Rights-based approaches

Exploring issues and opportunities for conservation

Edited by Jessica Campese, Terry Sunderland, Thomas Greiber and Gonzalo Oviedo

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Acronyms and abbreviations

ABS	Access and Benefit Sharing
ACM	Adaptive Collaborative Management
ACT	Australian Capital Territory
ADB	Asian Development Bank
ASCONAR	*Asociación de Concheras de Nariño* (Nariño clam collectors association, Colombia)
ASDES	*Corporación de Asesorias para el Desarollo* (Corporation of lawyers for development, Colombia)
BMR	Baviaanskloof Mega-Reserve (South Africa)
BZCF	Buffer Zone Community Forests (Nepal)
BZMC	Buffer Zone Management Council (Nepal)
CAPE	Cape Action for People and the Environment (South Africa)
CABI	*Capitanía de Alto y Bajo Isoso* (Bolivia)
CBD	Convention on Biological Diversity
CCA	Community Conserved Area
CCBA	Carbon, Community, and Biodiversity Alliance
CDO	Community Development Organisation (Nepal)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEESP	Commission on Environmental, Economic, and Social Policy (IUCN)
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CI	Conservation International
CIFOR	Center for International Forestry Research
CNP	Chitwan National Park (Nepal)
COICA	Coordinator of Indigenous Organizations of the Amazon Basin

DEAET	Department of Economic Affairs, Environment and Tourism (Eastern Cape Province, South Africa)
DECRIPS	United Nations Declaration on the Rights of Indigenous Peoples
DFID	Department for International Development (United Kingdom)
DIHR	Danish Institute for Human Rights
DLA	Department of Land Affairs (South Africa)
DNPWC	Department of National Parks and Wildlife Conservation (Nepal)
ECPB	Eastern Cape Parks Board (South Africa)
EMPOWERS	Euro-Med Participatory Water Resources Scenarios
FAO	Food and Agriculture Organization of the United Nations
FECOFUN	Federation of Community Forest Users (Nepal)
FIAN	Food First Information and Action Network
FIELD	Foundation for International Environmental Law and Development
FoE	Friends of the Earth
FPIC	Free, Prior, Informed Consent
GTB	GasTransBoliviano
HRBA	Human Rights Based Approach
HRCA	Human Rights Compliance Assessment
HRIA	Human Rights Impact Assessment
IADB	Inter-American Development Bank
ICCA	Indigenous Community Conserved Area
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social, and Cultural Rights
IFC	International Finance Corporation
IIED	International Institute on Environment and Development

ILO	International Labour Organization
INRA	*Instituto Nacional de Reforma Agraria* (National agrarian reform institute, Bolivia)
INVEMAR	*Instituto de Investigaciones Marinas y Costeras* (National marine research institute, Colombia)
IPA	Indigenous Protected Area
IPCC	Intergovernmental Panel on Climate Change
IPCCA	Indigenous Peoples' and Community Conserved Area
IUCN	International Union for the Conservation of Nature
JSC	Joint Services Council (Palestine)
KCCA	Khumbu Community Conserved Area (Nepal)
KINP	Kaa-Iya del Gran Chaco National Park and Integrated Management Area (Bolivia)
MAT	Mutually Agreed Terms
MEA	Multilateral Environmental Agreement (and Millennium Ecosystem Assessment)
MENA	Middle East and North Africa (IUCN Region)
NBSAP	National Biodiversity Strategies and Action Plans
NTA	Native Title Act (Australia)
OECD	Organisation for Economic Co-operation and Development
OP	Operational Policy
PA	Protected Area
PAR	Participatory Action Research
PARF	Protected Area People's Right Federation (National coalition of communities affected by protected areas, Nepal)
PIC	Prior, Informed Consent
PMU	Project Management Unit
PRA	Participatory Rapid Appraisal
PTD	Participatory Technology Development
RAMSAR	The Ramsar Convention on Wetlands

RBA(s)	Rights-based Approach(es)
RDA	Racial Discrimination Act (Australia)
REDD	Reduced Emissions from Deforestation and Forest Degradation
REWARD	Regional Water Resources and Drylands
RIDA	Resources, Infrastructure, Demand and Access
SBSTA	Subsidiary Body for Scientific and Technological Advice
SERNAP	*Servicio Nacional de Áreas Protegidas* (National park service, Bolivia)
SNP	Sagarmatha National Park (Nepal)
TCO	*Tierra Comunitaria de Orígen (*Indigenous territories recognised by law, Bolivia)
TK	Traditional Knowledge
UDHR	Universal Declaration of Human Rights
UNCCD	United Nations Convention to Combat Desertification
UNFCCC	United Nations Framework Convention on Climate Change
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
WCC	World Conservation Congress
WCS	Wildlife Conservation Society
WPC	World Parks Congress
WWF	World Wide Fund for Nature

Who we are

Contributors

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Foreword

The links between the realisation of human rights and the conservation of natural resources and biodiversity are receiving increasing attention worldwide. Conservation of ecosystem goods and services is important for upholding economic, social and cultural rights, such as the rights to health, an adequate standard of living, freedom from hunger and cultural freedom. At the same time, bitter experience has demonstrated that exclusionary approaches to conservation can undermine those same rights of affected communities, in some instances violate civil and political rights, and can undermine conservation objectives.

In recent years, the conservation community has begun to explore the relationships between conserving biodiversity and upholdling human rights by looking at its own practices and talking with partners and critics. Nevertheless, the practical implications of conserving biodiversity and, at the same time, protecting human rights are still not clear and are the subject of much debate. The so-called 'rights-based approaches' (RBAs) to conservation presented in this volume may offer a promising way forward. But RBAs also raise a myriad of new challenges and questions, not least how to define such approaches in practical terms and how to determine what they mean for conservation policy and implementation.

Both the Center for International Forestry Research (CIFOR) and the International Union for Conservation of Nature (IUCN) recognise the importance of understanding and addressing the links between conservation and human rights. Conservation of the Earth's biodiversity and realisation of human rights are profoundly connected and both are fundamental ethical values. Their mutual and integrated pursuit embodies the highest aspirations for a healthy planet and sustainable, fulfilling and dignified human livelihoods.

One of CIFOR's goals is to shift policy and practice towards conservation and development approaches that are more effective, efficient and equitable in both process and outcome. A strategy to achieve that goal is research to improve land use guidelines and management practices so that they both promote conservation of biodiversity and secure the resource rights of indigenous and local communities.

IUCN's mission is to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable. Supporting development of practical and effective rights-based approaches to conservation supports this mission. IUCN members have encouraged the Union to explore and take action on rights-conservation links

through resolutions adopted at the last World Conservation Congress (Barcelona, 2008).

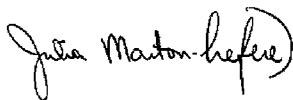
CIFOR and IUCN have a common commitment to supporting equitable conservation of natural resources and biodiversity, and the livelihoods they help sustain. The two organisations collaborated to share the cases and core issues that are the subject of this publication with IUCN Congress participants and have incorporated their feedback in this volume.

The experiences described in this volume make it clear that there is no one recipe for RBAs. However, each illustrates legal, customary, policy, programming, or advocacy strategies that local people, government and non-government conservation organisations and others can use to better understand and act upon their rights and responsibilities. The concepts and practical implications of RBAs presented vary widely. However, important common issues emerge, including sound governance systems that uphold procedural rights and support both rights holders and duty bearers in making claims and meeting obligations.

The papers in this volume also illustrate that engaging with rights means engaging with the social dimensions of conservation. RBAs challenge the conservation community to move beyond its traditional boundaries, engage in new partnerships, take on demanding new tasks and seize new opportunities. Finally, we need to examine many more experiences if we are to fully understand the implications of RBAs. This volume identifies many open, difficult questions for the conservation community and its partners to address.

Rights-based approaches to conservation are at an early stage of development, but are rapidly gaining momentum. They are targeting both longstanding biodiversity and natural resource conservation practice, such as protected areas and forests, and emerging concerns, such as the effects of climate change on the enjoyment of human rights and the rights implications of climate change mitigation mechanisms.

CIFOR and IUCN are pleased to bring together the diverse lessons and perspectives in this publication as part of the larger and growing effort towards dialogue, learning and action on RBAs.



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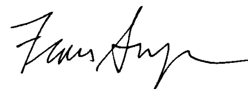

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A roadmap for readers

Jessica Campese, Terry Sunderland, Thomas Greiber and Gonzalo Oviedo

Rationale and objectives

The conservation community has been challenged to take stronger measures to respect human rights (Chapin 2004, Alcorn and Royo 2007, Igoe 2007). There are also significant opportunities for communities, governments, NGOs, private industries and others to contribute positively to realising human rights through management of natural resources and conservation of biodiversity. 'Rights-based approaches' (RBAs) may offer an effective way to reconcile conservation and rights, and have the potential to create positive synergies. RBAs are being increasingly adopted in development and business (Harris-Curtis *et al.* 2005, Nyamu-Musembi and Cornwall 2004). The concept is newer to conservation, but is gaining momentum (CEESP 2007, Colchester 2007, Svadlenak-Gomez 2007, Greiber *et al.* 2009). RBAs are innovative and challenging, and the conservation community and its partners need to discuss them further and examine lessons learned to date. Basic questions and concepts are still relatively unexplored, such as:

- What are rights-based approaches?
- How do RBAs complement other approaches to conservation, including other socially oriented, community-based or participatory approaches?
- What are the benefits of implementing such approaches (and for whom)?
- What are the costs and constraints (and for whom)?
- Who are the duty bearers and what is the nature and scope of their responsibilities?
- Who are the rights holders, and what rights, duties and responsibilities do they have?
- How, in concrete and practical terms, can conservation practitioners make RBAs a component of their work, without unduly infringing on the core mandates of conservation organisations?

The purpose of this publication is to make a substantive contribution to discussion, learning and action around these issues.

Content and structure

Chapter 1 provides an overview of key issues and develops a broad conceptual framework for RBAs to conservation. It includes some preliminary

suggestions to help ensure conservation policy and its implementation, respect and, where appropriate, help to further protect and fulfil rights. Chapter 2 gives an overview of the rights and social justice related standards and policies of major international organisations, including several non-governmental organisations (NGOs). Chapters 3 through 10 are case studies describing the diverse policies, processes and methods that a range of NGOs, governments and communities are using in rights-based approaches to conservation. Chapter 11 argues for a rights-based approach to mainstreaming gender in regimes to secure access to genetic resources and to share benefits. Chapter 12 explores the implications of rights-based approaches to mitigating climate change through Reduced Emissions from Deforestation and Forest Degradation (REDD). Finally, in Chapter 13, the editors identify and analyse common themes and lessons emerging from the papers as a whole. Chapters vary widely in terms of:

- organisational perspectives,
- core issues (the rights concerns being addressed),
- level of implementation (local, landscape, national, international),
- geographic region,
- political, socio-economic, cultural and historical contexts,
- experiences or lessons,
- the ‘stage’ of the process described, and
- conceptualisation of the form and content of rights-based approaches.

Scope

RBAs are an emerging, contested and vibrant area of exploration and learning in conservation. Our purpose in bringing together the diverse perspectives represented in this book is to share the experiences of different actors who are developing, implementing, or advocating rights-based approaches to conservation and natural resource management. None of the chapters, however, sets out to comprehensively resolve the questions surrounding RBAs, nor does any case represent a template to be transferred in full to other contexts. The cases are described from the perspective of the organisations and actors involved. We invite readers to share other experiences and perspectives.

Given the scope of issues and questions surrounding RBAs, there are, inevitably, dimensions left unexamined. The majority of cases in this collection deal with rights in the context of protected areas, under various management types and governance arrangements. This undoubtedly reflects the fact that protected areas are a key tool for conserving biodiversity and natural resources. It is within the protected areas context that human rights

Box 1. Case studies overview

(Chapter 3) RBAs to coastal resource management
Springer and Studd describe the *conversatorio*: a process facilitated by the World Wide Fund for Nature (WWF) and its partners in Colombia. The *conversatorio* focuses on enabling rights holders and duty bearers to more effectively engage and agree on the use of coastal resources. The case study demonstrates the importance of developing the capacity of marginalised groups to define and implement collective action. The *conversatorio* addresses asymmetries of power and establishes collaborative governance processes through which people can negotiate, claim rights and meet responsibilities. The authors also identify broad lessons learned for RBAs to conservation.

(Chapter 4) RBAs to water resource development and management
Laban *et al*. describe a participatory, stakeholder led water planning and management programme that demonstrates the importance of linking rights and accountabilities in RBAs to natural resources management. The authors describe a research framework for RBAs, and processes to collaboratively establish policy and programme responses that ensure that people's rights can be fulfilled and their responsibilities can be met. They illustrate the methodology with two cases from Jordan and Palestine.

(Chapters 5-10) RBAs to conservation in protected areas, forest buffer zones and landscapes
Strelein and Weir (Chapter 5) review the strengths and weaknesses of Australian native title law as a mechanism for respecting the rights and ecological relationships of indigenous peoples in the establishment and management of conservation areas. They demonstrate that, while laudable in many respects, narrow interpretation and a focus on territorial rights and customary livelihoods, to the exclusion of other substantive rights (those linked to economic development), limit this legal mechanism. The authors also highlight the dangers in focusing solely on the human rights framework, including a lack of concern for ecological life. They advocate for rights-based approaches that simultaneously embrace human and non-human ecological relationships.

Crane *et al*. (Chapter 6) examine an effort to uphold farm dwellers' rights in the process of bioregional conservation underway in the new South African democracy. The broad (livelihood, procedural, land) rights in question are enshrined by the South African Constitution and related laws and secured in donor defined social safeguards. The authors argue that RBAs can protect the interests of poor communities in landscape conservation, but only if certain preconditions are met. These include awareness and capacity of rights holders and duty bearers, sensitivity to history, and analyses of the political economy and power asymmetries. The paper also recommends specific mechanisms to support such approaches.

Painter (Chapter 7) shares the experiences of an alliance between *Capitanía de Alto y Bajo Isoso* (CABI), an indigenous organisation that represents the Isoceño people, and the Wildlife Conservation Society (WCS) Bolivia programme in designing and implementing RBAs to conservation. The CABI-WCS partnership is based on a shared vision and mutual interest in an indigenously managed, conservation landscape.

continued on next page

The benefits of the alliance have gone beyond those originally envisioned for the conservation landscape. They include new capacities and opportunities to demand rights from extractive industries and the state.

Jana (Chapter 8) explores emerging policy arrangements for community access, use and (in limited cases) ownership of buffer zone forest resources around protected areas in Nepal. He illustrates the importance of community mobilisation efforts in successfully advocating for these policies. He also raises concerns about whether or not the design of the current mechanisms sufficiently upholds the rights of the most vulnerable community members.

Stevens (Chapter 9) describes the ongoing struggle for more recognition of rights and conservation stewardship in a contested indigenous peoples' and community conserved area (IPCCA) declared by Sherpas in the Mount Everest region of Nepal. The controversy over the Sherpas' efforts to gain respect for their IPCCA within an existing national park is rooted in regional conservation history. Stevens reviews key international law instruments, arguing that they support rights-based conservation and IPCCAs, including in and around protected areas. The Sherpas' difficulty in gaining recognition and respect for their IPCCAs is thus examined in the larger context of the recognition of indigenous rights in Nepal's national parks.

Moeliono and Yuliani (Chapter 10) describe successes and challenges in enhancing individual and community rights and meeting conservation objectives around protected areas in Indonesia. Through a comparison of three cases, the authors illustrate potential livelihood and conservation benefits arising from securing tenure and natural resource rights. They also demonstrate that rights must be linked with responsibilities, and that there are potentially negative consequences for the most vulnerable when rights are upheld only for local elites.

(Chapter 11) Mainstreaming gender in access and benefit-sharing regimes from a rights perspective
Mata and Sasvári argue for rights-based approaches to mainstreaming gender equality and equity in access and benefit-sharing regimes under the Convention for Biological Diversity (CBD). The authors describe the contribution of women to conservation of biodiversity and the value of their traditional knowledge. They also call for mainstreaming gender in genetic resource access and benefit-sharing regimes under the CBD as a matter of obligation arising from women's rights. The authors give two examples of traditional knowledge and intellectual property rights regimes that consider gender issues and could serve as models for rights-based endeavours.

(Chapter 12) REDD and rights: Lawlor and Huberman give an overview of the rationale and current status of Reduced Emissions through Deforestation and Forest Degradation (REDD) in the international framework for climate change mitigation. They review potential REDD effects on forest-dependent communities and indigenous peoples in the context of recent UN Framework Convention on Climate Change (UNFCCC) decisions and in light of forthcoming negotiations. The authors then explore and provide suggestions on what 'rights-based approaches' to REDD might entail in theory and practice with regard to specific international law instruments.

and conservation have perhaps received the greatest attention and concern (Brockington and Igoe 2006, Cernea and Schmidt-Soltau 2006). RBAs to forest conservation are also rapidly gaining attention (IUCN FCP 2008). Rights issues in mitigating and adapting to climate change are a critical, emerging topic (ICHRP 2008). Rights issues related to desertification, resource-related human conflict, declining commercial marine fisheries and other issues are also pieces of the puzzle, and should be part of the ongoing discussion and experimentation with RBAs.

Taken together, the papers in this volume demonstrate important lessons and pose new questions for local communities, NGOs, governments, the private sector, and others who are interested in developing RBAs to conservation in their own contexts.

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Rights-based approaches to conservation:

An overview of concepts and questions

Jessica Campese

Introduction

The conservation of biodiversity and natural resources affects, and is in turn affected by, the realisation of human rights. Conservation can help realise substantive human rights, such as those to health, culture and food. Likewise, the realisation of human rights can create an enabling environment for achieving conservation objectives. However, certain conservation approaches and measures, such as economic or physical displacement of communities, or harsh enforcement mechanisms, can also undermine or violate human rights. The relationships between conservation and human rights are also shaped by history and their broader governance systems.

The conservation community has responsibilities and opportunities to respect human rights and to contribute to their protection and further fulfilment. Conservation organisations can adopt appropriate rights-based approaches (RBAs).[1] These involve integrating rights norms, standards, and principles in policy, planning, implementation, and evaluation to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible.

While a promising way forward, applying RBAs to conservation is also likely to present substantial challenges. RBAs are neither silver bullets nor stand-alone solutions to balancing diverse local and global needs and interests.

This chapter explores:

- relevant concepts and issues in the international human rights framework;
- conceptual and practical components of RBAs to biodiversity and natural resource conservation, including potential benefits and challenges; and
- policies, processes, methods and tools that may contribute to RBAs to conservation.

The chapter is intended to be a starting point for further reflection, action and refinement. Concrete examples of RBAs are provided in Chapters 3 to 12 of this book. Chapter 13 analyses the lessons learned across these examples.

Understanding rights

Rights can be understood as norms and entitlements that create constraints and obligations in interactions between people or institutions. *Human rights* refer to norms that help to protect all people from severe political, legal, social, or other abuses. They are based on the understanding that all people are, by virtue of being human, inherently entitled to minimum standards of freedom and dignity, regardless of nationality, place of residence, gender, origin, colour, religion, language, or any other status (see UN OHCHR website). Human rights are often, though not always, recognised and expressed in national or international law. Customary rights are also important, and may or may not be recognised in such legal frameworks.

Despite clarification and expansion of recognised rights over the last 60 years, their nature and scope remains contested. Those recognised in international (and much national) law today include:

- **procedural rights,** such as to participate in decision making, acquire information and access justice; and
- **substantive rights,** such as to life, personal security, health, an adequate standard of living, education, freedom to practice culture and freedom from all forms of discrimination.

Cross cutting *rights principles*, or governing characteristics, include (adapted from UN 2003):

- Universality and inalienability: All people everywhere in the world possess rights and they cannot be taken away.
- Indivisibility: Civil, cultural, economic, political and social rights all have equal status and all must be recognised for human dignity.
- Interdependence and interrelatedness: The realisation of one right often depends wholly or in part upon the realisation of others.
- Equality and non-discrimination: All individuals are equal and are entitled to their human rights without discrimination of any kind.
- Participation and inclusion: Every person and all people are entitled to active free and meaningful participation in, contribution to, and enjoyment of, governance systems in which human rights and fundamental freedoms can be realised.
- Accountability and rule of law: States and other duty bearers have obligations to observe human rights, and are answerable for the observance of rights under their jurisdiction.

The range of human rights instruments, and their often high levels of ratification, demonstrate wide international acceptance. However, rights norms and principles are not without controversy. Some challenge universality on the grounds that human rights reflect western cultural traditions, or more generally that universality is difficult to defend given global cultural diversity (see Le Roy 1992, cited in Campese and Guignier 2007). The principles of indivisibility, inter-dependence and inter-relatedness gained wide acceptance after the 1993 World Conference on Human Rights. This was connected to a parallel expansion in recognition of the importance of cultural, economic and social rights (see Amnesty International 2005 and Nyamu-Musembi and Cornwall 2004 for further discussion).

A key feature of human rights is their corresponding responsibilities. All human beings are rights holders. The individuals and groups responsible for upholding and enabling the realisation of rights are duty bearers. States are primary duty bearers, but other non-state actors also have important responsibilities (as discussed in more detail below). Duty bearer responsibilities are typically categorised as respecting, protecting and fulfilling rights (UN OHCHR webpage, see also UNDP 2000, p. 93 and Amnesty International 2005 for more detail).

- **Respecting rights** means refraining from interfering with people's pursuit or enjoyment of their rights, for example through uncompensated or forced eviction.
- **Protecting rights** means ensuring that 'third parties' (including private businesses and NGOs) do not interfere with people's pursuit or enjoyment of their rights.

- **Fulfilling rights** means creating an enabling environment for people to realise their rights. Rights must be directly provided when people cannot provide them for themselves, such as providing food aid following a severe drought.

Within the UN framework, the obligation to respect is taken to be immediate. Fulfilment, however, can be realised progressively, and in line with maximum available resources. Many human rights instruments also allow for a 'margin of discretion', which allows duty bearers to tailor efforts to meet obligations to their context. However, in all cases forward progress must be made, all measures must at all times be non-discriminatory, states must commit the maximum possible resources to fulfilment and certain

Box 1. Taking a closer look … What does the right to adequate food really mean?

Adapted from CESCR General Comment 12 (para. 7–13) and other sources as cited

International law instruments recognising the right to food include: the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 11, the Universal Declaration of Human Rights (UDHR) Article 25, and the Convention on the Rights of the Child Articles 24 and 27.

The right to food is both a fundamental right to be free from hunger and a key component of the 'right to an adequate standard of living'. 'Adequate' food includes the following:

- **Availability** of foods that are **culturally acceptable, free from adverse substances** and of a **quality and quantity sufficient to meet dietary needs**. Availability refers to the possibilities either of feeding oneself directly from productive land or other natural resources, or of well functioning systems that can move food to where it is needed.
- **Economic accessibility,** which implies that personal or household (financial and other) resources from livelihood strategies, wages and other economic activities should be sufficient for the acquisition of food. This food should support an adequate diet without interfering with the attainment and satisfaction of other basic needs.
- **Physical accessibility**, which implies that adequate food should be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, landless people, indigenous peoples, migrants and refugees, victims of natural disasters and other vulnerable groups.
- Availability and accessibility should be ensured through systems that are **ecologically and economically sustainable** and do **not interfere with the enjoyment of other human rights**.

Collectively, these elements also form the pillars of food security (FAO Right to Food Web Portal).

actions (such as removing unnecessary legislative barriers) must be enacted immediately. Priority should be given to securing a 'core minimum', that is, 'ensur[ing] the satisfaction of, at the very least, minimum essential levels of each of the rights.' (Adapted from CESCR General Comment 3)

To clarify the specific implications of human rights, for example, for an 'adequate standard of living', a number of detailed standards and indicators are included in human rights instruments, supporting guidelines and other sources. The UN Treaty Body, 'General Comments' provide particularly detailed explanations of standards demanded by certain instruments. The Committee on Economic, Social, and Cultural Rights (CESCR) General Comment 15 on the right to water (see Appendix I), for example, provides detailed implementation and monitoring criteria, and sets a precedent for the treatment of similar resource rights (Filmer-Wilson and Anderson 2005, Greiber *et al.* 2009). Box 1 summarises the right to food as another example. Some conservation initiatives may increase food *availability*, for instance, through effective watershed management and increased water flows for agriculture. However, conservation-related restrictions may also decrease economic or physical food *access*.

Recognition of environment: Rights linkages in law, policy and practice

Recognition of the links between the enjoyment of human rights and environmental protection, broadly speaking, has been growing within the UN, government, civil society and other sectors for several decades, starting with the 1972 Stockholm Declaration (Sensi 2007). Many international human rights instruments and multilateral environmental agreements now recognise rights to participation in environmental decision making, the importance of the environment for sustainable development and substantive rights to a clean and healthy environment (see Annex I, Filmer-Wilson and Anderson 2005, Sensi 2007). At the national level, over 100 national constitutions, and nearly all constitutions adopted since 1992, explicitly recognise rights to a clean or healthy environment. Many national and regional courts have also interpreted other human rights, such rights privacy and health, as requiring certain environmental protections (see Boyle and Anderson 1996, Picolotti and Taillant 2003, Sensi 2007, Kravchenko 2007). Many civil society organisations now focus on environmental justice issues (see Commission on Environmental, Economic, and Social Policy (CEESP) conservation and human rights webpage). Finally, discussion on the human rights implications of climate change and its mitigation is now rapidly increasing (ICHRP 2008, Seymour 2008).

Specific attention to links between human rights and *biodiversity /natural resource conservation* has been slower to emerge, but is gaining momentum. According to Alcorn and Royo (2007), human rights are already 'a smoking gun issue' for the conservation community. The literature documents synergies between rights and conservation. It also catalogues instances of rights infringements arising from conservation, including economic and physical displacement. Organised movements of indigenous peoples, local communities and other civil society actors increasingly demand greater accountability from conservation actors regarding past and present results (see the Dana Declaration, Forest Peoples Programme, Survivor International, Global Forest Coalition, World Alliance of Mobile Indigenous Peoples, and Coordinator of Indigenous Organizations of the Amazon Basin (COICA) among others).

Conservation organisations and other large international organisations have begun to recognise the importance of respecting rights, as demonstrated in the policies and commitments reviewed in Chapter 2 of this volume. Few, though, have dealt directly with the issue of population displacement (see Agrawal and Redford 2007). At the 2008 International Union for Conservation of Nature (IUCN) World Conservation Congress (WCC), members adopted over 19 resolutions dealing with rights in some fashion. These included resolutions on *Rights-based approaches to conservation* (RESWCC4.056) and on *Implementing the UN Declaration on the Rights of Indigenous Peoples* (RESWCC4.052).

Many human rights instruments and multilateral environmental agreements within the UN framework have rights and justice provisions relevant to conservation practice (see Annex I and Chapter 2 of this volume). The CBD, for example, calls for equity in access and benefit sharing from the use of genetic resources with indigenous peoples and local communities, including in the context of protected areas.

Understanding the relationships between rights and conservation

Drawing on case studies, informal interviews and a review of the literature on the social dimensions of conservation, several closely interrelated issues become clear.

- Conservation can help realise rights through, among many other things, securing sustainable natural resources and ecosystem services to support human health and an adequate standard of living. Likewise, conservation outcomes can be enhanced where people's rights and access are secure,

including collective rights to lands and resources (Borrini-Feyerabend *et al.* 2004, Oviedo and Van Griethuysen 2006, Castillo and Brouwer 2007, the work of the Rights and Resources Initiative generally) (see Case 1).

- Certain conservation approaches and measures, however, can undermine or violate human rights, including through economic or physical displacement (Cernea 2006) from lands or resources important to livelihoods and culture (Brockington 2002, Chatty and Colchester 2002, Brockington and Igoe 2006, Wani and Kothari 2007, Holden 2007, Magole 2007, Dowie 2009) (see Case 2).
- Cases of oppressive conservation enforcement measures, including around protected areas, also raise concerns about personal security rights in conservation practice (Jana 2007, Paudel *et al.* 2007).

Case 1. Conservation can contribute to human rights realisation, and vice-versa

Adapted from CEESP 2004a and *Parque de la Papa* (website)

In the highlands of Peru, six communities of the Quechua peoples have established a Potato Park (Parque de la Papa) to preserve the role of indigenous biocultural heritage (IBCH) for local rights, livelihoods, conservation and the sustainable use of agro-biodiversity. The Potato Park is dedicated to safeguarding and enhancing Andean food systems and native agro-biodiversity. Over 8500 ha of titled communal land are being jointly managed to conserve about 1200 potato varieties (cultivated and wild) as well as the natural ecosystems of the Andes. The villages entered into an agreement with the International Potato Center to repatriate 206 additional varieties, and have a long-term goal to reestablish all of the world's 4000 known potato varieties in the valley.

The Potato Park was initiated by an indigenously run organisation, the Quechua-Aymara Association for Sustainable Livelihoods (ANDES). The initiative has brought together communities that had experienced land conflicts, partly through the revival of the village boundary festival in which the boundaries are 'walked'. The traditional knowledge, innovations and practices of the Quechua people are showcased in the Park. Traditional techniques are being augmented by new ones, including greenhouses, education on potato varieties through videos in the local language and production of medicines for local sale. Native species are also being used to regenerate forests and a form of 'agro-ecotourism' is being developed. Geographical indicators and trade marks are used to ensure protection of collective rights and access to markets.

The Potato Park is a community led and rights-based approach to conservation. It is concerned particularly with the Quechua peoples' self-determination, security of tenure and rights to agricultural biodiversity, local products, traditional knowledge, and related ecosystem goods and services. This approach helps to secure local livelihoods using the knowledge, traditions and philosophies of indigenous people.

Case 2. Certain conservation measures can violate human rights (Conservation-related evictions and restitution in Southern Africa)

Case details adapted from Holden 2007 and Magole 2007

Economic and physical displacement (see Cernea 2006) related to protected areas is one of the more contentious and increasingly visible conflicts between conservation and human rights. Such displacements have been reported world wide (Chatty and Colchester 2002, Dowie 2005, 2009; Brockington and Igoe 2006, Agrawal and Redford 2007), though the data related to these reports varies in quality (Brockington and Igoe 2006).

In South Africa (Holden 2007) and Botswana (Magole 2007), the contemporary conflicts over park-related displacements that took place decades ago are still being played out, and new efforts at redress are being made. After the establishment of the South African Kalahari Gemsbok Park (now Kgalagadi Transfrontier Park) in 1931, the Kalahari San peoples' rights to live and hunt on the land were gradually eroded until they were finally evicted from the park in the mid 1970s. Similarly, since the start of the colonial era in Botswana, the establishment and management of protected areas has often involved forced and uncompensated displacement of people, especially the minority peoples often referred to as Khoi San groups. These displacements, which deprived people of the basis for their livelihood, can be seen as a violation of rights to customary lands, an adequate standard of living, health, culture, freedom from discrimination, self-determination and a host of procedural rights.

In recent years, some of the displaced communities have made efforts, and had partial success, in getting redress and restitution of their rights. In Botswana, a San group successfully challenged a recent eviction associated with the Central Kgalagadi Game Reserve and partially won the case. The San were granted the right to return to their settlement in the game reserve. What remains a human rights challenge is that the government is not obliged to provide the community with social services, as they do in other settlements (Magole 2007). Similar and closely related changes have been attempted in South Africa under the new democratic government. In 1999, after four years of negotiation, the 'reconstituted' Khomani San community land claim was partially successful, with the restitution of ownership of 25 000 ha of park land and shared management rights through a Joint Management Board. The San can now use this land in accordance with conditions contained in the settlement agreement and the management plan. No permanent residence, agriculture or mining are allowed, but tourism related and traditional/cultural activities are, including hunting, provided such use and activities are sustainable and in keeping with biodiversity conservation objectives. They have only cultural and symbolic rights to the remaining 350 000 ha they claimed. They were also granted six farms outside the park, but do not have the same cultural connection to this land. Between 1999 and 2002 there were additional negotiations to settle a conflicting land claim submitted by the neighbouring Mier community, which was eventually awarded 25 000 ha (Holden 2007). These cases reflect just some of the vast complexity and competing interests and claims that can be involved in rights restitution.

- Failure to conserve ecosystem goods and services can undermine human rights by eliminating people's means of subsistence or destroying essential services, such as those provided by mangrove stands which protect people from the effects of storms and waves (see Case 3); and
- Failing to fulfil human rights can lead to environmental destruction by reducing people's options for the sustainable realisation of their own basic needs and interests (see Case 4).

These rights-conservation relationships are closely interrelated, and most of the cases summarised in this chapter, and throughout this book, simultaneously demonstrate several linkages. Further, such linkages are often not solely a function of conservation practice; they are shaped by history and the broader political, socio-economic, cultural and ecological contexts (Filmer-Wilson and Anderson 2005, Noam 2007, Igoe 2007, Wilkes and Shen 2007). RBAs require not just changing conservation practice, but also engaging with political and governance systems.

Concepts and components for RBAs to conservation

Rights-based approaches, increasingly adopted in development, business, forestry and other sectors, may hold great promise for conservation. But what are the practical implications of such approaches? What are their benefits and challenges, and for whom? This section overviews RBAs and develops a broad, conceptual framework for such approaches to conservation.

What are rights-based approaches to conservation?

There is no consensus on the definition or form of RBAs. For purposes of this Chapter, **RBAs can be understood as integrating rights norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible.** This often includes efforts to make human rights and conservation mutually and positively reinforcing pursuits.

The conservation community can learn from experience in other sectors. RBAs to development generally focus on *enhancing* human development through protecting and fulfilling rights, particularly for the most vulnerable

(Hausermann 1998, UN 2003, Nyamu-Musembi and Cornwall 2004, Brocklesby and Crawford 2004, Tomas 2005, Filmer-Wilson and Anderson 2005, Harris-Curtis *et al.* 2005, UN OHCHR 2006, Boesen and Martin 2007). In the business sector, RBA models often involve measures to avoid infringing on people's enjoyment of their rights by creating internal safeguards, but also by developing supply chain control mechanisms to help ensure partners also respect basic rights (see, generally, the work of UN Special Representative on Business and Human Rights, Jungk 2001). Both safeguarding against infringements and pursuing further rights realisation are relevant to RBAs to biodiversity and natural resources conservation. The conservation community may also need to develop new dimensions of RBAs to reflect concerns particular to their arena, for example, inter-generational rights, environmental sustainability and governance of natural resources. RBA models and guidelines specific to conservation are beginning to emerge (for example, Filmer-Wilson and Anderson 2005, Larsen and Springer 2008, Colchester 2007, Svadlenak-Gomez 2007, Greiber *et al.* 2009, and the work of the Rights and Resources Initiative)[2], but much work and learning remains to be done.

