

**Customary land title and Indigenous rights
in Papua New Guinea**

Creative Commons Attribution 4.0

ISSN: 2463-641X

Diane Colman¹

Western Sydney University

Abstract

In a recent report on Papua New Guinea (PNG), the United Nations Human Rights Commission (UNHRC) noted its concern at the alienation of land held under customary title through the granting of Special Agricultural Business Leases (SABLs). Its concern centres on the impact of SABLs on human rights, with the UNHRC citing that the granting of these leases “had negatively affected the ability of indigenous communities to maintain customary land use patterns and sustain their traditional way of living” (UNHRC, 2016:12). Yet, I contend, such an Indigenous rights-based approach to the issue is problematic on two levels. First, it is not clear which groups in Papua New Guinea should be considered ‘Indigenous’ given the country’s universal franchise and the lack of a politically or economically dominant identity group. Second, such an approach does not account for the widespread commodification of land held under customary title. The majority of land in PNG is held under customary title and is occupied by Indigenous smallholders producing crops for immediate consumption, the local market and for export. These two problems show that framing the question of land as an Indigenous rights issue glosses over the ongoing struggle between these smallholders and the Indigenous capital class in Papua New Guinea. This means that challenging the use of SABLs to alienate land held under customary title by positing such use as an infringement of Indigenous groups’ rights to traditional or non-capitalist land use would have little potential to protect customary land rights in PNG, seriously circumscribing the capacity for achieving positive development outcomes.

Keywords: Papua New Guinea, Indigenous, rights, customary, land

¹ **Corresponding author:** Diane Colman (D.Colman@westernsydney.edu.au)

Introduction

The United Nations Human Rights Commission (UNHRC) released its Universal Periodic Review of Papua New Guinea (PNG) on 6 May 2016. The review notes the concerns of the Committee on the Elimination of Racial Discrimination about the alienation of land held under customary title through the granting of Special Agricultural Business Leases (SABLs). These concerns centre on the impact on human rights, citing that the granting of these leases “had negatively affected the ability of indigenous communities to maintain customary land use patterns and sustain their traditional way of living” (UNHRC, 2016:12). Yet such an Indigenous rights-based approach to the issue of land in Papua New Guinea is problematic on two levels. First, it is not clear which groups in PNG should be considered ‘Indigenous’ given PNG is an independent nation with a democratic governance system that includes universal franchise and representation from the full diversity of customary groupings. There is no clear dominance, either politically or economically, by one identity group. Secondly, such an Indigenous rights-based approach to land confuses customary title with a traditional or pre-colonial basis for occupation and use of land and consequently does not account for the widespread commodification of land held under customary title. The vast majority of land in PNG is actually held under customary title and is largely occupied by smallholders producing crops for immediate consumption, for the local market and for export.

Framing the question of SABLs as an Indigenous rights issue glosses over the ongoing struggle between the interests of these smallholders and those of the expanding Indigenous capital class acting to consolidate land into large-holdings. It also discounts the differentiation among smallholders and battles between ‘bigmen’ to retain/gain access to particular parcels of land and the labour and rights attached to them. Failure to acknowledge that all parties to the majority of land disputes in PNG are Indigenous also fails to acknowledge the considerable efforts of the PNG Constitutional Planning Committee to ensure that all Indigenous peoples of Papua New Guinea have their customary rights to their land and resources enshrined in law. These two problems show that challenging the use of SABLs to alienate land held under customary title by positing such use as an infringement of Indigenous groups’ rights to traditional or non-capitalist use would have little potential to protect customary land rights in PNG, seriously circumscribing the capacity for achieving positive development outcomes.

Indigenous peoples in Papua New Guinea

A ‘human rights-based approach’ to development has permeated the discourse of international development agencies for some time (Cornwall and Nyamu-Musembi, 2004). This approach has become particularly prevalent in recent times due to the linking of environmental concerns with development in the United Nations’ Sustainable Development Goals (UNDP, 2015). Such an approach seeks to establish an interrelationship between human rights and environmental rights. Situating issues relating to the environment within rights-based discourses further politicises conservation of the environment by linking it to the responsibility of governments to protect the human rights of the peoples within their territories. Rights-based conservation is grounded in international human rights law, in particular in the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007. The Declaration affirms that Indigenous peoples have the right to self-determination, political participation and extensive rights to their land and resources (UNDRIP, 2007, articles 4, 5 and 26).

