

> The basic rights and liberties in conformity with the commonly recognised principles and norms of the international law shall be recognised and guaranteed in the Russian Federation and under this Constitution.

Article 69 of the Constitution specifically states that:

> The Russian Federation shall guarantee the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation.

It is not clear whether Articles 17 and 69 will be interpreted as a "general statement of policy", or an "extension of the general principle of incorporation contained in s15(4)".[91] These provisions may "envisage a higher hierarchical status" for the "commonly recognised principles and norms of the international law" pertaining to human rights, than for other "commonly recognised principles and norms of the international law".[92] Article 69 has the potential to force the government to conform with recent international conventions and declarations relating to indigenous peoples, such as the ILO Convention No. 169, and the UN Draft Declaration on the Rights of Indigenous Peoples.

Because the Russian courts are "wholly unfamiliar" with the realm of international law and lack experience in the direct application of international law, there will be "serious practical problems" in the application and enforcement of international law by the courts.[93] The extent to which the courts will try to avoid or limit the application of international norms remains to be seen.[94] However, if upheld by the Courts, these Constitutional provisions would force the government to conform with recent international conventions and declarations relating to indigenous peoples.

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[91] Ibid.
[92] Ibid at 467.
[93] Ibid at 466.
[94] Ibid.

5.4.2 *Federal and Regional Legislation Pertaining Specifically to Indigenous Peoples*

After the First Congress of Northern Minorities took place in 1989,[95] the federal and regional governments passed a number of laws aimed at assisting the indigenous peoples. Those laws and other legal acts in effect in the Russian Federation before the Constitution was enacted in 1993 remain in force so far as they do not contravene the Constitution. Under the Constitution, the federal and regional authorities have joint jurisdiction over "protection of the rights and freedoms of man and citizen", "protection of the rights of ethnic minorities" and "protection of the original environment and traditional way of life of small ethnic communities".[96]

5.4.2.1 Federal legislation

The Federal law "On General Principles of Local Self-Administration" provides that "village councils, settlements, raions, towns and parts of towns can be considered as primary territorial units of self-administration", thereby allowing an ethnic group to establish its own administrative body.[97] According to s23, the establishment and reorganisation of industrial and social enterprises that are using natural resources of a given territory should be carried out only in accordance with the consent of local councils, and enterprises, irrespective of their affiliation, should get permission from the local council for any kind of activity affecting the ecology, demography etc of a given territory.[98]

In the early 1990s the Cabinet of Ministers of the USSR and the Council of Ministers of the RSFSR passed the law "On Additional Measures for Improving the Social and Economic Conditions of Living of the Small Peoples of the North for 1991-1995".[99] This law recognised the existence of "acute problems" with socio-cultural provisions in the national villages and settlements and with providing the small nations of the North with habitation, and that "in the majority of regions of habitation of these nations the ecological situation has deteriorated sharply, and a systematic violation of established standards and rules of using

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[95] The political activity of indigenous peoples is discussed further in section 5.6.4.

[96] 1993 Constitution, articles 72(b) and 72(l).

[97] *Novye Zakony SSSR, Vyupsk I*, Yuridicheskaya Literatura, Moscow, 1990, at 91-104.

[98] Vakhtin N, above n21 at 29.

nature is perpetrated". Because of the "necessity of all-round State protection and assistance for the small nations of the North" the Cabinet of Ministers of the USSR and the Council of Ministers of the RSFSR resolved to approve proposals for the implementation during the years 1991-1995 of a number of measures providing for "assignment to the small nations of the North of the exclusive right to exploit biological resources on the territory of their habitation, hunting and fishing allotments, and deer pastures".[100] The law also provided as follows:

> 7. For preservation and establishment of places of habitation of the small nations of the North and improvement of their living conditions, to empower the Council of Ministers of Republics, executive committees of the Council of People's Deputies of lands, districts and autonomous regions within the RSFSR, on whose territories live these nations, to:
>
> create, in the prescribed order, reservations, assign to indigenous small nations of the North the territories of traditional use of natural resources that are not subject to alienation for industrial purposes, and determine the conditions of land use with the purpose of allowing and effecting, in the abovementioned reservations and territories, economic activity and traditional industry only by these nations;
>
> assign to deer husbandry *sovkhoz* and *kolkhoz* (including also fishing), fishing enterprises, state trading collectives, animal husbandry collectives, work brigades, tribes and families of the small nations of the north, priority rights of economic use of biological resources, hunting and fishing grounds, and deer pastures;
>
> allow the small nations of the North in the districts of their habitation, and also the Yakut, Buryat, Komi and tribes of other nations living in the districts of the North and leading from industrial necessity a nomadic lifestyle, to hunt and fish all year round in all grounds and waters (excepting spawning grounds) with any equipment allowed by the rules of fishing and hunting, in order to secure food for families.

It was also recognised "as essential that the Council of Ministers of the RSFSR adopts, in the shortest term, the state programme, prepared on the basis of the abovementioned submissions, for the development of economy and culture of the small nations of the North during the years 1991-1995".[101] On 11 March 1991, the Council of Minsters of the RSFSR ratified the "State Program for the Development of the Economy and Culture of the Numerically Small Peoples of the North from 1991-1995".[102] The Programme provided various measures in the areas of education, language, development of industry and agriculture, communications, housing and scientific research. Despite its good intentions, the

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[99] Decree of the Cabinet of Ministers of the USSR and the Council of Ministers of the RSFSR, No.84, 11 March 1991 (*SP* 1991 No.7-8 Item 31).

[100] Article 1.

[101] Article 2.

[102] The state programme was ratified by Decree of the Council of Ministers of the RSFSR, No.145, 11 March 1991. (*Zak.Ek.* 1991 No 7-8, 77), reproduced in Kryazhkov V, *Status Malochislennykh Narodov Rossii: Pravovye Akty i Dokumenty* (Status of the Small Peoples of the North: Legal Acts and Documents) (Moscow, 1994) at 150-151. Extracts of the state programme are provided in Kryazhkov V, id at 151-158.

State Programme for 1991-1995 was never fully implemented due to budget shortages, with the program lacking the funding and material-technical resources to achieve its aims by the start of the second year.[103]

In April 1992 the President signed an edict "On Urgent Measures for the Protection of the Place of Residence and Economic Activities of the Small Peoples of the North."[104] This edict provides as follows:

> For the purpose of securing the legal rights and interests of the small peoples of the North, preservation and development of the traditional forms of their economy in the conditions of transition to market relations, and also the creation of additional mechanisms for securing the ecological safety in the regions of the industrialisation of the North, I order:
>
> 1. The Ministries of the Republics in the complement of the Russian Federation, the organs of executive power of the territories, provinces and autonomous regions, in which live the small peoples of the North, together with the regional associations of the small peoples of the North, to:
>
> define, in the places of habitation and economic activity of the small peoples of the North, the territories of the traditional use of the nature, which constitutes the inalienable heritage of these peoples and may not become, without their consent, liable for alienation for industrial or other purposes not connected with the traditional economic activity;
>
> hand over without payment reindeer pastures, and hunting, fishing and other facilities for integrated use (reindeer husbandry, the hunting, fishing and marine mammal killing industries, gathering of berries, mushrooms, nuts, medicinal herbs etc) to clan obschinas and families of the small peoples of the North for lifelong heritable possession on leasehold, and to *kolkhoz* and *sovkhoz* - for permanent (sine die) use or leasehold;
>
> grant the preferential right to conclude agreements and obtain licenses for utilisation of renewable natural resources to native communities, families, and individual representatives of the small peoples of the North in the places of their traditional use of nature.

The clan or family *obschina* is a voluntary unification of native communities and families and their properties for collaborative development connected with traditional activities and occupations, usually fishing, hunting and reindeer herding.[105]

The edict aroused great hope among the indigenous peoples that they would be able to take control over their traditional lands. However, a number of difficulties await the indigenous

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[103] Murashko O, "Introduction" in Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles.* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996) at 11; Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n 71, at 313.

[104] Edict of the President of the Russian Federation, No.397, 22 April 1992. (*Ved.RSFSR* 1992 No.18 Item 1009).

[105] Fondahl G, "Legacies of Territorial Reorganization for Indigenous Land Claims in Northern Russia" (1995) 19(1) *Polar Geography and Geology* 1 at 10 (hereafter "Legacies of Territorial Reorganization").

people who try to claim their rights under the legislation. First, to claim land, a native community or individual must be active in, or willing to return to, traditional activities, as defined by the state. The allocation of land to a family obschina does not grant comprehensive rights of ownership over land to the obschina; rather, the community has rights to use the land and its resources for traditional activities. The federal government and its subjects (provinces, republics and regions) remain the "owners" of the land.[106]

This requirement that the land must be connected with traditional activities provides difficulties for indigenous peoples claiming traditional lands. Sedentarisation, relocation and the economic restructuring that occurred with collectivisation fundamentally changed traditional geographic patterns of land use, and interrupted the transfer of knowledge and skills necessary to carry out traditional activities.[107] The transfer of *kolkhozy* and *sovkhozy* into private ownership often meant the dispossession of indigenous peoples of their lands and the reallocation of these to non-native peoples. Indigenous peoples interested in returning to their lands have little hope for success while non-native peoples continue to use the land.[108] The allocation of land based on the requirement that indigenous peoples be engaged in, or willing to return to, traditional activities, does not provide a legal basis for securing lands not used for hunting, fishing or herding, but which have great spiritual significance.[109]

A number of practical difficulties have arisen. The finances necessary to run ethnic enterprises have presented a problem for some groups, with the financial crisis in Russia undermining the ability of the financial system to support the communal enterprises.[110] There are also huge costs to indigenous peoples in travelling to administrative centres to apply for land, including the prohibitively expensive cost of travel itself, the cost in terms of time, psychological stress, and language difficulties.[111]

Finally the local administrations have typically frustrated the intentions of the law. The responsibility of allocating land falls to the governments of the republics, territories, provinces and autonomous okrugs, together with regional associations of the Small Peoples.

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[106] Fondahl G, *Gaining Ground*, above n22 at 85-86.
[107] Ibid at 100; Fondahl G, "Legacies of Territorial Reorganization", above n105 at 13.
[108] Fondahl G, *Gaining Ground*, above n22 at 100.
[109] Fondahl G, "Legacies of Territorial Reorganization", above n105 at 14.
[110] Fondahl G, *Gaining Ground*, above n22 at 102.
[111] Ibid at 104-106.

Clan-based communes (*obschinas*) and farms were formed along with ethnic enterprises, whose[112]

> leaders went to the local administrative authorities in order to obtain the right to the use of the land and the renewable natural resources and carried with them the presidential decree as a confirmation of their right to the traditional use of the land of their ancestors. But very often they were told that a decree is not yet a law; that no instructions had yet been given about how to hand over the land to the indigenous peoples; and that one should await the passing of the Federal laws on the rights of the indigenous peoples. The administration of the northern region was obviously in no hurry to implement the decree. In contrast, the presidential decree on privatisation has been implemented with unprecedented zeal.

While the laws on the rights of indigenous peoples are continually postponed, [113]

> the methods by which indigenous peoples are deprived of their lands and resources become more sophisticated. In some areas private companies rent, at a small expense and for a period of 90 years, oil-bearing clan pastures where clans graze their reindeer; in other areas the local administration issues "resolutions" withdrawing "commune land that has not yet been legally consolidated".

The State Programme required various governmental bodies to prepare and submit "drafts for laws on the small nations of the North and on the legal status of an autonomous region, national district, national village and settlement council" to the Council of Ministers RSFSR in 1992.[114] Subsequently, on 30 April 1999, President Yeltsin signed the federal law "On the Guarantee of the Rights of the Small Indigenous Peoples of the Russian Federation".[115] The Act, "in accordance with the Constitution of the Russian Federation, universally recognised principles and norms of international law, and international treaties of the Russian Federation", establishes the legal foundations of guarantees for the "original" socio-economic and cultural development of the small indigenous peoples (nations) of the Russian Federation, and protection of their immemorial living environment, traditional lifestyles, economy and trades.

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[112] Murashko O, above n103 at 12.

[113] Ibid.

[114] From 1992, several attempts were made by the Supreme Soviet of Russia and the Duma to pass laws regarding the status of indigenous peoples in the Russia Federation, but these were rejected by the president. The rights to self-government and to the use of traditional lands were to be secured in the special laws "On the Legal Status of the Indigenous Peoples of the North", "On the Legal Status of National Districts, Village and Settlement Soviets, Clan and Communal Soviets", and "On the Territories Designated for Traditional Land Use by the Small Indigenous Peoples". The laws were drafted and the first of them was passed by the Supreme Soviet in the summer of 1993, but the President rejected it. After that the law "The Foundations of the Legal Status of the Small Indigenous Peoples of Russia" was passed twice by the State Duma, but rejected by the President. On 20 December 1995 the President again rejected and returned for further elaboration the federal law "The Fundaments of the Legal Status of the Small Indigenous Peoples of the North of Russia". Murashko O, above n103 at 10-12.

The Act defines the "indigenous small peoples/nations of the Russian Federation" (referred to in the Act as "small peoples" or "small nations") as "people living in the territories of traditional habitation of their ancestors, keeping/leading traditional lifestyles, economy and trades, accounting within the Russian Federation for fewer than 50,000 persons and defining themselves by independent ethnic commonalities".[116] "Traditional lifestyle" is defined in Article 1(2) to mean the historically arising means of livelihood of the small nations, based on: the historical experiences of their ancestors in the area of exploiting nature; original social organisation of habitation; original culture; and maintenance of traditions and beliefs.

Article 3 addresses the scope of application of the Act. The Act applies to "persons belonging to small nations who live permanently in places of traditional habitation and economic activity of small nations, lead traditional lifestyles, and work at traditional trades"; to "persons who belong to small nations, who live permanently in places of traditional habitation and economic activity of small nations, and for whom traditional economic activity and work at traditional trades are subsidiary forms of activity compared with principle forms of activity in other branches of national economy, socio-cultural sphere, organs of state authority or organs of local self-government"; and may be applied to "persons not belonging to small nations but living permanently in places of traditional habitation and economic activity of small nations, according to rules established by legislation of the subjects of the Russian Federation". The Act also applies to organs of state authority of the Russian Federation, organs of state authority of the subjects of the Russian Federation, organs of local self-government, and officials.

Article 4 contains a guarantee of the rights of small nations for socio-economic and cultural development. Pursuant to Article 4, the organs of state authority of the Russian Federation, organs of state authority of the subjects of the Russian Federation, and organs of local self-government, in accordance with federal legislation and legislation of the subjects of the Russian Federation, "guarantee the rights of small nations to original socio-economic and cultural development, protection of their immemorial living environment, and traditional lifestyles and economic activity". "Immemorial living environment of the small nations" is defined in Article 1(3) as the "historically arising habitat, within the confines of which the

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[115] Federal Act of 30th April 1999, No 82 FZ, published in the Russian Gazette of 12 May 1999 and in the Collected Legislation of the Russian Federation, 3 May 1999, N18, ST 2208.

[116] Article 1(1).

small nations effect their cultural and living activity, and which influences their self-identification and lifestyle".