RBAs can be carried out at multiple scales and contexts, and through various legal instruments, policies, programming approaches, methods and tools. Key elements can include:

- identifying all relevant rights claims and obligations, including customary and collective rights;
- using rights norms, standards and principles to guide policy, programming and implementation;
- analysing and monitoring processes and outcomes against rights-based criteria;
- engaging with the rights implications of conservation practice as a matter of *obligation*;
- supporting efforts to address the underlying causes of rights violations, including by changing inequitable power relations;
- building the capacity of both rights holders and duty bearers to claim their rights and meet their respective responsibilities;
- taking all available measures to respect rights in all cases and supporting their protection and further fulfilment wherever possible, particularly for the most vulnerable; and
- supporting efforts to provide access to justice and redress for violations, where needed.

Who 'takes' a rights-based approach to conservation?

Examples of RBAs to development, business practice and conservation are typically framed as approaches carried out by duty bearers or third parties. They often include, among other things, measures to assist rights holders and duty bearers in exercising their rights and meeting their obligations. At the same time, rights holders often have extensive knowledge and capacity for defining and asserting their rights and their advocacy actions have often expanded rights recognition. Case 1 illustrates how communities used their conservation knowledge and strategies to enhance their cultural, food, land and other rights. Jana (2007 and Chapter 8 of this volume) demonstrates the importance of mobilising communities in claiming their rights around protected areas.

Rights, obligations and accountability in RBAs to conservation

RBAs to conservation raise challenging questions about who the rights holders and duty bearers are, how they relate to one another, and the nature and scope of their rights and responsibilities. States ratify international human rights instruments and are responsible for implementing national laws that uphold those obligations. However, third states (states acting within or affecting another state) and non-state actors, including private businesses, international organisations and NGOs, can have substantial positive and negative influences on rights. There is growing recognition that states should take responsibility for the human rights effects of their policies in other countries, particularly regarding the obligations to respect and protect (see Vandenhole undated, on extraterritorial application of the International Covenant on Economic, Social and Cultural Rights (ICESCR)). Non-state actors should also be held accountable for their effects on rights, even where not directly regulated by a state (see Vandenhole undated, Jungk 2001, ICHRP 2002, Ziegler 2006). '… [I]n an age when other public and private actors are more powerful than states, human rights must be extended to limit their potential abuses of power against people. … With power must come responsibility.' (Ziegler 2006, p. 2). While referring primarily to transnational corporations and international organisations, the sentiment of Ziegler's statement is relevant for many non-governmental conservation actors. Contemporary discussion about NGO accountability (Jordan and van Tuijl 2006) and calls for NGOs to respect human rights will likely only increase. James Igoe, for instance, argues that the increasingly powerful role of non-state conservation actors

Box 2. Conservation, rights, and governance

Natural resource governance, and the broader governance systems in which conservation and rights are interacting, can both support and be supported by RBAs. A focus on improved governance should be part of RBAs to conservation, and vice-versa**.**

Natural resource governance can be understood as 'the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say in the management of natural resources—including biodiversity conservation.' (IUCN RESWCC3.012). While there is no global consensus, commonly recognised elements of 'good' (that is, effective and equitable) governance include: transparency; access to information; access to justice (including a means of resolving conflict and disputes); participation, legitimacy, and voice (genuine involvement in decision making); fairness; coherence; performance; subsidiarity; respect for human rights; accountability; and rule of law (fair, transparent and consistent enforcement of legal provisions) (adapted from Borrini-Feyerabend *et al*. 2004). The overlap between elements of RBAs and 'good' governance—respect for human rights, as well as fairness, meaningful participation, accountability, rule of law, and access to justice—clearly illustrate the close links between them. Additionally, according to the UN OHCHR's RBA guidelines, 'a human rights-based approach … premise [is] that a country cannot achieve sustained progress without recognising human rights principles (especially universality) as core principles of governance. … **The concepts of good governance and human rights are mutually reinforcing** …' (UN OHCHR 2006, p. 16, 10, emphasis added).

Taken another way, the 'interactions among structures, processes and traditions that determine how power and responsibilities are exercised'—governance—are also a major factor in determining how conservation and rights are related in any particular context. It is the broader governance arrangements that shape the way that conservation will affect rights and that also help determine what options are available for addressing those affects. In this way, too, governance and rights in conservation are inextricably linked. **To be effective, then, RBAs must account for and focus on improving the governance systems through which the approach is being carried out.**

Shared governance and community governance may be given special consideration. RBAs work to enhance equity by increasing the capacity of both rights holders and duty bearers to realise human rights. Shared governance is one way to bring rights holders and duty bearers together in transparent processes in which they can understand the claims and duties at stake, and negotiate fair outcomes. Community governance supports collective rights, including the right to self-determination, and empowers communities to mobilise their capacities to protect and fulfil their rights and conservation vision. However, shared and community governance should also reflect rights-based approaches, including attention to rights issues within and across communities.

Box 3. What do RBAs add?

Introducing RBAs as a 'new' approach to conservation begs the question of how they differs from other methods. State and NGO led conservation approaches have evolved over the last several decades from practices which were often exclusionary to ones that increasingly (though by no means always) embrace local people's participation, interests, and knowledge (Jaireth and Smyth 2003, McShane and Wells 2004). RBAs can be seen, in part, as a continuation of the progression towards more inclusive and socially just conservation. But what exactly does it add?

By drawing on the human rights framework—a relatively well developed and widely recognised set of negotiated standards—RBAs offer a strong standard with which to understand and assess the social implications of conservation practice. Further, the substantive and procedural aspects of inclusive RBAs can be far more comprehensive than a more general 'participatory' or 'pro-poor' approach. RBAs can also enhance accountability by linking rights (and rights holders) with specific, corresponding obligations (and duty bearers), including consideration for particularly vulnerable individuals. By linking rights and obligations at the individual and sub-group levels, in addition to the community/state/NGO levels, RBAs can provide a powerful addition to approaches that fail to adequately address inequities and vulnerability within and across communities. (See, among others, Harris-Curtis *et al.* 2005, Filmer-Wilson and Anderson 2005, UN OHCHR 2006.)

RBAs may also provide a stronger foundation for incorporating human wellbeing concerns by recognising that doing so is a matter of obligation. The rationale for incorporating people's knowledge and interests in conservation practice—through, for example, participatory, community-based, and decentralised natural resource management regimes—has often been that doing so will enhance conservation outcomes. It does so by drawing on local knowledge, enhancing local ownership, and reducing conflict and non-compliance. In other words, an instrumental approach. Such approaches have sometimes been criticised on the grounds that they engage with people only at a superficial level, and that conservation costs and benefits are not evenly distributed within and across communities, as powerful differentials can lead to elite capture (Thomas 1996, Wyckoff-Baird *et al*. 2000, Ribot 2002). Additionally, where collaborative approaches have proven too costly or difficult, conservation organisations have sometimes moved back towards more overtly protectionist and exclusionary models (Wilshusen *et al*. 2002). Finally, approaches that exclude local people *can* sometimes be effective in achieving conservation outcomes (Brockington 2003). For all of these reasons, instrumental approaches *alone* may be insufficient to guarantee that people's wellbeing is secured. By addressing human wellbeing as a matter of *obligation*, and addressing the rights not only of communities, but also of individuals and vulnerable groups within communities, RBAs can, in principle, better ensure that basic human rights are respected.

At the same time, it is difficult, and perhaps not very useful, to make too strict a distinction between rights-based and instrumentally-driven approaches. RBAs are not stand alone solutions; they are likely to be one component in a mix of approaches with different rationales. Further, as recognised by UN OHCHR (2006), in the context of development, RBAs can make programming more effective. RBAs *can* enhance conservation outcomes, and those conservation benefits can rightly form part of an organisation's motivation for adopting such approaches.

(private and NGO) in eastern Africa must carry increased human rights responsibility, though continued and ultimate responsibility lies with the state (Igoe 2007). Non-state accountability should neither weaken the state's role, nor suggest that states are absolved of their responsibilities, because the state provides the institutional, policy and legal frameworks within which civil society exists and exercises its rights.

What do these state and non-state obligations imply in practical terms for RBAs to conservation? One option for conceptualising conservation actors' responsibilities is illustrated in Figure 1. RBAs would require taking explicit measures to respect rights—not infringing on people's enjoyment of their basic rights and avoiding harm to vulnerable people—in all cases. In this sense, restricting the access to or use of natural resources in cases where people rely on those resources for their livelihoods, without providing a viable, sustainable and better alternative, would be considered a failure to respect their rights. Beyond this, conservation organisations can, within their (often substantial) spheres of influence, help protect rights. This could involve encouraging and building the capacity of partners and other duty bearers to respect rights, for instance by training park guards on the use of rights consistent enforcement measures. An organisation might also choose to put specific obligations in contractual arrangements with partners regarding their rights-related actions. In working with rights holders, conservation organisations can also provide information to local people to help build their capacity to protect and demand their own rights. Finally, under 'supporting fulfilment', conservation organisations can take proactive measures to make conservation 'work for rights'. This could mean moving far outside the scope of the organisation's normal sphere, such as using revenues from conservation to build schools in communities near parks. However, supporting fulfilment of rights can also involve improving

Disregard	Address superficially	Respect	Support protection	Support fulfilment
Ignore/allow conservation to undermine human rights	Address human rights in an insufficient manner, or only when 'convenient'	Do not infringe on or interfere with people's enjoyment of their rights	Assist, encourage, and influence partners and other duty bearers to refrain from rights infringements	Actively support the further, progressive realisation of rights, including through natural resource governance

Increasing strength of RBAs →

Figure 1. Scope of potential RBAs to conservation

management of a degraded watershed to provide important, additional food and water services to local people. This kind of improvement will, in turn, help people fulfil their rights to health, water and an adequate standard of living (assuming they retain access to those services). The same actors may sit at different places along this continuum with respect to different rights. For instance, in some cases *respecting* the right to food access and availability could best be achieved by supporting the *fulfilment* of procedural rights and security of tenure/resource access. In all cases, the distinctions and linkages between 'respecting, protecting, and fulfilling' rights in RBAs to conservation—and their concrete implications for practitioners—require further exploration and learning.

Rights holders' responsibilities are another important piece of the RBA puzzle. Everyone has responsibilities not to infringe on the rights of others (UN OHCHR webpage). This raises challenging questions in the conservation context. How can upstream and downstream communities and individuals both respect one another's rights, and fulfil their own rights, when sharing insufficient watershed resources? Further, how can these communities, already struggling with scarcity, respect the rights of future generations to those same (or similar) resources? Regarding global justice and intra-generational rights, how can dispersed duty bearers be made accountable for the effects on rights of their contributions to environmental destruction, as in climate change? What responsibilities do people in wealthy countries have to use and redistribute resources in ways that enable *all* people to meet their basic needs in sustainable ways?

RBAs to conservation also raise difficult questions about rights holders' responsibilities with respect to biodiversity and non-human rights. How can RBAs to conservation both respect the inalienability of rights and support restricting use of natural resources for conservation, particularly where poor or vulnerable peoples are using those resources in support of their livelihoods or culture? The 'key question is how to assign responsibilities fairly and effectively … while maintaining an overall rights-based approach' (Borrini-Feyerabend *et al.* 2004, p. 12). In all cases, this 'fair' distribution of responsibilities should respect basic procedural and substantive rights. In principle this seems straightforward. In practice, it may be a difficult position to navigate, particularly in situations where resources are scarce or threatened.

RBAs cannot resolve all of these complex dilemmas. They can, however, provide a useful framework by helping to systematically identify and analyse the key issues, design a process for negotiating competing claims and resolve grievances. RBAs can also identify the minimum standards that should not be 'traded-off' in negotiations (Filmer-Anderson 2005, p. 29).

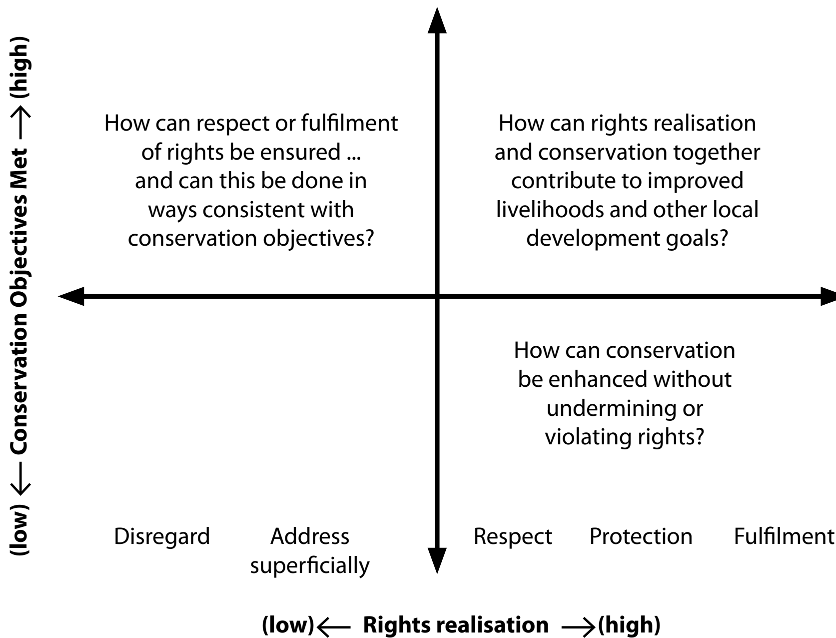

Figure 2: Integrating rights and conservation
Source: Developed by author with inputs from Gonzalo Oviedo and others

Building on Figure 1, Figure 2 presents an additional dimension, illustrating links between rights and responsibilities in the conservation context. The goal, conceptualised in this manner, would be to enhance both conservation effectiveness and the realisation of rights to the greatest possible extent, while ensuring that, in all cases, the minimum standards of both are respected. The question of how—in practical terms—this can be achieved is one the conservation community and its partners is beginning to explore, including within this publication.

Which rights are relevant for RBAs to conservation?

RBA encompass a vast array of potentially relevant rights, recognised in:

- treaties and declarations of the UN (see Annex I);
- regional human rights instruments (see Annex I);
- national constitutions, law and regulation, which are also often the basis for implementing international law obligations;
- customary law, norms and practices, which may or may not be recognised as legal rights by states;

- contracts, codes of conduct and organisational standards of governmental, non-governmental and community institutions;
- Multilateral environmental agreements (for example, CBD), that, while not rights instruments *per se*, include social standards; and
- other contextually relevant instruments and standards.

Within these sources, relevant **procedural rights** include: information, participation in decision making and access to justice. Relevant **substantive rights** may include (but are not limited to):

- life;
- privacy;
- health;
- culture and religion;
- freedom from hunger;
- freedom from all forms of discrimination;
- development;
- right to (a healthy, safe) environment;
- voluntary, safe and healthy working conditions;
- adequate standard of living (including food and housing);
- access and benefit sharing in the use of natural resources;
- peoples' rights to self-determination, to freely dispose of natural wealth and resources, and not to be deprived of their means of subsistence;
- indigenous peoples' rights to maintaining traditional ways of life, free and informed consent prior to activities on their lands, self-representation through their own institutions, freedom to exercise customary law, and ownership, control, and development of communal lands, territories, and resources traditionally owned or otherwise occupied (adapted from Colchester, 2003, p.16–17);
- rights of redress for infringements, including restitution, compensation and satisfaction; and
- other customary or contextually relevant rights (adapted in part from Greiber *et al.* 2009).

The human rights framework typically focuses on individual rights holders. It is only recently that established international human rights instruments have addressed, or been reinterpreted to address, collective rights. Collective rights of indigenous peoples and local and mobile communities may be particularly important for drawing out potential synergies between rights realisation and conservation. Strengthening collective land tenure rights,

for instance, can help provide incentives and support (customary and new) community institutions for effective local natural resource management.

Finally, there are several emerging rights issues to which the conservation community may be able to contribute understanding and capacity for action, including the following:

- **Inter-generational rights** imply that present generations have a duty to protect and sustainably manage natural resources and the common heritage of humankind. There are difficult questions regarding practical application: Who can represent future generations? How can present generations determine the needs of future generations and ensure respect for their rights? Conservation that helps secure resource sustainability across generations may contribute to the understanding and realisation of inter-generational rights. (Adapted from Campese and Guignier 2007. See also Principles 3, 7, Rio Declaration).
- **Climate change** already has, and will likely continue to have, profound effects on the enjoyment of human rights, particularly for the most vulnerable. Climate hazards may result in mass displacement, food insecurity, the spread of endemic disease, water scarcity and other issues. Adaptation is a pressing need, linked to many substantive human rights. Climate change effects also pose major **intra-generational rights** and global justice concerns; the most vulnerable countries and people are also, typically, those who have contributed least to greenhouse gas emissions. There are also concerns about the potential effects on human rights of major climate change mitigation strategies, including Reduced Emissions from Deforestation and Forest Degradation (REDD) (Seymour 2008, Lawlor and Huberman in this collection) and biofuel production (FoE *et al.* 2008).
- '**Environmental rights**', (the right to a healthy environment), **rights-based approaches to environmental protection** (using human rights law to thwart environmental destruction), and **non-human rights**[3] are all of interest to the conservation community. While not the focus of this chapter, RBA to conservation could complement these approaches.

Considering the range of relevant rights, and the often very limited resources available, must RBAs to conservation address *all* human rights in *all* initiatives? For any given initiative, it may be only a sub-set of rights that are at risk of being undermined, or that can be further fulfilled, through conservation. UN OHCHR (2006) suggests that RBAs to development should focus on the most pressing rights. However, this requires knowing which rights those are. Thus, **RBAs require up front and ongoing analysis of the specific rights issues relevant to the context**. In all cases, procedural rights and cross-cutting principles, such as universality, inclusion, accountability and non-discrimination, are important.

Box 4. Procedural rights in operationalising RBAs

International law recognises the rights to popular participation in decision making, information and access to justice among other procedural rights. **Procedural rights are important ends in themselves. They can also be entry points for securing substantive rights.** Information can help ensure that rights holders, duty bearers and other interested parties understand their respective entitlements and obligations. Inclusive processes (participation) that include options for redress or access to justice can help rights holders and duty bearers engage with one another, and hold one another accountable, in negotiations for satisfactory solutions. 'Accountabilities for achieving [RBA] results or standards are determined through participatory processes, … and reflect the consensus between those whose rights are violated and those with a duty to act.' UN OHCHR (2006, p.17).

Using procedural rights to identify and secure other rights can also be helpful because **substantive rights may, on their own, be difficult to operationalise or support.** For instance, the right to culture is highly relevant for people whose culture and livelihoods are closely linked to lands and resources being conserved. However, the practical implications of the right to culture are poorly understood (Centre for Economic and Social Rights website). Similarly, based on CARE International's RBA in Uganda, Franks (2007, p. 168) demonstrates that, while protected areas have sometimes had negative effects on substantive rights (for example, food), such rights 'offer little in the way of practical means of addressing the problem', but that 'working to ensure procedural rights can be an effective entry point for positive social and environmental impacts'.

Whose human rights must be considered in RBAs to conservation?

The principle of universality suggests that RBAs to conservation consider the rights of all stakeholders. At the same time, UN OHCHR (2006, p. 1) states that, '[a] human rights-based approach focuses on the realization of the rights of the excluded and marginalized populations, and those whose rights are at risk of being violated …. Universality means that all people have human rights, even if resource constraints imply prioritization. It does *not* mean that all problems of all people must be tackled at once'. Consistent with this, RBAs to conservation may also focus *primarily* on supporting protection or fulfilment of the rights of marginalised and vulnerable populations, or those facing the greatest (positive and negative) conservation-related effects on human rights. Attention to the most vulnerable within RBAs is intended in part to avoid 'elite capture' (Filmer-Wilson and Anderson 2005). However, this notion raises challenging questions regarding how, and by whom, the 'most vulnerable' are to be identified, including within and across local and mobile communities. Understanding who the most vulnerable are requires a nuanced, disaggregated picture of the context. This is no simple matter. In all cases, a focus *only* on the most vulnerable, to the exclusion of others' rights and interests, would violate the principle of universality. RBAs should also consider and at least respect *all* people's basic human rights.

Box 5. Tenure and resource rights, conservation and links to other human rights

Respecting and strengthening land tenure and resource access rights can be an important mechanism for harnessing the positive synergies between conservation and human wellbeing. Formal, informal and customary access, use, management and exclusion rights are often intricately connected to incentives for sustainable use (Ostrom 1990, Van Griethuysen 2006, and, in general, the work of the Rights and Resources Initiative).

There are also potential challenges of focusing RBAs on such rights. Tenure rights are highly complex, and fraught with difficulties of competing claims, lack of data, lack of political will and other challenges (see Jonga 2006, Bigombe Logo *et al.* 2006, and, in general, the work of the Rights and Resources Initiative). These, however, are challenges that may be common to many rights.

Another potential problem is that land rights may not necessarily be considered a *human right* in all cases. Instruments concerning indigenous and traditional peoples (ILO 169 and DECRIPS) recognise rights to traditionally owned and occupied territories. Tenure rights can also be recognised in national or customary law, such as many community land and forest laws (for example, in Tanzania). However, for many vulnerable people—including the millions of formally landless rural people—a clear 'human right' to land is weak or nonexistent. Here the normative content of other substantive rights, including the right to an adequate standard of living, can support basic land and resource access claims for rural, landless peoples (Franco 2006, 4 citing Monsalve 2006). Similarly, several of the UN voluntary guidelines on the right to food make direct links between food rights and natural resource sustainability and accessibility (FAO 2005, 2006).

Finally, as with all people, conservation actors are also rights holders. Many conservation practitioners have faced human rights abuses as a result of their work (Sierra Club and Amnesty International 2000, Olagbaju and Mills 2004). IUCN members at the 2000 World Conservation Congress (WCC) (Amman, Jordan) adopted a resolution—Support for environmental defenders—that calls on IUCN to speak out 'publically and forcefully' in support of environmental defenders facing rights abuses (RES2.37). A further resolution passed at the 2008 WCC (RES4.119—Protection of rangers within and in areas adjacent to protected areas) calls on IUCN members and other stakeholders to ensure adequate protection of rangers who are defending protected environments, including through appropriate legislative measures. The importance of protecting conservation actors' rights should not be forgotten as we also seek to understand our roles as duty bearers.

Which conservation approaches are possible under RBAs?

If well designed and governed, certain conservation strategies may be more effective than others at simultaneously meeting conservation and human rights objectives; examples include:

- **landscape and ecosystem approaches** that embrace conservation as a set of processes linked to the broader (cultural, ecological, historical, cultural and political) landscapes;
- **collaborative and community natural resource governance,** including in protected areas, which can institutionalise rights holder participation and mutual accountability, support collective rights, and facilitate communities in acting on their own potential and conservation visions; and
- **natural resource management objectives that include sustainable use,** alone or in combination with other approaches.

However, RBAs to conservation, as conceived of here, do not *preclude* strictly protected areas or any other particular conservation strategy. Rather, they guide and limit how such strategies are developed and implemented. For example, under RBAs, **physical or economic displacement** (see Cernea 2006 for the distinction) should be avoided in all cases, for example by seeking all possible alternatives and zoning for sustainable use. More discussion and learning is needed to understand the implications of RBAs where physical or economic displacement is the 'only option' (and to understand under what circumstances displacement can, in fact, be concluded to be the only option). In all cases, though, this would presumably require that duty bearers are held fully accountable for supporting or engaging in a fair, transparent and inclusive process in line with human rights law and all other relevant national law. This would include upholding the free, prior and informed consent of indigenous peoples, and ensuring that affected people are provided with better, culturally appropriate and sustainable alternatives in the short and long run.

Possible benefits, challenges and costs of adopting RBAs to conservation

RBA may present both benefits and challenges for conservation organisations, which will vary depending on the perspectives, interests and capacities of the participants. *Likely* benefits of RBAs, identified from experience to date in conservation and other fields, include the following (see also Box 3):

Case 3. Failure to conserve resources can contribute to undermining human rights (Large-scale shrimp farming threatens subsistence of coastal communities)

Adapted from Künnemann and Epal-Ratjen 2004, p. 44-45 and EJF 2003

Shrimp farming in Latin American and Asian countries has greatly increased in recent decades, due, in large part, to promotion by governments and international donors who view it as a mechanism for rapid development. However, while shrimp farming is lucrative for the relatively few farm owners, the effect on vulnerable coastal people has been devastating in terms of employment and subsistence livelihoods. Large-scale shrimp farming has led to destruction of wetlands, agricultural land and biodiversity on which the poorest people are directly dependent. Furthermore, the large amounts of shrimp being produced are not priced at local market levels, or otherwise made available to local people. For example, in Esmeralda (Ecuador), approximately 90 000 people (15 000 families) living in fishing villages are threatened by the indiscriminate cutting of the mangrove forest along the mouth of the Muisne River. For several decades, the shrimp industry has been destroying mangroves to set up aquaculture farms and, in so doing, is directly undermining the rights of the 25% of coastal residents who depend directly or indirectly on the mangroves. In sum, unless adequate alternatives or compensation are provided, allowing and promoting large-scale, export driven, shrimp farming can be viewed as a violation of, among others, the rights to health and an adequate standard of living for those people most dependent upon the natural resources destroyed by this practice.

- improving governance of natural resources and biodiversity (see Box 2), and in doing so potentially enhancing conservation outcomes;
- effectively responding to increasing demands from donors, NGOs, communities, social movements, etc., for greater accountability by conservation organisations for the effects of their activities on rights;
- more fully ensuring the rights of the most marginalised people, in addition to other rights holders and stakeholders, are addressed;
- better addressing possible inequalities within and across communities and levels, i.e. avoiding 'elite capture';
- providing clearer criteria with which to design and measure conservation programming and outcomes by drawing on the widely recognised human rights framework;
- bringing greater analytical clarity regarding the underlying and broader causes of the multidimensional links between conservation and human rights;
- helping demonstrate conservation's positive contributions to human rights, including in emerging areas, such as collective and inter-generational rights, and, conversely, increasing understanding of the rights-related risks of not protecting critical natural resources and biodiversity;

- providing a framework for identifying and balancing competing claims—including global public interests and local people's needs—with attention to the minimum standards that cannot be 'traded-off'; and
- providing a platform for, and guidance on, redress for infringements and violations, where needed.

There are also many **challenges and potential costs** to RBAs to conservation. The human rights framework is by no means simple, and many rights can be difficult to exercise in practice. Further, as discussed above, there may be competing rights claims between vulnerable people relying on the same set of scarce resources. It is difficult within the human rights framework to deal with such conflicting claims, or to prioritise among pressing individual rights and broader public interests (see Hiskes 2005). There may also be conflicts between rights within a given group. Wilkes and Shen, for example, describe how a conservation and food security enhancement programme appears to be undermining the cultural rights of some communities in China by introducing culturally inappropriate and likely, ultimately unsustainable food production methods (Wilkes and Shen 2007).

RBAs will also require moving outside common boundaries of the conservation arena. They demand engagement with the broader political and governance systems that shape the links between conservation and rights (Filmer-Wilson and Anderson 2005, Campese *et al.* 2007). The extent of conservation organisations' influence over these broader systems will be limited. For example, if there are discriminatory land tenure laws in place, and these laws allow unjust land acquisition (for conservation or other purposes), it may be difficult for conservation organisations alone to counteract the unjust results of the law. At the same time, conservation organisations often do have substantial power. This includes the power to choose not to benefit from unjust laws. An organisation may choose not to work in an area or context where rights violations are occurring, or are likely to occur, in ways that are linked with conservation activities. However, conservation organisations may also have the political influence to advocate for policy changes, and/or convene processes in which rights holders and duty bearers can discuss and negotiate just arrangements.

Using human rights language can raise new challenges by making explicit the conflicts and political tensions underlying conservation. At the same time, human rights can provide a framework for addressing these issues (Filmer-Wilson and Anderson 2005, p. 7). In all cases, the fact that RBAs pose political challenges is not a justification in itself for avoiding engagement.

RBAs require substantial resources—time, expertise (in, for example, human rights law), information (such as disaggregated baseline data and

indicators to assess change) and funding—which may be difficult to obtain. Embracing the fact that rights imply specific *duties* may also require a more fundamental shift in the perspectives of conservation organisations and their staff. Open discussion and better understanding of the ways in which realising human rights supports longer-term nature conservation objectives may assist in this process.

Finally, the timeframe (across generations) and scale (across borders) of conservation's positive contributions may not be easily understood in the traditional human rights framework; a framework which focuses, primarily, on present generation individuals or groups within certain places. The current debates on climate change and human rights are perhaps opening the door for further application of human rights principles to the intra-generational (global) and inter-generational scales.

In the end, the benefits and challenges of RBAs to conservation will be understood only after further learning. The benefits and challenges will also likely vary with the circumstances in which RBAs are adopted and the perceptions and resources of the parties involved.

Case 4. Failing to realise human rights can lead to loss of natural resources and biodiversity (Encroachment and biodiversity loss arising from failure to fulfil the right to food)

Adapted from Vosti 2001 and FIAN 2002

In an extensive review of rights campaigns, Vosti and FIAN identify numerous cases in which the failure to fulfil the right to food—for example, failing to address highly skewed land ownership and an acute lack of access to land by the poor—has resulted in encroachment into and destruction of areas of high biodiversity. According to Vosti, 'small farmers … account for about two-thirds of rainforest destruction, by converting land to agriculture … [and] only improvements in agriculture's performance as part of an opening up of alternatives for meeting basic welfare requirements can save the rainforest' (Vosti 2001, p. 142). Among several cases, FIAN documents instances in Brazil and Nepal where severe land access restrictions resulted in migration and encroachment into high biodiversity forests, though in both cases the true percentage of biodiversity destruction attributable to the landless and poor people cannot be determined and is often overestimated. In sum, 'in many (if not most) cases the eco-destruction by victims of violations of the right to food can be seen as resulting more or less directly from the violation itself. Had this violation not occurred, the deprived people would not have had to invade the forest, farm on steep slopes or overgraze fragile pastures' (FIAN 2002, p. 98). The implications of these accounts are that effective and long-term protection of biodiversity requires the sustainable fulfilment of human rights, including the right to food. As with other cases, the links between rights and conservation issues are embedded in history and highly complex social, economic and political circumstances.

Developing and implementing RBA to conservation

Ultimately, any organisation will have to develop RBAs appropriate to its mandate, resources and objectives. It is neither possible nor desirable to provide a blueprint. However, from the preceding analysis and experiences elsewhere, some *preliminary* recommendations can be identified. These are general points, which would require further development and adaptation by any conservation organisation. They are presented across three categories:

1. policy instruments and organisational commitments on rights;
2. guidelines and strategies for integrating rights into programming and practice; and
3. methods and tools for rights-based planning, monitoring and evaluation.

Policies/commitments towards rights

An important first step may be for a state, agency, or organisation to develop appropriate laws, policies, or organisational commitments on rights and justice in conservation. For example, a state may adopt stronger rights provisions within national tenure or conservation laws. An NGO may adopt a voluntary code of conduct, or other publicly communicated standard. Such instruments could include the following components.

- Recognising that land and natural resource use restrictions can infringe on the basic rights of vulnerable local people and others, commit to taking concrete, transparent steps to help ensure respect for basic human rights in conservation programming and implementation. Where infringements do occur (or have occurred), provide or facilitate access to redress.
- Recognising that conservation organisations can assist and influence their partners and other stakeholders, commit to helping ensure other duty bearers meet their obligations (i.e., support rights protection).
- Recognising that conservation outcomes can contribute to local livelihood security and human wellbeing, commit to supporting further rights fulfilment wherever possible, especially for the most vulnerable people.
- Recognising that conservation and human rights realisation can be mutually supportive, seek opportunities for positive synergies.
- Recognising the indivisibility and interrelatedness of rights, commit to respecting all relevant procedural and substantive rights, including, but not limited to, the rights of indigenous peoples and local and

mobile communities, and including customary norms and rights where appropriate.

- Recognising that experience within the conservation community can contribute to the advancement of human rights, including inter- and intra-generational and environmental rights, seek ways to contribute to new learning and action.
- Recognising that rights-conservation linkages are shaped by broader systems of governance and power, commit to understanding and engaging with other actors and systems as needed to fully develop a rights-based approach.

Guidelines and strategies for integrating rights considerations into practice

An organisation may have to decide *to what*, exactly, the rights approach is being taken (Harris-Curtis *et al.* 2005). Is supporting further rights fulfilment part of the organisation's mission, or is respect for rights a safeguard measure? How will rights factor into project and programme planning, fund raising, partnership arrangements, advocacy, monitoring and evaluation, etc? Will RBA implementation be top down (headquarters' policy) or bottom up (project and programme design at the local level)? Management questions like these will have to be resolved by organisations adopting RBAs. Further, embracing RBAs may also require a more fundamental shift in how people perceive the relevance and importance of rights to their work. In other words, if RBAs are only a management framework, and not a reflection of a deeper ethnical commitment, they risk remaining superficial. With this and the preceding analysis in mind, the following are some preliminary guidelines and strategies for RBAs to conservation.

Support **integration of rights considerations** by:

- undertaking a comprehensive organisational review to determine where and how to integrate rights considerations;
- establishing learning and exchange platforms, internally and between multiple stakeholders. This may require providing additional support to ensure rights holders can participate. It can also include linking rights holders with policy makers and other duty bearers across levels;
- establishing dedicated internal or external bodies to provide assistance and oversight in designing and implementing RBAs;
- developing guidelines and recommendations on RBAs for the organisation, its partners and others it can influence or assist, including policy makers;

- developing, testing and implementing tools to support RBAs in a variety of contexts; and
- providing training and other capacity building exercises for organisation staff, partners and other rights holders and duty bearers, including in collaboration with human rights organisations.

For any programmes or projects that may have positive or negative rights implications, **develop a clear understanding of the context and issues** by identifying:

- all claims holders, including vulnerable groups and individuals;
- all duty bearers—government and non-government—and the nature and scope of their responsibilities. Include the responsibilities of claims holders where relevant;
- contextually relevant rights and institutions, for example, international, national and local legal and customary rights
- pressing rights concerns or vulnerabilities of claims holders, including the most vulnerable;
- direct and underlying causes for rights realisation and rights concerns, including factors in the political, social, cultural and historical contexts;
- the capacities (resources) and needs (gaps) of rights holders and duty bearers for realising rights and responsibilities; and
- possible rights risks or benefits of ongoing or planned conservation activities, taking account of the broader political and governance systems (adapted in part from Tomas 2005, p. 22).

Use **rights principles and substantive and procedural rights norms and standards** to guide planning, programming and implementation. Some examples include:

- Promote meaningful participation and access to information for all interested parties.
- Support equality, non-discrimination, and inclusiveness of all individuals and people by: maintaining a disaggregated picture of the context. (How do issues and effects differ for women? indigenous people? mobile people? displaced people? the poorest?) Provide additional resources for otherwise marginalised groups to participate, developing culturally appropriate processes, using language accessible to all parties, and other steps.
- Establish accountability and access to justice by clearly setting out responsibilities and commitments of all parties. Build the capacity of rights holders and duty bearers to identify and act on their respective

entitlements and obligations. Encourage third party evaluation and arbitration and include processes for concerns to be raised and addressed, including redress where needed.