The United Nations, however, has not adopted an official definition of 'Indigenous', either in the Declaration or via any other UN document. Instead, it relies on a self-identification approach as proposed by Jose Martinez Cobo, a Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities who argues:

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 on 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. (Martinez Cobo, 1987:48).

The United Nations also relies upon an understanding of the concept of Indigeness adopted by the International Labour Organisation in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169. The Convention (ILO, 1989) states that the term 'Indigenous' 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.

When applying these definitions to the specific situation in PNG, it is difficult to distinguish a group or groups that would be considered to have separate rights as Indigenous peoples in opposition to other groups. Certainly, the PNG government does not have a policy on which groups might be categorised as Indigenous peoples. This is not to say that the members of the various tribes of PNG, with their common ancestry, their common culture, their common language and their continuing occupation of ancestral lands, do not self-identify as distinct peoples. But as the Melanesian peoples in PNG form the nation's majority population; descend from the populations which inhabited the country at the time of colonisation and when independence was declared; have a historical continuity with their territories; are an important electoral force; and have their rights to their customary lands enshrined in national law, it is difficult to see how the rights of one identity group are to be privileged over others.

The independent country of PNG is home to a highly diverse and complex society that consists of an extraordinary number of distinct identity groups. Individual and group identities based on continuing attachments to villages characterises social, economic and political belonging. Despite this, or perhaps because of it, since 1951, when moves towards self-government in PNG emerged, administrators and legislators, both colonial and Indigenous, have been at pains to ensure government would not be dominated by one specific identity group. As some areas of PNG were economically more advanced than others (for example, Port Moresby and Rabaul), the colonial administration put in place policies to achieve uniform development across the whole country to ensure no areas were 'left behind' at independence. At the same time, the colonial administration sought to impose a structural uniformity on the various forms of 'native rights' to land established through clearance, heredity, warfare and other means. With the exception of some freehold large

holdings obtained by European settlers before the Second World War, and the small amount of alienated land used for administrative purposes, the bulk of land in PNG was to be held under customary title. This form of title was specifically implemented through the exercise of colonial authority to protect Indigenous land rights from further alienation of land into large holdings. These policies meant that the majority of Papua New Guineans remained on smallholdings in rural areas under customary title (MacWilliam, 2013:119-28).

When independence came in 1975, Parliament included representatives from all over the nation and the huge number of rural voters became, and remain, a significant electoral force. This is not to say there are not any economically marginalised areas; these certainly exist. But the inequality that exists in PNG is not based on inclusion in or exclusion from specific Indigenous identity groups. While there have been periods where certain blocs of politicians from specific regional groups have been politically dominant, PNG politics has never included the deliberate discriminatory exclusion of specific identity groups. The Indigenous Constitutional Planning Committee (CPC) which drafted the independence constitution ensured that customary rights to land were defined under law and that no non-Papua New Guinean would have the same rights as the customary owners to land. Identification as part of a customary group with a continuity of attachment to a specific parcel of land forms the basis of political and economic organisation in PNG.