Article 8 sets out the rights of small nations and persons belonging to small nations to protect their immemorial living environment, traditional lifestyles, economic activity and trades. Some of the key provisions that are relevant to land rights include the right of the small indigenous peoples, for the purpose of protection of their immemorial living environment, traditional lifestyles, economic activity and trades, to:

- free of charge, own and use, in the places of traditional habitation and economic activity, lands of various categories essential for undertaking traditional economic activity and work at traditional trades, and widely distributed useful ores, under rules established by federal and regional laws;[117]
- participate in implementing controls over the use of the lands of various categories essential for the implementation of traditional economic activity and work at traditional trades, and widely distributed useful ores, in the places of traditional habitation and economic activity;[118]
- participate in implementing controls over observance of federal and regional laws on protection of the natural environment during industrial utilisation of lands and natural resources, construction and reconstruction of economic and other objects in places of traditional habitation and economic activity;[119]
- receive, from the organs of state authority of the Russian Federation, organs of local self-government, organisations of all forms of ownership, international organisations, community associations and physical persons, material and financial means essential for their socio-economic and cultural development and protection of their immemorial living environment,[120] traditional lifestyles, economic activity and trades;[121]
- participate, through their authorised representatives, in the preparation and adoption of government decisions regarding questions of protection their immemorial living environment, their traditional lifestyles, economic activity and trades;[122]

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[117] Article 8(1)(1).
[118] Article 8(1)(2).
[119] Article 8(1)(3).
[120] "Immemorial living environment" is defined in Article 1(3) as the "historically arising habitat, within the confines of which the small nations effect their cultural and living activity, and which influences their self-identification and lifestyle".
[121] Article 8(1)(4).
[122] Article 8(1)(5).

- participate in ecological and ethnological expertises[123] in the preparation of federal and regional programmes for exploiting natural resources and protection of the natural environment in places of traditional habitation and economic activity;
- compensation for damages suffered by them as the result of damage to the environment they have lived in since time immemorial by the economic activities of organisations of all forms of ownership, and of individuals;[124] and
- take advantage of concessions in land and resource use instituted by federal, regional and local government laws, that are essential for the protection of their immemorial living environment, their traditional lifestyles, economic activity and trades.[125]

Article 10 also guarantees persons belonging to small nations and communities of small nations the right to develop and protect their original culture, and, in pursuance of this right, in accordance with legislation of the Russian Federation, empowers them to observe their traditions and carry out their religious rituals which do not contravene federal law or laws of the subjects of the Russian Federation, and maintain and protect their sacred places.[126]

5.4.2.2 Laws of the Khanty-Mansi Autonomous Okrug

The government of the Khanty-Mansi Autonomous Okrug passed a number of laws in the early 1990s with the intentions of securing the rights of indigenous peoples. In 1990 the Council of People's Deputies of the Khanty-Mansi Autonomous Okrug passed a decree "On the Creation of Territories of Priority Exploitation of Natural Resources".[127] With the aim of "preserving the branches of economy as the material basis of livelihood and spiritual culture of the Small Nations of the North", the Council of People's Deputies confirmed the resolution of the Regional Executive Committee on "Status of the Territories of Priority Exploitation of Natural Resources by the Indigenous Population of the Khanty-Mansi Autonomous Okrug", contained in an annex to the decree.[128]

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[123] Article 8(1)(6). Article 1(6) defines "ethnological expertise" as scientific research into the influence of changes in the environment of the small nations lived in since time immemorial, and in the socio-cultural situation of ethnic development.
[124] Article 8(1)(8).
[125] Article 8(2)(4).
[126] Article 10(6).
[127] Resolution of the Council of People's Deputies of the Khanty-Mansi Autonomous Okrug of 6 May 1990, reproduced in Kryazhkov V, above n102 at 308-309.
[128] Resolution of the Council of People's Deputies of the Khanty-Mansi Autonomous Okrug of 6 May 1990, s1. The Annex is reproduced in Kryazhkov V, ibid at 309.

The decree created territories of priority exploitation of natural resources for the indigenous peoples of the Khanty-Mansi Autonomous Okrug with the aim of "securing the means of preserving and fostering the historic branches of economy (deer husbandry, hunting, fishing, animal husbandry, gathering and treatment of wild plants) as the material basis of the livelihood and spiritual culture of the nations of the North".[129] Territories of priority exploitation of natural resources includes areas of deer pasture, ancestral areas of economic significance for hunting/fishing, berry/nut zones, pasture, hay-meadows, natural monuments and cultural/ritual localities.[130] The boundaries of the territories of priority exploitation of natural resources are confirmed by the Council of the Ministers RSFSR as proposed by the local Councils, with compulsory taking into account of the opinion of the population living within them.[131]

The decree recognises that "the land and its underground resources, waters, flora and fauna, are an inalienable inheritance of the peoples dwelling within the territories of priority exploitation of natural resources".[132] The inclusion in, and deletion from, the needs not connected with economic activities of the nations of the North, of the land within a territory of priority exploitation of natural resources proceeds in accordance with results of a referendum of the peoples dwelling within it and the agreement of the corresponding Council of People's Deputies.[133] In every specific case the procedure for changing the undertakings and organisations for the land usage in the territory of priority exploitation of natural resources is determined by the Regional Council.[134]

On 5 February 1992 the Council of People's Deputies of the Khanty-Mansi Autonomous Okrug confirmed the "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug".[135] The confirmation of ancestral areas of economic significance "is directed towards the realisation of the rights of the nations of the North to their lands, underground resources, waters, forests, pastures and other natural means of livelihood, and the determination of their numbers, cultures and traditional

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[129] "Status of the Territories of Priority Exploitation of Natural Resources by the Indigenous Population of the Khanty-Mansi Autonomous Okrug" ss1 and 2.

[130] Section 2..

[131] Section 2.

[132] Section 3.

[133] Section 4.

[134] Section 5.

industries". Ancestral areas of economic significance are defined to mean the natural complex of territories (forests, rivers, their banks, lakes, marshes, meadows et al.) on which historically arose the lifestyle and forms of the traditional economy of the indigenous inhabitants of the Khanty-Mansi Autonomous Okrug.[136]

Ancestral areas of economic significance may be areas of economic significance allotted to individual citizens; areas of economic significance allotted to families; and areas of economic significance allotted to communities.[137] Allotments of individual citizens are defined as ancestral areas of economic significance individual citizens from lands of their traditional habitation and economy.[138] Family allotments are ancestral areas of economic significance of families from territories of traditional habitation and economic activity of persons connected by family relationships and the joint carrying-out of economic activity.[139] Community allotments may be formed from allotments of individual citizens or families voluntarily joined together, or from allotments given to the use of communities for furthering the joint carrying-out of economic activity by their members.[140]

Article 7 regulates the peoples who have the right to keep allotments. These people include:
— representatives of indigenous people of the Khanty-Mansi Autonomous Okrug permanently living in the territories of traditional habitation and working at traditional forms of economy, including the immigrants to these territories from other districts ["raions"] in connection with their industrial assimilation or for other reasons;
— entities of the indigenous population, their heirs from mixed marriages, who for whatever reasons left the localities of traditional habitation and who wish to return to them for occupations within traditional forms of economic activity;
— old inhabitants (irrespective of nationality) living in the territory of priority exploitation of natural resources, whose forbears lived in the Khanty-Mansi Autonomous Okrug and carried on the traditional forms of economic activity of the indigenous peoples;
— newcomers (irrespective of nationality) in the case of their assimilation within the community and granted allotments by it in consultation with the division of Northern

[135] Collected resolutions of the organs of state authority and government of the Khanty-Mansi Autonomous Okrug, Khanty-Mansiysk, 1993, at 45-60. Reproduced in Kryazhkov V, above n102 at 310.
[136] Article 1.
[137] Article 2.
[138] Article 3.
[139] Article 4.
[140] Article 5.

Nationalities of the district administration, for the purpose of carrying out traditional forms of economic activity.

Ancestral allotments are granted as a rule, within the boundaries of the territory of priority exploitation of natural resources.[141] Allotments are granted on the basis of an application by an individual citizen, head of family, the elders of a community, or the organ of governing a community by the administration within whose care the land is located. If an allotment is within the territories of different councils, the different administrations make joint decisions as to its apportionment. Disputes between administrations concerning the apportionment of such allotments are resolved by the higher-standing administration.[142]

The right to an allotment is verified by a State certificate as per an established form, which is issued an registered by the administration that has taken the decision to grant it. To an individual citizen or a family there is issued a State certificate for a life-time inheritable keeping of an allotment. To an organ of governing a community, a State certificate for a *sine die* usage of allotments is issued.[143] The decisions of administrations concerning the granting of allotments or refusal to grant allotments may be appealed against in the courts of law.[144]

As with federal legislation, the indigenous peoples do not have comprehensive ownership of their lands in the Western freehold sense, but rather a "lifetime inheritable ownership". Sale, gifting or other alienation, and also mortgaging, deeding as security for debts, of allotments by their keepers is not admissible, except in the case of handing over the right of ownership by inheritance.[145] The right of ownership of an ancestral allotment is purposeful: the individual citizen and the community keep the allotments for carrying out traditional economic activity. The right to own allotments is exclusive: it is assigned to the owners only. Other citizens, and also organisations, have no right, in ancestral allotments, to exercise ownership, except in cases as provided for in these Regulations. Compulsory resumption of allotments or their portions for state or community requirements, is not admissible.[146]

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[141] Article 8.
[142] Article 9.
[143] Article 10.
[144] Article 11.
[145] Article 12.
[146] Article 13.

Articles 20 to 22 are particularly relevant for the protection of traditional lands against oil and gas exploitation by assigning control over their lands to the indigenous peoples. Pursuant to Article 20, various types of geological research activities on the territory of ancestral allotments must be carried out "exclusively on the basis of agreement with the owner of the allotment and permission by the administration which had apportioned the ancestral allotment". Liability for compensation for damages caused to the owner of ancestral allotments must be included in the agreement, which is registered in the administration that apportioned the allotment. The terms and scale of payments for the utilisation of land plots, and liability for compensation for damages and restoration of land to a condition suitable for its original purpose, are determined by the administration that apportioned the allotment, with the consent of the owner of the ancestral allotment.

Under Article 21, the apportionment of land plots on the territory of ancestral allotments for "industrial needs" (the construction of enterprises, roads, winning of useful minerals, oil, gas, laying of pipes and other "non-traditional economic activity") is allowed only in exceptional circumstances by the regional administration and only with the agreement of the owner of the ancestral allotment and also of the indigenous inhabitants whose interests are harmed by the land alienation. The consent of the indigenous inhabitants for the alienation of the land plot is determined by a referendum. The decision of the regional administration, which must be based on the results of the referendum, is made in consultation with the district administration after the receipt of written consent of the allotment owner for its alienation, the results of the referendum of the indigenous inhabitants, and state ecological expertise.

Article 22 regulates the procedure and terms for agreements between the owner of the allotment and the industrial enterprise regarding the utilisation of land plots alienated for industrial needs. Such an agreement must cover the purpose and term of the transfer of the land plot, its extent, and also the nature and volume of the proposed activity of the enterprise. The agreement must, compulsorily, provide for full compensation for all damages (including lost income) caused for the owner of the allotment in connection with the alienation of the plot, carrying out of works for rehabilitation of lands and restoration of forests. The parties must also negotiate the amount and procedure for payment, to the owner of the allotment, of a share of income of the enterprise obtained from utilising the plot, rental for the land laid down by current legislation, including that due to the fund for future generations.

The agreement is registered in the relevant administration. Registration of the agreement may be refused if it is concluded in breach of current legislation or harms the legitimate interests of the owner of the ancestral allotment. In the absence of the said agreement or with the refusal of its registration the alienation of the land plot is not effected.

The Decree also provides for the "rational exploitation of natural resources". The owners of allotments are obliged to rationally utilise the natural resources in accordance with their appointed purpose; secure their safety and exploitability, take measures to protect nature, and not allow deterioration of ecology of the allotment as a result of their economic activity; and realise protection of the allotments from fire, poaching, unlawful gathering of wild plants, etc, in cooperation with nature conservation services.[147] For violations of nature conservation laws and non-rational utilisation of resources of the allotments, their owners carry responsibility established by law and these Regulations.

The ownership of allotments is terminated in cases of non-rational utilisation of the allotment expressed in the deaths or disappearance of animals, birds, fish, spoiling of forests, or other worsening of ecological features.[148] The facts concerning unauthorised or non-rational utilisation of allotments are to be established by the community, local administration, and nature conservation organs.[149] The decision to terminate ownership of allotments is adopted by the administration which had decided to apportion the allotments.[150] The administration that had apportioned the allotment, taking into account the opinion of the community (if the owner is a member of the community), makes the decision about the provisional deprivation of the owner of the allotment of the right to ownership for a period of up to two years. In the case of further transgressions against the proper ownership of the allotment, the administration that had apportioned the allotment, may, in accordance with representations of above-mentioned organs, take the decision to terminate the right to ownership.[151]

Chapter 5 of the Decree deals with the defence of rights of the owners of allotments. Article 34 deals with compensation for damages done to the allotments. It provides as follows:

> In the case of damage done to the allotment owner by an illegal seizure of the territory of the allotment, irregular exploitation of its natural resources, breach of rules in utilisation of land,

[147] Article 17.
[148] Article 25.
[149] Article 27.
[150] Article 25.
[151] Article 27.

> water and other resources of the allotment and also of other damage to the allotments and the property of its owner, the guilty entities (enterprises, organisations, institutions and citizens) are obliged to compensate for them to the full extent, including for non-receipt of income by the owner.
>
> With refusal to compensate voluntarily for the losses the allotment owner, and also on his behalf the local administration or public prosecutor have the right to turn to the courts to seek compulsory compensation for losses.

Despite the provisions of the 1992 "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug", experience has shown that the legal instruments of the Khanty-Mansi Autonomous Okrug have been insufficient to protect the lands of the indigenous peoples against the oil industry.[152] The decree is constantly being infringed because of its weak legal status as a regional decree. Although the decree allows the owners of allotments to file a complaint with the courts, the decree itself does not contain any sanctions in the case of breach. In addition, the authorities do not show any interest in fulfilling their duty to protect the law.[153] It has been claimed that "the process of legally establishing these kinship communities has been continuously obstructed" by the local administration.[154]

For example, the Regulation on Ancestral Areas of Economic Significance provided that only communities holding governmental acts certifying that the use rights on these territories belonged to the families living on them, could join together into larger communities. In 1992-93, demarcation and mapping of traditional territories was undertaken and approved by the had of the Surgut Region administration, family hunting territory survey maps were issued to each Khanty family, and governmental acts confirming use rights were issued. However, on the Yugan, acts were initially issued to only eleven small communities (extended families), much less than the territories mapped and the family communities identified. The Surgut administration ceased to issue new acts on the land for the remaining families, and then, in 1994 an administrative decree from the KMAO head, Alexander Filipenko, unilaterally voided those acts already issued to the eleven families. Shortly

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[152] Murashko O, above n103 at 11.

[153] FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, Parallel Information to the Initial Report of the Russian Federation Concerning the Right to Adequate Food as Enshrined in the International Covenant on Economic, Social and Cultural Rights, presented at the 16th Session of ECOSOC (28 April - 16 May 1997), Heidelberg, April 1997, <http://www.koeln-online.de/infoe/report.html#Heading8>, s2.3.