- Help ensure that substantive rights concerns are identified, addressed in processes and measured in outcomes according to all relevant standards (for example food availability and access).

Use human rights **standards** and **indicators** to **monitor and evaluate** outcomes, using disaggregated data to the greatest possible extent.

As **cross cutting principles:**

- Engage with the **broader (policy, political, socio-economic) context and governance systems** that shape the way that conservation may affect rights and that, in turn, define the opportunities for addressing these.
- Focus on **improved natural resource governance** for biodiversity and human wellbeing.
- Recognise, respect and support local people's **capacities, institutions, knowledge and conservation visions.**
- Approach RBAs as processes of **'learning-by-doing'**, rather than as events or tools.

Examples of methods and tools to support rights-based planning, monitoring, and evaluation

Planning, monitoring and evaluation methods and tools for RBAs have been developed within the development, human health, business and, more recently, conservation contexts. Examples are briefly described here, and in Annex II. Strengths and weaknesses of these methods and tools vary, and all would require further adaptation for use by any particular conservation organisation. These tools typically assess particular project or programme risks, but can also build towards more generalised rights-based programming over time.

Rights checklists and compliance assessments

For new or ongoing projects or programmes, an organisation may develop a checklist of questions or issues to be addressed. Relevant examples have been developed by Filmer-Wilson and Anderson (2005 Annex A) and Svadlenak-Gomez (2007). A more comprehensive tool—a *Human Rights Compliance Assessment*—has been developed by the Danish Institute for Human Rights to help businesses to identify areas of (potential) human rights concern (Danish Institute for Human Rights 2006).

Human rights impact assessments

Human Rights Impact Assessments (HRIA) have been developed and tested in development, health, business and other fields (see Andreassen and Sano 2004, and examples in Annex II). Like other impact assessments, HRIA are generally multistep processes supported by adaptable tools. Common steps may include:

- developing a nuanced understanding of the human rights and conservation situations in the (political, legal, socio-economic, cultural, historical) context;
- identifying the risks and/or developing a shared vision for rights fulfilment;
- formulating options and negotiating (risk mitigation/rights enhancement) activities;
- implementing policies/activities in project/programme cycles, using a 'learning-by-doing' approach; and
- monitoring, evaluating, reporting and changing policies/activities as needed.

Each step should be carried out in ways consistent with rights norms and principles, including full and meaningful participation. Monitoring and evaluation should be ongoing. The assessment should be supported by outcome, process and structural indicators developed and used from the beginning of the process and further refined at each step. Where possible, the assessment should address root causes for the non-realisation of rights. These would include issues of empowerment and rights holders' and duty bearers' capacity. The assessment should be complementary to and integrated with other environmental and social impact assessments.

Conclusions

Rights are no longer sideline issues in conservation and the time has come to take them up in earnest, including exploring and promoting the potential of RBAs to conservation. While much learning and work remains to be done, RBAs provide a promising, albeit challenging, way forward.

The issues overview and conceptual framework presented here are only starting points for further reflection, action and refinement. Even the basic question of what a RBA *is* remains relatively unexplored and contested. The practical implications for conservation practice of respecting, protecting, and fulfilling rights within RBAs to conservation must be further explored. This includes examining experience with RBAs across various types of

conservation organisations, timeframes, scales, and (social, political, cultural, and ecological) contexts. Conservation practitioners will also need to find better ways to engage with and improve the broader governance systems that frame and influence the linkages between their work and human rights. The world will benefit from the lessons learned and shared as the conservation community and its partners continue to advance rights-based approaches, open to an iterative process of 'learning-by-doing'.

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Endnotes

1 There is no clear distinction in the literature between rights-based and human rights-based approaches. This paper uses the term RBA to ensure openness to inclusive approaches (that is, all possible rights, including customary rights), but promotes an approach grounded in the human rights framework.

2 There are several conceptualisations of 'rights-based' approaches in the environmental arena that, while complementary, are distinct from RBAs to biodiversity and natural resource conservation as described in this chapter. These include: 'human-rights approaches to environmental protection', which use the existing human rights framework to protect the environment; promotion of substantive 'environmental rights', such as rights to a healthy and safe environment; and 'rights-based' economic or market instruments, such as individual, transferable quotas used in fisheries management.

3 The 'Rights of Nature' chapter in the Ecuadorian constitution, approved September 2008, states that, 'Nature has the right to an integral restoration' (Article. 2), and charges the state with 'motivat[ing]

natural and juridical persons as well as collectives to protect nature' and 'promot[ing] respect towards all the elements that form an ecosystem.' (Article. 3). In June 2008 the Spanish parliament's environmental committee expressed support for the declaration of the 'Great Apes Project', which calls for recognition of the rights to life, individual liberty and freedom from torture for 'all great apes'.

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IUCN recommendations and resolutions

RESWCC2.37: Support for environmental defenders

RESWCC3.012: Governance of natural resources for conservation and sustainable development

RESWCC 3.015: Conserving nature and reducing poverty by linking human rights and the environment

RESWCC4.048: Indigenous peoples, protected areas and implementation of the Durban Accord

RESWCC 4.052: Implementing the U.N. Declaration on the Rights of Indigenous Peoples

RESWCC4.056: Rights-based approaches to conservation

RESWCC4.068: Reducing emissions from deforestation and forest degradation (REDD)

RESWCC4.077: Climate change and human rights

Websites

Business and Human Rights Resource Centre

- Corporate Legal Accountable Portal: http://www.business-humanrights.org/LegalPortal/Home (accessed April 2009).
- UN Special Representative of the UN Secretary-General on Business and Human Rights Portal: http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative (accessed April 2009).

Commission on Environmental, Economic, and Social Policy (CEESP/IUCN): Conservation and Human Rights: http://www.iucn.org/about/union/commissions/ceesp/topics/rights/ (accessed April 2009).

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- Human Rights: http://plato.stanford.edu/entries/rights-human/ (accessed April 2009).
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UN Development Group–HRBA background materials (includes indicators and training guides) http://www.undg.org/?P=221 (accessed April 2009).

UN OHCHR

- 'What are human rights?': www.ohchr.org
- List of human rights issues: http://www.ohchr.org/EN/Issues/Pages/ListOfIssues.aspx (accessed April 2009).
- Climate change and human rights: http://www2.ohchr.org/english/issues/climatechange/index.htm (accessed April 2009).
- Rights-based approaches (to development): www.unhchr.ch/development/approaches-04.html (accessed April 2009).

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Annex I. International instruments of relevance for RBA to conservation

RBA should involve identifying which specific human rights and environmental instruments and provisions are pertinent in the context. Some likely possibilities are listed in this Annex. These instruments have different legal standings. Covenants, protocols and conventions are legally binding for states that ratify or accede to them. Declarations, principles and guidelines are not legally binding, but often have strong moral weight and can help guide states and other duty bearers in their conduct (see OHCHR website). Chapter 2 of this publication provides a detailed review of conservation-human rights links in many of these and some other instruments.

Universal human rights treaties and covenants (UN System)

- International Covenant on Civil and Political Rights (entered into force 1976)
- International Covenant on Economic, Social and Cultural Rights (entered into force 1976)
- Convention on the Elimination of All Forms of Racial Discrimination (entered into force 1969)
- Convention on the Elimination of All Forms of Discrimination Against Women (entered into force 1981)
- Convention on the Rights of the Child (entered into force 1990)
- International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (entered into force 1991)

General comments from treaty monitoring bodies

Core international human rights treaties have committees that monitor their implementation by states' parties. These bodies also provide their interpretations on the content of these human rights instruments in *General Comments* on particular issues. These and other guidance documents can be obtained from the UN OHCHR website. General Comments from the Committee on Economic, Social, and Cultural Rights (CESCR) relevant for RBA to conservation, for instance, include:

- CESCR General Comment No. 3: The nature of states parties' obligations (UN Doc. 14/12/90).

- CESCR General Comment No. 4: The right to adequate housing (UN Doc. E/C. 13/12/91)
- CESCR General Comment No. 12: The right to food (UN Doc. E/C. 12/1999/5)
- CESCR General Comment No. 15: The right to water (UN Doc. E/C.12/2002/11)

UN Declarations and voluntary guidelines

- Stockholm Declaration (*Declaration of the United Nations Conference on the Human Environment*, 1972) which recognises that, 'Man has the fundamental right to freedom, equality and adequate conditions … in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.' (Principle 1)
- Universal Declaration on the Eradication of Hunger and Malnutrition (1974, World Food Conference), which proclaims that, 'to assure the proper conservation of natural resources being utilised, or which might be utilised, for food production, all countries must collaborate in order to facilitate the preservation of the environment, including the marine environment.'
- Declaration on the Right to Development (1986), which states that, 'the human right to development also implies the full realization of the right of peoples to self-determination, which includes … the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.' (Article 1(2))
- Rio Declaration on Environment and Development (1992) which states that human beings are, '[e]ntitled to a healthy and productive life in harmony with nature' (Principle 1) and calls for environmental decisions to be made 'with the participation of all concerned citizens, at the relevant level.' (Principle 10)
- Vienna Declaration and Programme of Action (1993), which states that, 'The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations ….'
- Millennium Declaration (2000). Number IV, on 'protecting our common environment', calls for, 'support for the principles of sustainable development …' and 'adopt[ing] in all our environmental actions a new ethic of conservation and stewardship.'
- Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2004), which recognise the importance of land and natural resource access and management in securing the right to adequate food.

- Declaration on the Rights of Indigenous Peoples (2007), which contains provisions for self-determination, enjoyment of cultural and customary institutions, customary land and resource access and free, prior and informed consent in relation to their lands and territories.

Multilateral environmental agreements

While many multilateral environmental agreements are pertinent to RBA to conservation (see Chapter 2 of this volume) the Convention on Biological Diversity (CBD), including its Programme of Work on Protected Areas, is particularly far reaching in its recognition of the rights of indigenous peoples and local communities. CBD Article 8(j), for example, calls for respecting, preserving and maintaining the knowledge and innovations of indigenous and local communities with their approval and involvement, and encourages equitable benefit sharing from the utilisation of such knowledge and innovations.

Regional human rights instruments

- Charter of Fundamental Rights of the European Union
- African Charter on Human and Peoples' Rights, which states that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development' (Article 24)
- American Convention on Human Rights
- Arab Charter on Human Rights
- Asian Human Rights Charter
- Mar del Plata Action Plan (Organization of American States)
- Protocol of San Salvador, which calls for a 'right to live in a healthy environment and to have access to basic public services' (Article 11)
- UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Other documents

The *Draft Declaration of Principles on Human Rights and the Environment* (1994) was submitted as an appendix to a report from the UN Special Rapporteur on Human Rights and the Environment. While it was never adopted, it is a relatively comprehensive document linking environment and human rights to self-determination and permanent sovereignty over natural resources, life, health, food, housing, information, popular participation, freedom of association, culture and others (see UN Doc. E/CN.4/Sub.2/1994/9).

Annex II. Examples of HRIA and RBA models and tools

- **Conservation with justice: A rights-based approach (Greiber *et al.* 2009)**, developed by the IUCN Environmental Law Centre, provides a step-wise framework for RBAs to conservation that includes guidance on jointly securing human rights and environmental protection within the RBA framework.
- **Integrating human rights into energy and environment programming: A reference paper (Filmer-Wilson and Anderson 2005)** provides a conceptual overview, guidelines, and draft checklist for integrating RBAs, as defined within the UN Common Understanding, into the United Nations Development Programme's (UNDP) energy and environment programming.
- **Mainstreaming WWF principles on indigenous peoples and conservation in project and programme management** (Larsen and Springer 2008) is a resource to support the WWF Standards of Conservation Project and Programme Management when indigenous peoples, territories and resources are affected. It includes an overview of the concept and programming implications of rights-based approaches to conservation and development (see appendices).
- **Handbook in human rights assessment: State obligations awareness and empowerment** (NORAD 2001) is geared towards assessment by states, and focuses on deciding whether or not a full-scale impact assessment is warranted.
- **Applying a rights-based approach: An inspirational guide for civil society** (Boesen and Martin 2007), overviews RBA theory and practice and provides practical steps and implementation suggestions for civil society organisations, particularly in the development arena.
- **Rights and Democracy's Human rights impact assessments for foreign investment projects:** This project draws on community experiences to provide a framework, toolbox, and case studies to help communities identify the human rights effects of investment projects on their lands and resources. www.dd-rd.ca/site/home/index.php (accessed April 2009).
- **Guide to corporate human rights impact assessment tools** (Lenzen and d'Engelbronner 2009) overviews existing HRIA tools and guides managers of (multinational) corporations and their stakeholders in HRIA, including providing a framework for selecting the best tools.
- **Aim for Human Rights' Eight-step human rights impact assessment:** This HRIA framework is based on eight procedural steps, including monitoring and evaluation using pre-determined, objective quantitative

and qualitative indicators. The website also provides links to supporting tools and case studies. http://www.humanrightsimpact.org/?id=218 (accessed April 2009).

- **Human Rights Impact Resource Centre:** This clearing house provides centralised access to a broad range of HRIA information, cases, and expertise. www.humanrightsimpact.org/home/ (accessed April 2009).

Conservation and human rights —Who says what?

A review of international law and policy

Linda Siegele, Dilys Roe, Alessandra Giuliani and Nicholas Winer

Introduction

In recent years concern has grown about the effects of conservation on local and indigenous communities. This concern comes both from within and beyond the conservation community. In particular, protected areas have come under close scrutiny; a long list of case studies highlights evictions, forced resettlement, and a reduction or loss of access to important resources and sources of income.

International law addresses the human rights violations resulting from evictions, but legal mechanisms relating to these laws are rarely accessible to individuals and communities in need of redress. This is not to say that international law is powerless or should be ignored. On the contrary, its power lies more in setting standards for state behaviour than in directly compelling states to protect or refrain from violating the human rights of their citizens. In addition to international law, many agencies that fund or implement conservation activities have adopted codes of practice, principles and internal policies to guide their activities and to minimise negative effects on local and indigenous communities.

This paper provides a brief overview of current provisions for addressing human rights in a conservation context—both 'hard' international law, and 'soft' law (guidelines, principles, etc.) developed by a range of organisations. It is intended as a reference to help quickly identify what is and is not currently addressed in international law and policy, what is binding and what is not, and what are practical requirements and what are aspirations.

The first part of the paper sets out the most important 'hard' obligations concerning human rights and conservation to which states have committed themselves under international law—generally in the form of multilaterally agreed treaties. It should be noted, however, that within treaties, parties may agree to voluntary or indicative guidelines which are more akin to 'soft' law. The second part of the paper highlights the wide range of 'soft' law relevant to conservation and human rights. 'Soft' law is expressed in the resolutions, declarations, statements of principles, guidelines and action plans produced by UN agencies, international finance institutions and other multilateral organisations. More and more NGOs and other non-state actors also contribute to international 'soft' law both by participating in international fora and by issuing their own resolutions, declarations and statements of principles.

Conservation and human rights: 'hard' law provisions

International law does not specifically guarantee redress for people who have been displaced by conservation projects. Rather, obligations to these people are included more generally in international law on human rights, and on conservation and environmental protection (Barutciski 2006).

International human rights law is basically concerned with imposing limitations on state sovereignty—it requires states to treat the populations within their jurisdiction according to internationally agreed standards. International environmental law recognises a state's sovereignty over its natural resources, subject to certain conditions. Provisions in 'hard' and soft' law relevant to the rights of local and indigenous communities and the role they play in conservation are set out below.

Multilateral environmental agreements (MEAs)

The last 35 years have seen significant growth in the number of multilateral environmental agreements (MEAs)[1]. Many MEAs deal with the conservation and sustainable use of natural and living resources. This section focuses on the Convention on Biological Diversity (CBD), the MEA which provides the overarching international policy framework for biodiversity

conservation and which includes significant provisions for addressing the rights of indigenous and local communities.

Convention on Biological Diversity (CBD)

The **UN Convention on Biological Diversity** (CBD), agreed at the Earth Summit in Rio de Janeiro in 1992, is one of the most broadly subscribed international environmental treaties. The CBD has three main goals, the conservation of biodiversity, the sustainable use of its components and the equitable sharing of the benefits arising from the use of genetic resources. The CBD recognises the close and traditional dependence many indigenous and local communities have on biological resources (CBD, Preamble, para 12). Several provisions refer to this.

Article 8. *In-situ* conservation

Article 8 of the CBD not only recognises the 'interrelationship between the natural environment, sustainable development, and the well-being of indigenous peoples' (Birnie and Boyle 2002) but, under Article 8(j), Contracting Parties also specifically commit themselves to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities.

The Ad Hoc Open-ended Working Group on Article 8(j) produced a useful reference, a Compilation and Overview of Existing Instruments, Guidelines, Codes and Other Activities Relevant to the Programme of Work.[2]

On the recommendation of the UN Permanent Forum on Indigenous Issues (see below), the 7th Conference of the Contracting Parties (COP7) (CBD 2004) requested the Article 8(j) Working Group to develop an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities. This was reviewed at COP9 (CBD 2008) and includes:

> **Intellectual property**
>
> 8. Community and individual concerns over, and claims to, intellectual property relevant to traditional knowledge, innovations and practices related to the conservation and sustainable use of biodiversity should be acknowledged and addressed in the negotiation with traditional knowledge holders and/or indigenous and local communities, as appropriate, prior to starting activities/interactions … (G anx. sec 2(8))
>
> **[Transparency/full disclosure]**
>
> 10. Indigenous and local communities should be [fully] informed [to the fullest extent possible] about the nature, scope and purpose of any proposed activities/interactions carried out by others [that may involve

the use of their traditional knowledge, innovations and practices related to the conservation and sustainable use of biodiversity] … (G anx. sec 2 (10))

[Protection of] collective or individual ownership

13. The resources and knowledge of indigenous and local communities can be collectively or individually owned. Those interacting with indigenous and local communities should seek to understand the balance of collective and individual rights and obligations … (G anx. sec 2 (13))

Fair and equitable sharing of benefits

14. Indigenous and local communities ought to receive fair and equitable benefits for their contribution to any activities/interactions related to biodiversity and associated traditional knowledge [proposed to take place on, or which are likely to impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities] … (G anx. sec 2 (14))

[Precautionary approach (including the concept of 'do no harm')]

16. … the prediction and assessment of potential biological and cultural harms should include local criteria and indicators, and should fully involve the relevant indigenous and local communities. (G anx. sec 2 (16))

Article 10. Sustainable use of components of biological diversity

Article 10(c) requires Contracting Parties to protect and encourage customary uses of biological resources derived from traditional cultural practices that are compatible with the conservation of biological diversity and the sustainable use of its components.

Akwé: Kon Guidelines

The *Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments* regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities are an example of 'soft' law recommendations within the 'hard' law of a multilateral treaty. The guidelines were adopted in 2004 by COP7 as a collaborative framework for governments, indigenous and local communities, decision makers and development managers. While not binding, the COP requested governments to explore options for incorporating the guidelines into national legislation and policies. The guidelines require impact assessments to take the following into account (guideline 52):

(a) Prior informed consent of the affected indigenous and local communities;
(b) Gender considerations;
(c) Impact assessments and community development plans;
(d) Legal considerations;
(e) Ownership, protection and control of traditional knowledge, innovations and practices and technologies used in cultural, environmental and social impact assessment processes;
(f) Mitigation and threat-abatement measures;
(g) Need for transparency; and
(h) Establishment of review and dispute resolution procedures.

(Secretariat of the Convention on Biological Diversity 2004)

Protected areas programme of work

Protected areas are a key element of the CBD as well as being a key indicator for the achievement of Goal 7, on Environmental Sustainability, of the UN Millennium Development Goals (MDGs). COP7 decided that 'the establishment, management and monitoring of protected areas should take place with the full and effective participation, and the full respect for the rights of, indigenous and local communities consistent with domestic law and applicable international obligations' (CBD COP7 Decision VII/28). In addition, COP7 adopted a programme of work on protected areas (PoW on PA). The PoW on PA highlights the close links between conservation and socio-economics and suggests that Parties:

2.1.1 Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation …

2.2.4 Promote an enabling environment (legislation, policies, capacities and resources) for the involvement of indigenous and local communities and relevant stakeholders in decision making, and the development of their capacities and opportunities to establish and manage protected areas, including community-conserved and private protected areas.

2.2.5 Ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations.

(CBD PoW on PA, Programme Element 2: Governance, Equity, and Benefit Sharing)

Other MEAs

A number of other MEAs address the rights of indigenous and local communities in a conservation context. The **Convention on Wetlands** of International Importance especially as Waterfowl Habitat (Ramsar Convention), agreed in 1971, provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. In 1996 COP6 called upon Contracting Parties 'to make specific efforts to encourage active and informed participation of local and indigenous people at Ramsar listed sites and other wetlands and their catchments, and their direct involvement, through appropriate mechanisms, in wetland management' (Ramsar Recommendation 6.3). These issues were addressed and elaborated on in COP7 with the adoption of Guidelines for establishing and strengthening local communities' and indigenous peoples' participation in the management of wetlands (Ramsar 1999).

The **UN Convention to Combat Desertification** (UNCCD), while not always considered a conservation treaty, focuses on sustainable natural resource management as a mechanism to address land degradation. The emphasis is on 'bottom up' approaches that draw on local people and communities to develop and implement conservation programmes. This Convention also emphasises local participation in planning, designing and implementing conservation programmes (Article 3) and in National Action Programmes (Article 10).

The **Åarhus Convention** is the most far-reaching and detailed treaty to date on public participation in environmental decision making, bringing together human rights and environmental issues. Article 1 of the Convention recognises the right to a healthy environment for present and future generations and requests states to ensure the protection of this right through three fundamentals, access to information, public participation and access to justice.

International human rights law

Numerous provisions in human rights law may be relevant to the treatment of indigenous and local communities affected by conservation practices. In this regard, it is worth remembering that state obligations to ensure human rights also have indirect effects on non-state actors.[3] The most comprehensive catalogues of fundamental human rights are the **International Covenant on Civil and Political Rights** (ICCPR) and the **International Covenant on Economic, Social and Cultural Rights** (ICESCR). Both are legally binding treaties signed by most of the world's

Box 1. Human rights law and conservation practices

Right to life (Article 6 ICCPR)
The right to life not only prohibits the arbitrary or negligent taking of human life, but also sets out obligations. In the case of *Yanomani Indians v Brazil*, for example, the Inter-American Commission for Human Rights found that the construction of a Trans-Amazonian highway through the territory where the Indians lived impaired their traditional life style, amounting to a violation of their right to life.
See Yanomani Indians v Brazil, Decision 7615, IACHR, Inter-American YB on Human Rights (1985), p. 264.

The prohibition of arbitrary or unlawful interference with privacy, family, home or correspondence (Article 17 ICCPR)
This right aims to secure a sphere within which individuals may freely pursue the fulfilment and development of their private lives and physical wellbeing. The enjoyment of this right can be severely impaired by environmental conditions.

The right to freedom of movement and freedom to choose a place of residence (Article 12 ICCPR)
According to the Human Rights Committee, the right to liberty of movement and to reside in the place of one's choice includes protection against forced internal displacement and arbitrary denial of access to defined parts of a territory.

Prohibition of discrimination (Article 27 of the ICCPR and, more specifically, Convention on the Elimination of All Forms of Racial Discrimination (CERD))
Persons belonging to ethnic, religious or linguistic minorities must not be denied the right to enjoy their own culture, profess and practice their own religion, or use their own language. States are required to put in place positive measures to prevent violations of these entitlements, both by state authorities and third parties. These rights are often associated with territory and the use of natural resources.

The right to adequate food and housing (Article 11 ICESCR)
The right to food includes feeding oneself directly from productive land or other natural resources. The right is inherently linked to social justice, requiring the adoption of appropriate economic, environmental and social policies oriented to the eradication of poverty. The right to adequate housing provides that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. The ICESCR considers forced evictions *prima facie* incompatible with the Convention.

The right to self-determination (Article 1 of the ICCPR and the ICESCR)
A crucial aspect of the interpretation of the right to self-determination is the meaning of the term 'people'. According to the most widespread interpretation, 'people' applies to 'entire populations living in independent and sovereign states' and 'entire populations of territories that have yet to attain independence' (Cassese 1999, p. 59). It is unclear whether self-determination may be established without reference to a specific territory. This is an important question for the applicability of this right to minorities.

The right to the highest attainable standard of health (Article 12 ICESCR)
The right to health relates to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health. This embraces a wide range of socio-economic factors that promote conditions in which people may lead a healthy life, such as adequate food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.

The right to development
The right to development was first acknowledged in 1986 by the UN General Assembly, with the Declaration on the Right to Development. To date, however, the only binding human rights treaty including an explicit provision on the right to development is the African Charter on Human and Peoples' Rights.

states. Box 1 shows the provisions most relevant to the treatment of local and indigenous communities.

The rights of indigenous people

The first international law instrument covering indigenous rights was the 1959 International Labour Organization **Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries**. This Convention provides for a protection system to integrate and assimilate indigenous people in host states, an approach that was severely criticised for its lack of respect for indigenous identity. It has since been replaced by the 1989 International Labour Organization **Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries**. This seeks to preserve indigenous identity. Convention 169 emphasises indigenous people's relationships to territory, expressly recognising 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy' (ILO Convention 169, Article 14,1).

International Labour Organization Convention 169 articles

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, … which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible … these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development …
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Conservation and human rights: 'soft' law

International 'soft' law is not binding *per se,* but plays a very important role in supporting international law. 'Soft' law sets the direction for formally binding obligations by informally establishing acceptable norms of behaviour and 'codifying' and reflecting customary law (Sands 2003). A number of 'soft' law provisions link human rights and conservation practices.

United Nations agencies and bodies

United Nations Department for Economic and Social Affairs

Agenda 21 is a major outcome of the 1992 UN Conference on Environment and Development, the Rio 'Earth Summit', and is the 'action plan' for implementing the Rio Principles. Agenda 21 relates environmental and natural resource management to human rights. For example, it states that 'people should be protected by law against unfair eviction from their homes or land' (Agenda 21, chapter 7.9(b)).

The **Johannesburg Plan of Implementation**, adopted at the World Summit on Sustainable Development (WSSD) in 2002, identifies the CBD as the key instrument for the conservation and sustainable use of biodiversity (WSSD Plan of Implementation, para 44). The plan includes actions to reduce the rate at which biodiversity is being lost:

(j) Subject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices …

(l) Promote the effective participation of indigenous and local communities in decision and policy making concerning the use of their traditional knowledge.

United Nations Development Programme (UNDP)

Biodiversity is a focal area of the UNDP. UNDP is one of the implementing agencies of the Global Environment Facility (GEF) and an executor of the GEF Small Grants Fund. In 2001 the UNDP set out principles for relationships with indigenous people. The *UNDP and Indigenous Peoples: A Practice Note on Engagement* states:

> 27. By incorporating the 'right to development' in its work, UNDP fosters the full participation of indigenous peoples in its development processes and the incorporation of indigenous perspectives in development planning and decision-making …
>
> 29. … UNDP promotes the recognition of indigenous rights to lands, territories and resources; laws protecting indigenous lands; and the inclusion of indigenous peoples in key legislative processes. (UNDP 2001)

United Nations Office of the High Commissioner of Human Rights (OHCHR)

The OHCHR Guiding Principles on Internal Displacement (1998) compile and restate human rights and humanitarian law relevant to internally displaced persons.

> Principle 6/1: 1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
>
> Principle 7/1: Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
>
> Principle 7/3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters …
>
> (b) Adequate measures shall be taken to guarantee those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
>
> (c) The free and informed consent of those to be displaced shall be sought;
>
> (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
>
> (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.
>
> Principle 9: States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands (UN OHCHR 1998).

The United Nations Declaration on the Rights of Indigenous Peoples (UN-DECRIPS) 2007

The **United Nations Declaration on the Rights of Indigenous Peoples** is non-binding but sets out a universal framework of rights that countries should recognise, guarantee and implement. UN-DECRIPS recognises indigenous people's right to own and control their lands and, to various degrees, their rights to own, use and manage the natural resources on those lands. The right to development is understood as the right to decide the *kind* of development that takes place on their lands and territories in accordance with their own priorities and cultures. States are called upon to consult with indigenous people and obtain their free and informed consent prior to approval of any project affecting their lands and resources.

Guidelines on Indigenous Peoples' Issues 2008

The Guidelines on Indigenous Peoples' Issues help UN Country Teams to integrate indigenous people's issues into country policies and programmes. They direct that 'Programming should encourage the development of human capabilities and the participation of indigenous peoples in community and social contexts, policy design and implementation at local, national, regional and global levels, creating strategies that can help them escape poverty' (UN Development Group Feb 2008: 27).

Funding agencies

World Bank

The World Bank *Operational Policies* (OPs) set standards and conditions that are binding for World Bank staff, grantees and borrowers.

Operational Policy on Involuntary Resettlement (OP 4.12), December 2001, Revised April 2004

(a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs.

(b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.

(c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living, or at least to restore them, in real

terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.

This policy covers direct economic and social impacts that both result from Bank-assisted investment projects, and are caused by:

(a) the involuntary taking of land resulting in
   (i) relocation or loss of shelter;
   (ii) loss of assets or access to assets; or
   (iii) loss of income sources or means of livelihood, whether or not the affected persons must move to another location; or

(b) the involuntary restriction of access to legally designated parks and protected areas resulting in adverse impacts on the livelihoods of the displaced persons.

Operational Policy on Forests (OP 4.36), January 2002

10. To be acceptable to the Bank, a forest certification system must require:
    b) recognition of and respect for any legally documented or customary land tenure and use rights as well as the rights of indigenous peoples and workers;

11. In addition … a forest certification system must … be developed with the meaningful participation of local people and communities; indigenous peoples; non-governmental organizations representing consumer, producer, and conservation interests; and other members of civil society, including the private sector ….

Revised Operational Policy on Indigenous Peoples (OP 4.10), July 2005

1. This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples ….

Physical Relocation of Indigenous Peoples

20. Because physical relocation of Indigenous Peoples is particularly complex and may have significant adverse impacts on their identity, culture, and customary livelihoods, the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process.

In such cases, the borrower prepares a resettlement plan in accordance with the requirements of OP 4.12 ….

International Finance Corporation (IFC)

The International Finance Corporation is the private sector arm of the World Bank Group. World Bank Group policies and standards are binding on the IFC and its clients.

Policy on Social and Environmental Sustainability, 2006

8. Central to IFC's development mission are its efforts to carry out its investment operations and advisory services in a manner that 'do no harm' to people or the environment. Negative impacts should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated or compensated for appropriately.
19. … IFC requires clients to engage with affected communities through disclosure of information, consultation, and informed participation, in a manner commensurate with the risks to and impacts on the affected communities.
20. IFC is committed to working with the private sector to put into practice processes of community engagement that ensure the free, prior, and informed consultation of the affected communities.

Performance Standards 2006

5: Land Acquisition and Involuntary Resettlement

- The client will consider feasible alternative project designs to avoid or at least minimize physical or economic displacement, while balancing environmental, social, and financial costs and benefits.
- When displacement cannot be avoided, the client will offer displaced persons and communities compensation for loss of assets at full replacement cost and other assistance to help them improve or at least restore their standards of living or livelihoods ….
- Following disclosure of all relevant information, the client will consult with and facilitate the informed participation of affected persons and communities, including host communities, in decision-making processes related to resettlement ….
- The client will establish a grievance mechanism … to receive and address specific concerns about compensation and relocation that are raised by displaced persons or members of host communities ….

7: Indigenous Peoples

The client will establish an ongoing relationship with the affected communities of Indigenous Peoples from as early as possible in the project planning and throughout the life of the project. In projects with adverse impacts on affected communities of Indigenous Peoples,

> the consultation process will ensure their free, prior, and informed consultation and facilitate their informed participation on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues ….

Regional development banks

The policies relating to the involuntary resettlement of indigenous people of a number of regional development banks, including the Asian Development Bank (ADB), Inter-American Development Bank (IADB) and European Bank for Reconstruction and Development (EBRD), are similar to those of the World Bank and IFC. These policies are binding on bank staff, the governments of the borrowing countries and/or other private project sponsors and include:

Asian Development Bank (ADB) Policy on Involuntary Resettlement, 1995 (R1-79-95)

> As with the other IFIs [international financial institutions], the objectives of ABD's policy on involuntary resettlement are to avoid wherever possible and minimise the effects where it is unavoidable including (i) compensation for lost assets and loss of livelihood and income, (ii) assistance for relocation including provision of relocation sites with appropriate facilities and services, and (iii) assistance for rehabilitation to achieve at least the same level of well-being with the project as without it ….

Asian Development Bank (ADB) Policy on Indigenous Peoples, 1998 This policy is intended to ensure that ADB interventions affecting indigenous people are consistent with their needs and aspirations; planned and implemented with their informed participation; equitable; and provide appropriate and acceptable compensation in case of negative effects.

Inter-American Development Bank (IADB) Strategies and Procedures on Socio-cultural Issues as Related to the Environment, 1995 These focus on the need to avoid resettlement where possible; the need for local consultation and participation in project design and implementation; and the need for capacity building in agricultural and other productive activities, where relocation can not be avoided 'so as to ensure the long-term economic viability of the new communities'.

Inter-American Development Bank (IADB) Operational Policy on Involuntary Resettlement (OP 710), 1998 This seeks to avoid or minimise the need for involuntary resettlement to the extent of reconsidering the project if large-scale relocation is inevitable. Where relocation does occur, the need for 'fair and adequate compensation and rehabilitation' is required. The policy includes special consideration of indigenous communities, emphasising that:

- customary rights will be fully recognized and fairly compensated;
- compensation options will include land-based resettlement; and
- the people affected have given their informed consent to the resettlement and compensation measures.

Involuntary Resettlement in Inter-American Development Bank (IADB) Projects. Principles and Guidelines, November 1999 These provide further guidance on the Operational Policy, including on compensation and arbitration procedures.

Inter-American Development Bank (IADB) Operational Policy on Indigenous Peoples (OP 765), February 2006 This includes specific clauses on natural resource management and protected area projects including the following safeguards:

(i) respect for the rights recognized in accordance with the applicable legal norms; (ii) in projects for natural resource extraction and management and protected areas management, the inclusion of:

(1) prior consultation mechanisms to safeguard the physical, cultural, and economic integrity of the affected peoples and the sustainability of the protected areas and natural resources;
(2) mechanisms for the participation of indigenous peoples in the utilization, administration, and conservation of these resources;
(3) fair compensation for any damage these peoples might suffer as a result of the project; and
(4) whenever possible, participation in project benefits.

European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy, 2008 This includes specific performance standards for projects involving indigenous people and requires projects to 'avoid adverse impacts of projects on the lives and livelihoods of Indigenous Peoples' communities, or when avoidance is not feasible, to minimise, mitigate, or compensate for such impacts.'