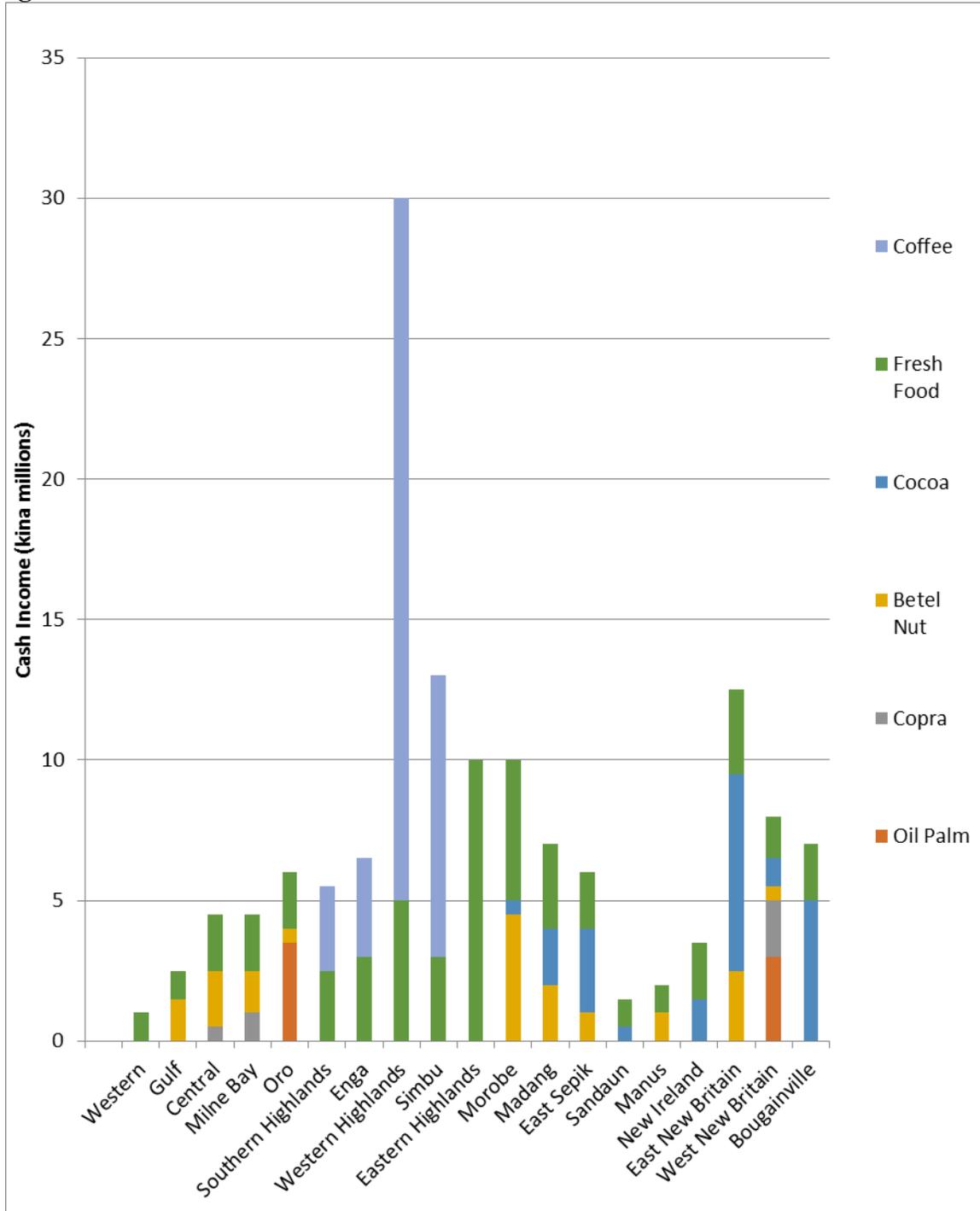
The democratic system of government in PNG, which includes universal franchise, means that it is essential for the political and economic elite to maintain a strong support base in the rural areas where the majority of voters live. In order to do this, it is vital that they remain connected to their identity group, be it a village, a clan or a larger tribe which constitutes their electorate. In order to gain access to the land and resources of the group, elites must be accepted as part of that group. Therefore, both the people physically occupying customary land and the political and economic elites who identify as members of those traditional groupings but who do not live on those lands claim an historical continuity with their ancestral lands. In this sense, then, all Melanesian Papua New Guineans might be regarded as Indigenous. This means that reference to the protection of Indigenous rights does not contribute to resolving the issue of which specific Indigenous groups should possess ultimate custodianship of certain lands. Indigenous rights do not differentiate between smallholders and the Indigenous capital class occupying large-holdings and employing Indigenous labour. The issue also discounts any differentiation among smallholders and the battles between 'bigmen' to retain/gain access to particular parcels of land and the customary rights attached to them. Failure to acknowledge that all parties to the majority of land disputes in PNG are Indigenous also fails to acknowledge the considerable efforts of the CPC to ensure that all the Indigenous peoples of PNG maintain customary rights to their land and resources as enshrined in law. The situation in PNG is therefore very different to that envisaged by the drafters of the UN Declaration on the Rights of Indigenous Peoples — countries where Indigenous peoples are a marginalised minority. This means that an Indigenous rights-based approach to the ongoing struggle over land ownership, occupation and usage in PNG is not an effective one.