[154] Wiget A and Balalaeva O, "National Communities", above n33.

thereafter KMAO administration, headed by Filipenko cancelled all acts on native lands in the KMAO, claiming that Moscow had said the laws were not in the correct form.[155]

Subsequently, on March 6 1995, the head of Surgut Administration issued a decree ("On the Status of Kinship Communities in the Khanty-Mansi Autonomous Okrug") asserting, in contradiction to general state law on native land, that Khanty peoples who have houses in villages should not have a family hunting territory. The Khanty who live in villages still support themselves by fishing and hunting on their traditional hunting territories. Those Khanty who had been forcibly relocated or voluntarily removed to villages at an earlier time were declared to have no rights to use lands on which they hunted and fished to feed their families. There was such an outcry the administration delayed the implementation of the decree. As of 1997, the status of the decree was unclear. It had not been revoked, nor has it been enforced.[156]

5.4.3 Land Code

Pursuant to Article 72 of the 1993 Constitution, the federal and regional authorities have joint jurisdiction over "issues of the possession, use and management of the land" and "land, water and forestry legislation".[157] As of 1994 there were 80 legal documents at the federal level dealing with land relations in Russia.[158] It is beyond the scope of this thesis to examine all these laws. For the purposes of this thesis, it will suffice to note that in addition to the federal and regional legislation examined above that specifically deal with the title to land of indigenous peoples, other laws more generally pertaining to land contain specific provisions recognising the special situation of indigenous peoples regarding their traditional lands. For example, the "Land Code RSFSR" contains provisions recognising the claim of indigenous peoples to their land and resources.[159]

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[155] Ibid.

[156] Ibid; see also Wiget A and Balalaeva O, "Government Deception Threatens Destruction of Eastern Khanty Traditional Culture", 1997, New Mexico State University <http://www.nmsu.edu/~english/hc/eastkhanty.html> (hereafter "Government Deception").

[157] Article 72(c) and 72(j).

[158] Brooks K and Lerman Z, *Land Reform and Farm Restructuring in Russia* (World Bank Discussion Paper No 233, Washington DC, 1994) at 16 and Annex Table 2.1.

[159] Adopted 25 April 1991. Communications of the Assembly of People's Deputies RSFSR and Supreme Soviet RSFSR, 1991, No. 22, p.768. Extracts reproduced in Kryazhkov V, above n102 at 122-125.

Article 4 of the Land Code subdivides the lands of the Russian Federation into: lands of agricultural designation; lands of populated points, such as cities, settlements and villages; land for industry, transport, communications, radio broadcasting, television, information science and cosmos establishments, energy production, defence and other designations; lands of nature conservation, nature reserves, curative, recreational and historico-cultural designation; lands of forest reserves; lands of water reserves; and reserved lands.

The Land Code allows indigenous peoples to carry out traditional activities on protected lands. For example, Article 89 provides that in the places of habitation and economic activity of small nations and ethnic groups, the usage of lands with nature conservation purposes is permitted for deer pasturing.[160] Article 90 states that, in the places of habitation and economic activity of small nations and ethnic groups, in cases provided for by legislation of RSFSR and republics within the complement of the RSFSR, there may be allowed on lands of natural reserve fund the "traditional extensive utilisation of nature which does not cause an anthropogenic transformation of the protected natural features".[161] Article 94 provides that in the places of habitation and economic activity of small nations and ethnic groups, the corresponding Councils of people's deputies is to allocate for use and let for tenancy to *kolkhozes*, *sovkhozes*, *gospromkhozes*, and also for proprietorship, ownership and tenancy of citizens, lands of the forest fund for reindeer husbandry and the hunting industry.[162]

The Land Code also "fully exempts" enterprises and citizens engaged in traditional trades in places of habitation and economic activity of small nations and ethnic groups, and also in folk arts, crafts and trades in the places of their traditional existence, from paying for land. [163]

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[160] Lands with nature conservation purposes are lands of reserves (except hunting reserves), prohibited areas and spawning protection zones, and other lands in the system of protected natural territories, and lands of natural monuments. Lands with a nature conservation purpose includes land sections within the boundaries of which exist natural objects representing special scientific or cultural value (typical or rare landscapes, communities of plant or animal organisms, rare geological formations, plant and animal kinds). Land Code Article 89.

[161] Article 90 of the Land Code identifies lands of the nature reserve fund as "prohibited lands, of natural monuments, natural national and dendrological parks, and botanic gardens". Land sections with natural formations and features having a special scientific, cultural or recreational significance are also regarded as lands of the nature reserve fund.

[162] Lands of the forest fund are defined as lands covered by forests, and also those not covered by forests but dedicated to the needs of forestry and forestry industries.

[163] Land Code Article 51(2).

5.4.4 Petroleum Law

Pursuant to Article 72 of the 1993 Constitution, the federal and regional authorities have joint jurisdiction over issues of the possession, use and management of mineral resources, and legislation on the subsurface and environmental protection. The Federal Law "*On the Underground*" provides the regulatory framework for the Russian oil industry.[164] Article 1 provides that "the underground within the borders of the Russian Federation, including the underground space and the useful minerals, energy and other resources contained within the underground, are state property". Article 1 also provides that "the questions of control, utilisation and disposal of the underground resources belong to the joint management of the Russian Federation and the subjects of the Russian Federation". Article 2 provides that the ownership, utilisation and disposition of the State stock of underground resources for the benefit of the nations living in their respective territories, and all the nations of the Russian Federation, is effected jointly by the Russian Federation and the subjects of the Russian Federation.

Article 4 of the Law on Underground Resources deals with the competence of the organs of state authority of the subjects of the Russian Federation in the sphere of regulating the treatment of exploitation of underground resources. Article 4 lists a comprehensive number of matters within the competence of the organs of state authority of the subjects of the Russian Federation. In particular, Article 4(10) provides that, in the sphere of regulating the treatment of exploitation of underground resources, "the protection of the interests of small nations" are subject to management by organs of state authority of the subjects of the Russian Federation. As we have seen, the Khanty Mansi Autonomous Okrug has sought to protect the interests of the Khanty and Mansi through the decrees "On the Creation of Territories of Priority Exploitation of Natural Resources" and "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug".

Article 42 deals with the division of payments for utilising underground resources. The royalties for the winning of hydrocarbons are distributed between the federal budget (40%), budgets of subjects of the Russian Federation (30%) and local budgets (30%). Article 42

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[164] Minutes of the Assembly of People's Deputies of the Russian Federation and Supreme Soviet of the Russian Federation, 1992, No.16, p834; No.29, p1690; 1993, No.2, p74. Translated from Federal Law No. 27 of 3 March 1995, "On Amending and Complementing the Russian Federation Law 'On Underground Resources'", *Sobranie Zakonodatelstva Rossiiskoi Federatsii*, 1995, No 10, Item 823, p1592.

specifically provides that "with the utilisation of underground resources in the districts of habitation of small nations and ethnic groups, that part of royalties paid into the budgets of republics within the complement of the Russian Federation, territories, provinces and autonomous bodies is used for the socioeconomic development of those nations and groups".

5.4.5 Environmental Law

One of the major grievances of the Khanty has been the environmental devastation wrought upon their traditional territories by the oil industry. This environmental destruction has occurred, and is still occurring, despite environmental laws enacted by Soviet and post--Soviet governments.

In Russia, several environmental protection acts were "adopted and promulgated piecemeal during the first half of the this century".[165] In the late 1950s, the Soviet government adopted a more comprehensive approach to environmental protection, articulating principles for the "rational use" of the environment", and promulgating a series of "Fundamentals of" statutes for environmental protection, such as the "Fundamentals of Forest Legislation", few of which exists today.[166] The Soviet environmental laws were "lofty, impractical statutory standards honoured only in the breach".[167] In the 1990s, the Russian government has started the process of reforming its substantive environmental laws.

The Federal Law "*On the Underground*"" contains various references to environmental protection.[168] First, Article 8 provides that the use of specific mining allotments may be limited or prohibited with the aim of ensuring protection of the natural environment. The use of mining allotments may also be limited or prohibited in specific areas, including inhabited points (such as cities), natural zones and industrial establishments, if the use endangers the life and health of people, or causes damage to economic objects or surrounding natural environment.

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[165] Teets R and Saladin C, *White Paper on Russian Environmental Law* (Center for International Environmental Law, Washington DC, September 1996) at 14.

[166] Ibid.

[167] Ibid at 5.

[168] Minutes of the Assembly of People's Deputies of the Russian Federation and Supreme Soviet of the Russian Federation, 1992, No.16, p834; No.29, p1690; 1993, No.2, p74, above n164.

The effectiveness of environmental protection is a criterion for granting licences under competitive tendering procedures.[169] Pursuant to Article 12, which deals with the essential or "unavoidable" contents of mining licences, the mining licence must contain conditions for compliance with legally-established standards requiring protection of the underground and the surrounding natural environment.[170] Under Article 22, a licensee or user of underground resources is under an obligation to observe the standards in established rules, norms, and regulations for the protection of underground resources, the atmosphere, the ground, forests and waters from damage by works connected with the use of the underground.[171] Oil production companies are thus required to observe environmental standards in laws relating to the protection of specific resources. A number of Acts dealing with environmental protection of resources exist.[172] Pollution of the atmosphere is regulated by a Soviet-era statute on atmospheric protection;[173] portions of the statute on the sanitary and epidemiological well-being of the population;[174] and the Statute on Environmental Protection (1991).[175] The pollution of water is regulated by the Water Code;[176] the Land Code;[177] portions of the statute on the sanitary and epidemiological well-being of the population; and the Statute on Environmental Protection (1991). The major federal statute for the management of forests is the Fundamentals of Forest Legislation of the Russian Federation.[178]

Entities that undertake mining activities are accountable for actions that contravene the Act, including contamination of the environment.[179] Where there is non-compliance by a user of the essential conditions of the licence, or the systematic transgression of rules established for the use of underground resources, the user's rights to the use of the underground may be cancelled.[180] An oil company may therefore have its licence revoked if it persistently pollutes the environment in contravention of Article 22 and the relevant environmental protection legislation. Furthermore, the Act provides that individuals bear personal liability for contravention of the Act, including environmental contamination, in accordance with

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169 Article 13.
170 Article 12(9).
171 Article 22(7).
172 See Teets R and Saladin C, above n165.
173 RSFSR Act of 14 July 1982, cited in Teets R and Saladin C, ibid at 18.
174 RSFSR Act No. 1034-1, 19 April 1991.
175 Decree No. 2612-1, 30 March 1992. *Ved. RSFSR* 1992 No.16 Item 868. Translated in World Bank, Environment Department, Land, Water and Natural Habitats Division, *The Russian Federation Legal Framework for Environmental Assessment*, February 1996.
176 RSFSR Act No. 167-93, 16 November 1995.
177 RSFSR Act No. 1103-1, 25 April 1991.
178 RSFSR Act No. 4613-1, 6 March 1993; replaced by RFSFR Act No. 22-FZ, adopted 22 January 1997.
179 Article 49.
180 Article 20(2) and 20(3).

legislation of the Russian Federation and legislation of the subjects of the Russian Federation.[181]

In addition to the Law on the Underground, there are various general provisions for the protection of the environment that impact on the activities of oil companies. The Russian Constitution contains various provisions relating to environmental protection, including "the right to a favourable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations".[182] Article 9(1) provides that "the land and other natural resources shall be used and protected in the Russian Federation as the basis of the life and activity of the peoples living on their respective territories". Article 58 contains a general obligation to "preserve nature and the environment, and care for natural wealth" and Article 36 states that "the possession, use, and management of the land and other natural resources shall be freely exercised by their owners provided this does not cause damage to the environment or infringe upon the rights and interests of other persons".

The Statute on Environmental Protection (1991) is the major federal Russian statute dealing with general principles of environmental protection.[183] The provisions of the statute are generally broad. For example, Article 4 provides that natural ecological systems and the ozone layer of the atmosphere, the land, underground resources, surface water and ground water, the atmosphere, forests and other vegetation, animal life, microorganisms, the genetic pool and natural landscapes are "subject to protection from pollution, degradation, damage, depletion and destruction from within the territory of the Russian Federation and its constituent republics". Among other things, the Statute provides that "every citizen has a right to protection of his or her health from adverse environmental effects caused by commercial or other activities, accidents, and man-made or natural disasters".[184] Where this right is breached, citizens have a right to compensation by court decision or on an administrative basis. The Act also sets out citizens' rights, duties and powers with respect to environmental protection.[185]

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[181] Article 49.
[182] Article 42.
[183] Decree No. 2612-1, 30 March 1992. *Ved. RSFSR* 1992 No.16 Item 868. Translated in World Bank, Environment Department, Land, Water and Natural Habitats Division, *The Russian Federation Legal Framework for Environmental Assessment*, February 1996.
[184] Article 11.
[185] Article 12.

The Act contains various provisions that apply to the activities of economic entities, including oil companies. Such provisions include the prescription of economic mechanisms for environmental protection, such as payments for the emission and discharge of pollutants, and the granting of incentives such as tax breaks and credits to minimise pollution;[186] the prescription of payments for the use of natural resources;[187] and the prescription of limits on natural resource utilisation.[188] The Statute also provides for the establishment of environmental standards, including the maximum permissible concentration, emission and discharge of harmful substances; and the maximum permissible levels of noise, vibration, magnetic fields and other adverse physical effects.[189]

The Act has a separate section dealing with compensation for damages caused by violation of environmental legislation.[190] Article 86 states that

> enterprises, institutions, organisations and individual citizens that cause damage to the environment or to citizen's health and property or to the economy by polluting the environment, degrading, destroying, damaging or using natural resources irrationally, destroying natural ecological systems and committing other violations of environmental legislation are obligated to make full compensation in accordance with current legislation.

Articles 89 and 90 respectively set out the criteria that must be taken into account when assessing compensation for damage to health and property. The damage to property includes the lost benefit caused by the loss of harvests, reduced soil fertility and other adverse effects. Indigenous peoples who suffer environmental degradation caused by oil activities are entitled to compensation for damage to their health and to their property.

Oil companies are affected by provisions on environmental impact assessment procedures that have been introduced since the 1980s. The major procedures for assessing environmental impacts in Russia are "ecological expertise" and environmental impact assessment (EIA or "OVOS").

The purpose of ecological expertise is to ensure compliance with environmental standards in order to prevent negative effects on the environment and related social, economic and other

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[186] Articles 15 and 24.
[187] Articles 15 and 20.
[188] Articles 15 and 19.
[189] Articles 26-28. Articles 29-34 also deal with environmental standards..
[190] Section XIV.

consequences.[191] There are two types of ecological expertise: the State Ecological Expertise ("SEE" or *expertiza*) and Public Ecological Expertise (PEE).[192]

SEE is regulated by Section V of the Statute on Environmental Protection (1991) and by the Law on Ecological Expertise (1995). The main purpose of the SEE is to review commercial projects for the purpose of determining the appropriateness of commercial or other activities in terms of environmental safety.[193] It is a mandatory environmental protection measure preceding the making of a commercial decision, the implementation of which could adversely affect the environment.[194] SEE is conducted at the federal and regional level of the Russian Federation by duly authorised state bodies, whose powers are set out in the Law on Ecological Expertise.[195] Articles 11 and 12 of the Law on Ecological Expertise sets out the projects or activities for which SEE is mandatory. These include oil mining projects. For example, SEE is mandatory at the regional level where "documentation substantiating agreement on sharing of production and concession agreements as well as other agreements that envisage use of natural resources and/or industrial waste that is managed by the subjects of the Russian Federation and by bodies of local self-government".[196] After conducting the SEE, a "conclusion" is prepared by the expert commission of the state ecological expertise.[197] The legal consequence of a negative conclusion of the SEE is a ban on implementation of the project.[198] In addition, Articles 31-34 impose criminal, administrative, financial and civil legal liability for violations of the law on ecological expertise.