Global Environment Facility

The Global Environmental Facility (GEF) is the designated financial mechanism for a number of multilateral environmental agreements (MEAs). It has no specific social or environmental policies, although a report by Griffiths for the Forest People's Programme notes that 'although the GEF has, since 1994, adopted a generally understood rule that it does not fund involuntary resettlement, this crucial institutional safeguard has yet to be consolidated in official GEF policies' (Griffiths 2005, p. 86). Nevertheless, GEF does have a policy on Public Involvement and this notes that ... 'all public involvement activities should be based on local needs and

conditions ... biodiversity projects affecting indigenous communities may require more extensive stakeholder participation than global projects which focus on technical assistance and capacity building at the national and regional levels' (GEF (1996) Guidelines on Public Involvement in Projects Financed by the GEF, cited by Griffiths 2005, p. 89).

Bilateral aid agencies

The Development Assistance Committee of the Organisation for Economic Cooperation and Development (DAC-OECD) is made up of the official development assistance agencies of OECD countries. DAC-OECD has developed a series of non-binding *G*uidelines on Aid and Environment, including the 1992 Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects. These call on members to avoid or minimise involuntary displacement wherever possible and state that 'Donor countries should not support projects that cause population displacement unless they contain acceptable resettlement plans protecting the rights of affected groups.' In particular, 'Indigenous groups, ethnic minorities, and pastoralists who may have informal customary rights to the land or other resources taken for the project must be provided with adequate land, infrastructure, and other compensation. The absence of legal title to land by such groups should not be a bar to compensation' (OECD 1992, p. 7).

International conservation NGOs

Conservation International (CI)

In 2003, Conservation International created the Indigenous and Traditional Peoples Initiative. This initiative is designed to ensure and support the development of appropriate tools, knowledge and resources to enable traditional groups to continue efficient and effective stewardship of their land, and achieve sustainable community development.

Indigenous Peoples and Conservation International: Principles for Partnerships, 2003

3. … We will openly inform, consult and obtain the informed consent of formal representatives of indigenous groups prior to undertaking any actions that are directly tied to indigenous peoples, their territories or natural resources.
4. … We support efforts by indigenous groups to gain legal designation and management authority over ancestral lands and their resources, while respecting issues of national sovereignty.

8. … Our support includes enhancing the capacity of indigenous people's organizations and communities to prepare, implement, monitor and evaluate conservation activities or activities that are likely to have an impact upon conservation.
9. We recognize that there are often overlaps between lands set aside for legally designated parks and protected areas and lands customarily owned or used by indigenous peoples. CI recognizes both the significance of these customary rights and the need for long-term sustainable management of critical ecosystems. In legally designated parks and protected areas, CI will work with protected area and indigenous authorities to support collaborative management initiatives that recognize customary uses while ensuring that natural resources are not depleted and that actively involve indigenous communities in planning, zoning, and monitoring (CI 2003).

International Union for Conservation of Nature (IUCN)

The International Union for Conservation of Nature[4] has produced a raft of resolutions and recommendations on conservation and human rights at its World Congresses (previously General Assemblies) and other events, such as the once-a-decade World Parks Congress. These guide the work of IUCN, but are not binding on members. The most pertinent resolutions are:

- 12th IUCN General Assembly (Kinshasa 1975) **Resolution 12.5 Protection of Traditional Ways of Life** calls on governments to recognise indigenous people's rights to land particularly in the context of preventing displacement in conservation areas.
- 19th IUCN General Assembly (Buenos Aires 1994) **Resolution 19.22 Indigenous People** urges governments to guarantee respect for the rights of local and indigenous people in protected areas.
- 1996 World Conservation Congress (Montreal) The 1996 IUCN World Conservation Congress adopted **Resolution WCC 1.53 Indigenous Peoples and Protected Areas,** which stresses the need to recognise the rights of indigenous people with regard to their lands and territories that fall within protected areas.

In 1999, IUCN, the World Commission on Protected Areas (WCPA) and the World Wide Fund for Nature (WWF) developed a set of Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas in response to Resolution WCC 1.53. These include guidance on protected area management agreements, noting that they should not only be based on respect for indigenous and traditional rights, but should also highlight the conservation responsibilities of indigenous people (IUCN, WCPA, WWF 1999).

- 2000 World Conservation Congress—**IUCN Policy on Social Equity in Conservation and Sustainable use of Natural Resources**. Building on previous resolutions and indigenous rights conventions this policy notes that

  > IUCN aims to: Respect indigenous people's knowledge and innovations, and their social, cultural, religious and spiritual values and practices. Recognise the social, economic and cultural rights of indigenous peoples such as their right to lands and territories and natural resources, respecting their social and cultural identity, their customs, traditions and institutions. Ensure full and just participation of indigenous peoples in all conservation activities supported and implemented by IUCN. Support indigenous peoples' right to make their own decisions affecting their lands, territories and resources, by assuring their rights to manage natural resources, such as wildlife, on which their livelihoods and ways of life depend, provided they make sustainable use of natural resources. (IUCN 2000)

- 5th World Parks Congress (2003) The **Durban Accord** urges commitment to '… ensuring that people who benefit from, or are affected by protected areas have the opportunity to participate in relevant decision making on a fair and equitable basis in full respect of their human and social rights'. The **Durban Action Plan**, the plan to implement the Accord, includes a number of human rights targets:

  > Key Target 8: all existing and future protected areas shall be managed and established in full compliance with the rights of indigenous peoples, mobile peoples and local communities.
  >
  > Key Target 9: protected areas shall have representatives chosen by indigenous peoples and local communities in their management proportionate to their rights and interests.
  >
  > Key Target 10: participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent established and implemented by 2010.

In addition to the Durban Accord and Durban Action Plan, the 5th World Parks Congress generated a number of more detailed recommendations including:

WPC Recommendation 24: Indigenous Peoples and Protected Areas which recommends that existing and future protected areas respect the rights of indigenous people through cessation of all involuntary evictions; full, prior, informed consent in establishing protected areas; and establishing compensation and restitution mechanisms to address historical injustices.

WPC Recommendation 27: Mobile Indigenous Peoples and Conservation which is the first instrument to focus specifically

on mobile communities and call for recognition of their resource management systems.

- 2004 World Conservation Congress (Bangkok) **Resolution 3.015 Conserving nature and reducing poverty by linking human rights and the environment** encourages IUCN to include human rights in its mission and calls on the IUCN Commission on Environmental Law to, among other things, analyse human rights law to provide effective access to justice in the event of the violation of rights and to 'provide a progress report to future World Conservation Congresses summarizing legal developments in human rights law and litigation that are pertinent to IUCN's Mission, with an emphasis on human-rights tools that may be used by IUCN and its members in pursuit of the Mission'.
- 2008 World Conservation Congress (Barcelona) passed a number of resolutions on human rights. In particular:

  Resolution 4.056 Rights-based approaches to conservation which calls on IUCN members and other actors to:

  (a) develop and/or work towards application of rights-based approaches, to ensure respect for, and where possible further fulfilment of human rights, tenure and resource access rights, and/or customary rights of indigenous peoples and local communities in conservation policies, programmes, projects, and related activities;

  (b) encourage relevant government agencies, private actors, businesses and civil-society actors to monitor the impacts of conservation activities on human rights as part of a rights based approach;

  (c) encourage and establish mechanisms to ensure that private-sector entities fully respect all human rights, including Indigenous Peoples' rights, and take due responsibilities for the environmental and social damage they engender in their activities; and

  (d) promote an understanding of responsibilities and synergies between human rights and conservation.

  Resolution 4.052 Implementing the United Nations Declaration on the Rights of Indigenous Peoples which endorses the UN Declaration, and calls on all IUCN members to do likewise and to integrate it into their work programmes.

  Resolution 4.048 Indigenous Peoples, protected areas and implementation of the Durban Accord which reinforces this request, especially with respect to protected areas.

  Resolution 4.053 Mobile Indigenous Peoples and biodiversity conservation which calls on IUCN to adhere to the five principles of the **Dana Declaration** 2002, the outcome of a meeting of social and natural scientists, and NGOs. These principles include the principle that 'conservation approaches with potential impact on mobile peoples and their natural resources must recognise mobile peoples' rights ….

Wildlife Conservation Society (WCS)

The Wildlife Conservation Society has a policy on human displacement. This recognises that WCS, as a part of its work, is often required to advise authorities on access to local resources. The policy notes that 'WCS only rarely and as a last resort advises authorities on the displacement of people from particularly fragile, valuable, or dangerous … environments' ….

WCS Policy on Human Displacement and Modification of Resource Access to Achieve Conservation Objectives 2007

This policy states that advice provided to authorities by WCS will take into account the legitimacy of land and resource claims, and the vulnerability of the people affected. Where the decision is to displace people or restrict access to resources the WCS policy is to make every effort to ensure that:

2.1. The authorities obtain in advance the freely given and informed consent of all persons proposed to be displaced or to lose resource access;
2.2. The authorities seek to minimize the impact on the people proposed to be displaced or to lose resource access;
2.3. The authorities take into account both the material and nonmaterial needs of the people proposed to be displaced or lose resource access and seek to provide them with reasonably acceptable resettlement alternatives or opportunities to secure comparable or enhanced means of livelihood;
2.4. The authorities meet all their legal and contractual obligations to the people ….

World Wide Fund for Nature/World Wildlife Fund (WWF)[5]

In 1996, WWF issued a Statement of Principles on Indigenous Peoples and Conservation. This statement provides guidance on partnering with indigenous people's organisations to conserve biodiversity within indigenous lands and territories, and on promoting the sustainable use of natural resources. The principles were updated in 2008.

Indigenous Peoples and Conservation: WWF Statement of Principles, 2008

> Since indigenous peoples are often discriminated against and politically marginalized, WWF is committed to make special efforts to respect, protect, and comply with their collective and individual rights, including customary as well as resource rights, in the context of conservation initiatives. This includes, but is not limited to, those set out in national and international law, and in other international instruments. In particular, WWF fully endorses the provisions about indigenous peoples contained in the following international instruments: Agenda 21; Convention on Biological Diversity; ILO Convention

> 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries); UN Declaration on the Rights of Indigenous Peoples ….

The principles specify some of the rights that WWF recognises and strives to uphold, many of which are mentioned in the documents described above. These include the rights of indigenous peoples to land and resources, and the right to determine development pathways. WWF also recognises that claims to land and resources are often contested and that the rights of indigenous peoples take priority: 'In instances where multiple local groups claim rights to resources in indigenous territories, WWF recognizes the primary rights of indigenous peoples … due regard for the rights and welfare of other legitimate stakeholders ….'

In addition to recognising the rights of indigenous peoples, the principles also identify WWF responsibilities in engaging with indigenous people. These include encouraging governments and other stakeholders to recognise indigenous land rights; ensuring WWF practises due diligence in exploring historic and current land claims and rights before initiating any conservation activities; and working with indigenous groups to challenge any activities which are proceeding without prior, informed consent (WWF 2008).

Other conservation organisations

The conservation organisations mentioned above have—publicly or internally—codified their policies and approaches regarding indigenous and local community rights. Other conservation organisations have made general statements on their approaches to human rights issues. The Nature Conservancy (TNC), for example, has a set of *Core Values* including a *Commitment to People* which notes, 'We respect the needs of local communities by developing ways to conserve biological diversity while enabling them to live productively and sustainably' (TNC website). Similarly Fauna and Flora International (FFI) pledges that it will '… take account of human needs' (FFI website) while BirdLife International aims to 'help, through birds, to conserve biodiversity and to improve the quality of people's lives' (BirdLife International website).

Conservation organisations also make joint statements on indigenous and local community rights. During the UN World Summit in 2005, for example, Peter Seligmann, Chairman and CEO of Conservation International, announced on behalf of BirdLife International, Conservation International, Fauna and Flora International, Wildlife Conservation Society, The Nature Conservancy and the World Wide Fund for Nature that 'A group of the world's largest conservation and environmental NGOs have come together to announce tonight their commitment to integrate conservation and development efforts. After working for decades in some

of the world's most impoverished places, the environmental community knows the critical need to work for improved livelihoods, respect indigenous and vulnerable peoples, and seek sustainable responses to the root causes that lead jointly to poverty and ecological disruption.'

Indigenous organisations

Just as many of the conservation agencies have developed policies, principles and statements on indigenous and local community rights, indigenous organisations have commented publicly on the responsibilities of conservation organisations.

Coordinating Body for the Indigenous Organizations of the Amazon Basin (COICA)

In the late 1980s the Coordinating Body for the Indigenous Organizations of the Amazon Basin (COICA), produced a key text on indigenous rights and the links to both conservation and development. *T*wo Agendas on Amazon Development (COICA 1989) addressed both conservation and development. Part One, directed at the development community, called for recognition of indigenous people's rights and the need for prior, informed consent in any development intervention. Part Two, To the Community of Concerned Environmentalists, acknowledged the role of the international conservation community in rainforest conservation but expressed concern about the preoccupation with wildlife over and above the needs of local communities. As a follow up, the First Summit between Indigenous Peoples and Environmentalists was held in Iquitos, Peru, in 1990. The resulting **Iquitos Declaration** confirmed the importance of recognising indigenous land rights and led to the establishment, in 1993, of the Coalition in Support of Amazonian Peoples and Their Environment (COICA 1990).

International Alliance of Indigenous and Tribal Peoples of the Tropical Forests

The International Alliance of Indigenous and Tribal Peoples of the Tropical Forests (IAITPTF), founded in 1992, has members from all over the tropics. In 2002, the Alliance adopted a charter that includes articles relating to biodiversity and conservation:

- Article 42. Conservation programmes must respect our rights to the use and ownership of the territories and resources we depend on. No programmes to conserve biodiversity should be promoted on our territories without our free, prior and informed consent as expressed through our indigenous organizations. (IAITPTF 2002)

Conclusion

'Hard' international environmental and human rights law sets out binding norms for considering and including local and indigenous community concerns in conservation activities. 'Hard' law is backed up by a rich body of 'soft' law set out by governmental and non-governmental organisations. Because international law has to be implemented nationally, states with transparent and participatory legal and social systems tend to have a stronger record of implementation and enforcement than those that do not. Conversely, states with evolving legal systems, or legal systems under intense political pressure, tend to have poor environmental and human rights records (Driesen, 2003).

While proponents of conservation projects have an obligation to abide by the laws of the host state, they also have an obligation to ensure projects can be ethically justified. Ethical responsibilities do not always translate into concrete legal obligations. International law can exert pressure on international actors to apply a uniform set of legal standards across national jurisdictions. However, the main problem is enforcement in host states. Here, NGOs can play a valuable role in closing the gap between international and national law by exploring innovative methods to put pressure on governments to respect international (human rights) law. The critical issue, however, is not what is written in law, policies or guidelines, but rather how these commitments are translated into practice. Good policy is just a starting point—good practice is more difficult to achieve.

Endnotes

1 While broad ratification of MEAs signifies acceptance of environmental ideals, the international environmental law framework presents a number of challenges to implementation and enforcement, including:
   - Treaty ratification is voluntary, which allows states to 'opt out' of compliance with global norms.
   - MEAs are binding only for states. The application of international environmental law to non-state perpetrators of environmental harm is complex.
   - There is no centralised regulatory body for MEA enforcement. Most secretariats for MEAs do not have enforcement authority, and many states, particularly developing states, lack the financial and technological capacity to enforce environmental obligations.
   - The growing number of international dispute resolution mechanisms raises the issue of which treaty regime has jurisdiction over a particular issue. (Rogers-Kalas 2001)

One of the primary tools that MEAs employ to assess compliance is periodic reporting, which allows parties to assess the extent to which other parties are implementing their obligations. It is clear, however, that many states fail to even fulfil basic reporting obligations, which suggests that more substantive obligations may remain unimplemented (Sands 2003). Other than a 'name and shame' procedure, there may be little else a treaty framework has available to it to enforce obligations.

2 Working Group on Article 8 (j) and Related Provisions of the CBD, Second Meeting, UNEP/CBD/WG8J/2/INF/1, 27 Nov 2001.

3 For example, the Universal Declaration of Human Rights speaks of the obligations of individuals and 'every organ of society' and Article 30 provides that 'Nothing in this Declaration may be interpreted as implying for any [s]tate, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

4 While treated for purposes of this Chapter as an NGO, IUCN is a union of governmental and non-governmental members, including 82 states, 111 government agencies and approximately 800 non-governmental organisations. See www.iucn.org for more information.

5 WWF changed its name from World Wildlife Fund to World Wide Fund for Nature, except for the US office, which retains the original name.

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The *conversatorio* for citizen action:

Fulfilling rights and responsibilities in natural resource management in Colombia

Jenny Springer and Kate Studd

based on Hannah Beardon *et al*. 2008[1]

Introduction: A collective response to environmental degradation in Colombia

> The land, the landscape, our culture is power. It is our capital, our history, the inheritance of our future generations.
>
> Lidoro Hurtado Quiñónez, Community Council leader

The mangroves of the Pacific coast of Colombia are areas of incredible biodiversity as well as inherent natural beauty and worth. The area is home to many small rural communities, mostly of Afro-Colombian descent, for whom the forests, rivers and seas are inextricably linked to both culture and livelihoods. These traditionally marginalised communities are under pressure from national and regional social and economic changes that contribute to the degradation, contamination and overexploitation of the natural resources on which they depend. Competition between

environmental laws and the interests of powerful commercial actors, and the impacts of armed conflict in some areas, are among the huge challenges facing local conservation efforts. However, some social changes, generated by communities and through national legal frameworks, provide opportunities for making more sustainable, equitable and culturally appropriate decisions about the management of these resources.

This chapter explores the development and use by these communities of the *conversatorio*, a process which develops the capacity of citizens to understand and articulate their rights and responsibilities and negotiate with state actors to address problems. The *conversatorio* enables rights holders and duty bearers to more effectively engage around environmental issues, and agree on strategies to address them. The *conversatorio* processes described here were facilitated by the World Wide Fund for Nature (WWF), Colombia, in collaboration with local partners. The term '*conversatorio* for citizen action' was coined by one partner, ASDES (Corporación de Asesorias para el Desarollo—Corporation of lawyers for development), with whom WWF Colombia initiated the first *conversatorio*.[2]

Women working in the coastal areas of Nariño, where the first *conversatorio* was launched. Collection of natural resources from the ecosystem in which they live is a key part of supporting local livelihoods. (Photo by Hannah Beardon/WWF–UK)

The high point and most visible part of the *conversatorio* is the negotiation phase. Typically this is a one-day event at which communities meet with the government agencies responsible for environmental and social issues, research institutes and others. It is an opportunity for community groups to hold public institutions to account and demand action to protect or support their livelihoods and the sustainable management of the natural resources on which they depend. This *conversatorio* event, while important and high profile, is only one part of a much longer process that begins with capacity building of community rights holders to analyse, articulate and claim obligations from duty bearer institutions. Through negotiation and sharing of perspectives, participants in the *conversatorio* event then reach and sign agreements with the relevant authorities to address problems which threaten vital natural resources. These may be agreements to change policy, conduct research, provide funding, or carry out specific actions, such as extension of basic health insurance and services to a previously excluded group. Engagement and dialogue then continue through the follow up phase as partners work together to monitor agreements, and to develop and implement activities.

WWF Colombia's work on the *conversatorio* approach is based on the recognition that the local people, who are the key constituency for long-term environmental health, often do not have access to decision making about their environment, or a voice to influence relevant policies. While

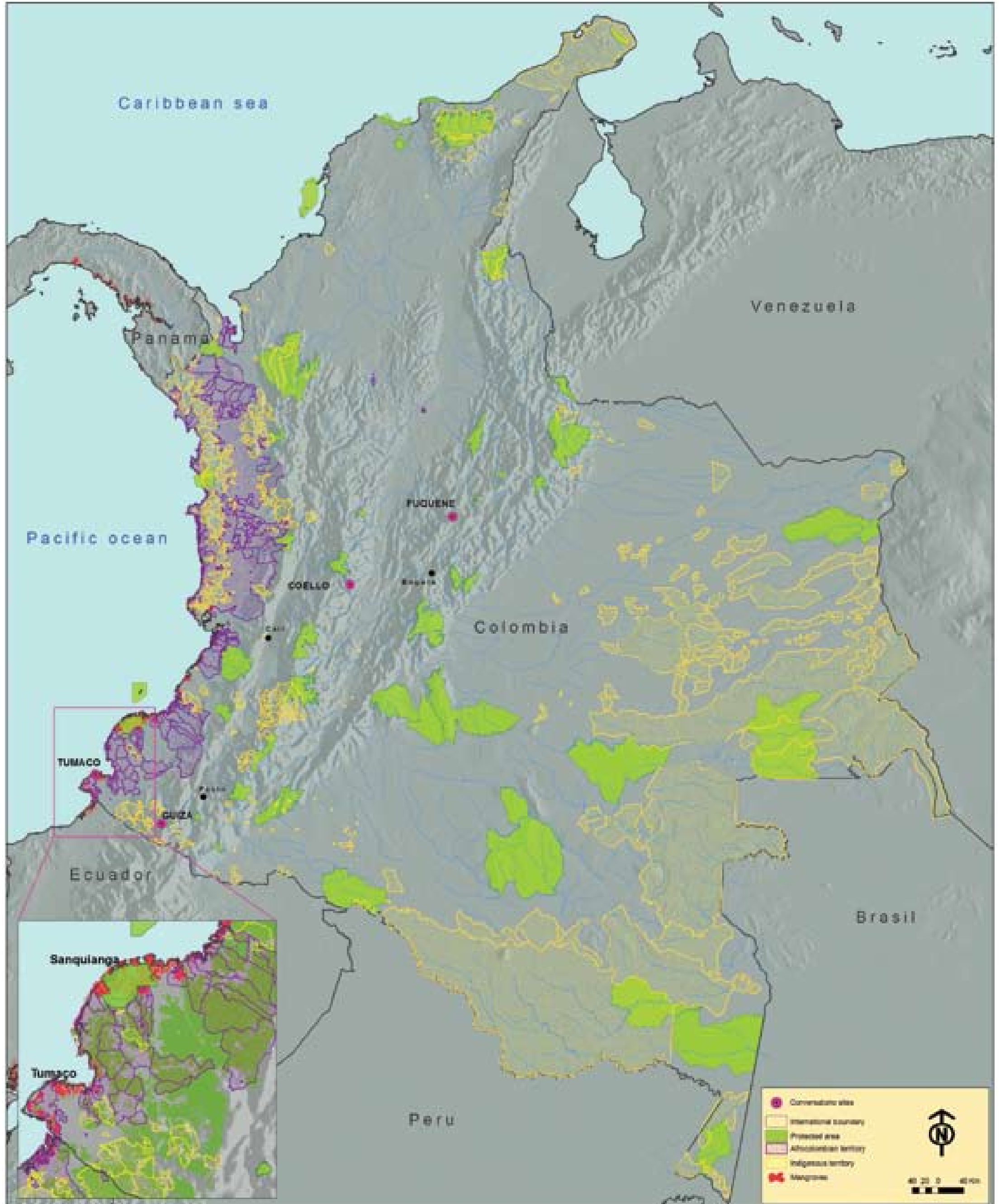
Mangrove forests host natural resources critical to local livelihoods, and central to the first *conversatorio* process. (Photo by Hannah Beardon/WWF–UK)

the *conversatorio* was not explicitly developed as a 'rights-based approach' it is grounded in a concern for promoting the protection and realisation of community rights, including rights to a healthy environment, traditional territories, community services and secure livelihoods. In addition, it encourages communities to recognise their own responsibilities and potential for collective action to address environmental concerns. Thus, the *conversatorio* has much in common with emerging rights-based approaches to conservation and is presented here along with reflections on the broader lessons it may offer for rights-based approaches.

The *conversatorio* in context

The *conversatorio* process was developed in the context of the unique ecological and social history of Colombia. With its incredible diversity of species and landscapes, Colombia is a country of immense interest and importance for conservation. Colombia is also often cited as one of the longest and most stable democratic republics in the Americas, with a democratically elected president and a modern constitution (1991).[3] The Colombian Constitution dedicates a chapter to environmental management, and guarantees the public right to a healthy environment.[4] Despite this, Colombia continues to lose natural forest at a rate of roughly 200 000 ha per year and illegal timber trading is rife (World Bank Report 2006). Extraction of timber, mining, exploitation of oil and gas, expansion of infrastructure, plantation agriculture and production of illicit crops, such as coca and the opium poppy, contribute to deforestation, threaten biodiversity and destabilise vulnerable mountain ecosystems which are the main source of freshwater (WWF 2007).

The majority of Colombian people are of Spanish, African and/or indigenous descent. According to the 2005 census, 10.6% of the Colombian population classify themselves as black and 3.4% as indigenous. The 1991 Constitution officially recognised Colombia as a multiethnic country, giving momentum to the indigenous and Afro-Colombian social movements. Land titles and community territories (reserves) are being recognised, providing both indigenous and Afro-Colombian communities collective titles to many traditionally occupied territories in the Pacific region of Colombia. To date, about 25% of the national territory has been titled as indigenous reserves known as *resguardos*. Most of these are in the Pacific, Amazon and Orinoco regions. About 50% of the natural forest in Colombia is legally owned by ethnic populations. In the Pacific region, 122 black territories, covering over 4.5 million ha and representing nearly 300 000 people, had been titled by 2003 (Offen 2003).



Map 1. Colombia map and *conservatorio* activities
(WWF Colombia GIS Lab)

The government has made substantial progress towards creating a legal framework for the realisation of a rights-based society. For example, Law 134 of 1994 recognises participation in public administration as a right, and commits the state to support the organisation, funding and capacity of citizen's oversight committees (*veedurías,* in Spanish) to monitor the use of public resources and the availability of public services. The law also provides for public engagement in decision making to guarantee orientation of the state to common interests and social benefit. However, the creation of a legal framework and political culture for the full realisation of constitutional rights has been a long and difficult process. It requires changes in culture and building capacity for public accountability and true citizen engagement. Powerful commercial interests continue to influence decision making, illegal armed groups operate in some areas, and many people still cannot take advantage of the opportunities offered by the Constitution or influence decision making without support (Beardon, 2008).

The *conversatorio* in practice

The *conversatorio* approach emerged in the new political scenario set by the 1991 Constitution. WWF Colombia and partners support *conversatorio* processes as practical ways for public accountability and fulfilment of community rights to become a reality.

The first *conversatorio* process began in 1997 in the mangrove forests of the Pacific coast of Nariño, a predominantly Afro-Colombian and ecologically important area. Some of the poorest and most marginalised people in this area are the *piangueras*, the people (predominantly women) who collect *piangua* (*Anadara tuberculosa)*, a native bivalve (clam), from the mud between the roots of the mangrove. While the species is in decline, in part due to contamination and destruction of its natural habitat, and in part due to over exploitation, more and more people, including those displaced by violence, look to *piangua* for their livelihood. Although officially recognised as being under threat of extinction in the mid 1990s, management plans are still being developed. The *piangua* continues to be freely collected and sold without licensing or management (Beardon, 2008).

While most of the *piangueras* work independently, or in small family groups, community groups and associations have been growing for some time amongst the women, who saw the potential strength and opportunities that unity could provide. Nariño clam collectors formed an association, ASCONAR (Asociación de Concheras de Nariño), in the Tumaco area of Nariño. Prompted by a local women's association, ASCONAR developed a

At the end of the day women in ASCONAR gather to consolidate and classify what they have collected. (Photo by Hannah Beardon/ WWF–UK)

list of priorities to improve their lives and livelihoods, including ensuring the sustainability of *piangua* and its habitat. The new provisions for collective title to ethnic territories also prompted mobilisation and organisation at grassroots. WWF was able to engage with the community councils formed to manage collective lands and processes.

Another key partner in Nariño was ASDES. Set up in the 1980s, ASDES is a social development organisation that provides legal assistance to rural communities to support their rights to land, water, work, credit and housing. ASDES began providing training on political and legal concepts and mechanisms, developing awareness of rights and the instruments to demand and deliver them. They piloted a *conversatorio* style event in the Colombian Caribbean island of Providencia on hotel development and local needs and culture.

Carmen Candelo, Governance and Livelihoods Manager of WWF Colombia and a native of the mangrove region, engaged with these local institutions and helped facilitate partnerships among them. Carmen brought together the concerns of the communities and the expertise of organisations like ASDES to develop the first *conversatorio* process.

Carmen Candelo, Governance and Livelihood Programme Director for WWF Colombia, after a fieldtrip for collecting *piangua* (Photo by Hannah Beardon/WWF–UK)

The *conversatorio* process is complex. The first step is to build the capacity of citizens and the state to engage and participate more effectively where previous relationships and dialogue have generally been limited. Each *conversatorio* has three stages—preparation, negotiation and follow up—as described below in the case of Nariño.

Preparation and capacity building

During the preparation phase, WWF brought together a team of consultants to support ASDES in capacity building, legal training and participatory research and analysis. WWF built collaborative local partnerships with community-based organisations. These included the *pianguera* groups, associations already active in defining problems related to the natural resource, the community councils who manage collective territories and Chonapi, a local NGO.

The preparatory phase began with identifying and analysing problems, taking into account the unsustainable use of natural resources and the community context. Participatory tools were used to identify causes of conflict and opportunities for change, and to build a shared vision for the future wellbeing of the community and the natural resources. Community

members conducted their own analysis of the environmental, political and cultural context and drew up a collective vision for the future. At this point, the key issues for the *conversatorio* could be prioritised and key actors to take part in the negotiation could be identified.[5] These included actors from the public and private sectors, community groups, NGOs and anyone else who needed to be involved in the negotiation in order for the priorities to be addressed. Community members explored the roles and legal responsibilities over various actors, along with their relationships to problems and solutions. They analysed power relations or levels of influence in order to elaborate strategies and plans to strengthen or create relationships and engage with different stakeholders. An important aspect of the multistakeholder process was clarifying and raising awareness of the diverse interests and objectives which motivate the different actors. This understanding set the scene for strong and constructive negotiation.

The community groups developed their own indicators of preparedness for the *conversatorio* negotiations. These included effective and legitimate representation, the negotiating skills of all parties, equality of power relations and trust between parties, availability of quality information on the issues at stake to all involved in the negotiations and guaranteed participation of all parties.

Negotiation

In the first *conversatorio* event held in Nariño, every demand or suggestion received a positive response and a signed commitment from the relevant agencies and institutions. By the end of the day, 14 institutions had signed 50 distinct agreements. The *conversatorio* event became known among participants as the 'festival of democracy'. All the agreements were seen as building blocks or foundations for the broad vision for the ecosystem, and the culture and livelihoods it sustains. A whole range of agencies, including regional environmental authorities, councils and rural development agencies, agreed to take action to give marginalised *piangueras* access to basic health and education services, as well as to improve management of the mangroves. The agreements signed and commitments undertaken during the *conversatorio* negotiation provided a baseline for monitoring the outcomes from the *conversatorio* and the changes in the use and management of the natural resources.

Follow up

A monitoring committee was formed of representatives from different communities and partner organisations to ensure that parties follow

through on their commitments. It also continues negotiations to develop and implement follow up activities. Monitoring provides an opportunity to build on changing relationships, capacity and conservation practice. In many ways the *conversatorio* is an ongoing and open-ended process, which seeks to enable duty bearers and rights holders to continue to develop and respond to issues, opportunities and challenges as they emerge. The process becomes embedded in the ongoing plans, priorities and responsibilities of the different actors involved. This makes it hard to define the boundaries of what is and what is not the *conversatorio*, and makes each *conversatorio* unique.

Key elements of the *conversatorio*

Since the Nariño experience, WWF and partners have supported *conversatorio* processes in four other areas in Colombia. These have built strong community capacity for participation and negotiation and promoted collective action. In 2006 and 2007 three *conversatorio* processes in the Guiza river of the Pacific piedmont of southwestern Colombia (Nariño), the Ubate and Suarez rivers in the northeastern Andes (Municipality of Fúquene, Cundinamarca) and the Coello River basin in Tolima, focused on resource management in river basin ecosystems. A slightly truncated *conversatorio* process to strengthen the governance capacity of the Wounaan people of the Pacific coast of the Lower San Juan River began in 2007. In each case, local organisations worked together with WWF, ASDES and consultants to build capacity for strong negotiations and between10 to 15 key actors agreed and signed commitments for sustainable and equitable natural resource and ecosystem management.

Distinct issues, actors and needs have emerged in each area. However, commonalities indicate key elements in the *conversatorio* approach. These key elements differ significantly from traditional, state-oriented approaches to conservation. They also contribute to the broader debate about the key elements of emerging rights-based approaches.

Taking collective action

One of the central features of the *conversatorio* approach is developing awareness and capacity in marginalised groups so that they can effectively define problems and implement collective action. Sustainable and equitable resource management requires collective decision making and action. In some cases, individuals must compromise for the benefit of the larger group. Collective action is grounded in painstaking and time consuming

work to build capacity, confidence and trust, and to create conditions that encourage sharing of different interests and perspectives, and co-creation of knowledge and agendas. The *conversatorio* process, which begins with a focus on rights over use of natural resources, includes exercises to explore these issues. The *conversatorio* event itself then allows the common agenda forged by communities to be translated into a blueprint for action, in the form of agreements and monitoring plans.

Starting with local perspectives

The *conversatorio* process starts with local community rights holders, and their perspectives on natural resource problems. The process engages local organisations to help analyse key issues, capacity and other relevant needs. Duty bearers are engaged in the process of dialogue and negotiation, to promote commitments to resolve locally identified needs. Voice and empowerment are at the heart of the approach.

Dealing with power relations

Processes for dealing with *asymmetries of power* are also fundamental to the *conversatorio* approach. The need to negotiate power relations is the reason for both the long and involved preparatory phase, and the complexity of proposed changes that emerge. The process brings in all the actors who influence the sustainability of natural resource use, and seeks to develop plans that recognise the multiple uses and values of natural resources or ecosystems. The great challenge is to create spaces where power relations between different interests and groups can, to some extent, be neutralised, or at least recognised and compensated for.

An event like the *conversatorio*, where agreements are made and signed, could easily exclude or bypass the interests of the poorest and most marginalised. The types of language used, the connections and relationships between actors, even the timings and locations, usually exclude the less powerful. In an effort to counter these power dynamics, the *conversatorio* event is shaped and directed by traditionally less powerful actors, as rights holders of natural resources. The empowerment of traditionally marginalised sectors of the community, while in no way even or comprehensive, is a key outcome of the *conversatorio* process.

Creating shared knowledge

Another key element of the *conversatorio* is action learning. This gives legitimacy and weight to local knowledge about the ecology, so that it can

be shared and integrated with scientific, or expert, knowledge and research. Action learning encourages decision-making processes on sustainable resource management to take account of different types of knowledge.

In Nariño, for example, working closely with community groups led many of those involved to gain a new respect for the depth and value of local and popular knowledge. Several stories circulate about *piangueras* holding their own with experts, whether in workshops or on the radio, in terms of knowledge about the *piangua* and the environment. Several of the consultants and professional organisations involved talked about how their attitudes to, and relationships with, communities had changed.