Customary land usage in Papua New Guinea

Under PNG's customary title laws, land is owned communally by a specific lineage, clan or tribal group. Usage rights to specific parcels of land are allocated within the group. These rights can be sold or leased to other landowning groups and individuals or to the landless, but the PNG Constitution prohibits the sale of customary land to foreigners; that is, to non-Indigenous and non-national people (Constitution of the Independent State of Papua New Guinea, 1975:s.56). Almost

all landowners in Papua New Guinea are Indigenous landowners; 97 percent of all land remains under customary title (NLDI, 2007:2). But this does not mean that land use is ‘traditional’ or non-capitalist as the UNHRC asserts (UNHRC, 2016:12). In fact, land has been heavily commodified in PNG, whether as large or smallholdings.

Table I: Estimated 1995 cash income of the rural population from the six most important agricultural commodities



The agricultural sector provides the livelihood for 80 percent of the population of PNG. While there are stark differences in the incomes derived from the sector in different provinces, different districts, and different villages, land forms the basis of production and consumption for the majority of Papua New Guineans. As can be seen in Chart 1, rural populations across all provinces are involved in the production of agricultural commodities, whether it be fresh food and betel nut for local markets or coffee, cocoa, copra or coconut oil for export markets. Households occupying customary land in PNG are connected to the global economy through imported products such as mobile phones, rice and canned tuna, purchased with the incomes they earn through the commodification of their land.

Inherent to upholding land rights within the Indigenous rights-based approach is the idea that the current situation, where more than 80 percent of the population remain on smallholdings under customary title, is somehow a continuity of pre-colonial land occupation practices. But, in fact, customary ownership is an effect of the colonial administration's and subsequently the independent state's drive to ensure households have access to land for commodity production. During the colonial period, the non-capitalist basis of occupation — that is, first clearance and then conquest — was removed and replaced by customary ownership rights defined by legislation and secured through state power. As MacWilliam (1988) has demonstrated, by removing the non-capitalist premises of smallholder occupancy, customary ownership represented a break, not a continuity, with previous rights to land. While successive colonial administrations legislated to demarcate land for large-holdings owned by international companies and European settlers, they were also concerned about Indigenous land access. Customary title was introduced as a means to secure Indigenous land rights in the face of expatriate encroachment on land. By implementing these rights in accordance with immediately existing occupation patterns, and using state force to check further acquisition through tribal warfare, traditional bases of ownership were removed (MacWilliam, 1988).

Had village life remained largely unaltered after colonialism and independence and increases in agricultural production remained minimal, the description 'customary land use patterns' and 'traditional ways of living' might have been apt for the smallholder population. But this was not the case at all, as Chart 1 demonstrates. A principal objective of colonial authority was to ensure that households produced for markets as well as for immediate consumption and that they would also purchase foods produced elsewhere. When self-determination was realised, specific rights to land occupation and usage remained high on the agenda. This was particularly highlighted by a series of Acts passed in 1974 during the self-government phase. In this period, immediately prior to independence, various peoples sought to establish a claim to land being vacated by European settlers and commercial enterprises that would be consolidated under the Constitution.