PEE is regulated in Chapter IV of the Law on Ecological Expertise (1995). PEE is organised and conducted on the initiative of citizens and public organisations that have, in accordance with their statutes, environmental protection as their major field of activity.[199] A PEE may be conducted on the projects listed in Articles 11 and 12 which require a mandatory SEE, excluding projects that contain "state, commercial and/or other secrets protected by law".[200] The law sets out the conditions for conduct of a PEE, which is conducted prior to or in

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[191] The Law on Ecological Expertise, RSFSR Act No. 174-93, 30 November 1995, Article 1. Translated in World Bank, Environment Department, Land, Water and Natural Habitats Division, *The Russian Federation Legal Framework for Environmental Assessment*, February 1996.
[192] The Law on Ecological Expertise, Article 4.
[193] Statute on Environmental Protection, Article 35(1).
[194] Article 36(1).
[195] Articles 7-9 and 13.
[196] Article 12.
[197] Article 14.
[198] Article 14.
[199] Article 20.
[200] Article 21.

parallel with the SEE.[201] The conclusion of a PEE is forwarded to the duly authorised state body of SEE, where, if it is approved by the authorised body, acquires legal force, and attracts the same penalties for violations as the SEE.[202]

Ecological expertise provides a legal basis for preventing projects that violate environmental standards, where previously there was no such basis. However, the procedure of ecological expertise has been subject to a number of criticisms including the following: it is poorly designed for decentralised planning; it is subject to corruption; it does not adequately address complex impacts; and it does not provide for the mitigation of project impacts, or provide alternatives.[203]

EIA grew out of rule-making by the Ministry of Environmental Protection and Natural Resources in 1985.[204] Requirements for EIA in the Russian Federation are determined in MENPR Order No. 22, July 18 1994.[205] Order No. 22 contains a list of the types of project for which a full-scale EIA is mandatory, including all oil refinery and oil mining industry projects.[206] Project developers are responsible for preparing and financing the EIA, the stages of which now include scoping, consultation and public participation. The purpose of the EIA is to identify environmental, social and economic impacts of a proposed project and incorporate mitigation measures into the project design. The EIA and project design are submitted by the project proponent to the state authorities responsible for the SEE.[207]

Historically, EIA in Russia has been seen as a requirement to generate a formal document to pass the SEE, with an absence of norms as to the content and procedure of public consultation and participation, which has led to social conflict at a later stage in the project.[208] Other typical problems of Russian EIAs have included: considering the effects of pollution, but ignoring other impacts; examining short-term or immediate effects only; assessing impacts on the natural environment but excluding economic, social and cultural effects;

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[201] Articles 22 and 23.
[202] Article 25.
[203] Teets R and Saladin C, above n165 at 17.
[204] Ibid.
[205] The Status of the Environmental Impact Assessment in the Russian Federation. Approved by the order of MEPNR No.222, July 18, 1994. Registered in the Ministry of Justice of Russia No. 695, September 22, 1994.
[206] List of Dangerous Types and Objects of Economic and Other Activities. World Bank, *Environmental Assessment Harmonization: Russia*, Report on a Seminar Held in Moscow, February 14-16, 1995, at 13.
[207] World Bank, Environment Department, Land, Water and Natural Habitats Division, *The Russian Federation Legal Framework for Environmental Assessment*, February 1996, p. i.
[208] World Bank, *Environmental Assessment Harmonization: Russia*, above n206 at 11.

focusing on the operating period, while construction and elimination periods are often ignored; and focusing on normal technical processes, excluding accidents and exceptional situations.[209] Following the Environmental Assessment Harmonisation Seminar in Moscow in 1995, the World Bank and Russian environmental protection authorities have worked together to improve the EIA process in Russia.

5.5 Social, Economic and Political Factors

As can be seen from the preceding survey, Russia has a "plethora" of laws and standards relating to the protection of indigenous peoples and the environment.[210] The major obstacle to the protection of indigenous peoples and the environment is not so much the absence of legislation, but the lack of implementation of the law. A number of social, economic and political factors contribute to the inadequate compliance with, and enforcement of, these laws and standards. Some of these factors (the absence of the rule of law, the lack of political will to protect indigenous peoples and the environment, and the political power of oil companies) are legacies not only of the Soviet era, but of Muscovite Russia and the Tsarist era, and their pervasive influence and ubiquity can only be appreciated in an historical context.

5.6.1 Economic

The economy of Russia is in a catastrophic state. Economic stagnation evident in the 1980s under the Soviet regime accelerated into a disintegration of the economy after the Soviet Union collapsed, as real GDP fell by 12% in 1991, the budget deficit totalled 26% of GDP, and inflation rose to triple digits.[211] Russia took over the repayment and servicing of the former Soviet Union's debt, which stood at $67.5 billion at the end of 1991.[212] Russia was unable to meet all of its obligations upon assuming the debt of the USSR, and has rescheduled its debt payments every year since then.[213] Recent figures from the Economist

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[209] Ibid at 13.
[210] Teets R and Saladin C, above n165 at 27.
[211] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99* (Economist Intelligence Unit Limited, London, 1998) at 13.
[212] Ibid at 38.
[213] Reschedulings include an agreement with the London Club of creditors in October 1995 to reschedule commercial debt worth $32.5 billion over 25 years with a 7 year period of grace, and an agreement with the Paris Club of creditors concluded in October 1997 to reschedule debt of $40 billion over 20 years with a 6 year period of grace. Economist Intelligence Unit Limited, ibid.

Intelligence Unit estimate total Russian external debt to be over $130 billion at the end of 1997.[214]

The first genuine market reforms began in 1992, and rested on the four broad policy arms of price liberalisation, stabilisation (of the currency, inflation, and the budget deficit), internationalisation, and structural reform, including privatisation and the strengthening of property rights.[215] However, the government has been unable to put its finances in order, with a vicious circle of unpaid wages, taxes and debts existing between the state, business and household sectors as a result of the need to cut government expenditure to rein in the budget deficit.[216] The outlook for the Russian economy is "bleak" in the wake of the financial crisis of 1998 which saw the government default on external debt, the collapse of the currency and a crisis in the banking sector.[217] "Russia's credibility in the financial markets has now been shattered and there is no prospect of the government or commercial companies being able to raise foreign capital."[218] Inflation for 1999 has been predicted to be in the order of 45%, and a contraction of 5% in GDP is expected for 1999. [219]

The current economic crisis will have severe social impacts, particularly with regard to welfare areas such as health and education. The debt situation is described as "critical".[220] The Bank states that "too little progress has been made in addressing the pervasive "non payments" culture, fiscal and financial indiscipline, institutional weakness, corruption and deterioration of the social safety net" and predicts that "the situation over the coming 2-3 years and perhaps beyond will be fraught with risk, and the years beyond will be difficult".[221]

Oil and gas production are crucial to the Russian economy and to government revenues, a situation that is unlikely to change in the near future. Mineral fuels are the country's main hard-currency earners, accounting for 46.9% of export revenue in 1996 and an estimated

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[214] Economist Intelligence Unit Limited, *Country Report: Russia: Third Quarter, 1998* (Economist Intelligence Unit Limited, London, 1998) at 5.

[215] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99*, above n211 at 14.

[216] Ibid at 15.

[217] On August 17 1998 the government announced it would default on and restructure its internal debt, impose a 90-day moratorium on the repayment of external debt by Russian companies and allow the rouble to depreciate as much as 50% by the end of 1998. Economist Intelligence Unit Limited, *Country Report: Russia: Third Quarter, 1998*, above n214 at 3.

[218] Ibid at 6.

[219] Ibid at 3.

[220] World Bank, *Russian Federation: Country Assistance Strategy (CAS) - Progress Report*, 1998, World Bank internet site http://www.worldbank.org>, paras 1, 10 and 13.

[221] Ibid paras 18-19.

47.4% of export revenue in 1997.[222] The next highest earners of hard currency are metals and precious stones, accounting for 20.8% of export revenue in 1997.[223] In 1997, the Minister for Energy and Fuel, Pyotr Rodinov, estimated energy enterprises contributed approximately 70% of the total tax revenue of the government.[224]

The dependency of government on oil and gas for foreign exchange earnings and tax receipts will operate against the reform of property rights in favour of indigenous peoples. While the European part of Russia contained most of the manufacturing industries, Siberia and the Far East have been the suppliers of energy and raw materials to the Russian economy. As the furs from the lands of indigenous peoples in Siberia became the primary source of foreign exchange of Muscovite and Imperial Russia, so have the oil and gas deposits found on the lands of the Khanty and Mansi become the mainstay of Russian foreign exchange earnings, "severely curtailing" any native right to protest against exploitation of their traditional lands.[225] In the current economic climate, it is highly unlikely that control of oil-bearing lands will be passed to the indigenous peoples of Siberia.

> It is difficult to expect after the break-up of the USSR and the severing of interrepublican economic ties that the push for raw materials, fuel, and energy in the Russian North will subside. Quite the contrary, over the next few years pressure on the natural resources of the northern territories will continue. Moreover, the resources of the North, now a highly important destination for foreign capital investment and a leading source of foreign exchange, will serve as one of the principal means that can be used to help the country emerge from its economic crisis.[226]

In the current climate, it is "as unrealistic to hope that the pressures to exploit Siberia's resources will abate as it is foolhardy to assume the Siberian environment can support unrestricted development. How much land is to be preserved, how much it is to be developed, and the nature and scope of the developments, are crucial questions."[227] In the territory of the Khanty and Mansi in Western Siberia, where "industrial interests are so strong ... it is inconceivable that the state, or its private corporate surrogates, could

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[222] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99*, above n211 at 25.
[223] Ibid.
[224] Crow P, "Oil: Russian Energy's Weaker Sister?" *Oil and Gas Journal*, 13 January 1997, 32.
[225] Vitebsky P, "The Northern Minorities" in Smith G (ed), *The Nationalities Question in the Post-Soviet States* (Longman, London, 2nd ed, 1996) at 97 (hereafter "The Northern Minorities").
[226] Kotlyakov V and Agranat G, "The Russian North: Problems and Prospects" (1994) 18(4) *Polar Geography and Geology* 285 at 286.
[227] Rosencranz A and Scott A, "Siberia, Environmentalism, and Problems of Environmental Protection" (1991) 14 *Hastings Int & Comp L Rev* 929 at 930.

withdraw. Here, the influx of newcomers will continue and the natives' bargaining power will remain severely limited".[228]

We saw above at pp199-200 that the administration has continusly blocked the establishment of kinship communities under the KMAO "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug". It has been claimed that "such comunities were intolerable to the local administrations because the main source of money for the administration budgets came from the sale of licences to the oil companies", and administrators were not eager to share the money with local communities.[229]

In addition, environmentalism is also less prominent now than during perestroika; there is a feeling that good environmental management is a luxury that Russia may not be able to afford, as Russia's "continuing economic woes push environmental issues off the national agenda".[230] The oil companies themselves are facing continuing fiscal crises that are pushing environmental concerns into the background. It has been stated that the most pressing issue facing Russian directors today is economic survival.[231] Russian enterprises, including oil and gas companies, are in desperate need of capital to undertake capital works.

> [T]he Russian oil and gas sector must raise vast sums of money, both short and long term, to undertake neglected capital expenditure programs, to arrest production declines, rehabilitate existing wells, upgrade inefficient refineries, increase refining complexity, develop a service station network, alleviate export bottlenecks and, and repair or replace and ageing pipeline system.
>
> The scope of these capital programs does not even begin to envisage funding required for environmental protection and remediation initiatives that are estimated to be significant. [232]

Resource limitations arising from the precarious economic situation undermine the ability of the legal system to protect indigenous peoples by hampering the effective implementation of the Constitution and other laws and the observance of the rule of law. Government officials simply do not have the necessary funds to implement environmental laws and laws relating

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[228] Vitebsky P, "The Northern Minorities", above n225 at 107-108.

[229] Wiget A and Balalaeva O, "National Communities", above n33.

[230] Vitebsky P, "The Northern Minorities", above n225 at 103; United States Energy Information Administration, *Russia: Environmental Issues*, December 1999, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/russenv.html.

[231] For the difficulties facing Russian oil companies, see Gaddy D, "Fresh Opportunities Arise in Russia as Country's Oil Majors Respond to Lessons Learned from the 1990s", *Oil and Gas Journal*, 28 February 2000, 23-26; Gaddy D, "Yukos Priobskoye Project Litmus Test for Foreign Investment in Russian E&P", *Oil and Gas Journal*, 6 March 2000, 25-31; Gyetvay M, "Restructuring, Consolidation Top Solutions for Russia's Major Oil Companies' Woes", *Oil and Gas Journal*, 13 March 2000, 20-26.

[232] Gyetvay M, ibid.

to indigenous peoples. "Neither the central government nor okrug authorities have sufficient funds to implement existing laws, and the dependency of government on industry as a source of revenue reduces the likelihood of implementation even of existing environmental laws."[233] The State Programme 1991-1995 was abandoned for lack of funds to implement it. The Courts are badly underfunded. The buildings in which courts are situated "are so ramshackle that they pose a danger to everyone entering into them; the courts lack modern office equipment, the majority of courts lack centralised information-computer legal services; the judges do not receive adequate salaries and are moving into other jobs.[234]

5.6.2 Absence of the Rule of Law

5.6.2.1 The legacy of Muscovite Russia, the Tsarist era and the Soviet period

Russia has no history of government according to the rule of law, either under the Tsars or in the Soviet era. The absence of government according to law has been particularly marked in Siberia. From the 16th century until the Russian revolution, some of the worst abuses and exploitation of the indigenous peoples, and expropriation of their lands, occurred despite Russian government policy.[235] However, from the beginning of the colonisation of Siberia, the Russian government found it difficult, if not impossible, to enforce legislation for Siberia passed in Moscow or St. Petersburg. In particular, the long distances meant any laws passed for the benefit of the indigenous population were disregarded from start of colonisation, and the Russian soldiers, governors and colonists pursued their own objectives with scant regard

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[233] Osherenko G, "Indigenous Political and Property Rights and Economic/Environmental Reform in Northwest Siberia" (1995) 36(4) *Post-Soviet Geography* 225 at 226.

[234] Savitskii V, "Judicial Power in Russia: First Steps" (1996) 22(4) *Rev Central & East European L* 417 at 421; Schwarzer W, "Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation" (1994) 28(3) *Int Law* 825 at 833.