One example is the case of the Instituto de Investigaciones Marinas y Costeras (INVEMAR), a national marine research institute that conducted research with the *piangueras* on the breeding cycle and potential for conservation of the *piangua*. This led to greater awareness and commitment amongst the *piangueras*, to the practice of leaving smaller *piangua* and only collecting the larger ones that no longer reproduce. Based on the positive experience of co-research with communities who live and work in the ecosystem, INVEMAR created their own 'knowledge dialogue'.

A systems approach

The *conversatorio* process has also entailed a shift in roles—of WWF Colombia in this case—from manager or 'owner' of a project to facilitator and catalyst of a process. This means building capacity, providing information and training, and facilitating networking. It means bringing different actors together and preparing them to work collaboratively. It means creating links that build positive relationships, alternatives and solutions. The wide scope makes the role of WWF Colombia difficult to explain or quantify, especially in a context where institutions commonly work independently. The evolution of the role of WWF from project owner to facilitator requires adjustments in expectations and attitudes within the organisation, and also in the way projects are planned and implemented. As a systemic approach, the type of conservation demonstrated through the *conversatorio* and other rights-based approaches cannot be neatly fenced into discrete 'projects'. Clear outputs and targets cannot be defined at the outset because the *conversatorio* is a process, not an activity or project. The changes brought about by the *conversatorio* are inevitably less predictable than those brought about by projects but, because the *conversatorio* evolves and embraces the unanticipated, the changes are potentially more creative, appropriate and sustainable.

Reflections on change: how can we begin to understand the difference that the *conversatorio* has made?

While many people will judge the success of the *conversatorio* by the number of agreements signed and completed, this is only part of the story. Just as the process is not easily demarcated, the changes or the causes of change cannot be understood in a neat and linear fashion. As a process that promotes the protection and realisation of community rights and addresses power imbalances between rights holders and duty bearers, the *conversatorio*, and WWF Colombia's work more broadly, is fundamentally about social change.

In order to better understand these processes of social change and the broader range of changes emerging from the *conversatorio*, WWF-UK facilitated a participatory process of observation and analysis, referred to as *Reflections on Change* (see Beardon 2008).[6] This encouraged critical reflection and analysed the complexity of change processes. A wide range of participants involved in the Nariño *conversatorio* process took part, including community members, local authorities and local organisations, research institutions, WWF staff and others. The changes that are emerging are complex.

Claiming rights

The effect of capacity building on the personal confidence and capacity of *piangueras* and community leaders could be clearly seen and heard. They talked about 'freeing their words', learning to relate to people and to explain themselves. The women themselves, the community council leaders and the local institutions recognised that more empowered negotiation and mobilisation comes from having a stronger voice.

> Through the *conversatorio* process (the piangueras) began to see they had rights, that the state had an obligation to them. They became more alive, more critical, losing the conformism they had before. They began to feel important and useful to society (Lidoro Hurtado Quiñónez, Community Council leader).

People involved in the *Reflections on Change* process explained how learning to express themselves has changed their outlook as well as opening up opportunities and possibilities—both within the household and within the community. People with the interest, time or energy to do so have been inspired by the *conversatorio* to engage more directly and constructively with those in power.

Community members in Nariño collecting resources from the mangrove forests (Photo by Hannah Beardon/WWF UK)

New community leaders have been emerging across the region. Their skills in constructive negotiation enable them to continue achieving positive change for their communities. For example, Carmelo Castillo was able to confront the district government over plans for a school in his village. The proposed school would have been too small for the children it was to serve, would have had no toilets, and would have been built of materials inappropriate for the environment. With the confidence, skills and knowledge he had gained through the *conversatorio*, not least the knowledge of the roles and responsibilities of government, he was able to get the plans changed to meet the needs of the community. Mercedes Urrieta spoke of how she had previously been embarrassed to talk to people she did not know. She has taken advantage of the learning opportunities provided by the *conversatorio* process and now knows how to fight and get things done. Building community leadership, bringing about changes in power relations and decision-making processes, is an important part of the *conversatorio* process and the sustainability of the approach.

Asserting responsibilities

Through the *conversatorio*, members of the association of *piangua* collectors (ASCONAR) became increasingly aware of the value of natural resources and their roles and responsibilities as resource managers. A specific example

is greater recognition of the need to protect and preserve the smaller *piangua* through minimum capture sizes and reforestation and rotation schemes. Mercedes Urrieta, a member of the *piangua* collectors association in Salahonda, noted that, 'Those of us who have learned to be aware of the situation don't mind missing a day here or there. I think that what we are doing, control of the *piangua*, is helping ensure that the product doesn't run out. Otherwise what are our children going to eat when they are big? Will they even know what a *piangua* tastes like?' Silvana Espinosa, from INVEMAR, noted that the mangrove conservation awareness and commitment of the groups who participated in the *conversatorio* is notable even by international standards. At a recent regional meeting on mangroves in Ecuador, which she attended with a representative from ASCONAR, she noted that the Colombian experience of mangrove conservation was very different to experiences in other countries. Unlike other countries, in Colombia the community owns the process, looks for solutions and alternatives themselves, and research is up to date.

But there are *pianguera* who do not take part in this collective process. As Carmen Julia Palacios, President of ASCONAR, put it, 'There are a lot of people walking around like a loose wheel who don't pay any attention to the rules.' While the *pianguera* organisations are clear that they wish to recruit more members and increase representation, they are aware that while people who do not belong to any association, are not represented and are not accountable continue to collect *piangua*, their efforts to improve management of the resource will be undermined. Gerardo Arteaga from Corponariño agreed, 'Others don't think the same; they extract without thinking. They are not part of any process, they are a threat.'

In subsequent *conversatorio* processes, support for development of inclusive, community-based political leadership has become stronger. Fabio Londoño, of ASDES, together with WWF Colombia, is currently looking at how to promote collaboration among the various municipalities that work with communities in the same ecosystem. However, insecure rights continue to affect local governance. One example is displacement, which brings people who have immediate needs but little awareness of local social norms or organisations into an area, causing disruption.

Influencing duty bearers

Participants in the *Reflections on Change* analysis talked about the positive influence on their personal lives, as well as on communication and mutual understanding between local people and state resource management agencies about their respective rights and responsibilities. However, analysis of wider changes, to the mangrove forest and the community, for

example, showed wide variations. Realisation of rights relies on duty bearers recognising and responding to the demands and claims. Asymmetrical power relations and weaknesses in governance make the capacity building and rights-based approach of the *conversatorio* necessary, but also limit the potential for impact. The impact can be seen as ripples of change, with the most notable, strong and sustainable evidence of impact felt at the personal and community levels, weakening in the broader context as external factors influence more strongly.

Some contexts seem to be more favourable than others for change within communities to generate broader effects. For example, in one of the mangrove areas there has been little change due to the influence of powerful commercial and government players who are not susceptible to pressure or influence from community groups. Some of the problems were linked to armed groups in and around the area, operating outside the law and having no incentive or desire to engage with the local communities. The biggest difference that emerged was between rural areas, where communities have strong organisations to manage their own lands, and urban areas where there was little solidarity beyond small groups and governance was remote. Communities living within a national park had the park authority as an ally in conserving the natural resources on which they relied. However, other factors, including the orientation and personality of local mayors and leaders, also made a difference in how far strengthening capacities in communities translated into influence on duty bearer institutions, equitable and sustainable management of natural resources and socialisation of new types of awareness and behaviours.

> The process opened doors and spaces for a working dynamic which can be very strong, but you need alliances with policy makers, a good mayor who will stick his neck out. (Ignacio Guerrero, Chonapi)

Conclusions: Lessons for rights-based approaches to conservation

Community rights and livelihoods are an essential part of equitable and sustainable natural resource management. However, positive change is difficult to achieve unless communities are empowered to act collectively, are aware of their legal rights and responsibilities and have the information and confidence they need to interact with duty bearing institutions. The *conversatorio* is an innovative methodology for empowering communities to participate actively and effectively in the governance of natural resources. Participants learn to use legal tools to hold authorities accountable—to provide information, listen to complaints, fulfil their obligations and

comply with their responsibilities. At the same time, they learn more about their ecosystems and develop a shared vision of problems and potential solutions. Through the process, communities and government entities learn to take concrete action to protect rights and the environment.

As noted in the introduction, the *conversatorio* was not explicitly conceived as a rights-based approach to conservation, but shares much in common with this approach. Lessons from the *conversatorio* process that are likely to be relevant to rights-based approaches (RBAs) include the following:

- The starting point of an RBA to conservation is local people, their rights and relationships to natural resources and their identified needs. Voice and empowerment are at the heart of promoting change through an RBA. Understanding people's problems, knowledge, capacity to contribute to change and leadership are critical dimensions of this. Building the knowledge, relationships and the ability of rights holding groups to engage in dialogue and decision making around natural resources requires considerable investment of time and resources.
- Focusing on the rights of a particular group of people is an important entry point for dialogue. However strong engagement with all relevant rights holders and duty bearers is also required to ensure adequate response and change at the systemic, as opposed to the local and individual, levels. Experience in Colombia shows that 'ripples of change' generated locally become weaker as they move further away. Change requires that duty bearers are responsive. However, responsiveness may be constrained by lack of capacity, differences in interests and/or structures that limit the ability to respond. One lesson from this experience, therefore, is to focus increased attention on the actions and capacities of duty bearers, and the structures through which they operate.
- Legal and governance contexts greatly influence RBA strategies and outcomes. In Colombia, the Constitution provided the necessary political space and legitimacy for the *conversatorio* process to thrive, but significant political pressures and governance weaknesses remain. The *conversatorio* experience indicates that RBAs may be strengthened by linking local strategies with advocacy to address national and international policy and institutional issues. Local empowerment and higher-level advocacy can be mutually supportive.
- RBAs entail changes in the roles and obligations of implementing institutions. As processes rather than projects, RBAs have implications for conservation planning, monitoring and evaluation. Conservation planning needs to be flexible and allow objectives and strategies to adapt to the agendas and perspectives of community rights holders, and to social processes as they evolve. Similarly, monitoring and evaluation must take into account social change. By focusing on changes defined

by the participants themselves, the *Reflections on Change* methodology offers a potentially valuable tool for monitoring and evaluation of rights-based approaches.

- Given the scale of the environmental challenges, and the likely impacts of climate change, *environmental justice* approaches are already central to sustaining conservation outcomes, and will become even more so.

Endnotes

1 This chapter is adapted from Beardon *et al.* 2008. The authors would also like to acknowledge contributions from Sandra Valenzuela, Mike Morris, Hannah Williams, Carmen Candelo and Ana María Roldán.

2 WWF's work on *conversatorios* in Colombia, and the *Reflections on Change* study are funded by DFID and WWF-UK as part of their Partnership Programme Agreement. WWF Colombia is in the process of developing a guidance manual for those interested in learning more about the *conversatorio* approach and specific methods used. More information is available from Carmen Candelo (WWF Colombia), Hannah Beardon and Hannah Williams (WWF-UK, hcwilliams@wwf.org.uk).

3 The Political Constitution of Colombia, promulgated in 1991, and better known as the Constitution of 1991 and more recently as the Constitution of Rights, is the current governing document of the Republic of Colombia. It replaced the Constitution of 1886.

4 Article 79 establishes that every person has the right to enjoy a healthy environment and that the law will guarantee a community's participation in decisions that may affect it. It also recognises the duty of the state to protect the integrity and diversity of the environment, and to conserve areas of special ecological importance. Concerning citizens' duties and obligations, the Constitution (Article 95) provides for the obligation to protect the country's cultural and natural resources and watch over the conservation of a healthy environment. Provision 72 places the cultural patrimony of the nation under state protection and recognises the special rights of indigenous people.

5 For example, the *conversatorio* for integrated management of the Coello River basin included the following themes: conservation/protection; availability/treatment; use/transformation; and community organisation.

6 Beardon (2008) documents a participatory process of observation and analysis, called *Reflections on Change,* of the first *conversatorio* undertaken by WWF Colombia. WWF-UK are currently pulling together good

practices from the *Reflections on Change* methodology for those who may wish to learn more about how to capture and analyse change from the perspective of programme stakeholders. More information is available from Kate Studd (WWF-UK) and Mike Morris (WWF-UK).

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4

Enhancing rights and local level accountability in water management in the Middle East:

Conceptual framework and case studies from Palestine and Jordan

Peter Laban, Fidaa Haddad and Buthaina Mizyed

Introduction

This chapter explores rights and accountability in local water resource management. Non-governmental organisations (NGOs) and government agencies have important roles and responsibilities in creating an environment in which people can both exercise their rights to water and assume accountability for management of water. Anyone who exercises rights to a natural resource, be it water, land or forest, must also assume a degree of accountability for the management of that resource. Rights-based approaches (RBAs) explore conditions under which rights can be asserted and local level accountability assumed. An analytical framework is proposed within a broader RBA framework. Answers to the research questions raised in this framework can contribute to policies to ensure people's rights can be fulfilled (especially those of underprivileged groups) and to ensure that people can assume their share of accountability for the use of water resources. The analytical framework builds on earlier work in community forestry in West Africa (Laban 1994) and on its further elaboration in the Euro-Med Participatory Water Resources Scenarios

A Qabatya women's association, established after discussions about water rights and responsibilities, helped to increase women's access to water. (Photo by Buthaina Mizyed)

(EMPOWERS) programme (Laban 2007). The EMPOWERS programme was a stakeholder led participatory water planning and management programme carried out in three countries of the Middle East (between 2003 and 2007). It was funded by the European Commission and implemented by CARE International and 14 other partners. We present two cases studies, one from Jordan and one from Palestine, which draw on the experience gained in the EMPOWERS programme and use the analytical framework discussed in this chapter.

Accountability in local water governance

Accountability in a complex 'decision making in conflict' system

The management of natural resources is a long-term, complex, multistakeholder process in which many players at different levels have to assume responsibilities and accountabilities to others (Röling and Engel

1991). Accountability is used here in the sense of taking responsibility for one's own behaviour and actions, and at the same time being able to account for the effects of such behaviour and actions on others (Laban 1994, 2005). Natural resource management can be seen as a system composed of two interacting decision-making sub-systems: a 'horizontal' natural resource use system and a 'vertical' human activity system. The horizontal system may be described as the complex interaction between land, water, vegetation and their users within a given geographical space and given timeframe, taking into account downstream and upstream effects. The vertical system may be described as a complex network of actors at different levels, from households to governments. All of these actors have their own roles, rights and responsibilities and sometimes conflicting interests in natural resource management. These two interacting systems could be described as 'decision-making-in-conflict' (Laban 1994). Such a system certainly also applies to the governance and management of water resources, the focus of this chapter. Each level (element of the system) will interact with other levels. Through their activities, actors influence and interfere with the very conditions they are taking into account when decisions are being made (Röling and Engel 1991). The outcomes of such interactions can be either positive or negative, depending upon their effect on the sustainability of water resource management. Systems-oriented research explores the degree of accountability that different actors at various levels have to assume in order to sustain local water governance activities (Laban 1994). This chapter explores the concept of accountability, and particularly what it means in terms of water rights and responsibilities at the grass root levels of the vertical system, such as local communities, local households and their organisations. Following this conceptual reflection, two cases, from Jordan and Palestine, describe how obstacles to ensuring rights and local accountability can be analysed and possibly overcome using the research framework described in this chapter.

Accountability at grass root levels

Accountability has to be defined at all levels in discussions on how sustainable management of natural resources can be supported. This is especially the case for water use and management. In this chapter, emphasis is given to the accountability of local people and institutions, to themselves and their community, for sustainable water use and management. However, raising the issue of local level accountability is certainly not a call to shift responsibilities away from government agencies and NGOs. On the contrary, rights-based approaches stress the need for government and NGOs to be accountable and responsible to their target groups, so that local people can exercise their rights and assume their own accountability for water resource management within their local settings (Laban 2007).

The importance of considering local accountabilities stems in part from the unfortunate failure of many development projects over the past 30 to 40 years. Although these projects may have been efficient in achieving the expected physical results in the short-term, in many cases long-term results, sustainability and even the effectiveness of specific projects have been poor (Laban 2003). Long-term and sustainable effects of water sector interventions depend, for an important part, on the sense of ownership and the degree of accountability that local people assume for resource management and use in their community (Laban 2003). In many cases, local people will not assume such accountability because they do not feel that the activity and/or its results are really theirs (ownership). Rather they are something provided temporarily by an outside institution (an NGO or a government agency) that does not meet their real priorities or longer-term interests. Many water infrastructure and service delivery projects in the past have suffered from these shortcomings. In many situations, the degree to which local people are able to assume accountability for resource management is subject to the knowledge, rights, claim-making power and benefits they can secure from that management. Local level accountability has to be seen as a long-term goal rather than a prerequisite for a development programme or an investment in the water sector.

Potential impact of rights-based approaches

Potential and pitfalls of RBAs

The focus on local level accountability can be considered part of the wider framework of RBAs. RBAs can bring about and sustain efficient water resource management through good governance, empowerment, equitable access to water and knowledge, local level accountability and end-user involvement in shared management (Laban 2007). RBAs, thus, may have considerable potential to make local water management more effective in all countries, including the countries of the Middle East and North Africa. While RBAs are thought by some to be new jargon or, 'old wine in a new bottle', they focus on rights that have had little attention until recently. RBAs place a greater emphasis on the rights of local people than other approaches. This makes them the latest in a sequence of development approaches that have tried to capture what really makes development efforts meaningful for people in local communities. While each approach focuses on a different aspect of participatory and development thinking, all belong to a family of participatory approaches where the interests of

local people are placed in the foreground. This has been greatly enhanced by 'farmers first' (Chambers *et al.* 1989) and the further development of participatory rapid appraisal (PRA), which translates much of the thinking of Chambers and others into practical tools. These new ideas, developed in the 1980s, made it clear that farmers have much to tell, and that their opinions and knowledge count as much as those of researchers and rural extension workers. The work of Chambers and others has been followed up with, among others, innovative thinking on Farmer Participatory Research and Participatory Technology Development (ILEIA 1989, Van Veldhuizen *et al.* 1997). These ideas have been given further recognition by the general acceptance of concepts, such as 'sustainable development' (Gips 1986) and 'sustainable livelihoods' (DFID 1999–2005). The interests and priorities of local people can often be advanced if explicit attention is given to the rights they have to pursue those interests and priorities, be it in terms of land, natural resources or more fundamental needs, such as education, health and the future of children. This also applies to water as a key resource for the livelihood of every household. Indeed, access to water can be considered to be a basic human right (see UN CESCR Committee General Comment No. 15). In short, RBAs are about empowerment, partnerships, accountability, rights and responsibilities and sustainability.

In advocating RBAs, a number of pitfalls have to be avoided. In most of the discourse on RBAs, the issue of rights is considered at a rather generic level. Do we consider 'securing rights' as a general development concept or concern, or do we focus on specific rights (for example, to water) for specific target groups? Also, discussion of responsibilities and accountability is often restricted to those of government agencies, NGOs and other decision makers to make sure that local people can exercise the rights they have. The analysis of accountability at grass root levels as discussed in this chapter is left out. While accountability of government agencies and NGOs is indeed critical to create an enabling environment for local people to act (Laban 2007), this chapter argues that accountability at the local level is also important to sustain natural resource management.

Emphasising local level accountability of individuals and community groups may well be important for another reason. The current discourse on formal, individual rights may have unexpected negative effects, especially for informal, customary, or collective rights. As in the case of forest resources, there may be many different customary rights related to the use and management of water resources that are not recognised by formal (statutory) laws (Okoth-Ogendo 1991). Current liberalisation policies place the individual at the centre of development processes. But the promotion of formal individual rights and ongoing privatisation tend to benefit the better educated and richer households, which may have unexpected and undesired effects, for example the marginalisation of women and other

underprivileged groups (Ahlers 2005). Thus, where RBAs intend to provide a framework for social justice, complex, endogenous, socio-cultural relationships have to be carefully considered. If not, new policies and approaches, even RBAs, may end up dismantling community protection and solidarity, and control over the management of water resources (Ahlers 2005). Enhancing internal accountability of local community groups for water resource management may then become crucial to balance individual rights and internal solidarity, with external influences.

Accountability and rights analysis in RBA

Grass roots accountability for local water management and water rights are important issues to be dealt with in RBAs. Their analysis should, intrinsically, be part of RBAs. As for rights to water, they can be considered an important precondition for grass roots accountability and ownership of local water resource management practices. Box 1 shows essential rights that need to be considered.

RBAs in practice in the MENA region

There are very few case studies and examples of projects in the Middle East and North Africa (MENA) region where RBAs are applied or where genuine participatory and long-term community approaches are practiced. Even though participatory rapid appraisal (PRA) has been practiced in other parts of the world since the 1980s, it was introduced to Egypt and other countries in the MENA region only in the mid 1990s (Zakaria and Laban 1997). Even today, NGOs in most countries in MENA use PRA as a kind of pro forma needs assessment, primarily in an extractive way (getting information by and for outsiders). Much of this is due to an institutional and

Box 1. Important rights for management of water and other natural resources

- Right to accessible and transparent information
- Right to assemble, voice and claim
- Right to freedom from all forms of discrimination
- Right to adequate water
  - Collective community rights
  - Individual customary rights
  - Individual formal/statutory rights

Adequate water specified by:

- Availability
- Access (physical and economic) and control
- Quality and quantity
- Affordability (price)
- Acceptability (of technology and interventions)

development context that is heavily influenced by weak decentralisation, a critical lack of civil society involvement in planning and decision making and fragmented responsibilities among many government agencies and other players. Intermediate level government staff and end users are usually confronted with top-down implementation of instructions, little autonomy, almost nonexistent planning and intermittent communication. This is compounded by limited capacity for social interactions and an overemphasis on troubleshooting and complaints management. In addition, the specific needs for good quality drinking and irrigation water, and the water rights of poor communities and women, are largely ignored (Laban 2007). As mentioned earlier, government agencies and NGOs have important roles and responsibilities. They are accountable to civil society for creating an environment that encourages local people and institutions to fulfil their rights to access water and assume accountability for water management.

An analytical framework to support rights and responsibilities in water management

To provide further insight into the issues outlined above, this section focuses on two research questions, questions which were also used in the two case studies:

- What are the reasons why people can or cannot realise their rights to water?
- What are the reasons why people can or cannot assume accountability for the management of water resources?

To address these questions we propose a simple analytical framework, illustrated in Figure 1, in which rights, claim-making power, benefits and capacities are preconditions for people to assume accountability for the management of their natural resources (Laban 1994, 2007). Understanding the degree to which the 'preconditions' shown in Figure 1 are in place, and why or why not that is the case, helps uncover the restrictions people face in assuming accountability. The analysis of such 'preconditions' shows the importance of:

- existing economic and other (non-material) benefits;
- appropriate awareness, knowledge, skills and capacities;
- guaranteed rights to water (quality, quantity, access and control); and
- power to make a claim and leadership.

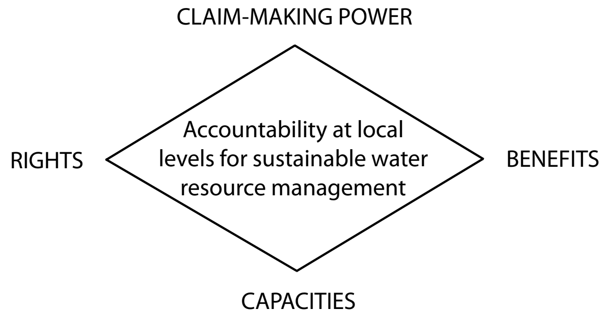


Figure 1. Preconditions for local communities to assume accountability for sustainable water resource management (Laban 2007)

Based on experience with many other development projects focusing on natural resource management (Chandy *et al.* 1993, Gueye and Laban 1994, Laban 2003), the analysis of preconditions implies that ownership of, and as a consequence accountability for, natural resource management will only be assumed by individuals or local groups when they:

- perceive the benefits;
- have access and control over the resources;
- have relevant knowledge and capacities;
- have the organisational strength to act collectively on their capacities; and
- have the power to claim and ensure that their benefits and rights can be fulfilled or maintained (claim-making power).

Table 1 gives guidelines for participatory assessment of the extent to which the above mentioned preconditions are in place, and how those conditions can be fulfilled. The guidelines may be considered as key questions that need to be elaborated in action research, as demonstrated in the case studies. In seeking answers to the questions it is important to recognise differences and inequalities between genders in interests, priorities, rights and access to water, and the different degrees to which men and women are able to assume accountability. Experience over the last ten years has shown that the participation of both genders does not necessarily lead to gender equality. Moreover, granting formal rights will not necessarily lead to gender balanced water security. Water rights are complex, contextually diverse and historically dynamic (Ahlers 2005). Reducing access to, and control over, water to an individual and universally defined entitlement can endanger people's security over water, rather than safeguard it. Furthermore, it may seriously undermine sustainable use (Ahlers 2005).

Table 1. Guidelines for participatory analysis of accountability and rights in local water resource management

Basic information for planning

a. identify the different **water user categories** in a community with regard to direct physical availability of, and access to, water, (in)formal rights, water quality and cultural acceptability of technology;

b. uncover which water user categories can be considered **underprivileged** in terms of access rights, quality, quantity, etc.; this will probably also give clues about other dimensions of social, cultural, or economic differentiation within the community;

c. ask each water user category about the actual local mechanisms in place that enhance or restrict access to water by underprivileged water user categories;

d. ask each water user category who they currently consider to have rights to water, why they have them, and who holds these opinions;

e. question each (or at least the underprivileged) water user categories about their direct **priorities** and what local/immediate solutions they see to achieving such priorities (possibly as part of a longer-term strategy/vision).

Light participatory analysis

f. ask water user categories what **benefits** (material/non-material) they expect from actual and proposed water resource management interventions (irrigation, drinking water, sanitation);

g. ask water user categories what **knowledge** and capacities they do or do not have to implement and manage actual and proposed water resource management interventions;

h. ask water user categories what effective formal and/or informal **rights** they have to access water resources in the community or to benefit from actual and proposed water resource management interventions;

i. ask water user categories how they can or cannot influence community leaders and other influential persons/institutions (**claim-making power**), within or outside their community, to acquire the necessary knowledge and capacities to manage; to get a greater share of benefits; and to realise their rights and access with regard to actual and proposed water resource management interventions (in other words, what are the power relations in their community that positively or negatively affect their share of quality water?);

j. analyse, on the basis of the answers to the above questions, the most important constraints to water users feeling **accountable** for, and taking **ownership** of, a specific water intervention that is in their interest;

k. explore with different water user categories options to overcome identified restrictions on ownership and accountability (technological, socio-economic, institutional, legal and political);

l. explore, at institutional levels outside the community, what can be done to overcome the restrictions on ownership, accountability and rights realisation (cultural, socio-economic, institutional, political) of the targeted water user categories that have been found.

In-depth participatory analysis

m. explore, through more in-depth research, the underlying causes of the situations revealed by the answers to the questions as formulated under f) to k);

n. explore, through more in-depth analysis, what differences/inequalities may exist between the genders in terms of benefits, rights, knowledge and claim-making power;

o. explore what negative effects the formalisation of individual rights may have on access and security to water for women and other underprivileged groups.

The questions in Table 1 need to differentiate between socio-economic groups by identifying different water user categories. The water user categories are not necessarily organised groups. In the practice of PRA, it is often difficult to differentiate directly by poverty/wealth categories, for example, wealth ranking tools. People in local communities may find it difficult or embarrassing to classify others and themselves in such categories and the result is often imprecise. Poverty or wealth depends on subtle factors that cannot easily be captured in strictly defined categories.

Different levels of study and analysis can and perhaps have to be applied. In many situations, time and resources will be insufficient for answering the kinds of questions posed in Table 1, and may not even be necessary for planning basic water resource management interventions. However, they may be necessary to identify the underlying causes of marginalisation of specific water user categories. For practical reasons we distinguish between 'lighter' and more 'in-depth' participatory analysis. Where emphasis is given to effective participatory planning and RBAs, answers to questions such as those in Table 1, at least those labelled 'light participatory analysis', are crucial. Questions labelled as 'in-depth' participatory analysis explore the underlying causes of poverty for women and underprivileged groups further.

Basic participatory planning and 'lighter research' typically rely on simple PRA inspired tools. For understanding the priorities of water user categories, and the solutions they put forward for achieving them, problem trees and problem and priority ranking have proven effective in many cases (Zakaria and Laban 1997, Diop and Laban 1998). The EMPOWERS programme elaborated these approaches further, building tools for visioning and scenario building into a participatory water planning cycle (Moriarty *et al.* 2005). The *Planning Guide to Local Water Governance* (Moriarty *et al.* 2007) provides many practical tools. Tools for 'light participatory analysis' have also been explored in other work (Laban 2003, 2005), and are further elaborated in the case studies. For more in-depth participatory analyses, appropriate RBA tools have also been developed by CARE, such as the *Benefit-Harm Tool* and *Causal-Responsibility-Analysis Tool* (CARE UK 2005).

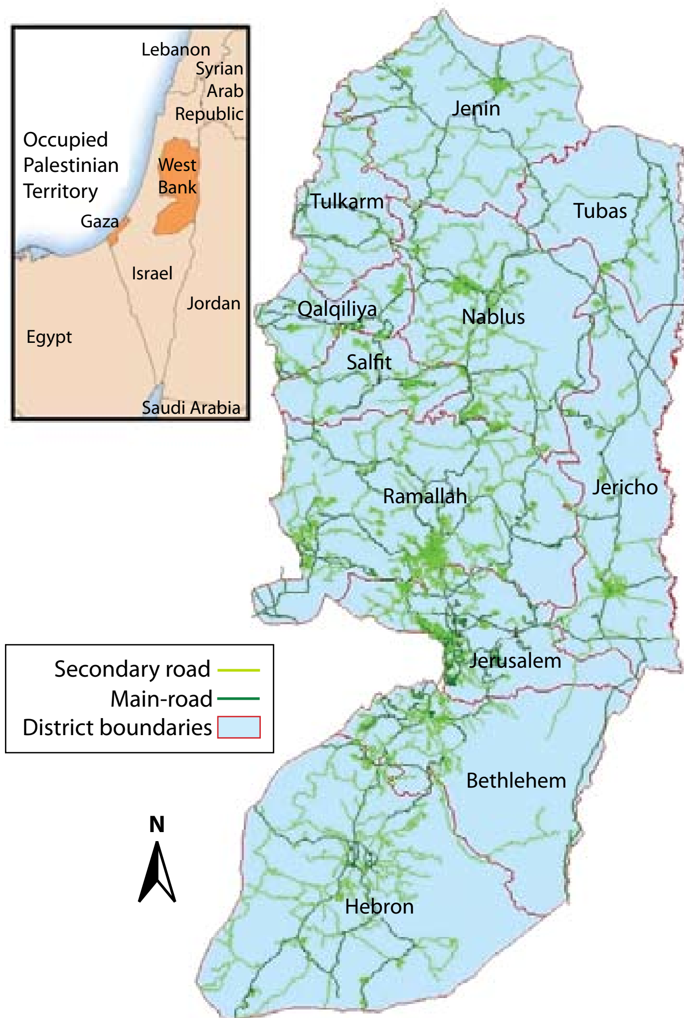
The analytical framework for exploring the extent to which people can realise their rights to water, assume accountability and take ownership for water resource management was used in most of the 20 villages in the EMPOWERS programme. The experiences in two of these villages are described in the case studies.

Case study 1. Enhancing water management ownership in Kufrdan Village, Palestine

(Adapted from Mizyed *et al*. 2007)

Background

Kufrdan is located about 6 km west of Jenin City, Palestine (see Map 1). All land within the village is designated either 'Category A' (controlled by the Palestinian Authority) or 'Category B' (control shared by the Palestinian



Map 1. The West Bank
Source: Palestinian Water Authority

Authority and Israel) according to the land division resolution of the 1993 Oslo Accord. The population was about 5265 (1000 families) in 2005 (Palestinian Central Bureau of Statistics). According to wealth rankings established by the Village Council and other community stakeholders, about 10% of the population is considered extremely poor, 30% poor, 40% average income and 20% well off.[1]

The total land area of Kufrdan Village is about 720 ha, 350 ha of which is flat irrigated cropland. The rest is unirrigated olive trees (about 260 ha), uncultivated land (about 50 ha), and village infrastructure (about 60 ha). In the past, village livelihoods relied primarily on jobs in agriculture and government, and in the Israeli domestic sector. Now, the current political situation and continuous area closures block access to jobs and agriculture is the main source of income for villagers, whether they own or rent land. Villagers depend mainly on three water sources: groundwater-agricultural wells, cisterns (rain water collection systems) and a spring-fed water pipeline managed by the Joint Services Council (JSC) for Jenin Western Villages for Water and Wastewater.

Analysis methodology

Kufrdan was one of the six villages in Jenin, Palestine, participating in the EMPOWERS programme. A rapid participatory assessment analysed the water resources situation and identified problems and solutions. Stakeholders participated in the assessment, using the Resources, Infrastructure, Demand and Access (RIDA) framework. RIDA is a simple framework that links water supply infrastructure and institutions to people's demands, and helps to structure collection and analysis of information (Moriaty *et al.* 2008, p. 79).

An assessment team consisting of the core project staff, representatives of official partner institutions (the Ministry of Local Government, the Ministry of Agriculture, the Palestine Water Authority, and the Environmental Quality Agency) and community stakeholder representatives (representatives of all community-based organisations in the village) led the process. During an initial planning meeting the team discussed the data collection and analysis methods, and in subsequent field visits interviewed the following actors:

- Village Council (president and two members of the council).
- A charitable organisation (president and several female staff).
- Agricultural cooperative (president and administrative staff).
- Schools (directors, teachers and students in four schools).
- Workshops (owners of a local stone cutting factory).

Irrigated lands in Kufrdan Village, with rows to be planted covered in plastic to reduce evaporation and weed growth. (Photo by Buthaina Mizyed)

- Women's Centre (president and administrative staff).
- Joint Services Council (JSC) (council director).
- Randomly selected farmers, citizens and well owners.

Results were analysed and discussed within the assessment team, and then again in a workshop with representatives of official partner institutions and village residents, to identify and address information gaps and complete the analysis.

Water-related problems

According to the problem analysis, visualised in a problem tree with the participation of village stakeholders and government organisation representatives, the main problems included the following:

- Inconsistent water availability from JSC Water Network: 20% of citizens receive no JSC water services, and many Kufrdan residents complain about constant water cuts and lack of information regarding pumping times.
- Increasing price of water provided by the JSC network: the price of water provided by the JSC network has increased dramatically and is now more than four times the price per unit of water purchased from agricultural wells.

Stakeholders meeting to discuss collected data and identify information gaps from the participatory analysis in Kufrdan. (Photo by Buthaina Mizyed)

- Seasonal overuse of well water: agricultural wells in the village draw from the shallow aquifers of the Jenin Formation. In summer, water is often over-pumped, resulting in sand and soil being pulled into the water. This decreases water quality, damages irrigation pipes and pumping tools, and increases farmers' operating costs.
- Pollution: lack of a proper sewage system or cesspits to absorb sewage water in the village makes it difficult to treat or dispose of sewage water. This increases groundwater pollution risks, and other sanitation and public health risks in the village.