To deal with this, the government passed laws that secured large-holding owners against arbitrary seizure, cementing state authority as the basis of ownership under customary title. The legislation sanctioned the use of state repression to block squatting by the landless, formalised acquisition of plantations and estates from departing settlers, and secured a compromise between claims of Indigenous capital and households for vacated large-holdings (Downs, 1980:486-492). It also provided for collective ownership of smallholdings held under customary title to take a corporate form, enhancing the prospect of financial institutions advancing funds for smallholder projects operated by business groups. This effectively signalled the end of any right to occupy land for simple reproduction. At the same time, it represented another step forward in moves to tie flows of money capital directly to family labour processes for the expanded production of crops on smallholdings (MacWilliam 1988:89). This was taken further in the post-independence era where customary ownership was defined in terms of the clan, or clan sections, "who customarily

exercise control over and are entitled to the profits of land” (GoPNG, 1985:2). This has meant that however land occupied by smallholders is used, whether it be for the production of immediately consumed goods, for local marketing or for export, it is not traditional or non-capitalist use. These smallholder farmers are a labour force that remains attached to its land. Thus it is their continuing attachment to their land that forms the basis of their struggle with the capital class in PNG.

This means the question of which Indigenous interests — those of smallholders or large-holders or investors — are being recognised and protected by the PNG government is essential to the understanding of what customary land rights mean in Papua New Guinea today. Directing efforts to protect these rights in opposition to international capital glosses over the formation of an Indigenous capitalist class and the development of distinct notions of interest between Indigenous smallholders and Indigenous capital. It also does not take into account the conflict between smallholder ‘bigmen’ for control over customary land and the benefits that such control accrues. Land reform in PNG has been, since colonial times, and continues to be, a struggle between those who seek to consolidate land into large-holdings for capital accumulation and those who seek to maintain the interests of smallholders. SABLs were introduced in 1979 by the independent state as part of a push by international and Indigenous capital classes to further expand into large-holding plantation agriculture. The more recent rapid expansion of the use of SABLs to alienate large tracts of customary land can also be interpreted as a move by a coalition of international and Indigenous investors for rapid capital accumulation through logging as well as land clearing to facilitate the extension of large agricultural businesses. In the majority of cases, excluding those cases where certificates were fraudulently obtained, customary landowners agreed to SABLs in order to access the agricultural development opportunities that such agreements represent.

The mobilisation of these often very large groups of customary title holders is facilitated by trusted members of their own identity group, by local administrators, departmental officials and by their elected representatives. When the promised development does not materialise it becomes evident that these local political and economic elites are in coalition with the international companies which reap the benefits of harvesting the resources without providing any benefits to the landowners in return (COISABL, 2013). Once the land is cleared, with little opportunity for landowners to utilise it for smallholder agriculture, leases can be obtained by those seeking to expand coffee, cocoa and oil palm plantations. It is evident, therefore, that SABLs need to be seen in the context of the ongoing struggle between the Indigenous capital class, which is pushing for large landholdings, and the interests of the majority of Papua New Guineans, who remain attached to their land as smallholder farmers.

Conclusion

Contemporary customary land rights in PNG bear little relation to traditional or pre-colonial land rights. Customary land rights in PNG are the rights of an international capitalist order. In the absence of any meaningful development programs, the continuing attachment to their land is the margin between security and extreme poverty for rural Papua New Guineans, the vast majority of the population. Customary ownership rights certainly need to be protected as the majority of the population of Papua New Guinea rely on their land as their source of livelihood in the capitalist economy. But framing the issue of land access in terms of Indigenous rights is glossing over the struggle between the Indigenous capital class and Indigenous smallholders. Further research might investigate how this struggle has played out in terms of the politics of land tenure in PNG; it is

unclear whether the alienation of large tracts of customary land through SABLs represents a new setback in this struggle. As Filer (2011:30) notes, with customary ownership rights to land accruing significant entitlements to tax revenues in the event of mining leases or petroleum development licenses being granted, it is not clear whether such rights are reserved for customary land owners or would transfer to the leaseholder. While the current Papua New Guinean Prime Minister Peter O'Neill has indicated all leases have been cancelled, efforts to action this directive by the authorities remains limited. Regardless, the razing of the forests has certainly altered the usage of the land over which SABLs have been granted without the promised large-scale agricultural developments materialising. Should usage rights to the now-cleared land be returned to its customary owners, they will require considerable assistance to ensure it provides a sustainable livelihood for the households to which it belongs.