[235] The Russian state did not employ a policy of genocide towards the indigenous inhabitants, but rather wished to protect them and their lands to ensure the continuing supply of immensely valuable furs to Moscow. To this purpose, the governments over the centuries issued "countless decrees" aimed at protecting the yasak people and their lands. For example, the 16th and 17th century Russian governments demanded that settlement of new peasant populations be preceded by a determination that the land was "empty". If the land belonged to the yasak people, permission to settle was to be denied by the voyevodas, and the peasants were to be punished as thieves. However, land continued to be expropriated. Reforms to the yasak system by Peter the Great and Catherine the Great in the 18th century failed to protect the indigenous peoples, as did Mikhail Speranskiy's "Regulations for the Administration of the Natives", initiated under Alexander I in 1822, which regulated the status of the indigenous peoples until the Russian Revolution. Speranskiy's Statute allotted land to the clans, leaving land use rights within the clan to be determined by the common law of the indigenous peoples. Forsyth J, *A History of the Peoples of Siberia*, above n1 at 41 and 157; Fondahl G, *Gaining Ground*, above n22 at 43.

for the law. The rule of the Russians in Muscovite Russia and in the Tsarist era, as far as the indigenous Siberians were concerned, was been one of arbitrariness and violence. The indigenous peoples were completely unable to enforce their rights through the processes of law.[236]

This disregard for the law passed into the Soviet era, with government officials and the huge industrial ministries flagrantly violating the laws relating to indigenous peoples and the environment throughout the history of Communist rule.[237] In the Soviet era, the Communist Party controlled the executive government and the legal system, and was always above the

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[236] Although in theory the indigenous peoples possessed various legal rights and privileges, in practice their actual rights were almost nil: Vakhtin N,above n21 at 10. From the start, the harsh climate, difficult terrain and long distances from Moscow provided a formula for abuse of the indigenous peoples. The low standards of civic responsibility and disregard for human rights in Muscovite Russia resulted in ubiquitous corruption, which remained endemic through the centuries. The implementation of laws lagged far behind their adoption, as it was impossible to enforce government regulations. The Russians established in Siberia "a hierarchy of power in which there were practically no effective laws and no ethical imperatives", and the norm in Siberia was "self-enrichment at the expense of the indigenous population": Forsyth J, *A History of the Peoples of Siberia*, above n1 at 160. "There was little machinery, or will, to enforce these [rights] and for the most part the administrative conditions of the Northern minorities remained benighted and impoverished, while Russian immigration and expropriation of their territory continued unchecked". Vitebsky P, "The Northern Minorities", above n225 at 95.

[237] This is demonstrated by the failed efforts of the Committee of the North to protect the indigenous peoples from industrialisation by the formation of National Regions, including the Ostyak-Vogul National Region formed for the Khanty-Mansi in 1930, described in Vakhtin N, above n21 at 14-15; Forsyth J, *A History of the Peoples of Siberia*, above n1 at 284; and Slezkine Y, above n38 at 270-273. National Regions were intended to be autonomous administrative and territorial units set up along ethnic lines, to bring the indigenous peoples into the twentieth century by inducing them to abandon the "backward" parts of their culture, and to provide a greater level of local autonomy for those under their control. The Regions were to be accompanied by a land survey and an apportionment of all hunting and fishing grounds on the basis of ethnicity. Indigenous peoples were to be segregated from non-indigenous peoples, and new arrivals were to be forcibly removed where necessary. Inside the Regions the small peoples were to be included in economic development, but gradually and cautiously. The new administrative units were to have sufficient funding to represent the interests of the indigenous peoples. For this purpose, the Committee of the North asked the State Planning Commission (Gosplan) and all ministries in the north to form special northern departments.

The formation of National Regions failed for various reasons. First, the borders of the new administrative units were drawn on maps that often had nothing to do with reality. This meant some lands were never properly assigned to the indigenous peoples, and settlers moved into previously occupied territories, ignoring the rights of the indigenous inhabitants. Second, the indigenous peoples formed a minority in these new non-indigenous administrative units. The exploitation of indigenous peoples continued, with those in power in the administration simply ignoring government decrees and orders from Russia. Government decrees that local native administration be funded on equal basis with local Russian soviets were ignored; government orders to allocate funds to local representatives of the Committee for the North for education, medical services and cultural centres were ignored; local administrations taxed the indigenous peoples contrary to government orders. Gosplan did not even know of the formation of National Regions until a year after the event, and refused to form special northern departments, while the Commissariat of Agriculture never had the time or means to survey the lands, and claimed hunting was not part of its responsibilities. Industrial planners and provincial officials were concerned only with the fulfilment of the Five Year Plans, which did not mention the indigenous peoples. Reports of violations of the law, both by unauthorised Russian settlers and State institutions and enterprises continued to be received.

law. One of the most essential aspects of the rule of law, the independence of the judiciary, was non-existent under the Soviet regime.

> [B]etween the constitutional declarations [of judicial power] and actual reality lay a vast gap engendered by the undivided omnipotence of the Communist Party. In the USSR, there never was a separate and independent judicial power. All that the courts, the procuracy and the organs of investigation did in the name of the state was done on direct instruction of assorted party committees and individual members of their staff ... [N]ot a single direction constitutional provision proclaiming the independence of the courts was applied in practice. [238]

As regards the environment, the Soviet North was developed with outright violations of environmental legislation.[239] State bodies simply ignored laws pertaining to the environment with no fear of legal reprisal. None of the people involved in land-use conflicts - indigenous peoples, the government or the companies - believed the state-run enterprises could be taken to court, because of the complete dependence of the courts at all levels on Communist Party structures. The courts always approved Communist Party decisions. The courts, KGB, the administration and the Press were bound by mutual guarantee and by membership in the Communist Party, and were ready to bring state power to bear on any peoples who questioned their right to violate the law.[240] Furthermore, before 1985 (glasnost), it never occurred to those in power in the North that indigenous people could claim compensation for the environmental destruction of their land. Not only were state enterprises able to ignore the law with impunity, but those indigenous peoples who sought justice against the oil industry suffered prosecution and punishment. Those indigenous peoples who tried to oppose large-scale industry or protect traditional cultures were accused of "nationalistic activities"; by opposing the interests of the state, they were held to have committed a crime against the state.[241]

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[238] Savitskii V, above n234 at 417.

[239] Roginko A, "Conflict Between Environment and Development in the Soviet Arctic" in Käkönen J (ed), *Vulnerable Arctic: Need for an Alternative Orientation?* (Tampere Peace Research Institute, Research Report No. 47, Tampere, Finland, 1992) at 146.

[240] Vakhtin N, above n21 at 26.

[241] Ibid at 25; Forsyth J, *A History of the Peoples of Siberia*, above n1 at 398.

5.6.2.2 Absence of the rule of law today

Russia still does not have an effective legal system in place that is founded on the rule of law to develop, enforce and monitor its laws, including those relating to indigenous rights and environmental protection.[242] The rule of law is still weak in Russia, and "the gap between the law on paper and in practice is often wide".[243]

> The absence of rule of law ... permeates the Russian legal system. The current Russian legal system is characterised by a failure to adequately protect legal rights, a general inadequacy of legal institutions, legal process, and substantive law, and a history of weak enforcement of the law.[244]

Where good laws are passed, their provisions remain mainly on paper and they are not being enforced.[245] Current federal laws that recognise the special rights of the indigenous peoples of the North to their resources are not effective because of the lack of adequate mechanisms allowing for their implementation.[246] A number of different factors contribute to the absence of the rule of law in Russia.

(1) conflicting legal responsibilities

The tradition of assigning conflicting legal responsibilities to the same departments and ministries is one inadequacy of Russia's law enforcement mechanisms.[247] Russia has a history of assigning responsibility for implementing policies towards indigenous peoples to the officials responsible for production and development. In Muscovite and imperial Russia, the same governors responsible for the fulfilment of the yasak quotas were also responsible for the well-being of the indigenous peoples. In the Soviet era, after the brief period of the Committee of the North, responsibility for administration of the Arctic region, including policies and laws relating to indigenous peoples, was divided between the huge, central industrial ministries.[248] Traditional lands were devastated environmentally as the central production ministries that set production quotas also set the ministry environmental policy,

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[242] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99*, above n211 at 16.
[243] Teets R and Saladin C, above n165 at 3.
[244] Ibid.
[245] Roginko A, above n239 at 150-151.
[246] Murashko O, above n103 at 11.
[247] Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n71 at 323.
[248] Vakhtin N, above n21 at 16.

and environmental protection functions were assigned to the very departments responsible for construction and fulfilment of production quotas.[249]

Today, the same people in charge of protecting indigenous peoples are also in charge of oil licences. For example, in the Khanty-Mansi Autonomous Okrug, successful development of a proposed Biosphere Reserve for indigenous peoples depends on the will of regional and central government authorities, in particular the Head Administrator of Khanty-Mansi Autonomous Okrug, Alexander Filipenko, who is also responsible for the sale of oil licences.[250] Another example is the abolition by Russian President Vladimir Putin of the State Committee on the Environment on 21 May 2000, and the transfer of its functions, which include undertaking environmental reviews and enforcing environmental laws, to the Ministry of Natural Resources, which is responsible for facilitating and licensing oil and gas development.[251]

(2) proliferation of legislation

The many years of "legal vacuum", followed by a "legal boom" in the 1990s, has "engendered a persistent ignoring of the law in any sphere of life or society".[252] The "sheer proliferation" of legislation has resulted in confusion and internal contradictions in Russia's legal code.[253] For example, as of 1994 there were 80 legal documents at the federal level dealing with land relations in Russia, resulting in ambiguities and contradictions.[254] When confronted with conflicting legislation, republican and provincial governments often interpret

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[249] Roginko A, above n239 at 149; Rosencranz A and Scott A, above n227 at 931; Rehbinder E, "Different Approaches to the Development of Environmental Law Relevant to Amazonia and Siberia" in Bothe M, Kurziden T and Schmidt C (eds), *Amazonia and Siberia: Legal Aspects of the Preservation of the Environment and Development in the Last Open Spaces* (Graham and Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1993).

[250] Wiget A and Balalaeva O, "Alternative to Genocide: the Yuganskii Khanty Biosphere Reserve", 1997, New Mexico State University <http://www.nmsu.edu/~english/hc/hcbiosphere.html> (hereafter "Alternative to Genocide").

[251] US Energy Information Administration, *Monthly Energy Chronology*, March 2000, US Energy Information Administration <http://www.eia.doe.gov/emeu/cabs/monchron.html>; Project Underground, "Hotspots: Russia", *Drillbits and Tailings*, v 5(8), 31 May 2000, Project Underground <http://www.moles.org/>.

[252] Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n71 at 323; Cormaney M, "RICO in Russia: Effective Control of Organized Crime or Another Empty Promise?" (1997) 7 *Transnat'l L & Contemp Probs* 268 at 269.

[253] Fondahl G, *Gaining Ground*, above n22 at 85; Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n71 at 323.

[254] Brooks K and Lerman Z, above n158 at 16 and Annex Table 2.1.

it to their advantage, and "sometimes they simply ignore it, allegedly waiting for the federal government to rationalise its profusion of legal acts."[255]

(3) lack of accountability for official actions

The legal system lacks the basic protections against arbitrary action by officials and does not provide accountability for official actions.[256] The legislation of the Khanty Mansi Autonomous Okrug, which attempts to protect the ancestral lands of indigenous peoples, is flagrantly violated by the government authorities and by the oil companies. As examined above, Articles 20 to 22 of the "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug" assign indigenous peoples control over traditional lands through the negotiation and registration of agreements between the owner of an ancestral allotment and an industrial enterprise regarding the utilisation of land plots alienated for industrial needs. The authorities simply disregard the procedure set down in the law. In direct violation of Russian law, oil production licences which dispose of traditional hunting grounds are granted by the administration without the knowledge or consent of the indigenous peoples.[257] The history of the proposed Yuganskii Biosphere Reserve in the KMAO provides an example of the failure of the rule of law in this context.

In May 1996, Goskomsever (the Russian State Committee for the North) accepted a formal proposal for the creation of a Biosphere Reserve in the Yugan Zapovednik (nature preserve) on the Yugan river, made by a US research team conducting fieldwork among the Khanty.[258] An official of Goskomsever visited the KMAO and received verbal assurances of support from the Governor (head administrator) of KMAO, Alexander Filipenko, on the condition that existing territories licensed to oil companies be excluded form the Biosphere Reserve.[259]

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[255] Fondahl G, *Gaining Ground*, above n22 at 85; Fondahl G, "The Status of Indigenous Peoples in the Russian North", above n20 at 219.

[256] Osherenko G, above n233 at 226.

[257] FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, above n153, s3.1.1; Wiget A and Balalaeva O, "Government Deception", above n156.

[258] Since 1992 a project team consisting of Dr Andrew Wiget (ethnographer), Dr Olga Balalaeva (specialists on Finno-Ugric studies), Mr Nikolai Pluzhnikov (research associate) and Dr Elena Glavatskaya (historian) have been conducting fieldwork among the Khanty. The "Sacred Trust" project sought to develop basic data to support plans for preserving Khanty scared places and guarantee access to them. It involved fieldwork in Western Siberia in 1994 and 1995. The team identified sacred sites hitherto unknown to non-indigenous peoples. The project team has been involved in the creation of the Yuganksii Biosphere Reserve since 1993. Wiget A and Balalaeva O, "Alternative to Genocide", above n250.

[259] Wiget A and Balalaeva O, "Government Deception", above n156.

The Goskomsever official also received assurances of support from raion and village administrators and indigenous communities living on the Yugan.

To facilitate planning, Filipenko authorised the Surgut administration to provide a map of existing and projected licences in the Yugan basin. From the map provided, it was discovered in July 1996 that many of the licenses were granted without the consent or knowledge of the local Khanty families.[260] Two licensed areas of land, the "Ledyanoe" and "Chietinskoye" parcel, were tendered without the knowledge of Khanty families living in the area of the proposed biosphere reserve, whose property they affected. One parcel (the "Tailakohovskoye" license) extends within the boundary of the Yuganskii Zapovednik, in apparent violation of the law.[261] In December 1996 another parcel of land on the lower Bolshoi Yugan was scheduled for tender. In March 1997 the KMAO administration was prepared yet again to tender parcels of land for oil development in the basin of the Yugan Rivers on land traditionally occupied by Khanty families and officially identified in the early 1990s as family hunting territories, and without those families' knowledge or consent.[262] Furthermore, the recent schedulings for tender of two parcels of land, the "Achimovskoye" and "Multanovskoye", were not undertaken according to the procedure defined in the recent environmental law approved by the Duma in December 1995, requiring independent ecological and ethnographic expertise.[263]

Wiget and Balalaeva report that "a deliberate strategy ... is being implemented by the administration of Khanty-Mansi Autonomous region to delay approval of the proposed Yuganskii Biosphere Reserve until all the Territories defined for development within the Reserve's proposed boundaries can be tendered for licence".[264]

> The recent schedulings for tender of "Achimovskoye" and "Multanovskoye" parcels represent a deliberate strategy to subvert the expressed will of the Yuganskii Khanty to preserve their hunting territories as a Biosphere Reserve, as was made known to the village, regional and okrug administration, by selling as much of their land for development as possible without the Khanty's prior knowledge or consent in order to make the proposed Yuganskii Biosphere Reserve territory so broken up as to be unsuitable for Biosphere Reserve status [265]

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[260] Ibid.
[261] Ibid.
[262] Letter from the Deputy Head of KMAO for resources to the Surgut Region Administrator, March 1997, reprinted in Wiget A and Balalaeva O, ibid.
[263] Ibid.
[264] Ibid.
[265] Ibid.