Rights and accountability in managing water resources

Despite the reasonable availability of water in Kufrdan Village, particular social groups often face difficulties in securing physical and economic access to water. Finding solutions to these challenges is an important first step in enhancing the management of water resources. Following the methodology described above, people's knowledge, benefits, rights, claim-making power and leadership qualities were analysed in order to understand differences in access to water and responsibilities for water management.

Knowledge and Skills

Water resources management requires information, and technical and financial skills. In Kufrdan, relatively few stakeholders have such knowledge and skills. Lack of information exacerbates communication problems, especially regarding the performance and finances of the JSC. Most Kufrdan residents, including Village Council members, believe that the JSC makes a lot of profit as they sell water for much more than they buy it. Most village residents are not aware that high pumping costs, overhead costs and other technical costs have to be taken into account. In general, only JSC technicians understand how the water network works. Most villagers avoid using the network whenever possible.

Most farmers use new irrigation techniques, particularly drip irrigation. They have a great deal of knowledge of groundwater and substantial skills in digging wells. However, well owners and farmers have problems maintaining wells because low groundwater levels in summer damage wells and because the spare parts they use are poor quality. Moreover, rather than calling on JSC technical specialists to fix pumps when they go wrong, well owners typically ask neighbouring villages.

Benefits

Agricultural well owners, farmers, the JSC and the villagers are the main beneficiaries of the use and sale of village water resources. Farmers who own wells are the greatest beneficiaries as they can irrigate their land and produce high value crops, and can also sell surplus water to other farmers or domestic users. At the same time, the number of groundwater wells has increased in recent years. This has created competition and reduced unit prices for well water to a level far below the JSC water network unit price. The amount of water purchased from farmers' wells was 245 189 m^3 in 2005 (based on a field survey and analysis by the EMPOWERS programme team; Mizyed *et al*, 2007).

The political situation in Jenin makes it difficult for farmers to realise some of the indirect potential economic benefits of access to water. More frequent curfews, area closures and other barriers imposed by the Israeli occupation make it difficult to move produce and maintain access to product markets. Farmers make a loss due to frequent closures of Jenin and lack of access to external markets. The Village Council estimates losses of at least US $ 3 million since the April 2002 Israeli invasion of Jenin, the refugee camps and neighbouring cities. Losses also arise from damage to the water network, irrigation systems and agricultural crops inflicted by the Israeli military. In some cases, farmers are prevented from accessing their own farms. All the village sub-groups (water user categories) suffer these barriers

and losses; they all face intimidation and the oppressive impacts of curfews and military occupation.

Rights and access to water

Kufrdan is somewhat unique among Palestinian villages in terms of water access, control and costs because the village has ample physical water resources. Agricultural well water is abundant and the surplus is sold to the JSC. Many villagers have options: they can buy water from the JSC network, buy water from agricultural wells and/or draw on household cisterns. However, for the poorest households, and for farmers who do not own land, water in Kufrdan is still often economically inaccessible.

Many families who used to buy water from the JSC network have now opted to buy water directly from agricultural wells. It is mostly the poorest households in the village that continue to use JSC water services. While private wells require immediate financing, and upfront costs for cisterns are high, payment of JSC bills can be delayed. Many poorer families using JSC services delay payment, some for over a year. When debts accumulate, the JSC sometimes reduces the supply, or cuts it altogether in the case of long-term nonpayment. Whereas in principle all families have a right to water access, that right is often severely limited because they cannot afford to pay even though water services are physically available to them.

Farmers who have agricultural wells on land they own (about 30% of 700 farmer families) typically have secure access to sufficient agricultural water. They can often use surplus water for domestic needs and/or sell it to JSC and other villagers. Farmers who rent land and buy water from wells have far less secure access as they depend on land owners and well owners.

Claim-making power and leadership

Eighteen of the 24 farmers who belong to the Agricultural Cooperative are well owners. Most small agricultural projects are conducted through the cooperative for members. The farmers who own wells and are members of the cooperative, already have the most secure access to water. They also have more influence on the decisions that affect their lives (claim-making power) through the cooperative and other avenues. Most other farmers, particularly those who do not own land or a well, do not belong to any organisation or active agricultural groups. Their avenues for claiming their rights to access water are therefore very limited.

More generally, it is difficult for citizens and farmers to effectively claim access to water from the relevant institutions (for example, the JSC). The

Interview with a family in Kufrdan. (Photo by Buthaina Mizyed)

institutions are weak and lack the capacity to coordinate or lead water sector management. Water resources development and management is based on the individual initiatives of citizens and farmers.

Case conclusions

While there are sufficient water resources in Kufrdan, the management and governance of water in the village makes water economically inaccessible to many, particularly the poorest households and farmers who do not own land. Most water user groups do not trust the JSC, and JSC fails to provide water sector leadership although it was designed to do so. Management of water is largely left to farmers and other individuals. In the absence of leadership by the JSC and Village Council, most power, rights and benefits are in the hands of the land owning and well owning farmer families (about 20%). In this situation, the interests of those who have most to gain influence water management, rather than needs of the community as a whole.

The analysis of rights, benefits, knowledge and claim-making power has helped both the village residents and the support institutions (the JSC and Village Council) to better understand the water management issues. It has, at the same time, empowered them to take their fate into their own hands, and increased the sense of ownership and responsibility for the water sector. This increased awareness has been important in identifying a number of small projects to solve some of the identified problems, and in contributing to the shared vision developed to improve the water situation.

Case study 2. Enhancing ownership for water management in Rweha Village, Jordan

Rweha Village is located about 38 km west of the Balqa Governorate, in the Dir Alla District of the Jordan Valley. In 2005 the Rweha population was nearly 3500 and will likely exceed 4000 by 2012 (Haddad and Alaween 2004). This will increase demand on already overexploited water resources. Most families in Rweha depend on the drinking water network, but 5% of households have no connection. Most of the villagers' incomes and livelihoods are based on agriculture. Agriculture, in turn, depends on the Jordan Valley Authority to supply irrigation water from the King Abdullah Canal. Villagers in the lowest national income range constitute 40% of the community. These families lack capital to invest in new water efficient technology, such as drip irrigation for the farm or garden, or water harvesting storage tanks for the house. There was little cooperation between water users, and no organised village society or voluntary schemes for water management (Haddad *et al.* 2005).

The Jordan Valley landscape (Photo by Rania Al Zoubi)

Analysis

Village groups conducted exercises to understand how the various water problems are related to one another. Many underprivileged community members participated actively. Participants developed a common feeling about the importance of improving conditions and tackled gaps in access to water. From the results of these exercises, participants drew up 'problem trees' mapping the causes and effects of water problems across the village.

The excercises helped government officials obtain a realistic and close-up view of the situation. Officials took immediate measures to solve some problems, such as rehabilitating local water resources and canals, especially for farmers far from the government irrigation pumping point, to enhance irrigation efficiency. They also provided technical support for some households to construct concrete reservoirs for harvesting and storing irrigation water. Village residents and government officials also analysed local water stakeholders to develop a better understanding of the roles and services of various government departments. This established a good basis for planning (Al-Zoubi 2006).

As was done in Kufrdan, Palestine (Case Study 1), an accountability/rights analysis was undertaken as part of the broader PRA. Facilitators identified water user groups, and their different roles and usages, using an adapted version of the analytical framework and the questions in Table 1. In the analysis, rights, knowledge, benefits and claim-making power in relation to water resources management were explored. In a particpatory process, the groups used the information to see whether the conditions were in place for people to assume accountability and claim their rights to water management (Haddad 2007).

Participants used a 'Rapid Appraisal for Agricultural Knowledge System' tool (Engel and Salomon 1997) to understand the level of knowledge of different water user categories. The community then analysed the degree to which rights are secured and accountability for water resource management is taken by each category, taking gender into account.

In the first year, the community confirmed that water is probably their most vital natural resource. This realisation motivated the people of Rweha to establish a cooperative society—a local water management committee—to serve the community and enhance village residents' awareness and capacity. The water management committee worked with community leaders and local government officials to develop a strategic plan for local water resources using the EMPOWERS programme approach. This involved taking stakeholders through a structured process of problem identification, visioning, strategy development, project identification and implementation.

Their pilot projects have been implemented, the most successful being the creation of the committee itself. They have prepared other project proposals based on their vision for water in Rweha, which illustrates their increased capacity and power to claim their rights.

Case conclusions

Establishing the water management committee enabled programme participants in Rweha to address the rights and interests of others in their community. Raising public awareness on environmental issues, water resources management and other related subjects helped create the opportunity for the community to consider themselves as part of both the problem and the solution. People became more aware of water policies and regulations through lectures and awareness programmes conducted by the Ministry of Water and Irrigation and the Ministry of Agriculture, and by various development agencies and projects. These programmes had a positive effect on reducing illegal water use. Village residents are also more careful about using water as a result of programmes that raised awareness of the need to optimise water use in farming, to harvest water, and to grow less thirsty plants and crops.

At the same time, the local community introduced ideas that could enhance their living standards and add value to their wellbeing. Women have started thinking about ways to solve their water related problems, including how to increase their access to, and influence on, authorities so that they can help their families. As the EMPOWERS programme progressed, some young women gradually began participating in the meetings. They became more self confident in sharing their views and participating in the discussions. One of the active women summarised the achievements in Rweha in a speech to a Regional Middle East Forum on water resources management: 'Through our experience we demonstrated that local development institutions and local community members of different groups are able to participate in the development of their communities and the management of their water resources'.

Lessons learned from this case include the following:

- To create a sustainable system of integrated water resource management, it is important to understand the differences between water user categories and between men and women, and target action appropriately.
- While a participatory analysis process such as that described here is instrumental in realising rights to water, it also contributes to people feeling greater ownership and taking more responsibility for water resource management.

An active local participant in Rweha water management (Photo by Rania Al Zoubi)

- The sustainability of specific water resource management measures in communities is at risk when those directly concerned are not involved and feel no ownership over the resource and/or the way it is used and managed.
- It takes much time and effort to change intermediate level government actors' attitudes towards working with local communities. Local community groups have, however, used the opportunities provided through the EMPOWERS programme to strengthen and organise themselves vis-à-vis local authorities in a very short time.
- Inspiration and suitable leadership, rather than top-down directives, are the ways to make change happen.

Conclusions

These two case studies, the experience of the EMPOWERS programme and earlier works (Gueye and Laban 1994, Laban 1994, 2003) illustrate the following:

- The emphasis on rights and local accountability adds a new and necessary dimension to sustainable community development and RBAs.

This chapter asserts that there is no sustainable development without explicit attention to these two issues, which essentially have to do with dignity and respect, as well as with physical and economic access to quality water as a human right.

- Local accountability and rights analysis, as proposed here, can serve several purposes:
  - Dealing with complex informal responsibility and ownership;
  - Protecting informal rights to water, especially when formal rights and neoliberal pricing of water become a challenge;
  - Strengthening the solidarity of underprivileged groups;
  - Facilitating upstream-downstream interaction among multiple water users;
  - Ensuring ownership, impact and sustainability for water use and management activities beyond the (project/government) intervention;
  - understanding the issues that may hamper people in claiming their water rights and in assuming accountability for local water resource management;
  - identifying priority actions for NGOs and local government agencies in their development programmes;
  - determining the most effective focus for advocacy programmes; and
  - monitoring the progress made in terms of better access to water and higher levels of accountability for local water resource management.
- Strengthening participatory and rights-based planning processes, such as those in the EMPOWERS programme, seems to be important to ensure that underprivileged groups have a 'seat at the water table'.
- Good local water governance requires:
  - decentralisation and empowerment of end users in local communities;
  - partnerships between a wide array of stakeholders from government agencies to local community-based organisations;
  - overcoming social exclusion by ensuring rights and access to water for all end users;
  - ensuring accountability and promoting responsibilities at all relevant levels; and
  - giving strong emphasis to the institutional, policy and other modalities that will ensure sustainability.

This chapter outlines a pragmatic way to identify and substantiate issues important for overcoming barriers to fulfilling the rights of underprivileged groups, and to enabling end users in local communities to assume accountability for good water resource management. It is important to provide financial and other support for such participatory analysis. The development of a large number of case studies to substantiate the relevance and effects of such approaches is urgently needed in order to better advocate for these approaches with decision makers in government and funding agencies. The two case studies provided here, are just a start.

Endnotes

1 For wealth/poverty ranking no reliable information was available from the Central Bureau of Statistics. The four poverty groups were established in discussions with the Village Council and other community stakeholders. The two main criteria used were level of income and family expenditure.

- Extremely poor: income less than US $ 300 per month;
- Poor: income between US $ 300 and US $ 500 per month;
- Average income: families with members who are government or NGO employees with fixed income between US $ 500 to US $ 1000 per month;
- Wealthy: well and land owners, quarry owners and traders with incomes that exceed US $ 1000 per month.

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5 Conservation and human rights in the context of native title in Australia

Lisa M. Strelein and Jessica K. Weir

Introduction

Native title is the common law recognition of rights that Australia's Aboriginal and Torres Strait Islander peoples hold in relation to their country. In this chapter we examine the complexities of native title to highlight what the human rights approach offers to conservation and where there are limitations. Prior to recognition of native title there were a handful of joint management arrangements for conservation areas that were leased by government on land tenures owned by Aboriginal people. These joint management arrangements were not as explicitly grounded in human rights norms as native title rights. They were partly a response to the land rights movement and partly arranged to give mining companies access to mineral deposits.

The Gunditjmara celebrate the Federal Court recognition of their native title rights and interests, 30 March 2007 (Photo by Jessica Weir)

Conservation encounters human rights

Conservation areas are specifically designed to protect and conserve ecological habitats. They are areas where certain human economic activities are regulated or prohibited to protect the ecology. Unfortunately, this protectionist approach has often had negative consequences for social justice. Protection has often excluded the people who formerly lived in or near protected areas, and criminalised formerly legal livelihood activities (Forum 1998). Campaigns to save 'nature' do not address the complex and intertwined issues of ecological and social justice and indeed have, at times, perpetuated injustice (Langton *et al.* 2005, p. 32-33, Campese *et al.* 2007). Conservation is not value-neutral; rather, it is shaped by historical, political, cultural and socio-economic issues, and is subject to exercises in power between different interest groups. For example, conceptualising ecological relationships as separate and external to humans builds on distinctly western knowledge tradition (Braun 2002).

Human rights frameworks bring a critical perspective to conservation projects. With a human rights approach, people are returned to the heart of the project, and marginalised or excluded peoples have a better chance for inclusion in projects where resource constraints set priorities. Further, with the increased participation of people with vested interests in the process,

the outcomes of conservation projects are likely to be more supported, and thus more sustainable. With meaningful involvement, the people who live with or next to protected areas will have more ownership over the success of the conservation objectives (HREOC 2008).

However, human rights frameworks are also not above criticism and bring their own assumptions and restrictions to conservation. Human rights principles can go to the other extreme of protected area thinking—by focussing on humans and paying insufficient attention to ecological life and relationships. For example, traditional owners from the Murray River in Australia have criticised UN approaches to protecting human rights to water, because these approaches have focused on the importance of water in terms of human needs only, denying the agency and life of water on its own terms (Weir 2008). Whilst human rights frameworks are a counterpoint to the human-free framework of conservation, and are thus fertile ground for dialogue, there continue to be complex issues about how ecological relationships are perceived by human rights frameworks. These issues need to be addressed as part of working towards more ethical ecological relationships, including positioning humanity within those relationships. Indeed, the current rate of ecological destruction demands that conservation discourses undertake a much more rigorous self-examination than offered by human rights.

With the increasing recognition of indigenous people's rights, a key issue to tackle is the casting of indigenous people as people without economic agency or needs. This is how indigenous people are cast in 'wilderness' thinking (Braun 2002). Green advocates who portray indigenous people as ecological saviours filter out those aspects that do not suit their arguments for conservation (Lohmann 1993). They endow indigenous people with values that are antithetical to capitalist or market economies. The influence of this powerful ideology on the recognition of native title rights and interests is clear (as discussed below). This ideology denies indigenous people the resources they require for self-determination. Including indigenous people in conservation projects on such unjust terms is not an exercise in respecting their human rights.

Recognising that conservation is not value-neutral is an important part of developing ethical conservation practices. Unfortunately, rather than protect nature, the separationist thinking that underlies the 'protected area' concept has underwritten a rationalist and utilitarian approach to land (Forum 1998, Kinnane 2002, p.24). Our responses to ecological devastation need to move beyond separating nature into definable 'people-free' spaces, and seeing nature only in human terms of consumption—whether for conservation or development. Instead of separating people from land what we need to do is to focus on the relationships upon which

all life depends. With that priority established we can then consider how to sustain our economies whilst supporting our ecologies. We need to be able to acknowledge these life-sustaining connections before we can build such a decision-making framework.

One of the critical concepts we need to clarify in the debate on conservation and human rights is 'country'. In Australia, Aboriginal peoples' understandings of 'country' have been described as a 'nourishing terrain' that both gives and receives life, and is lived in and lived with (Rose 1996). 'Country' is profoundly important to traditional owners, who are the people who have inherited 'country' from their ancestors and ancestral beings, whether their 'country' is formally recognised or not in Australian courts and parliaments. 'Country' embodies the innate ties between particular people, land, law and language (Rose 1996, Kinnane 2002, Smith 2005). This place-based knowledge system is often characterised as 'holistic' knowledge, and is a knowledge system that focuses on relationships rather than separations (Weir 2008).

In the following sections we will discuss how human rights frameworks lead to the recognition of indigenous peoples' rights in Australia as 'native title'. The recognition of native title partly addresses the brutal abuse of indigenous peoples' rights in the last 220 years. However, native title continues to enforce discriminatory frameworks that undermine indigenous peoples' rights and responsibilities to their lands.

Human rights underpin the recognition of native title

From the time the British asserted sovereignty over the continent now known as Australia, the indigenous people were dispossessed of their sovereignty, their rights to property, as well as deprived of most of their fundamental human rights and freedoms. The complexity of this history, including attempts by the British colonial office to protect certain rights and inclusions in legislation to allow traditional access, hunting or fishing, is explored in the writing of Henry Reynolds (1992). The Australian Constitution was drafted to specifically allow discrimination against indigenous peoples (Strelein and Dodson 2001). Legislation was introduced in most states, often called 'protection acts', to restrict the freedom of movement and association of indigenous people. Some examples are: *Aborigines Protection 1886* (WA), *Protection of Aborigines and restriction on the sale of opium act 1897* (Qld), and *Aborigines Protection 1909* (NSW), among others.[1]

This complex history of aggression, accretion, resistance, accommodation and resilience is beyond the scope of this paper. In brief, the repercussions of historic violence and policies reverberate through continued racism among the general populace, institutionalised discrimination and systemic disadvantage. Contemporary policies of reconciliation, both through symbolic and practical measures (Behrendt 2002, p. 43-58), have attempted to overcome this marginalisation, but remain a long-term project within Australian nation building. The loss of land has been a central issue in this debate.

Australia has very few fundamental rights or freedoms enshrined in constitutional forms, short of just compensation for the deprivation of property, the freedoms of religion and trade, and freedom of exchange between states (*Constitution* ss. 51(xxxi), 117, and 118). The High Court has also implied a right to political participation in provisions relating to elections. Primarily, however, the Commonwealth Constitution focuses on the powers of the Commonwealth government and how legislative responsibilities are distributed within the federal system. Rights are expected to be protected by the institutionalisation of democratic government and the separation of powers (Williams 1999). However, the foundations of the Australian Constitution are undoubtedly racially discriminatory, in particular against indigenous people (Strelein and Dodson 2001, Williams 2001).

In response to changing international standards for the recognition and protection of human rights, the federal government has introduced legislation against discrimination, including racial discrimination and sex discrimination acts. The Federal Government has the power to make laws that implement international treaties and conventions pursuant to the external affairs power (section 51(xxix)). This power has also been used to introduce legislation for environmental protection: *Commonwealth v Tasmania* (1996) 158 CLR 1.

However, even after the passing of the *Racial Discrimination Act* in 1975 (RDA), indigenous peoples did not make extensive use of the protections available and there was never any comprehensive bill of rights enacted to implement Australia's obligations under international human rights in domestic law. It is only in recent years that state governments within Australia have begun to experiment with statutory bills of rights (*Human Rights Act 2004* (Australian Capital Territory); *Charter of Human Rights and Responsibilities Act 2006* (Victoria)). However, the rights literacy of the Australian polity is not well developed (Behrendt 2002).

The former Australian Government opposed the UN Declaration on the Rights of Indigenous Peoples based on misplaced concerns that this would

require greater recognition of indigenous peoples' rights under domestic law, although stakeholder consultations were underway in 2008 regarding this policy stance.

Against this backdrop, the decision of the High Court of Australia in 1992 in the case of *Mabo v Queensland (No 2)* was groundbreaking.[2] The case was brought by representatives of the Meriam people of the Torres Strait seeking the recognition and protection of their rights to their traditional lands. The court recognised indigenous peoples' customary property rights and interests under Australian law for the first time. This decision has had a fundamental and lasting impact on Australia's conception of itself by legitimising two centuries of claims that indigenous people had made against the state for recognition of their rights and status.

The decision in the *Mabo* case was grounded in the framework of international human rights norms and standards. The High Court was explicit:

> It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands (*Mabo v Queensland (No 2)*, 42, Brennan J).

The decision was premised upon the principles of equality before the law and non-discrimination, one of the central tenets of the United Nations human rights framework (*Mabo v Queensland (No 2)*, 42, Justice Brennan). The conception of equality that the High Court relied upon was not one of individual equality, but of equality as peoples, recognising that the laws and customs of indigenous peoples are equally deserving of respect as a source of authority.

The *Mabo* decision moved Australian law towards a theory of inherent indigenous rights, whereby the rights of indigenous peoples are recognised by virtue of their status as distinct peoples whose existence as a constitutional entity predates the colonial state and distinguishes them from any mere minority (Boldt and Long 1988, Macklem 1993). Justice Brennan explained that '[n]ative title, though recognised by the common law is not an institution of the common law' (*Mabo v Queensland (No 2)*, 59). According to Justice Brennan (in common with his colleagues):

> Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs (*Mabo v Queensland (No 2)*, 58; 87-88 Deane and Gaudron JJ).

Despite this acknowledgement of indigenous peoples' law and custom as a source of rights, the jurisprudence of native title has struggled to come to terms with the idea of an alternative, pre-existing and continuing source of law and authority. The *Yorta Yorta v Victoria* case in 2002 was a harsh reality check on the capacity of native title to provide land justice for the majority of indigenous peoples in Australia. In that case the Yorta Yorta people were perceived as having suffered a 'substantial interruption' to their acknowledgement of law and custom so that their current identity as a society could not be considered 'traditional' in the sense required by native title law. The High Court sought to explain that, while proof of the continued vitality of the systems of laws and customs was required, the new sovereign could admit no alternative source of law other than itself after the assertion of sovereignty by the British (*Yorta Yorta v Victoria* 2002, [44]). This creates a somewhat constrained and ambiguous right that does not fully reconcile the colonial state and indigenous peoples as constitutional entities.

Trying to understand native title law

After *Mabo*, native title enjoyed only a brief period of development within the common law of Australia, with legislative intervention quickly following in the form of the *Native Title Act 1993* (Commonwealth) (NTA). It is the NTA that now determines the nature and extent of native title (*Commonwealth v Yarmirr* 2001 [7], *Yorta Yorta v Victoria* 2002 [32], *Western Australia v Ward* 2002, [16]). Native title can be determined by the courts through the hearing of evidence (litigated determination), or can be settled by agreement among the parties and approved by the courts (consent determination).

In order to establish that native title exists, indigenous peoples must prove the elements listed under section 223(1) of the NTA. The courts have established extraordinary standards of proof, attaching significance to each of the elements. The group must demonstrate that they are indeed the same society that existed at the time sovereignty was asserted and that by the laws and customs of that society they have a connection to land. They must prove that they have acknowledged laws and customs, generation by generation, that give rise to the rights asserted. The laws and customs may have adapted and changed, but not 'unacceptably' so (*Bodney v Bennell*, 2008).

The way the requirements of proof have been framed by the courts invites a reading of indigenous peoples' history as 'un-economic'. By requiring the tracing of rights and interests to pre-sovereignty laws and customs, the

courts have refused to recognise general economic rights emerging out of exclusive possession or the utilisation of available resources using available technology. This is reinforced by a tendency to view indigenous peoples' relationship with 'country' as 'primarily a spiritual affair' (*Western Australia v Ward* 2002, [14], Gleeson CJ, Gaudron, Gummow and Hayne JJ).

The Courts have failed to accept the right of native title holders to commercially utilise their native title rights for individual or community economic development. These economic uses are not seen by the courts as a natural extension of the recognition of native title. The commercial aspects of resource use are often presumed to be excluded, and the courts have preferred to limit native title rights to subsistence and ceremonial use. Only rarely has there been an overt reference to economic rights in the description of the extent of native title. One example is *Kaurareg People v State of Queensland* [2001] FCA 657 (23 May 2001), which recognised the right to use and enjoy the Determination Area and the Natural Resources of the Determination Area for social, cultural, economic, religious, spiritual, traditional and customary purposes, including to: (i) hunt, fish and gather; (ii) exercise and carry out economic activities on the Determination Area including to grow, produce and harvest; and (iii) engage in trade in relation to the Natural Resources of the Determination Area; see also *Masig v State of Queensland* [2000] FCA 1067 (7 July 2000). The NTA further limits the economic power of native title holders by limiting their rights to negotiate access and use, rather than recognising their ownership of the resources on their lands.

While recognising that native title may exist, the High Court also found that the Crown has the power to 'extinguish' native title unilaterally (that is, without consent). This may be done by legislation or by executive act, demonstrating a clear and plain intention to extinguish indigenous peoples' rights, or by implication by the grant of private rights in the land or public uses that are inconsistent with the continued enjoyment of native title (*Mabo v Queensland (No 2)*, 68, Brennan J). The High Court also argued that because native title was said not to have its source in the Crown it does not enjoy the same protection as a grant from the Crown and is therefore extinguished wherever there is a necessary inconsistency. Extraordinarily, the Court in *Mabo* held that compensation was not available for the unilateral and involuntary extinguishment of native title, even under the Constitutional guarantee of just terms. The argument was made that the past extinguishment of native title may be wrongful, but it was not illegal in Australia prior to the passing of the RDA in 1975. Through the process of 'recognition' and 'protection', native title has entered a hierarchy of interests, and the High Court has made it clear that native title is positioned at the lowest point in the scale (*Fejo v Northern Territory* 1998).

The NTA engages with the discriminatory treatment of native title under the doctrine of extinguishment. On the one hand, the 1993 act sought to provide a framework for future dealings with indigenous peoples' lands (the 'future act regime') and made it unlawful to undertake any act that would affect native title rights and interests without going through the procedures outlined in the NTA. The NTA also made it unnecessary to extinguish native title in order to undertake some acts, and it is also possible to ignore prior extinguishing acts in relation to land currently occupied by indigenous people (sections 47A and 47B). On the other hand, the NTA also validated non-indigenous titles and interests that might have been invalid. The government suspended the operation of the RDA for this purpose. In 1998, further titles and interests were validated and rights to negotiate under the future act regime were reduced. The 1998 amendments were strongly criticised by United Nations Committee on the Elimination of all forms of Racial Discrimination, but their comments were rejected by the government of the day (Strelein *et al.* 2001).

Where there are no extinguishing acts, native title most often translates into a right of exclusive possession, including the right to control access and determine the use of the land and its resources (*Western Australia v Ward* 2002). Where extinguishment has occurred, by the grant of other interests or uses, native title rights and interests can be taken away in a piecemeal fashion. Significantly for the protection of indigenous rights, the High Court, in the *Wik* people's case, established the important principle of coexistence (*Wik v Queensland* 1996). That is, while the non-indigenous interests take precedence, native title will only be extinguished to the extent of any inconsistency. Thus, where there is a pastoral lease it is considered that the rights of native title holders to control access, or determine the use of the land generally, have been taken away, but their rights to use the resources of the land may continue to co-exist.

Despite the significant burden of proof, and oppressive doctrine of extinguishment, indigenous peoples are establishing native title claims to the satisfaction of the courts and the government. There are now 74 determinations that native title exists, comprising over 700 000 km^2. Native title has been recognised across Australia, including in town centres, with the largest land holdings recognised in remote arid Australia. The map of native title determinations (Figure 1) reveals a pattern; in the more heavily settled parts of Australia the native title determinations are small pockets of land, whilst the larger claims are in remote Australia where more Crown land is available to claim.

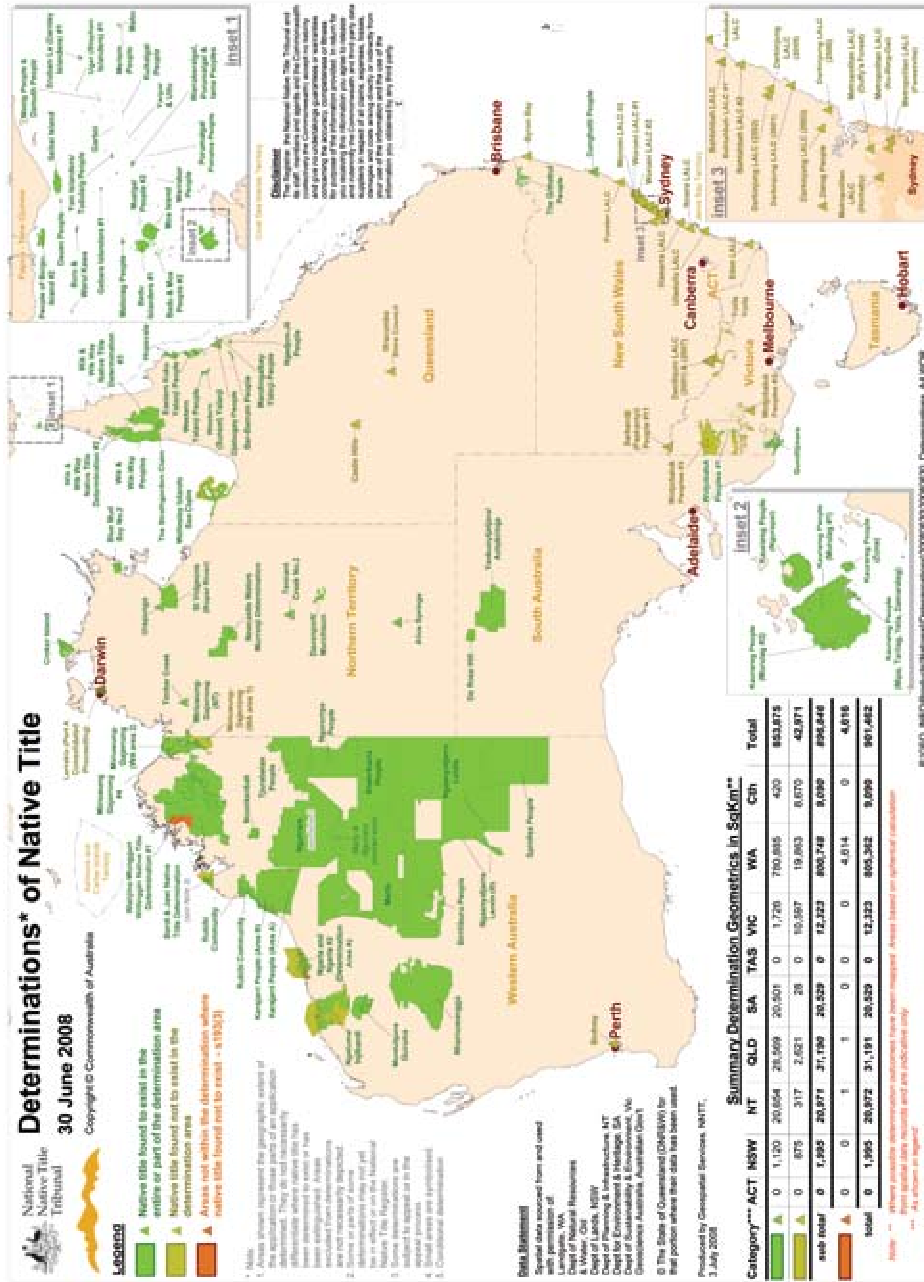

Figure 1. Map of Native Title Determinations as at 30 June 2008
Source: National Native Title Tribunal[2]

Importantly, reaching native title through agreement—consent determinations—can overcome the limitations and reach more comprehensive settlements. Consent determinations may include recognition of native title, together with supporting agreements for other land transfers, ongoing resourcing of organisations to manage the land, community development, land management, conservation and other outcomes particular to the group. These supported consent determinations, or alternative settlements, while still relatively unusual, are likely to be an emerging method of resolving native title claims.

Native title, conservation and being 'un-economic'

Given this native title framework, it is now possible to review how indigenous peoples' rights have been recognised in relation to conservation lands in Australia. Interestingly, environmental uses, regulation and the preservation of landscapes have generally been seen by the courts as consistent with the continued enjoyment of native title. This was identified in the original *Mabo* decision, as Justice Brennan said: (para 83)

> Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (for example, land set aside as a national park).

In practice, whether native title can be recognised on conservation lands has become dependent on the wording of conservation legislation in each state or territory. The *Western Australia v Ward* 2002 High Court decision addressed this question for the Miriuwung Gajerrong people whose lands span the border of Western Australia and the Northern Territory. The outcome was striking. Native title was not recognised over national parks in Western Australia because of how that land was vested. National parks legislation in the Northern Territory was regarded as fundamentally flawed and thus open to native title claims. The Northern Territory Government has subsequently entered into over thirty agreements with traditional owners whose 'country' includes national park and reserved lands.

The relationship between environmental legislation and native title has been put to the test in the High Court. In Queensland, Murrandoo Yanner relied on native title as his defence for killing a protected species, a crocodile. The High Court held that the Crown does not own wildlife, but through legislation asserts its right to manage those resources. Thus, it was found that the regulation of resource exploitation curtails the exercise of rights

rather than extinguishes them (*Yanner v Eaton* 1999). Where native title exists, s. 211 of the NTA prioritises native title rights in relation to hunting, fishing, gathering and cultural or spiritual practices for personal domestic and non-commercial needs over commercial licensing regimes. While these rights can be regulated for research, environmental and public health and safety purposes, they cannot be restricted by purely commercial or general resource management regimes.

The recognition of native title has not led to wholesale land tenure reform, but native title holders and governments have used agreements to overcome the limitations of native title, including deciding on native title through consent. Indigenous peoples across Australia have used consent determinations to lobby for joint management arrangements over national parks and/or, the return of national park lands. This flexibility has been particularly important in southeast Australia. Here, the much longer period of colonisation and more intensive settlement has greatly constrained the 'waste lands' on which native title can be recognised.