References

- Allen, M., Bourke, M., and McGregor, A. 2009. "Cash income from agriculture" in Bourke, R. M., and Harwood, T., *Food and Agriculture in Papua New Guinea*, Canberra: Australian National University, E Press.
- Ambang, Tabian., 2007. "Re-Defining the Role of Tribal Leadership in the Contemporary Governance Systems of Papua New Guinea." *Contemporary PNG Studies: DWU Research Journal* Vol. 7:87-100.
- (COISABL) Commission of inquiry into Special Agricultural Business Lease. 2013. Report. Port Moresby:GoPNG
- Constitution of the Independent State of Papua New Guinea. 1975. Available from: http://www.paclii.org/pg/legis/consol_act/cotisopng534/
- Cornwall, Andrea, and Celestine Nyamu-Musembi, 2004 "Putting the 'rights-based approach' to development into perspective." *Third world quarterly* 25(8) : 1415-1437.
- Downs, Ian., 1980, *The Australian Trusteeship: Papua New Guinea 1945-75*, Commonwealth of Australia, Canberra.
- Filer, Colin. 2011. "The political construction of a land grab in Papua New Guinea." Resources, environment and development: Pacific discussion paper series. Canberra: Australian National University.
- (GoPNG) Government of Papua New Guinea, 1985, 'Executive summary: The new land legislation. Port Moresby: GoPNG.
- GSMA Intelligence. 2018. Papua New Guinea Market Overview. Retrieved from <https://www.gsmaintelligence.com/markets/2638/dashboard/> 7 March 2018
- (ILO) International Labour Organization. 1989. *Convention concerning Indigenous and Tribal Peoples in Independent Countries*. Geneva:ILO. Available from: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
- Kama, Bal. 2017. *An analysis of Papua New Guinea's political condition and trends through to 2025*. Lowy Institute. Available from: <http://interactives.lowyinstitute.org/publications/PNGin2017/png-in-2017-png-political-condition-to-2025.html>
- Martinez Cobo, Jose.1987. *Study of the problem of discrimination against indigenous populations*. Final report by the Special Rapporteur, Sub-commission on Prevention of Discrimination and Protection of Minorities, New York: United Nations. Available from: <https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez->

- cobo-study/
- MacWilliam, Scott. 1988. "Smallholdings, land law and the politics of land tenure in Papua New Guinea." *The Journal of Peasant Studies*, 16(1):77-109.
- MacWilliam, Scott. 2013. *Securing Village Life: Development in Late Colonial Papua New Guinea*, Canberra: ANU Press.
- (NLDI) National Land Development Taskforce. 2007. *The National Land Development Taskforce Report, Land Administration, Land Dispute Settlement, and Customary Land Development*, Monograph 39. Waigani: National Research Institute.
- (UNDP) United Nations Development Programme. 2015. *Sustainable Development Goals*. New York: United Nations. Available from <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html>
- (UNDRIP) United Nations Declaration on the Rights of Indigenous. 2007. New York: United Nations. Available from: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- (UNHRC) United Nations Human Rights Council. 2016. *Universal periodic review, Papua New Guinea. A/HRC/WG.6/PNG/2* New York: United Nations. Available from: <https://www.upr-info.org/en/review/Papua-New-Guinea/Session-25---May-2016/Compilation-of-UN-information>
- United Nations Permanent Forum on Indigenous Issues. *Indigenous Peoples, Indigenous Voices, Factsheet, Who are indigenous Peoples?* New York: United Nations. Available from: http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf
- World Bank. 2012. *Papua New Guinea: Connecting people in one of the most isolated places on earth*. Available from: <http://www.worldbank.org/en/news/feature/2012/09/11/papua-new-guinea-connecting-people-in-one-of-the-most-isolated-places-on-earth>

Author's biography

Diane Colman is a lecturer in international relations in the School of Humanities and Communications Arts at Western Sydney University.