Since 1996, some progress has been made on establishing a protected region for the Khanty. After receiving many letters of protest, from within Russia and from abroad, in November 1998 Governor Filipenko summoned the head of the Yuganskii Khanty community, Vladimir Kogonchin, to Khanty-Mansisysk to discuss the proposed reserve. A Surgut Commission meeting was convened on the 11 December 1998, attended by Vladimir Kogonchin (as the only Khant), the Chairman of the Committee on Oil and Gas, the Chairman of the Northern Fund, the Chairman of the Ecological, the Head Administrator of the Surgut region (Sarychev), the Deputy Region Administrator for Nationalities (Cherkashin), all the Administration Committee heads, and Pavel Oftchinnik, the Yugan Zapovednik Director.[266]

The administration argued against the establishment of the Biosphere Reserve, on the grounds that: the Reserve was being imposed by outsiders (although, in fact, the initiative stems back from a 1989 Khanty petition to establish a "green zone"); that there is oil is the regions; that the Khanty should not have self-government on lands holding oil; and that there was no such thing as a Biosphere reserve in law, a clear misrepresentation of the law, which clearly provides for Biosphere Reserves, of which Russia has several. Eventually the Commission agreed to create a "regional nationality park", with no drilling on the territory of the part for 5 years. The administration of the park would be the sole responsibility of a newly formed committee within the regional administration.[267]

On 18 December 1998 a joint meeting was held between administration officials, led by Sarychev, and representatives of ECOJURIS, a legal NGO based in Moscow, which serves as legal representative for the Yaoun Yakh community. As a result of the meeting, the public (in the form of ECOJURIS), representatives of the Yaoun Yakh community and other native peoples of the KMAO will be involved in working out regulations for establishing the protected area in the Surgut Raion. However, the final decision about the status and form of a newly-established protected territory will be made after various scientific studies have been undertaken in relation to the establishment of the protected territory. Making establishment of the protected area conditional upon the need for further research has been described as a "diverting tactic", as the scientific work conducted in the Yuga for the last six years provides all the necessary data.[268]

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[266] Wiget A, "Yuganskiy Khanty Protected Area", 1999, University of Connecticut <http://arcticcircle.uconn.edu/ArcticCircle/SEEJ/Khanty/khanty1.html>.
[267] Ibid.
[268] Ibid.

Although there is agreement on the need to create a protected territory on the Yugan, there is no agreement between the region and okrug administrations and the Yaoun Yakh Khanty community concerning the basic principles on which the protected area should be established, its purposes, legal form, boundary definition or management, nor is there any clear timetable or process for planning and development.[269]

The authorities also engage in administrative intimidation to obtain consent to agreements. For example, in 1993, an economic agreement was drawn up between "Maiksneft", working in Ugut, and 15 families in Kinyamino village. It was signed first by the Ugut administrator, which is illegal, and then distributed to the indigenous peoples who were convinced by the signature that the agreement was a *fait accompli*.[270] "The process for securing the 1993 Maiskneft agreement ... reflected, as initially begun, an attempt to intimidate Kinyamino residents with a fait accompli ... in apparent violation of the law, concerning the process for securing agreements."[271] This type of intimidating behaviour is exacerbated by the deteriorating economic conditions and collapse of the state system of buying furs and selling necessary supplies at subsidised prices, which has compelled many Khanty families to give up their lands for oil development, and placed "enormous pressure on Khanty families to sign punitive, often fraudulent agreements with oil companies".[272]

Where compensation for land is paid by oil companies, it is not paid directly to the indigenous peoples, but to the regional government. In the current economic crisis, when okrug budgets are almost entirely dependent upon oil and gas revenues, the local authorities divert compensation money for their own use. Compensation payments are usually spent on "so-called "services" that facilitate the interests of large-scale resource development in improved infrastructure (roads, electric lines, transportation networks, improved housing) rather than priorities determined by the permanent resident population of the communities affected".[273] The Khanty, who are a small minority in the okrugs, have no say in the expenditure of this money.

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[269] Ibid.
[270] Wiget A and Balalaeva O, "Government Deception", above n156.
[271] Ibid; Wiget A, "Black Snow", above n70.
[272] Wiget A and Balalaeva O, "National Communities", above n33.
[273] Osherenko G, above n233 at 227.

(4) lack of judicial independence

While the Russian Constitution provides for an independent judiciary, in practice there has been considerable difficulty in achieving this. The judiciary remains subject to executive, military and private influence and corruption. The tradition of the Soviet period, which regarded the judiciary as an administrative function, continues to prevail. The independence of the judiciary is undermined by: a lack of resources which is "so overwhelming that it prevents the judiciary from working properly", with reports of courts functioning without telephones, electricity and other infrastructure; low judicial salaries, which have contributed to the corruption crisis in the judiciary; the failure of judge themselves to understand the concept of judicial independence; and the murder of judges in Moscow, Irkutsk and Yekaterinburg for judgments issued, including attacks on lawyers and human rights defenders.[274]

(5) corruption, bribery and organised crime

Corruption and bribery are pervasive across all sectors of the economy, not merely in the judiciary.[275] Furthermore, the real power in the country is now seen to be in the hands of the Mafia. Those in control of the Mafia are former Communist bosses and KGB agents who have remained well entrenched in their positions of power.[276] Russian organised crime has deep ties and close connections to the government in Russia. It has been estimated that 30% to 50% of the income of organised crime in Russia is given to corrupt officials as bribes, and that one of every six criminal organisations has ties or members in the government.[277] Cormaney describes the relation between organised crime and the government as follows:[278]

> [O]rganized crime figures in Russia not only influence the political system, they personally occupy many positions in the state bureaucracy. Communist Party members, for the most part, retained their positions in the bureaucracy after the Soviet Union dissolved. The trend in corruption is moving away from individualised cases of bribery toward "close and regular cooperation (on a permanent basis) between the apparatus elite, businessmen, and related criminal forces ... ". Many members of organised crime groups are former Communist Party

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[274] Rishmawi M (ed), *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers March 1997-February 1999* (International Commission of Jurists, Centre for the Independence of Judges and Lawyers, Geneva, 1999) at 243-250.

[275] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99*, above n211 at 16.

[276] Bruinsma T, "Trade and Investment Opportunities in the New Russian Far East" (1993) 14 *Whittier L Rev* 471 at 475.

[277] Cormaney M, above n252 at 270.

[278] Ibid.

> officials and bureaucrats simply because they have access to the state machinery and "are accustomed to using the institutions of state power to protect their political and economic interests.

Organised crime does not only influence the state bureaucracy, but has extended to election to the legislative branches of the government, resulting in "mass corruption on scale rarely seen in the West".[279] Furthermore, not only does organised crime in Russia have connection with corrupt government officials, but in many cases has "virtually supplanted many of the functions of the state", including the enforcement of legal rights.[280] As a result of its history as a state lacking the rule of law, it is not part of Russian culture for citizens to look to the courts as the means for resolving grievances and disputes.[281] The weakness of the judiciary eroded public confidence in the legal system as means of enforcing rights and receiving redress of wrongs.[282] The Mafia has been able to take advantage of the ineffectiveness of courts and enforcement agencies, providing services such as enforcement of contracts, protection of property rights, dispute settlement, loans and financial assistance, debt collection, and social services through criminally-owned philanthropic organisations.[283]

Organised crime is heavily involved in the provision of illegal goods and services and also in the legal sectors of the economy. Banking is one of the most profitable areas of organised crime, with estimates that 70% to 80% of Russia's private banks are in the hands of organised crime.[284] With the banking sector heavily linked to control of the energy sector in Russia, particularly the large oil enterprises (see section on political power of oil companies"), it is clear that organised crime has business interests to protect in the oil industry; interests that conflict with the land rights of indigenous peoples.

5.6.3 Lack of Will to Protect Indigenous Peoples' Lands

The ability of the law to protect indigenous peoples' lands depends on both the desire of the government to pass laws to protect the lands of indigenous peoples, and the motivation of local authorities to uphold laws that are passed. In Muscovite and Imperial Russia, the Russian government passed many laws to protect the indigenous peoples in order to ensure

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[279] Ibid at 271.
[280] Ibid.
[281] Schwarzer W, above n234 at 833.
[282] Ibid at 833-844.
[283] Cormaney M, above n252 at 270-271.
[284] Ibid at 274-275.

the continued supply of furs. These laws were circumvented by local officials, settlers and soldiers, who, facing the opportunity of exploiting the indigenous peoples for personal gain, lacked the will to implement the laws. The norm in Siberia was "self-enrichment at the expense of the indigenous population".[285]

If the governments prior to the twentieth century passed decrees aimed at protecting the indigenous peoples, the aims of the Soviet government were completely incompatible with protection of the lands and lifestyles of the indigenous peoples. Soviet policy regarding Siberia was

> the subordination of the whole colony to the industrial aims of Moscow, according to which it was seen simply as one of the regions of the USSR, the resources of which were to be utilised as part of the 'national economy'. The needs, or demands, of central planning generated by the military and political interests of the state assumed an absolute priority against which consideration for the traditional way of life of the native peoples or the natural environment carried little weight.[286]

Where the Soviets passed legislation aimed at improving the economic and social situation of the Northern minorities, this failed for lack of will to implement the measures on the part of local authorities, as continued to be "motivated more by self-interest than by real prospects of economic and social benefit, especially to the lives of local inhabitants".[287] An example is the failure of the 1980 law "On Measures for the Future Economic and Social Development of the Regions Inhabited by the Peoples of the North", which allocated new funds to the North, and urged local officials and central ministries to improve the indigenous economy, health care, food supplies, housing and communications.[288] Because the social and economic measures were aimed at "development of the *regions inhabited by* the people of the North" not "development *of the* people of the North", the decree was "useless in practice for the Northern minorities".[289] The funds went directly to Regional and District authorities and were invested in industrial centres and their temporary immigrant employees, and not the indigenous peoples, who had no influence on the distribution of funds.[290] The decree failed

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[285] Forsyth J, *A History of the Peoples of Siberia*, above n1 at 160.
[286] Ibid at 394.
[287] Ibid.
[288] Decree of the Central Committee of the CPSU and the Soviet of Ministers of the USSR, No.115, 7 February 1980.
[289] Vakhtin N, above n21 at 23; Slezkine Y, above n38 at 374.
[290] Ibid.

because of the "unchanged attitudes of the ministries and bureaucrats concerned with implementing the decree".[291]

> Good and regular resolutions passed by the party and government concerning the social developments in the districts inhabited by the Peoples of the North are simply not carried out. The departments for the nationalities of the North in the regional executive committees and the territory (*krai*) executive committees have failed to tackle a whole number of questions that they were suppose to. These bodies are affected by a formal, bureaucratic style of work and an attitude of indifference toward the Small Peoples' problems. [292]

Local authority attitudes of indifference to the plight of indigenous peoples and "self-enrichment at the expense of the indigenous population", passed down over the centuries, remain a major obstacle to the protection of indigenous lands, particularly in the context of oil exploitation.[293] In general the local authorities have shown little interest in fulfilling the duty to protect the rights of the indigenous community. As the infrastructure (such as helicopters) is basically owned by the oil companies, and as many of the officials are themselves shareholders in oil companies, the authorities either depend on the oil companies or profit directly from them.[294]

> The okrug administration and the regional administrations are now much more dominant players in decision making, and they are not tempered by any concern for indigenous needs. There is not one Khanty representative in the okrug or regional Dumas ... In 1993 Yeltsin dissolved the system of village soviets, replacing them with a village administrator, appointed by the regional government and confirmed in Moscow, and these are always Russians whose responsiveness to the pressure of regional administration, the oil companies and the migrant oil workers who live in the village far outweighs any sense of obligation to the traditional Khanty families who hunt, fish and herd reindeer in the hinterlands of their territory of their administration.[295]

Furthermore, not all Russians today believe that land rights and rights to control oil and gas resources should be granted to the indigenous peoples. It has been argued that it is "unfair to grant to the northern [ethnically based] territories the full mantle of political and especially economic freedom". They argue that these "highly valuable resources" should not be under the control of northern regions and indigenous peoples in particular because they belong to all the Russian people; that the shortage of raw materials and fuels in the whole Russian

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[291] Slezkine Y, above n38 at 375.

[292] Letter of April 20, 1988 to the General Secretary of the Central Committee of the Communist Party of the Soviet Union Comrade M.S. Gorbachev, reproduced in Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996) at 48-49.

[293] Wiget A, "Sacred Trust", above n24.

[294] FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, above n153, s3.1.2.

[295] Wiget A, "Sacred Trust", above n24.

economy should be alleviated by the resources of the North, which belong to all of Russia; that immigrants to Siberia, especially second and third generation Russians born in the North, are also entitled to the land; and that because the North received subsidies to develop at the expense of the non-Northern parts of Russia, the North is liable to pay for these subsidies in terms of resources.[296]

5.6.4 Indigenous Peoples' Lack of Political Activity and Influence

Until 1987 state censorship suppressed all reference in the Russian press to ecological disasters perpetrated in the USSR. It has only been in the last decade that the environmental destruction cause by huge industrial schemes has become publicly known.[297] Not only has the ruthless exploitation of the mineral resources been carried out by the Soviet state with no regard for the welfare of the native peoples, but the native peoples had less chance than indigenous peoples in Western countries to assert their rights to land because they lacked until recently freedom of information, assembly and publication of their views. The true state of the small peoples of the North was cloaked in the propaganda of the Soviet party. It was only in the late 1980s that it was possible to make admissions regarding bad social conditions for the indigenous peoples and to speak out on their behalf.[298]

After the advent of glasnost, independent political and social structures began to appear throughout the North. In March 1990 the First Congress of Northern minorities took place in Moscow. The Association of Northern Minorities (Association of the Small Peoples of the North) was established at the Congress, with the Nivkh writer Vladimir Sangi as its chairman. In May 1991 the indigenous northern members of the USSR and the RSFSR formed their own caucus known as the Assembly of Peoples' Deputies Representing the Small Peoples of the North, with the purpose of promoting and coordination legislation and public relations activities at all levels of representation.[299] The Assembly was short-lived, dissolving upon the break-up of the Soviet Union.[300]

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[296] Kotlyakov V and Agranat G, above n226 at 292.
[297] Forsyth J, *A History of the Peoples of Siberia*, above n1 at 395.
[298] Ibid at 398.
[299] Slezkine Y, above n38 at 378.
[300] Pika A, Dahl J and Larsen I (eds), *Anxious North: Indigenous Peoples in Soviet and Post-Soviet Russia. Selected Documents, Letters and Articles* (International Work Group for Indigenous Affairs, Document No. 82, Copenhagen, 1996) at 75. The proposal for the establishment of the Assembly, the Declaration on the Formation of the Assembly, and the Programme of the Assembly are reproduced in Pika A, Dahl J and Larsen I (eds), id. The Statutes of the Association, and the Programme of the Assembly, are reproduced in

A new and intense phase of political activity began in 1990 in the KMAO, with the formation of "Save Yugra", a voluntary association of indigenous peoples seeking to protect Khanty and Mansi lands, and the participation of the Khanty in elections for village, region and okrug soviets (councils). These elections were perceived to be the only really free and open, democratic elections. Many Khanty won victory as delegates to these bodies, and their influence was seen in the adoption by the Council of peoples' Deputies of the KMAO of the "Regulations on the Status of Ancestral Areas of Economic Significance in the Khanty-Mansi Autonomous Okrug" in February 1992, despite resistance from delegates representing oil interests.[301]

The political influence of the Khanty in the soviets was to be short-lived. In 1993, President Yeltsin cancelled all village, region and okrug soviets, replacing these bodies with a restructured executive, which reduced the opportunity of the Khanty to hold executive or legislative positions. For example, in the Surgut region, Yeltsin appointed the KMAO okrug administrator, who in turn appointed the Surgut Regional Administrator, who in turn appointed the village administrators. Legislatively, following elections in 1994, with the Khants comprising a minority in the KMAO, only one Khanty was elected to the newly-formed okrug Duma. Regionally, there was not one Khanty representative in the newly-constituted Surgut Duma; by contrast, 4 of the 9 members of the Surgut regional duma represented oil companies.[302] Since the restructuring, it has became apparent that there is "no effective representation of Khanty interests in either legislative or executive positions", and political activity by the Khants has declined.[303] This has impeded the efforts of the Khants to uphold their rights under the law, for example, by obtaining registration of their traditional lands.