For example, in Victoria, the Government has entered into agreements with the Wimmera native title holders that include decision making over natural resource management, joint management, and employment in Parks Victoria (Mealey and Kormendy 2002). Also in Victoria, the Gunditjmara settlement includes a cooperative management agreement for Mount Eccles National Park (Victorian Government Solicitor's Office 2007). In Far North Queensland, the Eastern Yalanji settlement covers approximately 230 000 ha of land in Cape York, including World Heritage areas. Fifteen native title agreements ('Indigenous Land Use Agreements') were made with the state to recognise the Eastern Kuku Yalanji people's native title rights. Among many other matters, these agreements stipulate how native title rights will be exercised in national parks, transfer the ownership or management of reserved areas to the Eastern Kuku Yalanji people, and create new conservation areas (Queensland Government 2007).

Conservation outcomes were part of the native title negotiations held for the Miriuwung Gajerrong people's traditional lands. Their 'country' is important to the Western Australian Government, as the land is being developed for an irrigation scheme that is planned to be the largest in Australia. In exchange for the compulsory extinguishment of native title rights over the proposed development area, the native title holders were able to secure the transfer of 'freehold' title to 150 000 ha of conservation parks, with a compulsory 200 year lease back arrangement to the state government and the creation of joint management arrangements. Also included was the stipulation that over 50% of park jobs were reserved for native title holders (Strelein 2008). In addition to conservation outcomes, the settlement included funding for the corporate operations needed to

manage the settlement, and an 'Aboriginal development package' to encourage local employment and contracts for the native title holders.

These examples of 'alternative settlements' provide a valuable opportunity for native title holders to have greater management over their lands and waters, and to form strategic partnerships with conservation programmes. However, such settlements only occur in the extreme minority of native title determinations. The overall trend in the recognition of native title has been not to fund the management of native title rights and interests, once native title is recognised. In another example of strategic partnerships, indigenous peoples have increasingly turned to private or state funded conservation programmes as a way of overcoming the funding constraints of managing their native title land (Altman *et al.* 2007). Of particular note is the Federal Government's Indigenous Protected Areas programme which funds environmental reserves on land owned by indigenous people. The land remains under the management of the native title holders, whilst there is funding for looking after 'country' (such as the provision of a vehicle, money for fences, for signs, and such like) (Langton *et al.* 2005). For example, in the Paruku Indigenous Protected Area (IPA), the Tjurabalan native title group entered over 434 600 ha of their exclusively possessed native title area into the IPA to assist them in preserving an internationally significant wetland system around Paruku (Lake Gregory), south of Halls Creek in the Kimberley region of Western Australia.

The ongoing work to overcome discrimination

Native title has lead to a profound shift in the relationships between indigenous peoples and state and federal governments, but, as we have shown, it is a flawed process. The determination of native title is a point of contention between two systems of law and between indigenous rights to land and non-indigenous interests (*Wik v Queensland* 1996, 214, Kirby J, *Commonwealth v Yarmirr* 2001, 175). The institutions of federalism—including the High Court—have shown a preference for recognising non-indigenous rights at the expense of indigenous rights, rather than working with the reality of coexistence.

While the recognition of native title is fraught with difficulty and results in a flawed form of title that cannot fully encompass the expression of indigenous laws and customs on their own terms, there is an important point where indigenous peoples' aspirations for their country and non-indigenous peoples' priorities can result in a shared vision for country.

Shared commitments to sustain ecological life and respond to ecological devastation coupled with native title can provide a framework of tenures and rights that allow indigenous and non-indigenous people to jointly support ecological relationships.

However, to ensure that such a partnership does not perpetuate the subjugation of indigenous peoples' rights and knowledge of 'country', we need to return to ways of thinking that prioritise ecological relationships without penalising economic relationships. The current scale of environmental destruction must help us to examine our approaches to the Earth, including conservation (Latour 1991, Plumwood 1993). We have to find ways of living within the environment, ways that sustain the ecological systems upon which all life depends. We need to consider how an understanding of 'country' might set us on this path. Human rights focuses on people, and conservation focuses on places, but the indigenous knowledge tradition places people within their relationships with 'country' (Weir 2008). This creates a decision-making framework that includes our ecological relationships. It is a way of thinking that focuses on the life sustaining relationships within which our own agency is exercised and our own needs are met.

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Endnotes

1 For others see http://www1.aiatsis.gov.au/exhibitions/removeprotect/index.html#.

2 *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988) was an important decision laying the ground for Mabo (2).

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Where conservation and community coincide:

A human rights approach to conservation and development in the Cape Floristic Region, South Africa

Wendy Crane, Trevor Sandwith, Eleanor McGregor and Amanda Younge

Background

South Africa has only recently emerged from a colonial and apartheid history spanning four centuries of systematic, racially based land dispossession and disenfranchisement. The 1994 democratic transition heralded unprecedented change. Virtually every facet of policy and practice in the emergent democratic state was reviewed and revised. A range of international human rights and other treaties were ratified. A progressive rights-based constitution was adopted. These changes have had a marked influence on the way in which environmental and nature conservation programmes are planned and managed. South Africa was closely involved with the evolution of international norms for sustainable development following the 1992 Rio Earth Summit. It also provided global leadership, hosting the World Summit on Sustainable Development in 2002 and the 5th IUCN World Parks Congress in 2003, where both policy and practice came under international scrutiny. In parallel, the world was pursuing a powerful and inspirational global agenda demanding sound and sustainable principles for human development for the new millennium (Annan 2000).

Leading up to the 1994 democratic transition, the African National Congress developed principles for a new national environmental policy. These included: sustainable development; equitable access to resources; public participation in planning, development and management of resources; an integrated approach to environmental issues that relates to all sectors of society; and public right of access to information and the courts on issues of environmental concern (ANC 1993). Most of these principles were later included in the subtext of the Bill of Rights, which forms part of the new Constitution and specifically guarantees the right of all South Africans to a safe and healthy environment. Other constitutional rights include property rights (including secure tenure and equitable access to natural resources), and rights to human dignity, administrative justice and access to information (RSA 1996).

Clearly, not all rights can be realised simultaneously. Instead, national development programmes seek to realise rights progressively. A rights-based approach to conservation and development is fertile ground for debate in this regard, given the inherent tensions in the pursuit of the bundle of rights that the Constitution guarantees. Reconciling complex and often conflicting relationships between poverty, inequitable access to resources, and protection of environmental assets is a major challenge in South Africa. Paradigmatic attachments to 'fortress conservation' are still quite strong in some quarters. Livelihood rights of rural communities, where nature-based land uses predominate, are often seen to be at odds with conservation of biodiversity. In practice, these tensions are likely to persist as rights and

Farm dwellers in the Baviaanskloof Mega-Reserve depend on donkey carts to access their basic supplies (Photo by Wilderness Foundation South Africa)

responsibilities are exercised over time. The approaches South Africa takes to achieve equitable trade-offs and 'win-win' outcomes will be of crucial importance.

South Africa is a country of considerable biodiversity, comprising an astonishing variety of biomes including Mediterranean, arid, alpine and tropical environments (Sandwith 2002). The Cape Floristic Region, the setting of the case study below, has the most plant species of any of the world's six floral kingdoms and lies entirely in South Africa. South Africa feels strongly responsible for conserving biodiversity as a facet of the country's development. State environmental departments and conservation agencies have particularly sought to demonstrate that biodiversity conservation can be a driver for rural development, by leveraging economic and social benefits at the local level, within the prevailing constitutional and policy frameworks.

This paper considers the relationship between human rights and conservation in South Africa. For our purposes, a human rights approach means an approach that empowers people to make their own decisions, rather than to passively accept choices made on their behalf. Such an approach has strong links with good governance in that it is based on the participation of claimants and the accountability of duty bearers. We begin by contextualising the discussion of human rights and the environment in

Beekeeping is one of several activities that support livelihoods of people living in and adjacent to the Baviaanskloof Mega-Reserve Project (Photo by Wilderness Foundation South Africa)

the changing paradigm of protected areas and conservation, nationally and globally. From here, a rights-based approach emerges as a step towards more inclusive approaches in conservation. Secondly, we present a case study from the rural Eastern Cape where an impoverished community of farm dwellers is engaged in a struggle to defend their rights and entitlements in a landscape-scale conservation programme. The rights considered here are largely defined by national laws and social safeguard frameworks inspired by donors, rather than abstract notions of citizenship or even international law conventions. The case study demonstrates that laws and social standards have little meaning if rights holders and duty bearers do not know about them, or do not feel compelled to uphold them. Finally, we draw out lessons and approaches that might be relevant for rights-based conservation and development at the landscape scale anywhere in the world.

The politics of conservation—issues of power and participation

In confronting the relationship between conservation and human rights it is worth considering how fundamentally our understanding of these issues has changed in recent history. Not very long ago, issues of people, equity, participation and power sharing were not, in any meaningful way, on the conservation community's agenda (Borrini-Feyerabend *et al.* 2004). Historically, state led conservation was the exclusive domain of scientists and bureaucrats, and was driven by a mindset that excluded people from places of particular ecological value. The state-led approach paid little attention to human consequences. The extent of protected areas worldwide has quadrupled since 1980 (Brockington 2004), yet we have no precise idea of how many people have been evicted or what the social effects have been (Schmidt-Soltau 2003). More recently, the old exclusionary approach has made way for a more open and collaborative one (Borrini-Feyerabend and Sandwith 2003). In the wake of the Earth Summit in Rio, social and economic factors were increasingly seen as keys to successful conservation (Ghimire and Pimbert 1994) and conservation agencies are now taking more inclusive, people-centred approaches.

Rights and conservation in South Africa interface in a unique context. Under colonial and apartheid rule, thousands of black South Africans were forcibly removed from ancestral land to make way for game parks. Hundreds of millions of dollars were spent on preserving wildlife and wildflowers while people in 'townships' and 'homelands' went without adequate food, shelter or clean water. Racial policies prohibited black people from enjoying the country's rich natural heritage and prevented the rural poor from using

desperately needed natural resources. In short, flora and fauna were often considered more important than most of the population (McDonald 2002). After 1994, along with countless other monumental changes in policy and paradigm, the environment was redefined as the living and working space of all South Africans. Unsurprisingly, conserving biodiversity and progressively realising rights of all citizens are now expected to be mutually reinforcing.

New legislation on biodiversity conservation gives effect to the state's obligations under the new constitution and multilateral environmental agreements (see Wynberg 2002). Key international instruments to which South Africa is a party are the Convention on Biological Diversity and Agenda 21, the Convention on International Trade in Endangered Species, the UN Convention to Combat Desertification, and the UN Framework Convention on Climate Change. National legislation, such as the Protected Areas Act (2003) and the Biodiversity Act (2004), provide for community participation and benefit sharing. Delegation of power to communities through co-management and contractual parks distributes income and promotes the sustainable use of natural resources. These measures are consistent with the objectives of democratisation, participation and empowerment, and assume that the approach will help uphold the guarantees in South Africa's Bill of Rights.

Participation, however, goes beyond benefit sharing. The origins of the broader development debate on community participation go back to the early 1980s. Calls began to be heard for development practice to be less top-down and more bottom-up, and to actively engage local people's knowledge, aspirations and contributions in planning and managing development initiatives (Chambers 1983, 1997). These principles were later taken up by the conservation sector, where community participation is now widely accepted. The World Bank's 'Best Practice Note' illustrates this. The Note suggests that local communities should be actively involved in biodiversity conservation projects (World Bank 1994). However, as the concept of community participation gained currency, practice varied widely. Practices ranged from manipulative and passive, for example where involvement meant project planners asked communities to 'tick the box', to self-mobilisation where local people took the initiative largely independent of external actors (Pretty 1995).

Concepts of participation are further complicated by disparities in power. Not everyone in a community has the same influence or access to a participatory process, and the degree of access influences outcomes (Few 2000). There are also power differences between local communities and conservation agencies (state and NGOs). Communities around many conservation areas are rural and the rural poor tend to be politically

weak and poorly organised—they can be ignored more easily than their urban counterparts. This is especially true for pastoral minorities whose relatively weak social structures make them less able to resist and to mount successful challenges. Even where legal rights are tested in court, the court system often does not favour poor and marginalised people (for example see Brockington 2004).

Co-management of parks where local people have strong historical links to the land is increasingly seen as a way of sharing power in conservation areas—sharing management and responsibility as opposed to token consultation and passive participation (Borrini-Feyerabend *et al.* 2004). Typically this is a partnership between community and government, although, as Berkes (2004) points out, it also often involves complex relationships with multiple parties. South Africa's legal framework provides for 'contractual' parks. A contract between landowners and the state is formally proclaimed. Landowners retain title and negotiated rights of use. While this model has been practiced with different degrees of success around the world, South Africa's version evolved from an apartheid era strategy of entering into legal agreements with politically powerful white landowners to expand national parks (Magome and Murombedzi, cited in Kepe *et al.* 2005). As long as the extremely unequal pattern of land ownership inherited from the past persists, poor landless communities will draw little or no benefit from such arrangements. Even where land reform has restored ownership rights over conservation areas to previously dispossessed communities, co-management approaches suffer from various problems, many of which stem from power issues. (Grossman and Holden 2006)

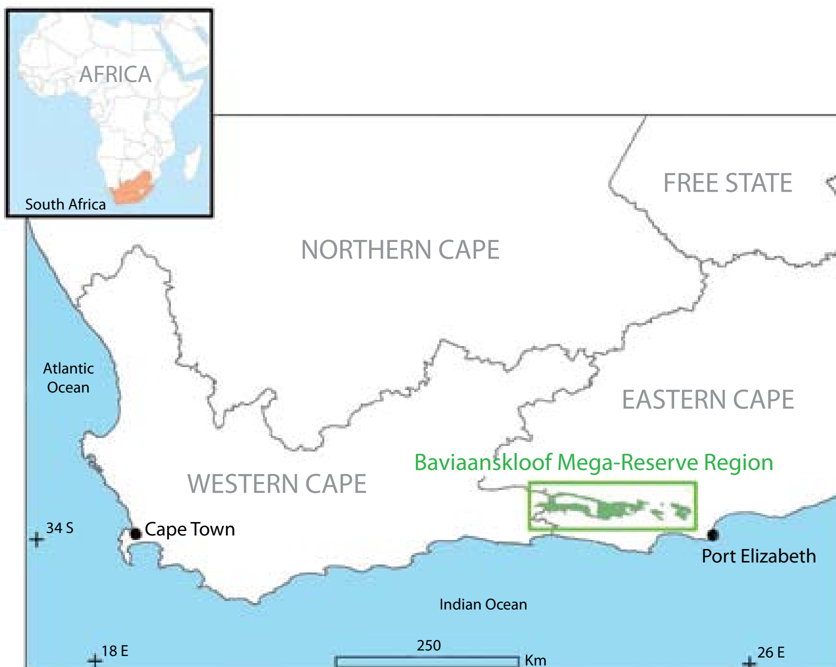
Leach *et al.* (cited in Borrini-Feyerabend *et al.* 2004) use the concept of 'environmental entitlements' to examine power issues in the context of natural resources. Entitlements here are understood as rights to manage an area or cluster of natural resources based on a socially recognised, legitimate claim to participate in its management. They are not necessarily set in law, but are often derived from a range of society-specific normative values. For Leach *et al.,* entitlements are the outcome of negotiations among social actors, and this invariably involves power relationships.

What Few, Brockington and Leach *et al.* have in common is a shared perspective of the centrality of power relations and the inherently political nature of landscape-scale conservation. They all see landscape change as profoundly political, involving dialogue, negotiations and conflicts between actors with different priorities and different degrees of power. As with so many political issues, the playing field is not level. A fundamental question is how those with less power can get a better grip on the forces affecting their lives. The case study that follows demonstrates how this can pose particular challenges in South Africa, with its extreme and deeply

entrenched inequities in power and entitlements, especially in relation to land and natural resources.

Ultimately, the politics of participatory conservation ensure that all cannot be negotiated and there will always be winners and losers, even within more inclusive approaches. However, in a conservation context where natural, social and political sciences converge, we cannot separate environmental concerns from issues of values, equity and social justice (Berkes 2004). If conservation is to hold up to the scrutiny of an environmental justice paradigm, then conservationists must tackle inequality and injustice as an integral part of their work. This requires a proactive engagement with the political, social and economic forces that cause and reinforce inequality and injustice.

The notions of power and participation are directly relevant to a rights-based approach to conservation. Around the world, popular movements and local leaders are using the human rights framework to claim social justice (IDS 2003). Human rights are rights that individuals have to claim social arrangements to guarantee their freedoms. While individuals have human rights, 'duty bearers' have the obligation to put in place the social arrangements in which rights can be upheld (Fukuda-Parr 2007).



Map 1. Baviaanskloof Mega-Reserve in the Western Region of South Africa's Eastern Cape Province (Source: Wilderness Foundation South Africa)

A rights-based approach is, therefore, in part about changing power relations to increase the capacity of both rights holders and duty bearers to realise human rights. Within this approach, the right to participation is particularly vital, as it is the entry point for realising other rights—the right to participate effectively *is* the right to claim other rights. It is for this reason that we emphasise meaningful community participation in the planning and decision-making processes of conservation programmes. The right to participate in decision making is recognised in various human rights instruments, including the Universal Declaration of Human Rights, Article 21, and the International Covenant on Civil and Political Rights, Article 25. But this right can be narrowly construed to mean participation through elected representatives. Participation is also promoted in multilateral environmental instruments. The next section offers a glimpse of how this plays itself out in practice in the Baviaanskloof, a critical, landscape-scale biodiversity corridor in the globally significant Cape Floristic Region of South Africa.

A human rights approach to conservation in practice

Background of the Baviaanskloof Mega-Reserve

Prompted by the degradation of the biological diversity of the Cape Floristic Region in South Africa (see Map 1), a Biodiversity Strategy and Action Plan for the biome was developed in 2000 (Younge 2000). Coordinated by the World Wide Fund for Nature South Africa, the planning process involved a wide range of stakeholders including government, civil society and the private sector, and was supported by the Global Environment Facility (Lochner *et al.* 2003). Based on new methods for systematic conservation planning, the result was the first scientifically determined set of priorities. The priorities coupled pattern and process targets for biodiversity conservation with considerations of current and future threats (Cowling *et al.* 2003). The plan set out responses to deal with *in-situ* conservation, including measures to address inadequacies in the legal and institutional enabling environment, and a complementary socio-economic development process. The plan recognised that targets for conservation were unlikely to be achieved by the prevailing protected areas system, especially in lowland landscapes where land use practices had reduced opportunities for conservation to highly fragmented remnants, mainly under private ownership. Apart from setting up more protected areas in priority sites, the plan proposed a broad programme of conservation stewardship involving private lands, and

centred on three landscape-scale corridors. One of these, the Baviaanskloof Mega-Reserve (BMR), is the focus of our case study. This landscape-scale conservation programme is implemented under the umbrella of the Cape Action for People and the Environment (CAPE) programme and financed by the South African government and international donors, including the Global Environment Facility, the Critical Ecosystems Partnership Fund and the Global Conservation Fund.

The Baviaanskloof ('Valley of Baboons') is a valley 75 km long of varying width and depth, which lies between two mountain ranges (the Baviaanskloof and Kouga Mountains) in the western region of Eastern Cape Province (see Map 1). The BMR covers 700 000 ha, of which 201 000 ha is state owned protected area (the Baviaanskloof Nature Reserve) while the remaining 449 000 ha comprise a mix of municipal and other state land, private farms and communal land (the Mega-Reserve Planning Domain) (Map

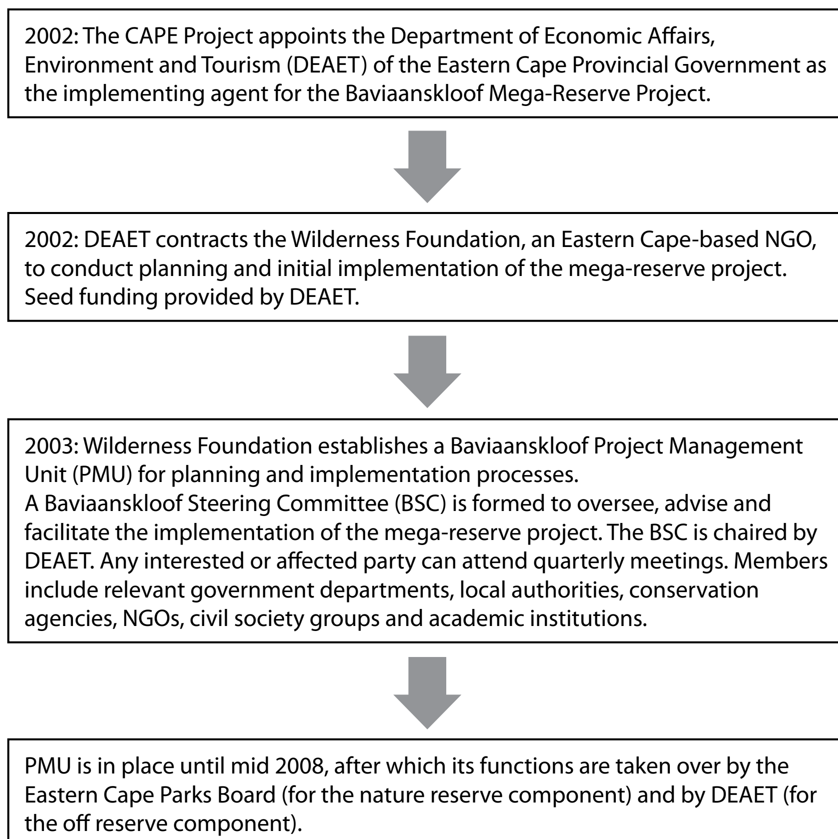
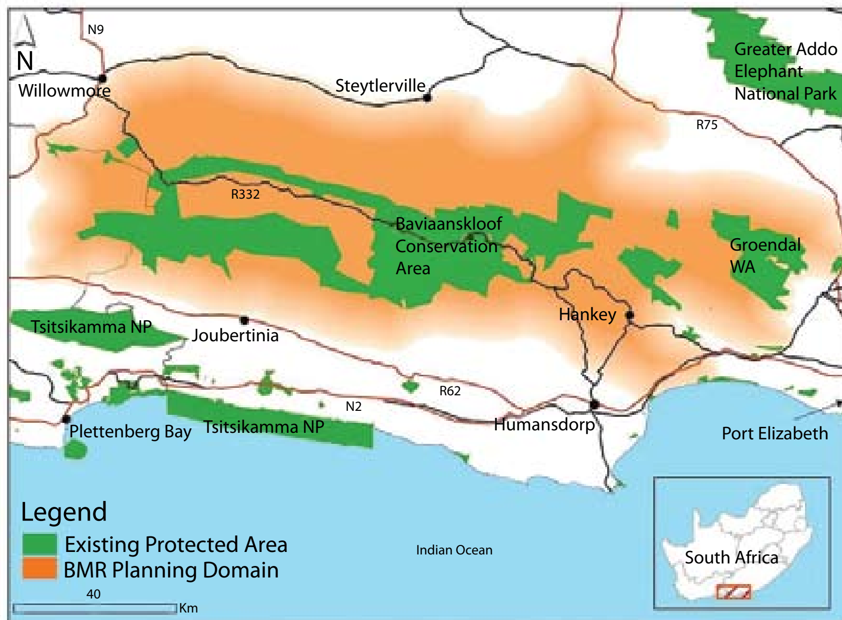


Figure 1. Institutional arrangements for the Baviaanskloof Mega-Reserve Project (Adapted from Boshoff 2005)

2). The BMR embraces a philosophy of 'keeping people on the land in living landscapes' and aspires to be a model of ecologically sustainable land management. It is conceptualised as groups of adjoining properties of various tenures and land uses, whose owners share a common vision of stopping the degradation and loss of indigenous plant and animal communities, managing their land in a cooperative and integrated way, and improving their own livelihoods (Boshoff 2005). The present BMR programme is not the first to support a vision of landscape-scale conservation in the area. Efforts to protect its ecological assets had started many years earlier.[1]



Map 2. Planning domain of the Baviaanskloof Mega-Reserve Project (Source: Wilderness Foundation South Africa)

Constituencies in the mega-reserve

Various constituencies, with a range of land tenure and property rights, can be identified when considering rights and obligations in relation to the mega-reserve project. They include the state as owner of the Baviaanskloof Nature Reserve, communities living on nearby church land, private landowners in the planning domain and farm workers and farm dwellers on white owned, commercial farms. 'Farm dwellers' here refers to farm workers as well as people who are not farm workers. Those who are not farm workers may be unemployed former employees, or dependents of workers, who continue to live on the farm largely subject to the tacit agreement of the owner. They are invariably black people, historically displaced and denied access to land by

successive laws and economic pressure. (For a useful summary of the origins of this group see Hall (2003).) The patterns of land use and ownership reflect the history of South Africa and reveal disparities in wealth, power and influence among the racial groups. Black farm dwellers are the most vulnerable people in the community.[2] Across South Africa, an estimated three million farm dwellers live on mostly white owned, agricultural land (SSA 2004). They are among the most impoverished and marginalised people in the country—most have very poor housing, little access to social infrastructure, above average levels of malnutrition and the lowest wages (Hall 2003). Providing the basic services to which they are constitutionally entitled presents a notorious problem for local government, as it requires interventions on private property that does not belong to them. Evictions have been rife in the past decade, and legislation designed to secure farm dwellers' tenure rights has proven difficult to enforce (Wegerif and Russell 2005).

The Coleske community in the Baviaanskloof is a case in point. This community of farm dwellers resides on land recently acquired by the state for incorporation into the nature reserve. The experiences of this community illustrate the complexity of ensuring that the rights of poor and vulnerable people are upheld in the implementation of a landscape-scale conservation programme.

The Coleske community

The Coleske farm is on the boundary of the Baviaanskloof Nature Reserve. Prior to 2001, the land was farmed commercially (see Table 1). Eight permanent workers were employed, all of whom lived on the farm with their families. Some of their dependents were frequently employed as seasonal workers. Altogether, the permanent staff members, seasonal workers and their families amounted to 120 people. This farm dweller community is typical of many South African farms—most people were born on the farm and have lived there their entire lives, often for many generations. Their relatives are buried there and they have no other place to go. Before the farm was sold in 2001, they had access to natural resources on the farm which, combined with wages, provided a basic livelihood. Their contracts made residence on the farm contingent on their employment. Rules regarding access to natural resources were included in these contracts. These rules covered such issues as the number of donkeys a person could keep, livestock, access to clay, collection of firewood and so on.

In 2001 the provincial government purchased the farm to incorporate it into the core protected area and use it as the western gateway into the nature reserve. Officials from the Department of Economic Affairs, Environment

and Tourism (DEAET) of the Eastern Cape Provincial Government met with the community, and conducted a census of the farm dwellers with a view to exploring resettlement options. The latter's scattered settlement pattern was seen by the conservation authorities to be at odds with their vision of a wilderness experience as a key tourism draw to the mega-reserve. The way the community used natural resources was also seen as contrary to the concept of a wilderness area. Discussions around resettlement left the community feeling intimidated. This in turn resulted in a popular appeal for political assistance through local channels that led the then National Minister of Environmental Affairs and Tourism to visit the community. The minister promised that they would not be worse off as a result of the land acquisition, and that they would be given jobs. On the strength of these promises the community embraced the purchase and agreed to set up a representative structure to communicate between them and DEAET through which negotiations regarding their future could take place.

This structure was never formed. Instead, 45 individuals were employed by DEAET under a state funded, poverty relief project, on monthly contracts. Two years later funding ran out and work stopped, virtually without notice. In addition, restrictions on the community's use of arable lands (for grazing) and natural resources (clay, firewood, medicinal plants) were strictly enforced. People were also prohibited from constructing new dwellings, or making additions, alterations or repairs to existing ones without permission from the conservation authority. The authority is a considerable distance away along a treacherous road across the nature reserve. Getting permission is nearly impossible as the community lacks even the most basic transport. The community's continued presence at Coleske became increasingly precarious. As a result of these developments, relations between the conservation authorities and the community became conflictual and tense.

Many Coleske residents are unwilling to leave the farm, which offers them a modicum of security, is familiar and to which they have a sense of belonging through a lifetime's association (RUC 2007). DEAET officials were not familiar with the provisions of the new Extension of Security of Tenure Act, introduced in 1997, which offers some protection to farm dwellers against arbitrary evictions and confers occupancy rights under certain conditions (RSA 1997). When the state bought the farm in 2001, contracts linked to the farm dwellers' residences on the land were not renewed for two years. This meant—in terms of the law—that the community acquired DEAET's 'tacit consent' (as landowner) to reside on the farm. This in turn resulted in the community members acquiring occupancy and tenure rights as defined by law. The 1997 national tenure legislation has been a significant factor in driving what effectively became a rights-based approach to conservation in the BMR.

Table 1. Historical timeline of developments at Coleske

Pre 2001	Coleske Farm is privately owned and operated by a farmer. 120 farm dwellers reside at Coleske.
2001	DEAET purchases Coleske Farm for inclusion in Baviaanskloof Nature Reserve. Farm dwellers continue to reside at Coleske, but lose long-term employment and livelihood security. DEAET offers short-term employment on monthly labour contracts. DEAET's lack of attention to provisions under new land tenure legislation results in the farm dwellers acquiring occupancy rights in law.
Late 2002	DEAET contracts Wilderness Foundation (an NGO) to plan mega-reserve project.
2003–2005	Project Management Unit (PMU) is established and GEF funding acquired, conditional on compliance with World Bank's social safeguards policy. This provides additional entitlements for the community over and above their lawful tenure rights. PMU undertakes numerous consultations and mass meetings with Coleske community. DEAET community employment funds expire in 2003. Coleske community members remain unemployed and their use of natural resources is severely restricted. DEAET and the community are made aware of the latter's tenure rights under new legislation. However, the community remains uninformed about their entitlements under the WB social safeguards policy.
2005–present	Eastern Cape Parks Board (ECPB) takes on management authority of Baviaanskloof Nature Reserve (including Coleske), with support from PMU. PMU continues to mediate meetings between ECPB, Coleske community and other relevant parties to negotiate the way forward. In 2006 a representative structure is established to facilitate regular communications between the community and ECPB. PMU acquires Poverty Relief funding in 2006 for temporary employment of Coleske residents. In 2006, PMU commissions detailed study of rights and entitlements, socio-economic status and natural resource use of all Coleske residents, to inform basic service delivery, just compensation and/or resettlement options that adhere to all statutory provisions and World Bank's social safeguards. Coleske community becomes aware of their full range of entitlements. The completed study paves the way in 2007 for a negotiated plan for the way forward.

When a Project Management Unit (PMU) was established in late 2002 (see Table 2), it was clear that considerable effort would be required to restore trust between the community and conservation authorities. The PMU swiftly appointed a Community Engagement Manager and initiated a stakeholder engagement programme through which numerous consultations with the

Coleske community were held. Mass meetings enabled the PMU to assess the situation. It was clear that the community lacked formal representation structures, that they were unaware of their basic rights (particularly their tenure rights) and that the relationship between DEAET and the community was strained and characterised by extreme mistrust. Anger and frustration had started to boil over, with younger people agitating and throwing stones at tourist vehicles entering the nature reserve.

Whereas DEAET had acquired the Coleske farm for conservation purposes and envisaged resettling the community from the area, the PMU took the position that the community's rights and entitlements had to be determined first, with particular regard to the state's tenure legislation, but also with regard to the World Bank's social safeguards policy (the latter being a condition of GEF funding for the Baviaanskloof Mega-Reserve Project). This led to discussions involving the community, the Department of Land Affairs, DEAET officials, the CAPE Coordination Unit and social safeguards experts in the World Bank. The Department of Land Affairs was mobilised to help DEAET and the community understand the latter's legal tenure rights, and to guide and advise the PMU in its efforts to ensure that the Coleske challenges were addressed in a fair and just manner for both community and conservation authority, through a process that all parties could agree on.

Coleske community members have participated in identifying options for settlement in line with their rights (Photo by Eleanor McGregor)

In 2005 the newly established Eastern Cape Parks Board (ECPB) took over from DEAET as the management authority of the nature reserve. This included responsibility for addressing the issues at Coleske. The PMU had to bring the Eastern Cape Parks Board up to speed on its obligations as a duty bearer. The PMU ensured that due process was followed with regard to the people's rights, and mediated discussions and negotiation between the parks board and the community. The idea of a representative structure for communication and negotiation was revived and a community committee was elected in 2006. Later that year, an in-depth study assessed each household and determined in detail each individual's rights and entitlements as a basis for exploring equitable resettlement options. This study, undertaken by an independent social science research group (RUC 2007), paved the way for a more inclusive dialogue between Coleske residents and the conservation authorities. An official task team was formed, comprising Eastern Cape Parks Board, DEAET and other relevant departments, including several local authorities. Facilitated by the PMU, this task team is to ensure that the people understand their rights and entitlements as identified by the study, and to explore viable options for relocation in a fair and participatory process. As part of the negotiation, the Coleske community has been able to identify options for settlement, the feasibility and logistics of which are being researched and developed by the task team. In addition, the services of the Legal Aid Board have been secured to advise the Coleske community and act as their legal representative during the negotiation phase.

Analysis and discussion

Conservation planning in the Baviaanskloof Mega-Reserve is an evolving process. With the mega-reserve programme just a few years underway, it may be premature to pass judgement about the manner and degree to which rights and responsibilities are being exercised by different stakeholders. However, it is useful at this stage to reflect on some of the lessons emerging from the experience, and the implications for more broadly incorporating rights considerations into conservation planning.

An important point demonstrated by this case is that history matters. The conservation-human rights interface is embedded in the larger historical, political and, to an extent, cultural context in which it is located. This context shapes and determines the meaning of the link between them. A rights-based approach in the Baviaanskloof is inextricably linked to the historical and political context of place. This history may matter even more when introducing a rights-based approach halfway through the process, as is the case here.

Another lesson is that any biological appraisal by natural scientists should be accompanied by a socio-economic appraisal. The approach should be multilayered and multidisciplinary and driven by core values and principles. A rights-based approach to conservation demands a solid understanding, before acting, of a wide range of issues in an area. These include ecological and anthropological factors, the historical context, the local political economy, an understanding of power asymmetries within and between local communities and the specific rights of resident communities. People's rights should be integrated into conservation from the beginning, and planners should avoid creating conditions that make it impossible for people to continue to live in the area. Instead, planners should focus on the significant potential contributions that local communities can make to conservation, through employment in such activities as fencing, maintaining walking trails, controlling invasive species, propagating and revegetating, growing produce for tourists, monitoring and evaluation, etc.

While lessons learnt in the Coleske process are being applied to other initiatives in the Baviaanskloof, the Coleske issue itself has not yet been resolved. Many concerns remain, the process is slow and some see the representation structures for the community in the negotiation process as inadequate. Nevertheless, a process is in place to see that, ultimately, community members' rights are respected. It could also be argued that this particular conflict between community and conservation has made people's rights more visible and therefore more likely to be respected. Had the land been sold to a private owner, the process may not have carried the same level of scrutiny and response to rights concerns.