5.6.5 Political and Economic Power of Oil Companies

The lack of political power of the Khanty contrasts strongly with the politically and economically powerful oil companies. After the collapse of the Soviet Union, pursuant to

Indigenous Peoples of the Soviet North (International Work Group for Indigenous Affairs, Document No. 67, Copenhagen, 1990). The Resolution of the Presidium of the Supreme Soviet of 8 July 1991 ratifying the creation of the Assembly is reproduced in Kryazhkov V, above n102 at 142.

[301] Wiget A and Balalaeva O, "National Communities", above n33.

[302] Wiget A, "Sacred Trust", above n24.

the federal law "On the State Programme for Privatising State and Municipal Enterprises in the Russian Federation", all the state enterprises controlling oil exploitation were turned into joint-stock companies.[304] The oil industry was restructured into vertically-integrated corporations (VOCs) and a small number of independent producers. The government initially retained 45% to 51% of the equity in each company, and the remaining shares were offered to the companies' employees and managers, and to the public through auctions and investment tenders.[305]

At the end of 1995, the government undertook a notorious "shares for loans" scheme whereby shares in oil companies, including Sidanko, Surgutneftegaz, Lukoil, Yukos and the Siberian Oil Company, were pledged against commercial loans offered by a handful of Russia's newly privatised banks. By the 1 September 1996 the government had to decide between returning $530 million in loans or losing control over the pledged companies. The state's default on the loans (which some say was prearranged) resulted in the financial institutions attaining majority control of the largest oil companies.[306] As a result of the scheme, the "new masters of Russia's major oil companies are represented by influential Russian financiers and tycoons".[307] In 1997, directly or through affiliated companies and subsidiaries, Menatep Bank controlled 84.7% of Yukos' assets; Uneximbank held 85% of the equity of Sidanko; and Stolichny Savings Bank (SBS) controlled 99.3% of the Siberian Oil Company.[308]

The management of the financial institutions and oil corporations "reads like a veritable who's who of Soviet and Russian politics".[309] Lukoil CEO Vagit Alekperov was a minister of the oil industry in a former Soviet government. Mikhail Khodorkovsky, CEO of Yukos, was an important ranking member of the Communist Party youth wing. Boris Berezovsky, "whose financial support is credited with assuring Yeltsin's last electoral victory", is currently the chairman of SBS, which owns the Siberian Oil Company.[310] One former Prime Minister, Viktor Chernomyrdin, was also a former chairman of Gazprom. Five Russian

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303 Wiget A and Balalaeva O, "National Communities", above n33.
304 Edict of the President of the Russian Federation, December 1993.
305 Obut T, Sarkar A and Sunder S, "Roots of Systematic Woes in Russian Oil Industry Sector Traceable to Industry Evolution", *Oil and Gas Journal*, 25 January 1999, 27; Khartukov E, "Incomplete Privatization Mixes Ownership of Russia's Oil Industry", *Oil and Gas Journal*, 18 August 1997, 36.
306 Obut T, ibid at 30.
307 Khartukov E, above n305 at 38.
308 Ibid.
309 Obut T, Sarkar A and Sunder S, above n305 at 30.
310 Ibid.

CEOs who participated in privatisation were new additions to the Forbes magazine list of the world's 200 wealthiest people.

The links between oil companies, financial institutions, state power and organised crime forms a network of economic and political power which greatly impedes the Khanty and other indigenous peoples in upholding their rights under law. "There is a long history of collusion between between the oil and gas interests, the Surgut regional government and the Khanty Mansiysk okrug govenremnt".[311] Regionally, there is not one Khanty representative in the Khanty-Mansi Autonomous Okrug or regional Dumas; by contrast, 4 of the 9 members of the Surgut regional duma represent oil companies.[312]

> The oil companies are now directed by men who, while serving in a similar capacity in the former Soviet oil monopoly, also served in the regional soviet or administration; today they are wealthy and powerful enough to control the regional, okrug and oblast Dumas and administrations.[313]

As the infrastructure (such as helicopters) is basically owned by the oil companies, and as many of the officials are themselves shareholders in oil companies, the authorities either depend on the oil companies or profit directly from them.[314] Oil companies routinely violate laws that require oil companies to obtain signed lease/compensation agreement from Khanty families before any work is done.[315] The allocation of property rights has "facilitated sharp and unethical bargaining practices" in the purchase of drilling rights, comprising pre-existing communal rights to use land for hunting, fishing and trapping, and preventing access to reindeer migration routes.[316] Where agreements are obtained, they are inadequate, fraudulently implemented, and signatures on leases are obtained by coercion, false promises, and even forgery.[317] The deteriorating economic conditions and collapse of the state system of buying furs and selling necessary supplies at subsidised prices has placed "enormous pressure on Khanty families to sign punitive, often fraudulent agreements with oil companies".[318]

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311 Wiget A, "Black Snow", above n70.
312 Wiget A, "Sacred Trust", above n24.
313 Ibid.
314 FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, above n153, s3.1.2.
315 Wiget A, "Sacred Trust", above n24.
316 Osherenko G, above n233 at 227.
317 Wiget A and Balalaeva O, "Alternative to Genocide", above n250.
318 Wiget A and Balalaeva O, "National Communities", above n33.

It has been reported that families affected by oil company activities are not given copies of the agreements; compensation is not determined in some cases when agreements are signed; agreements have been signed under the influence of alcohol; and in other cases agreements were signed in Russian when the indigenous peoples did not have a full understanding of the language.[319] For example, Yuganskneftegaz paid compensation to one family living permanently within the Priobskoye license area, but outside the village, for rights to use the family land to access the subsurface resources. The head of the household, who suffers from alcoholism and tuberculosis, and is illiterate, did not understand the nature of the agreement by which relinquished his rights, although he marked his name on the agreement.[320] "It is a very common feature that the negotiations only include a few family members with limited knowledge of their rights."[321]

The oil companies use their economic power to put pressure on the indigenous populations to sign agreements. For example, during particular times of the year most of the homes of the indigenous people can only be accessed by helicopter. Helicopters are therefore an efficient tool for oil companies to put pressure on the indigenous peoples. If they refuse to agree the companies can simply stop supplying goods to villages or whole areas. In the case of the village of Yuilsk on the Kazym river in Beloyarskii Rayon, northwest of the autonomous region of Khanty-Mansi, consent by the indigenous people to start construction for the extraction of oil was extorted by a temporary suspension of supply flights.[322]

5.6.6 Legacies of the Soviet Economic System for Environmental Law Today

The Soviet economic system, which contributed to the alienation and environmental destruction of indigenous peoples' traditional lands, has left an undesirable legacy for the people today. In the Soviet era, all means of production were owned by the state, and the state through its bureaucracies determined what was to be produced, and in what quantities. Economic policy was determined by the Communist Party's Politburo, and applied through rigid lines of command, from the State Planning Committee (Gosplan) down to the industrial

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[319] FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, above n153, s3.1.1.

[320] Osherenko G, "Indigenous Political and Property Rights and Economic/Environmental Reform in Northwest Siberia", above n233 at 227.

[321] FIAN International, *The Right to Adequate Food and Violations of this Right in the Russian Federation*, above n153, s3.1.2.

[322] Ibid.

and sectoral branch ministries and then individual bureaucracies.[323] This economic system failed to provide any incentives for the conservation and care of the land and resources.

First, the system of collective ownership of lands and resources contributed to the alienation and destruction of indigenous peoples' traditional lands by failing to ascribe the rights and responsibilities of land ownership. Under the Soviet system, the lands and resources of the North ceased to be the property of the indigenous peoples and became state property. The ministries and the agencies controlled the land and resources according to their own interests, and the Northern minorities were the ones who suffered the consequences. Any environmental damage the ministries caused was compensated by paying each other. If fish were exterminated the money would go to the Fisheries Ministry; if forests were destroyed, the Forestry Ministry would be compensated. The indigenous peoples, who had no ownership rights over their traditional lands, suffered the expropriation and environmental degradation of their traditional lands, with no recourse to the law.[324]

Second, the pricing of land and resources under the Soviet regime contributed to excessive alienation of traditional lands for industrial purposes. Under classical Marxist theory the value of natural resource is zero while they lie awaiting use. The Land Legislation Act of 1968 made land, which was owned by the State, available free of charge to farms and other enterprises.[325] "Regulations governing the free use of lands and the until recently uncontrolled departmental access to lands have stimulated considerable increases in land acquisition for [industrial] purposes".[326] One example is over-use of land resulting from under-pricing is that of land acquisition in the Nadym and Pur districts of the Yamal-Nenets Autonomous Okrug, where 31,500 hectares would have been sufficient for 8500 drilled wells, but in fact 75,000 hectares were used. In the new cities of Nvyy Urgenoy and Noyabrsk, only 1,429 hectares were required, but 75,000 hectares were used; and for Nadym, where 859 hectares would have sufficed, 18,300 hectares were alienated.[327] Where values have been put on land, the prices did not reflect the true value of the land.[328]

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[323] Economist Intelligence Unit Limited, *Country Profile: Russia: 1996-97* (Economist Intelligence Unit Limited, London, 1997) at 13.
[324] Roginko A, above n239 at 149.
[325] Vitebsky P, "Gas, Environmentalism and Native Anxieties in the Soviet Arctic: the Case of Yamal Peninsula" (1990) 26 *Polar Record* 19 at 23 (hereafter "Gas, Environmentalism and Native Anxieties").
[326] Leksin V and Andreyeva Y, "Environmental, Social and Legal Issues in Russia's Northern Policy", above n71 at 308.
[327] Ibid.
[328] Vitebsky P, "Gas, Environmentalism and Native Anxieties, above n325 at 23.

> Because the soil had no economic value, the following happened: The representative of the building organisation came to the city administration of the executive committee of the local Soviet and said: "I need a piece of land for building a factory." He then was asked: "How much do you need?" "From here to the horizon". "So take from it from here to the horizon"![329]

Third, success of the ministries was measured by fulfilment of plans and by spending, not by conservation of the environment.[330] In some cases, where the fulfilment of a production plan brought a 30% bonus, and anti-pollution measures brought only a 10% bonus, the incentive to exploit the land in the short term with little regard for long term environmental effects is obvious.

> The success of a ministry under central control has been evaluated by only one criterion: how much money it spends. Neither the negative ecological consequences nor even the profitability is of any interest ... the ministry is indifferent: the more the project costs, the better for them. The local administration, on the other hand, is very interested in what is built on the land but has no rights.[331]

Fourth, environmental problems were exacerbated by *vedomstvennost*, the concern of each ministry and department to look to its own interests and nothing beyond, rather than submitting to a more coordinated approach to planning in which their own role and powers may be more limited.[332] For example, the production ministries shifted resources and money from their environmental units their non-environmental units to maintain production quotas. When Goskompriroda was formed in 1988, to oversee environmental regulation, the production ministries held on to their environmental authority to keep control over their resources, although the environmental functions were to have been absorbed into Goskompriroda.[333] Another example is the excessive number of trees that have been felled and left to rot when land has been cleared for environmental operations, because the land is designated for oil development not timber development, with no coordination between the ministries.[334]

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[329] Kazannik A, "Soviet Environmental Law and Its Application in Siberia" in Bothe M, Kurziden T and Schmidt C (eds), *Amazonia and Siberia: Legal Aspects of the Preservation of the Environment and Development in the Last Open Spaces* (Graham and Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1993) at 145.

[330] Vakhtin N, above n21 at 24.

[331] Ibid at 25.

[332] Vitebsky P, "Gas, Environmentalism and Native Anxieties", above n325 at 23.

[333] Rosencranz A and Scott A, above n227 at 932.

[334] Pearce F, "The Scandal of Siberia", *New Scientist*, 27 November 1993, 28.

Secrecy in official decision-making contributed to environmental degradation under the Soviet system.

> The centralised production ministries generally broker joint venture projects, often behind a veil of bureaucratic secrecy. There is no citizen review process by which to assess the social and environmental consequences of any project, nor is *Goskompriroda* consulted ... Multinationals and the Soviet ministries are therefore unaccountable to local populations, and projects can be initiated without any opportunity for citizens to protest because there may be no advance knowledge of the project or its impact. Moreover, citizens have little capacity to monitor public operations or compel enforcement of regulations once the projects are underway.[335]

The assignment of conflicting legal responsibilities to the same officials undermined the enforcement of environmental laws. The system of assigning environmental protection functions to the very departments responsible for construction led to the clouding of issues pertaining to the state of the environment, and worked against environmental protection as managers tried to fulfil their all-important production quotas.[336] The local governing bodies who set standards for the environment were in the untenable position of having no real authority over the enterprises, who were run by the powerful ministries. Efforts to improve environmental protection in 1988 by introducing a new agency, Goskompriroda, to oversee all environmental regulation and enforcement were unsuccessful, with Goskompriroda suffering from a lack of status, legal authority, jurisdiction and funding.[337]

Although the Russian government has started the process of reforming its substantive environmental laws, these efforts to strengthen environmental law are not likely to function effectively for some time, as "the legal system lacks the basic protections against arbitrary action by public officials, accountability, and rights of public participation - all fundamental building blocks of effective environmental laws".[338] After the collapse of the USSR, in the early days of privatisation, the issue of vouchers in state enterprises to all citizens resulted in widely dispersed ownership and the managers in the Soviet era were largely left in control.[339] "Today, old power networks remain strong and traditional bosses have adapted their style to remain in power".[340] The same people who were in power in the Soviet era are in positions

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[335] Rosencranz A and Scott A, above n227 at 943; see also Rosencranz A, "Preserving the Environment of Siberia" in Bothe M, Kurziden T and Schmidt C (eds), *Amazonia and Siberia: Legal Aspects of the Preservation of the Environment and Development in the Last Open Spaces* (Graham and Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1993) at 85.

[336] Roginko A, above n239 at 149; Rosencranz A and Scott A, above n227 at 931.

[337] Rosencranz A and Scott A, ibid.

[338] Osherenko G, above n233 at 226.

[339] Economist Intelligence Unit Limited, *Country Profile: Russia: 1998-99*, above n211 at 15-16.

[340] Vitebsky P, "The Northern Minorities", above n225 at 103-104.

of power in Russia. Institutional weaknesses and attitudes remain, such as corruption, the pursuit of self-enrichment on the part of officials, the concern of each ministry and department to look to its own interests, secrecy and the lack of public accountability, and the desire to exploit the land in the short term with little regard for the indigenous peoples and long term environmental effects.

CHAPTER 6: CONCLUSIONS FROM CASE STUDIES

6.1 The Impact of Oil Exploitation on Indigenous Peoples

The case studies of Nigeria and Russia demonstrate that one of the major concerns of indigenous peoples is that they continue to be dispossessed of their lands for oil exploitation by oil companies, without the provision of adequate compensation. Furthermore, as seen in the case studies of Ecuador and Russia, the construction of access routes and roads, and the promise of employment in oil industry, encourages the immigration of colonists into indigenous areas, leading to conflicts over land and access to natural resources, and the despoliation and profanation of sacred sites.

As seen from all three case studies, another major concern of indigenous peoples is the severity of environmental degradation that has accompanied oil exploitation, which negatively affects their health, and cultural, religious and traditional economic activities. Some of the worst environmental impacts are water pollution caused by unsafe waste disposal methods, oil spills from pipelines, and blowouts; air and noise pollution caused by gas flaring; and the loss of biodiversity from forest clearing, the construction of access routes to remote areas and pollution. As the study of the Khanty revealed, the destruction of the environment forces indigenous peoples to "voluntarily" relocate away from their traditional lands.

In other cases, as demonstrated by the study of the Ogoni people of Nigeria, the control of revenue and participation in the benefits of resource exploitation are major concerns. As demonstrated by all three case studies, indigenous peoples usually bear the environmental costs of oil development that takes place on their traditional lands, without reaping the benefits of exploitation, which are shared among the population as a whole.

6.2 The Role of the Law

In some emerging economies, oil development has taken place, and continues to take place, in a vacuum of laws protecting the land and environment of indigenous peoples.

First, as demonstrated by the case studies of Russia and Ecuador, oil development started to take place in an era where legal regimes for the ownership, control and use of land by indigenous peoples were non-existent or inadequate, and assimilation and integration were accepted policies, with the result that in some cases, government policy and laws aided the dispossession of indigenous peoples' lands. For example, the legislation regarding the development of the Amazon encouraged colonists to move into the regions traditionally inhabited by indigenous peoples such as the Huaorani. In Russia, Soviet policies regarding collectivisation and the forced relocation of indigenous peoples into large farms and villages, took them away from their traditional lands.

It is only in the 1990s that new constitutional guarantees and laws have been passed that recognise and protect the right of indigenous peoples to live traditional lifestyles and maintain control over their traditional lands, for example changes to the 1998 Ecuadorean Constitution, the 1993 Russian Constitution, and the new Russian federal law on the status and rights of indigenous peoples.

Currently, one of the biggest threats to indigenous land rights are laws recognising state ownership and development rights over oil resources. For example, in Ecuador, the rights of the Huaorani over the area of land known as the Huaorani Protectorate, is limited by their inability to control oil exploitation in the Protectorate. Under the Nigerian Land Use Act, indigenous peoples no longer own their traditional lands. Rural land is held under a customary right of occupancy which may be revoked for mining purposes. Although compensation for the disturbance of surface rights is legally required, no compensation is payable for the loss of the land itself.

Second, until the 1990s, oil companies in Russia, Ecuador and Nigeria operated with a dearth of environmental legislation. For example, it is only recently that FEPA and EIA legislation has been passed in Nigeria. The legal regime in Nigeria was so inadequate that one writer has commented that "the pre-FEPA (1988) regulatory regime in Nigeria is, in theory and practice, plagued with so many shortcomings that there is a temptation to write it off as non-existent".[1] In the Soviet era in Russia, the oil industry in Russia operated under laws that were largely hortatory, and it has only been since the collapse of Communism that

substantive reform of these laws has taken place. Similarly, the oil industry operated in the Ecuadorean *oriente* for years with virtually no environmental and public health controls, and it is only since 1992 that specific legislation controlling the activities of oil companies on the environment has existed.

There has been an increased drive towards environmental protection in emerging economies since UNCED in 1992, as evidenced by the examination of the laws of Ecuador, Nigeria and Russia, where legislation has developed at a rapid pace in the 1990s. Emerging economies have included environmental assessment criteria and performance conditions as part of new laws and revised mining and petroleum codes and contracts in the 1990s. While this is a positive trend, the legislation in many emerging economies remains inadequate. For example, the legal regime for the regulation and control of pollution in Nigeria is still deficient, as sanctions for oil pollution remain "laughably inadequate"; there is a lack of environmental protection afforded to the smaller creeks and rivers in Nigeria; the discretion given to implementing agencies is too wide and the power granted to the regulatory bodies is often too vague; and the legal framework for compensation for oil spills is confusing, fragmented and inadequate.[2]

In other cases, even where adequate legislation exists, and the provisions of land tenure and environmental laws are strong, the implementation and effectiveness of the laws are undermined by a complex web of historical, social, political and economic factors.

6.3 Social, Economic and Political Factors that Undermine the Effectiveness of Land Tenure and Environmental Laws

The case studies of Nigeria, Ecuador and Russia demonstrate that land tenure laws and environmental laws have failed in practice to protect the rights of indigenous peoples, for a number of reasons. First, despite the recent proliferation of new and revised laws relating to indigenous peoples rights and the environment, the governments of emerging economies still

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1 Ekpu A, "Environmental Impact of Oil on Water: a Comparative Overview of the Law and Policy in the United States and Nigeria" (1995) 24 *Den J Int L & Pol'y* 55 at 96.

2 Ibid at 96-102; see also Emole C, "Nigeria: Regulation of Oil and Gas Pollution" (1998) 28(2) *Envtl L & Pol'y* 103; Ene E, "Oil and the Environment in Nigeria", *OPEC Bulletin*, November/December 1994, 20.

lack the political will to enforce these laws and programmes.[3] As seen in all three case studies, the first, and overwhelming reason for this is economic. Low national income and large foreign debt, combined with a heavy reliance on oil to generate tax and export revenues, place enormous pressures on emerging economies to develop their oil resources. It is naive to assume this pressure will abate in the near future.

The imperative of development is particularly noticeable in the environmental sphere, where underdevelopment and poverty have led to a "disregard even of pressing and imminent environmental degradation with visible cost when immediate income beckons".[4] Emerging economies have argued that it is not possible for them to put the preservation of the environment before development needs of food and shelter.[5] This view, often accompanied by the belief that strict environmental regimes deter foreign investment, has led to a lack of political will to implement strong environmental policies.[6] The concept of giving up mining prospects "for the sake of environmental purity" is out of the question in most developing and ex-Socialist countries, where the mineral and oil and gas industries are often the major sources of export income, providing a strong impetus for economic development, the establishment of basic infrastructure in remote areas, employment, and for learning the basic skills of industrialisation.[7]

For emerging economies, the exploitation of oil and other natural resources will continue to take precedence over the environment or the environmental and land concerns of indigenous peoples and local populations.

Second, as demonstrated by the studies of Nigeria, Ecuador and Russia, the effectiveness of land tenure and environmental laws in emerging economies has been undermined by the inadequate implementation and enforcement of legislative provisions arising from a lack of, and inadequate, legal and administrative institutional structures.[8] The introduction of new

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3 Andreen W, "Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World" (2000) 25 *Colum J Env L* 17 at 63.

4 Wälde T, "Environmental Policies Towards Mining in Developing Countries" (1992) 10(4) *J Energy & Nat Resources L* 327 at 346.

5 Ibid at 346-347.

6 Cohen M, "A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries" (1996) 15 *Stan Envl LJ* 130 at 154.

7 Wälde T, above n4 at 337.

8 Nanda V, *International Environmental Law and Policy* (Transnational Publishers Inc, Irvington-on-Hudson, New York, 1995); Andreen W, above n3 at 29; Cohen M, above n6 at 154; Mensah C, "The Role of Developing Countries" in Campiglio L, Pineschi L, Siniscalco D and Treves T (eds), *The Environment*

and better laws alone is insufficient to ensure improved observance of indigenous rights and environmental performance in the absence of an administrative structure with the capacity and the motivation to implement and enforce the legal regime.[9] In emerging economies, "the development of law and the strengthening of the institutional arrangements for its implementation are tasks of crucial significance."[10] However, institution building is one of the "most difficult and elusive" of objectives for emerging economies, and institutional inadequacy remains one of the major causes behind the failure of indigenous and environmental programs.[11] In general, emerging economies

> lack a well functioning public administration system able to set objectives and achieve them. There is a large gap between the formal rule of law, a seemingly very productive legislative process on the one hand and actual compliance on the other. The underdeveloped state ... lacks the relatively effective machinery of modern statehood. ... Non-compliance ... is therefore phenomenal in underdeveloped states. [12]

The case studies of Russia, Ecuador and Nigeria demonstrate the cause of institutional failure in the environmental sphere. Although many emerging economies introduced new government bodies or ministerial departments with responsibility for the environment during the 1970s-1990s, these institutional arrangements have suffered from a number of inadequacies. First, the new ministries or departments have "often proved to be primarily advisory in nature, and their ability to coordinate government action has suffered from a generally weak position relative to the more traditional sectoral ministries, especially those that deal with major economic sectors such as mining, industry, oil, and agriculture".[13] Second, in some emerging economies the agencies responsible for environmental regulation are also responsible for oil production, leading to conflicting roles and interests.[14] Third, a number of institutions may be responsible for environmental policy and protection, resulting in confusion, overlap, bureaucratic competition over jurisdiction, a lack of cooperation and coordination between the different ministries with responsibility for environmental protection, poor planning, and the inefficient utilisation of scarce resources.[15]

After Rio: International Law and Economics (Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1994); Wälde T, above n4 at 346.

9 Andreen W, above n3 at 25.

10 Ibid at 25.

11 Ibid at 63 (reference to quotation omitted).

12 Wälde T, above n4 at 346.

13 Nanda V, *International Environmental Law and Policy*, above n8; Andreen W, above n3 at 57; Cohen M, above n6 at 154; Mensah C, above n8; Wälde T, above n4 at 346.

14 Wälde T, above n4 at 346-347.

15 Andreen W, above n3 at 30 and 57; Cohen M, above n6 at 154.

Institutional failure also arises when governments have enacted strict environmental regulations for the sake of compliance with conditions laid down by international lending institutions, and/or in response to international pressure, but these laws are seen as imposed from the outside, and are not taken seriously by government officials.[16] As demonstrated by the studies of Ecuador and Nigeria, this is compounded by corruption, entrenched through underdevelopment combined with low pay for administrative officers, traditions of bribery, and the absence of a realistic code of civil service ethics.[17] These case studies also show that the infrastructure and institutional framework allowing the public to enforce environmental laws, through such measures as public participation and access to the courts, is often lacking in emerging economies.[18]

Finally, even where institutions are established, these may lack the capacity to implement the law. Implementation of environmental regulations, including enforcement, compliance and the imposition and enforcement of sanctions, requires adequate financial, technical and human resources, including trained staff with motivation, administrative power, access to information and integrity.[19] In emerging economies, environmental agencies often suffer from a lack of adequately trained personnel, including staff with certain professional skills such as financial accounting, and poor management capacity.[20] Environmental agencies often have limited financial resources; lack access to adequate equipment and facilities, with telephones, computers, printers and copying machines being in scarce supply; and lack access to necessary information such as statutes, regulations, reports, studies and environmental data.[21] Government agencies and national companies may also lack access to relevant environmental know-how and technology.

Third, the non-observance of indigenous rights takes place within the broader context of government in the absence of the rule of law. For example, in Russia, there has been no tradition or history of government according to the rule of law. From Muscovite Russia to today, government officials have acted arbitrarily and often in flagrant disregard of the laws pertaining to indigenous land rights and the environment. In other countries such as Nigeria, the absence of the rule of law is a feature of military rule. In military regimes, where

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16 Wälde T, above n4 at 346-347.
17 Ibid.
18 Ibid.
19 Ibid.
20 Nanda V, *International Environmental Law and Policy*, above n8; Andreen W, above n3 at 63-64; Mensah C, above n8; Cohen M, above n6 at 154; Wälde T, above n4 at 354.
21 Nanda V, *International Environmental Law and Policy*, ibid; Andreen W, ibid; Mensah C, ibid.

governments suppress dissent and protests by force, the violation of indigenous peoples' rights is one aspect of a pattern of general human rights violations.

As demonstrated by all three case studies, the lack of independence of the judiciary is a feature of countries operating in the absence of the rule of law. Judicial independence may be compromised in a number of ways, including the promulgation of ouster clauses by military regimes; short terms of judicial appointment, with appointments and reappointments being subject to political influence; the harassment and threatening of judges; and through bribery. This lack of judicial independence, coupled with difficulties in gaining access to justice for indigenous peoples because of financial problems, language and cultural barriers and long distances to travel from remote areas, has undermined the effectiveness of the justice system for indigenous peoples seeking to enforce their rights under existing laws.

Finally, many countries have their own particular factors arising from the historical development of the nation that undermine the motivation of the government to enact strong laws pertaining to indigenous rights and the environment and/or the effectiveness of the laws in practice, for example: ethnicism in Nigeria, whereby ethnic loyalties and competition over resources have led to the minority peoples of the Niger Delta regions bearing a disproportionate share in the environmental costs of oil development, while not receiving compensatory benefits; the national attitude of "conquering the frontier" in Ecuador, which have contributed to desires of the government to support oil development in the Amazon; and in Russia, the legacies of the Soviet economic regime, such as indifferent and sometimes hostile bureaucratic attitudes towards indigenous peoples that have carried over into government agencies today.

6.4 A Dual Approach to the International Protection of the Land, Resource and Environmental Rights of Indigenous Peoples

Given the failure of national legal systems to protect the land, resource and environmental rights of indigenous peoples, indigenous peoples have turned to the international legal system to assist in the protection of these rights. A range of international instruments adopted or in the process of adoption by the United Nations and by regional forums of international law, such as the inter-America legal regime, set out a range of rights of indigenous peoples and address the international legal duties and obligations of states in this regard. This regulation

of the behaviour of states is crucial, as states are responsible for the recognition of titles to land, the demarcation of indigenous territories, the enactment and enforcement of environmental laws, and the issue of oil licences and leases. Not only do the instruments of international law set out the rights of indigenous peoples and the duties of states, but some treaties provide mechanisms whereby indigenous peoples can take their grievances directly to international forums, such as the Human Rights Committee (established under the International Covenant on Civil and Political Rights),[22] the Committee on the Elimination of Racial Discrimination (established under the International Convention on the Elimination of All Forms of Racial Discrimination),[23] and special committees of the International Labour Organisation. States that become parties to human rights treaties may also expose their policies and procedures regarding development on indigenous peoples' lands to international scrutiny through procedures such as country reporting mechanisms.

These treaties and international monitoring and enforcement mechanisms will be examined in Chapters 7 to 9 of Part III as one part of a dual approach to the international protection of indigenous peoples land, resource and environmental rights, where the second arm of the approach is the international regulation of the activities of oil companies seeking to operate on indigenous peoples' traditional lands. This dual approach is advanced because in the case of emerging economies, the factors that undermine that effectiveness of national laws analysed in the case studies will also operate to undermine the effectiveness of international laws in practice. This is because the effectiveness of international law relies on the willingness and ability of the various arms of government, including the legislature, the executive and the judiciary, to translate the international laws into practice and ensure their enforcement. Factors such as economic pressures, inadequate institutional capacity, lack of independence of the judiciary, corruption, and the absence of the rule of law, seriously compromise the will and ability of the government to enact and enforce laws relating to the protection of indigenous peoples' lands, whether these are initiatives that are solely domestic in origin, or undertaken in pursuance of international duties and obligations.

In this context, a code of conduct addressing the activities of oil and gas corporations on indigenous peoples' lands has a useful role to play in effecting the observance of indigenous peoples' rights and principles for the protection of the environment contained in international

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[22] International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171, [1980] ATS 23, 6 *ILM* 368 (1967) (entered into force 23 March 1976).

legal instruments by translating these rights and principles into practice through regulation of the actual behaviour of oil and gas corporations. As the second arm of the dual approach to the international protection of indigenous peoples land, resource and environmental rights, in Part IV of this thesis I draft and discuss a voluntary code of conduct that draws on the developments in international law discussed next in Part III.

[23] International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, 660 UNTS 195, [1975] ATS 40 (entered into force 4 Jan 1969).