This brings into focus the importance of building the awareness and capacity of both rights holders and duty bearers. Certainly this applies to South Africa. In spite of a progressive Constitution and Bill of Rights, and an emerging legal framework that supports biodiversity conservation in a context of democratisation, institutional behaviours, policies and practices in the conservation sector still favour privileged groups. To date policies and practices have failed to meaningfully change the political exclusion of traditionally marginalised, vulnerable and poor communities. Part of the Coleske problem was that neither DEAET nor the community fully understood the farm dwellers' rights under national tenure legislation or the Constitution. As late as 2005, even the mega-reserve steering committee remained largely unaware of the community's social safeguard entitlements (Crane 2006). It was only the active intervention of the CAPE programme that led to identification of the community's rights and setting up processes to uphold them. The intervention was prompted by the provisions for social safeguards in the CAPE programme's contracts with the World Bank.

Procedural rights provide an important entry point for supporting substantive rights. Rights to participation, information and administrative justice are instrumental in enabling people to claim rights, such as secure tenure, housing, culture, self-determination, etc. The Protected Areas Act of 2003 requires authorities to consult any lawful occupier with a right to the land and other affected communities around the protected area. Authorities are also required to follow a process of meaningful public participation when they develop park management plans. Park management can enter into agreements with communities inside, and adjacent to, the reserve regarding the use of natural resources. The Protected Areas Act was not in place when the initial planning for the BMR was undertaken. It was not until three years after the mega-reserve project had started that a deliberate effort was made to inform the Coleske community of their legal rights and other entitlements. But, even if procedural rights are in place, marginalised rural communities, such as Coleske, are likely to need help in accessing technical, legal and organisational support for their negotiations with the authorities. A participatory process on its own does not necessarily lead to rights being upheld; power inequities must also be openly addressed.

In South Africa, the challenge of the next decade will be to give life and meaning to the Bill of Rights at the local level. The protections offered in the Protected Areas Act may not be sufficient to avoid violations of rights. More specific mechanisms are required that will support a human rights approach to conservation planning, and lead to outcomes where rights can be defended in a fair and just process. The CAPE programme should consider how it can leave behind a legacy where these rights are institutionalised.

Several avenues can be explored to institutionalise rights. Options suggested below are set in the South African context, but could apply to conservation and development at the landscape scale elsewhere in the world.

- Include a social safeguards policy that incorporates guaranteed rights as a minimum standard within the core mandate of the Eastern Cape Parks Board and all other parks boards in the country, and establish key performance indicators for chief executive officers. While it is the ECPB vision 'to be recognised as a premier entity in managing biodiversity through mutually beneficial partnerships with neighbouring communities and other stakeholders by 2010', this does not guarantee a human rights approach to conservation planning. Rights concerns should become an integral part of conservation work, staff recruitment and training.
- Implement a statutory requirement that all new conservation proposals and initiatives be preceded by an in-depth and inclusive assessment of the local context, perspectives and applicable rights by a carefully

selected multidisciplinary team. This should be followed by an open, flexible and facilitated process with meaningful public participation, directed at developing a shared, long-term vision for the area.

- Establish a governance body for each protected area, giving relevant local stakeholders a meaningful say in all park planning and decision making that affect their rights.
- Establish, in partnership with local communities, a monitoring mechanism for each protected area to ensure that conservation activities that affect people's rights are implemented with their free and informed prior consent, and that opportunities for their gainful employment are optimised.
- Guarantee each community access to ongoing legal aid through a state sponsored body, to defend their rights and to help overcome the asymmetries of power that typically prevail.
- Provide some form of mediation between biological and socio-economic objectives. This would need to be undertaken by a neutral party, not just in the initial planning process, but also in the long term.

Conclusion

A rights-based approach can be seen as a next step in the move towards incorporating social concerns in conservation that has been witnessed over the past decade. The case study of the Baviaanskloof Mega-Reserve demonstrates that a focus on rights holds the potential to protect the interests of poor communities in landscape-scale conservation, but only if certain preconditions are met. Preconditions include awareness and capacity of both rights holders and duty bearers, sensitivity to history and power asymmetries and specific mechanisms that support such an approach.

Provided such preconditions are in place, human rights approaches in conservation can empower poor people in two ways. First, they have the power of law to reduce their vulnerability. For example, when rights to secure land tenure are protected, poor people are less likely to lose their livelihoods. The right to participation and information enables them to gain greater voice in negotiations with external actors. Second, they have the power of ideas that empower people to claim their rights, mobilise collectively and defend their interests. A rights orientation brings the social justice agenda in conservation into sharper focus, and offers new mechanisms for empowering the poorest people in and around protected areas. Human rights approaches can be a useful addition to the conservation planner's toolkit.

Endnotes

1 Active management and conservation of the area began in 1923, with the establishment of the Baviaanskloof Forest Reserve, which has evolved over time, expanding in geographical and conceptual scope.

2 Some readers may find the description of people by skin colour offensive. This is not the case in contemporary South Africa, where the terms Black, Coloured, Indian and White are widely used and form part of the official discourse, for example, Black Economic Empowerment legislation enacted to transform the racially skewed structure of the economy.

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7

Rights-based conservation and the quality of life of indigenous people in the Bolivian Chaco

Michael Painter

Indigenous rights and conservation

The *Capitanía de Alto y Bajo Isoso* (CABI) is an indigenous organisation that represents the Isoceño Guaraní people of Bolivia's Santa Cruz Department. CABI was one of the few indigenous organisations in lowland Bolivia to resist incorporation into the missions established during the colonial period. This means that the continuity in CABI's political structures is unusual. The Chaco War in the 1930s nearly destroyed the Iscoceños. CABI led the struggle to recover their land and cultural identity. As part of this effort, since the 1940s, CABI has sought to assert and expand Isoceño land rights. Initially, this involved securing titles to community lands and defending those areas from encroachment (Combès 1999, Arellano 2003, Beneria-Surkin 2003). However, in the 1980s CABI began to develop territorial management, a concept that included conserving biological diversity and sustainable use of renewable resources as key elements. The development of the territorial management concept both reflected and deeply influenced the growth in organisation and political mobilisation of Bolivia's indigenous people, and the efforts by the Bolivian Government to decentralise political authority and decision-making.

Isoceño parabiologist Filemón Soria (Photo by Hal Noss)

As CABI developed its territorial vision, it both pushed, and took advantage of, Bolivia's political decentralisation to assert its right to manage directly, or influence the management of, most of the territory historically used by the Isoceño Guaraní. CABI recognised that political success in consolidating its control or influence over substantial areas did not translate directly into effective management. CABI set out to demonstrate effective management to consolidate the legitimacy of its claims. To implement this vision, CABI sought alliances to develop critical skills and capacities (Arambiza and Painter 2006, Castillo 2007).

Parallel to the CABI initiatives, the Wildlife Conservation Society (WCS), an international conservation organisation, was exploring approaches to promote the conservation of the South American Chaco. The scale of degradation of Chaco region ecosystems exceeds that of almost any other region in South America (Taber *et al.* 1997, TNC *et al.* 2005). While WCS's objectives were primarily about conserving biodiversity, it recognised that long-term success would depend on developing an effective local constituency for conservation. Such a constituency would identify its own quality of life as being linked to healthy ecosystems and healthy populations of the wildlife that form part of those ecosystems. Based on this understanding, WCS found much of CABI's vision of territorial management consistent with its own conservation goals. WCS acknowledged CABI's leadership role in the region and recognised that CABI would be a powerful ally in promoting conservation and sustainable resource use in the Bolivian Chaco (Arambiza and Painter 2006, Castillo *et al.* 2006, p. 24-30).

Based on distinct, but overlapping, interests in promoting conservation and the sustainable use of renewable resources in the Bolivian Chaco, CABI and WCS began to work together in 1991. WCS helped CABI develop a combination of technical and administrative skills so that its assertion of rights over a substantial portion of the Bolivian Chaco was accompanied by the capacity to manage the area effectively. By demonstrating effective management CABI became an increasingly important partner for departmental and national government authorities, and added to its already considerable political weight in the region (Arambiza and Painter 2006, Castillo *et al.* 2006, p. 24-30).

Background to the partnership

South America's Gran Chaco covers about 1 million km^2 in Bolivia, Paraguay, Argentina and Brazil, and is one of the continent's most extensive bio-geographical regions (Taber *et al.* 1997, TNC *et al.* 2005). It is characterised by diverse ecosystems that include palm savannas and marshes, semiarid thorn forests and open grasslands on sand dunes. The Gran Chaco includes the largest expanses of dry tropical forest in the Neotropics, a biome that is facing greater threats than the region's moist tropical forests. It has been deeply affected by overgrazing by cattle and goats and commercial hunting for the international pelt and skin trade. In many areas, land clearing and associated schemes to promote ranching and farming have degraded ecosystems on a scale that exceeds that found in almost any other area of South America (Taber *et al.* 1997, TNC *et al.* 2005, WCS 1997).

Based on extensive field research in Argentina, Paraguay and Bolivia, WCS found that Bolivia is the only country in the region that still has large areas where Chacoan ecosystems and habitats remain largely intact. At the same time it recognised that the Bolivian Chaco faces significant threats, particularly from ranches and farms with production practices based on extensive land use—many property owners have found it easier and cheaper to acquire additional land, rather than improve their management of the land they already own. The Chaco is also a key area in Bolivia's efforts to develop its natural gas industry. It contains several exploration and exploitation concessions and lies at a critical intersection in an expanding regional gas pipeline network that transports natural gas from fields in Bolivia and Argentina to urban markets in Brazil. Parallel to the gas pipeline network, and partially stimulated by the development of the natural gas industry, the Bolivian Government, with international donor support, has also constructed major highways, which will make travel into the Chaco significantly faster and easier (Arambiza and Painter 2006). The dramatic degradation that much of the Chaco outside of Bolivia has experienced,

combined with the mounting threats to the remaining relatively undisturbed areas of the Bolivian Chaco, led WCS to propose establishing a protected area as an essential step in building a regional conservation strategy (Taber *et al.* 1997, WCS 1997).

The threats to biological diversity at the root of WCS's concern are considered by CABI as threats to the livelihoods and cultural identity of Isoceños. The advancing agricultural frontier, natural gas concessions and highways encroach upon, or have significant effects, on areas that have, historically, been important to the Isoceños. The developments influence the possibilities for creating alternative livelihoods that would allow them to prosper economically while maintaining their identity as a people. Thus, CABI sought to consolidate control over a territory that would allow it to create production options that would permit Isoceños to meet their livelihood needs without having to abandon values and practices important to their identity as a people. This goal reflected two major concerns:

1. that economic growth be equitable in order to allow the Isoceños to improve their standard of living as a people, as opposed to a few individuals accumulating wealth; and
2. that economic growth should not carry the high environmental costs—defined in terms of deforestation, soil degradation and the destruction of habitats of key wildlife species—characteristic of the farming and ranching activities that dominate the rural economy of Santa Cruz (Arambiza and Painter 2006, Castillo *et al.* 2006, p. 24-30).

Independently of WCS, CABI's leaders reached the conclusion that establishing a protected area would provide a legal basis for halting the advance of the agricultural frontier, and provide a focus for defining new production alternatives. For CABI, the objective of establishing a protected area was part of a broader strategy to secure and manage the area the Isoceños regard as their historical homeland. This strategy also included a territorial claim filed under Bolivia's 1996 agrarian reform law, and support for strengthening indigenous participation in municipal government. Within this strategy, conserving biological diversity is important because it is a central element of the physical setting that the Isoceños associate with their identity as a people.

Key conservation accomplishments

The key accomplishment of the initial collaboration was the establishment of the Kaa-Iya del Gran Chaco National Park and Integrated Management Area (KINP) in September 1995. CABI presented the proposal for the

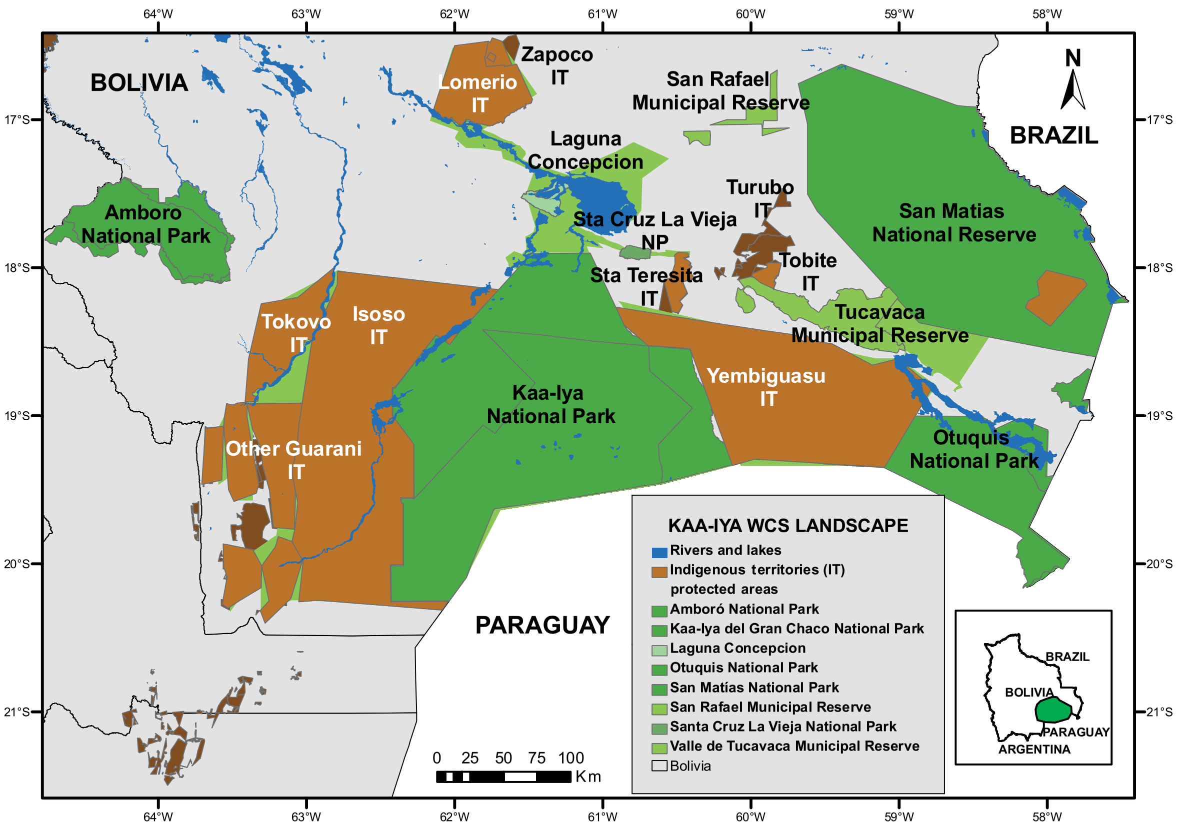

Figure 1. Kaa-Iya del Gran Chaco National Park and the Isoceño Indigenous Territory (Source: Painter *et al.* 2008)

establishment of the park to the Government of Bolivia, while WCS provided CABI with technical support to prepare the proposal and help follow progress through the government review process. Covering some 3.44 million ha, KINP is the largest protected area in Bolivia, and contains the largest area of dry tropical forest under protection in the world. When founded, it was the only national park in the Americas established as the result of an initiative by a Native American People, and the only one where a Native American organisation shared primary administrative responsibilities with the national government (Taber *et al.* 1997, WCS 1997, p. 1-4, Noss and Castillo 2007).

For CABI, the establishment of the KINP was part of a larger strategy to implement a regional land use strategy. Simultaneously with its efforts to establish the KINP, CABI played an active role in Bolivia's decentralisation programme and was a leading organisation in Bolivia's indigenous movement. A key element of Bolivia's decentralisation programme was the granting of additional authority and responsibility to municipal governments, and the creation of new channels to encourage local participation in electing and overseeing the work of municipal officials. The turning point for this was the *Ley de Participación Popular* (Ley No. 1551, the Popular Participation Law, or PPL), passed in 1994. Under the provisions of the PPL, in July 1994, CABI was recognised as the municipal authority of the *Segunda Sección Municipal* (Second Municipal Section) of Santa Cruz's Cordillera Province, the largest geographic unit administered by the municipal government of Charagua. CABI was the first indigenous organisation in Bolivia to assume municipal government responsibilities. Recognition as a municipal authority complemented and reinforced CABI's assertion of rights as an indigenous organisation (Arambiza and Painter 2006, Noss and Castillo 2007, Painter *et al.* 2008, p. 29).

In 1996, in part thanks to the leadership role played by CABI in Bolivia's indigenous movement, the Bolivian Government enacted a new agrarian reform law (Ley 1715, the *Ley del Instituto Nacional de Reforma Agraria*, commonly known as the Ley INRA). This law recognised, among other things, indigenous territorial rights, as defined in the International Labour Organization Convention 169, as a legal form of land tenure. Taking advantage of the new law, in early 1997 CABI presented a claim for a 1.9 million ha *Tierra Comunitaria de Orígen* (TCO), the term used in law to refer to indigenous territories. This area was subsequently immobilised by the Bolivian Government, meaning that no land could be bought or sold until the titling issues raised by the claim were resolved. The process of surveying the area, and sorting through the documentation supporting conflicting claims began in 2000. The work received financial support from a landmark agreement signed between the sponsors of the Bolivia-Brazil Gas Pipeline and the organisations representing indigenous people in the

pipeline's area of influence (*Convenio Marco* 1997, see below). To date, 560 000 ha of the area included in the demand have been titled to CABI, while 165 000 ha have been titled to individual owners who have documented the legality of their land claims (Arambiza and Painter 2006, Noss and Castillo 2007, Painter *et al.* 2008, p. 29, 32).

Parapetí River passing through Bañados de Isoso (Photo by Hal Noss)

Most of the work to title the remaining area has been completed. However, work has stalled because the present Bolivian Government has ideological issues with the concept of indigenous territories as defined under current Bolivian law, which is based on ILO Convention 169. These have to do with upland peasant and settler organisations who want to settle in many territories claimed by lowland indigenous people and who are the government's main constituencies. The government also has issues with indigenous organisations that assert their independence from political parties and official control. It fears that consolidated territorial rights would reinforce such assertions of independence. Considering that CABI's claim to most of the remaining area has been validated twice by the Agrarian Court (*Tribunal Agrario*) as a result of legal challenges, the delay by a government claiming to represent the interests of indigenous people is disappointing.

Since the establishment of the KINP, the principal focus of the CABI-WCS partnership has been to ensure that CABI has been able to move beyond the political achievement of creating this vast area and assume the technical and administrative challenges of managing it effectively. This effort has focused on four major areas:

1. strengthening CABI's in-house technical and administrative capacities;
2. conducting participatory wildlife population and ecology research, and defining appropriate wildlife management practices based on the results;
3. consolidating a land use planning and environmental monitoring programme for the KINP and Isoceño TCO; and
4. designing and implementing a permanent environmental education programme, which focuses on improving understanding of basic ecological concepts and their application in the management of the KINP and Isoceño TCO (Winer 2003a, 2003b).

Following the establishment of the KINP, the CABI-WCS partnership achieved several other important objectives, including:

1. Establishment of a major research programme focusing on wildlife populations and ecology in the Chaco. Importantly, the participatory research methods have contributed to the emergence of a team of Isoceño para-professionals. This team is capable of designing and implementing research activities to help them understand the environment in which they live. It is also capable of presenting the results to scientists and professionals in national and international settings, rather than having others speak for them (Arambiza and Guerrero 2000, Ayala 2000, 2003, Barrientos and Maffei 2000, Leaños and Cuéllar 2000, Parada and Guerrero 2000, Soria Modesto and Noss 2000, Guerrero

et al. 2002, Barrientos and Cuéllar 2003, Martínez and Cuéllar 2003, Mendoza and Noss 2003, Soria 2003, Cuéllar *et al.* 2004, Guerrero and Arambiza 2004).

2. Completion of the management plan for the KINP, and the application of the methods to other critical areas of the landscape. Completed in 2001, the KINP management plan was commended by Bolivia's National Park Service (*Servicio Nacional de Áreas Protegidas*, or SERNAP) for scientific rigour and broad local participation. The same approach was subsequently used to prepare the zoning proposal for CABI's management of the Isoceño TCO.
3. Environmental education in Isoceño schools. Begun in 1996, the education programme built on Bolivia's educational reform, which gives local people greater control over curriculum content. Based on extensive consultation with students, parents and teachers, the programme elaborated a core curriculum, along with supporting materials. The curriculum was implemented in all 16 Isoceño schools, by all 90 teachers and reached a student population of over 2000. The programme focuses on teaching students about how the Isoceños came to live successfully in the Chacoan environment. It also provides the concepts for understanding the management issues confronting the Isoceños as they assume the challenges of managing the KINP and TCO. UNICEF has prepared a guide for implementing school-based, environmental education structured on the Isoceño experience. With assistance from CABI and WCS, district education officials are adapting the Isoceño materials so that they can be used to design and implement a similar programme for the entire Charagua school district (Winer 2001, p. 14-15, 38-39). (In addition to developing the materials, during the initial years of the programme CABI and WCS trained teachers to use them and CABI continues to arrange refresher courses. To-date, resources have not been found to provide a training component to accompany the teaching materials being developed at the school district level.)

These achievements demonstrated CABI's capacity to effectively manage the area that it had successfully secured rights to, and contributed to the recognition of the claims as legitimate by a broad range of regional and national actors.

Addressing new challenges

The successes directly associated with creating and undertaking the management of the KINP also laid the groundwork for other important achievements that were not anticipated. These unanticipated achievements

helped consolidate CABI's assertion of rights and further contributed to recognition of the legitimacy of its claims. Key among these unanticipated achievements are:

1. designing and implementing programmes to address the environmental and socio-economic impacts of the Bolivia-Brazil gas pipeline;
2. defining new approaches for titling indigenous lands; and
3. establishing new mechanisms to finance local conservation initiatives.

Addressing the effects of the Bolivia-Brazil gas pipeline

The partnership between CABI and WCS has helped both institutions deal with challenges arising from the rapid expansion of Bolivia's hydrocarbon industry. This began in the mid 1990s with the construction of the Bolivia-Brazil gas pipeline, which either passes through or immediately borders the KINP for 250 km. With technical support from WCS, CABI led indigenous organisations in negotiating an agreement with the pipeline sponsors, signed in December 1997, which included groundbreaking provisions in structuring relations between local organisations and energy companies working in Bolivia (*Convenio Marco* 1997, Arambiza and Painter 2006, Noss and Castillo 2007, Painter *et al.* 2008).

The agreement was reached after a long negotiation, the advance of which was interrupted, in September 1997, when a Petrobras subcontractor, accompanied by armed soldiers, illegally entered the KINP with heavy equipment to begin clearing the pipeline right-of-way. The action was illegal because the subcontractor should have submitted a work plan to SERNAP for review by the national office and the KINP director. While SERNAP and KINP did not have the authority to stop work on an approved project—declared a national priority by the government—they did have the responsibility to place conditions on how the work should proceed, to ensure their ability to monitor it and minimise is effects on the park. Beyond its illegality, the action was particularly provocative in the context of the negotiations regarding the Indigenous Peoples Department Plan (IPDP). A central element of the plan was a procedure to ensure compliance with protected area regulations and review construction activities. CABI responded by dispatching park guards who stopped the machinery until the IPDP agreement was signed with the pipeline owner, GasTransBoliviano (GTB), in December 1997. Petrobras signed a letter formally adhering to the agreement in February 1998 (*Convenio Marco* 1997, Carta de Adhesión 1998, Arambiza and Painter 2006).

Petrobras spokesmen hastened to inform the press that work on the pipeline project, vital to Bolivia's national interest, had been halted by indigenous people looking to pressure the companies into increasing the size of the socio-economic compensation package being offered. They neglected to mention that the indigenous people in question were park guards, employed by the national protected area system, performing their duties in accordance with Bolivia's national environment law and regulations on the management of protected areas (CABI 1997, El Deber 1997a, b, c). Subsequently, representatives of GTB responsible for supervision of the construction of the pipeline confirmed to the authors that, based on the pipeline construction plan and timetable, there had been no reason for the subcontractor to enter the KINP. The incident had been manufactured:

1. to attempt to establish the precedent that the pipeline builders were not obligated to treat protected areas differently from other state lands affected by the project; and
2. to create a confrontation that would undermine the negotiations between the pipeline sponsors and indigenous organisations regarding the IPDP.

The programme defined by the agreement included four major components:

1. organisational strengthening;
2. pilot production projects to explore opportunities to construct new economic options, based on principles of sustainable resource use;
3. support for titling indigenous lands; and
4. support for the management of the KINP.

The agreement also provided for the implementation of an environmental management programme for the section of the pipeline right-of-way located within the KINP, to be implemented by CABI in its role as park co-administrator (*Convenio Marco* 1997).

The sum committed by the pipeline owner to the programmes covered by the agreement was over US $ 4 million, an unprecedented amount for an agreement between energy companies and indigenous organisations in Bolivia (Arambiza and Painter 2006). More important than the amount of funding involved, however, was the structure defined to implement the programmes created by the agreement. CABI led the indigenous organisations in arguing successfully for a programme run by an executive committee composed of three representatives of indigenous organisations, three members representing pipeline sponsors and an independent member chosen by mutual agreement of both parties. It was further agreed that this body should operate under an open-ended time frame to ensure that the various activities were implemented properly.

Test well natural gas in Kaa-Iya del Gran Chaco National Park (Photo by Hal Noss)

The innovative structure of the programme contributed to three important features that had not previously been part of agreements between energy companies and indigenous organisations in Bolivia:

1. Indigenous organisations were involved in critical decision making. These included decisions surrounding the definition, funding and implementation arrangements of programmes. These decisions reflected their priorities, their vision of the changes they expected the development of the hydrocarbon industry to bring to their areas and

their acceptance of responsibility for the successes or failures associated with the programmes.

2. Indigenous people took the lead in implementing or monitoring activities in which they otherwise would have been involved primarily as passive spectators. While there was a wide variation in how well different tasks were carried out—and not all experiences were satisfactory—local people gained important skills in addressing technical issues associated with project implementation. Also the programme's administration made greater contributions than it otherwise would have to its organisational strengthening activities.
3. The implementing structure encouraged collaborative problem solving. Under the programme structure defined in the agreement, pipeline sponsors and indigenous organisations were required to work together to find solutions to the kinds of concrete problems that are part of planning and implementing participatory programmes. The mechanisms that arose from this experience were subsequently used by CABI and the pipeline sponsors to address other issues associated with the continuing expansion of the energy industry in the region.

As noted above, the agreement was groundbreaking in the sense that it was the first of its kind between indigenous organisations and energy companies in Bolivia. It allowed CABI and the other indigenous organisations that participated in it to deal, relatively successfully, with the effects of the pipeline project. Furthermore, it was the point of departure for the land titling and conservation finance activities discussed below. In this context, it has received considerable international attention. For example, it was a major factor in the decision of the International Association for Impact Assessment to recognise the project for its programmes to address the pipeline's socio-economic and environmental effects. The World Bank has cited the project as an example of best practices in the same areas. Also, the agreement was a factor in CABI being awarded the XIII Bartolomé de las Casas Prize from the Spanish Government, for tenacious and innovative defence of indigenous cultures and biological diversity, as well as other awards (El Deber 2002a, b, Arambiza and Painter 2006).

It remains unclear to what extent the agreement will influence how relationships between the sponsors of pipelines and other large infrastructure projects and local people will be organised in the future. There have been several subsequent examples of companies saying that they were applying the principles of the agreement in programmes to mitigate the socio-economic and environmental effects of other pipeline and infrastructure projects. However, the desire of the companies to 'simplify' and 'streamline' structures and procedures has tended to weaken or eliminate provisions that helped ensure equitable participation and shared responsibility for

outcomes. For their part, other grassroots organisations and their advisors have found it difficult to maintain the same level of engagement with companies in negotiating and implementing complex agreements such as CABI organised and led in the case of the Bolivia-Brazil gas pipeline. This has reinforced company tendencies to seek to simplify and streamline. So, to date, the application of this experience in other settings in Bolivia has been modest.

Titling indigenous lands

Of particular importance to CABI and the other indigenous organisations who were party to the agreement was a programme providing US $ 1.5 million for the titling of indigenous lands in the pipeline's area of influence. CABI and WCS led the design of this programme, the key element of which was to define a working relationship with the National Agrarian Reform Institute (*Instituto Nacional de Reforma Agraria*, or INRA) that would lead to efficient titling. Planned titling of the Ayoreode TCO and the Chiquitano community lands was completed on schedule. As noted above, 560 000 hectares of the Isoceño TCO have also been titled, along with 165 000 hectares belonging to individuals with legal claims inside the TCO. In addition, the legal and technical requirements to permit completion of the titling of most of the rest of the Isoceño territory have been met, but progress is stalled by political disagreements with the current Government (Painter *et al.* 2008, p. 29-33, 42)

Land titling is also a critical conservation issue because it is impossible to encourage people to practice conservation or manage land sustainably if ownership or use rights are in question. Land has historically been cheap and abundant in the Bolivian lowlands, a situation that has encouraged farmers and ranchers to expand, pushing peasants and indigenous people into marginal areas (for example, Gill 1987). This, combined with the institutional weakness of INRA and other government agencies responsible for land management, has meant that the process of establishing boundaries and securing titles often has not been transparent. This lack of transparency has, over time, contributed to bringing an end to the perception of cheap and abundant land. Much of the land is subject to multiple conflicting ownership claims. Unfortunately, the growing sense of scarcity has not created incentives for better land management. Instead, it has encouraged more deforestation, inappropriate production practices and more conflict as would-be landowners attempt to demonstrate their use of an area and derive whatever benefits they can before their claims are challenged (for example, Painter 1987).

CABI's approach to defining land ownership and use rights, in both a national park and an indigenous territory, as the central elements in a regional land management strategy are an example of mutually reinforcing indigenous territorial demands and conservation objectives of national parks. The approach requires that the two sets of objectives are explicitly and transparently taken into account in defining the respective areas and that there is a plan for how the land is to be used. The case of CABI was unique in the sense that both the KINP and TCO were products of the same grassroots initiative and each was conceived with the other in mind. CABI's self-interest was tied to the KINP as well as to the TCO. But CABI also conceived of the KINP as an initiative on behalf of all Bolivians, and on behalf of people generally whose quality of life is linked to culturally important ecosystems and biodiversity. CABI's leadership was important in generating important political support for the KINP and this broad support has also helped CABI resolve conflicts that have affected the titling of its TCO.

Conservation Finance

The agreement signed between indigenous organisations and the sponsors of the Bolivia-Brazil gas pipeline included US $ 1 million to capitalise a private trust fund to generate revenues for the KINP in the long term. This was an important milestone in constructing mechanisms that would generate funding streams to ensure that critical initiatives would be sustained over the long term. WCS and CABI worked with GasTransBoliviano, S.A.

Isoceño parabiologist Joaquín Barrientos (Photo by Hal Noss)

(GTB) to design the organisational structure of the Kaa-Iya Foundation. This Bolivia based, non-profit organisation is the owner of the trust fund. The Foundation's board of directors includes representatives from GTB, CABI, and an independent member. Under this arrangement, CABI and GTB share responsibility for ensuring that the KINP continues to be able to meet the challenges that may arise from future hydrocarbon development. To this end, the Kaa-Iya Foundation is using the US $ 1 million from the agreement as seed money to attract additional revenue to support the park and encourage investment in the surrounding area. Such investment would have to be consistent with sustainable land use and with the conservation mission of the KINP. Contributions to the trust fund's capital would increase the income the fund generates and this could be used to match the funds raised by CABI, WCS and other sources.

The Kaa-Iya Foundation is one example of CABI's general commitment to raising funds to support KINP operations. In each year between 1998 and 2004, for example, the revenues generated by the Kaa-Iya Foundation and other CABI initiatives were 30% to 40% of the KINP's total operating revenue. That CABI has made this kind of commitment to the KINP is a clear indication of:

1. the central role that the protected area plays in CABI's land management strategy;
2. the importance that CABI places on conserving biological diversity as an element in the quality of life that Isoceños seek to achieve for themselves; and
3. CABI's commitment to sustaining the kinds of initiatives described in this paper.

Conclusion

The rights-based approach to conservation that emerged from the partnership between CABI and WCS resulted from the active and able assertion of legal rights by CABI, and the assistance provided by WCS. The partnership addressed the technical and administrative challenges involved in both the initial assertion of rights and in implementing effective management when rights were granted or recognised. The point of departure was a shared interest in creating a protected area in the Bolivian Chaco. By working together, two organisations with different institutional agendas contributed to results that neither could have achieved alone.

The successful assertion of rights by CABI rested on its strong and adaptive culture. This coupled political legitimacy, rooted in a long and distinguished

history of political struggle, with the ability to respond to opportunities and adapt to changing conditions. Beginning in the mid 1980s, CABI's efforts were reinforced by a supportive policy environment characterised by political decentralisation and recognition of indigenous territorial rights. The result was a synergy between CABI's assertion of indigenous territorial rights and conservation of biodiversity. CABI understood that, while the government had recognised the right to claim historical territory, it was unlikely to approve a territory covering the entire area that CABI considered crucial for protecting the livelihoods and cultural identity of the Isoceños. So, it proposed the creation of a national park. The park would serve to halt the advance of the dominant approaches to rural development in Santa Cruz. It would contribute to the conservation of the Chaco's threatened biodiversity. And it would also engender broader public interest in constructing alternative approaches.

The partnership with WCS was a result of CABI's recognition that it had some, but not all, of the kinds of capacity it needed to sustain its initiatives to defend and assert its rights. For example, CABI was a key force in the political movement that convinced the government to recognise indigenous territorial rights. Having been involved in its design, it understood well the process of claiming and securing title to a TCO. CABI was also knowledgeable about how different kinds of initiatives would work in departmental and national political contexts. But, having decided to propose the creation of a national park, it was not familiar with the requirements for presenting a successful proposal and securing a co-administration agreement. Nor was it familiar with the specific management challenges that such an agreement would bring.

More generally, while Bolivian law grants many rights to indigenous people and local communities, for most of the people they are intended to benefit these remain largely academic. Because of institutional weakness, limited human and financial resources and because the government has to mediate between conflicting political agendas, rights are granted to those who assert and exercise them. Asserting and exercising rights requires a combination of technical capacity, and the ability to generate the financial wherewithal to support such capacity.

CABI also recognised that strong technical and administrative skills would contribute to long-term recognition of the legitimacy of rights granted under law by other social actors. Acquiring such skills make it (CABI) a more attractive partner for building the alliances needed to address broad issues related to constructing and implementing a shared vision for development. Engagement at this level, in turn, helped in the construction of a broader constituency for the park and for conservation generally. This

created synergies that allowed CABI to address the opportunities and challenges associated with:

1. addressing the effects of the pipeline, ensuring that resources secured for indigenous land titling were applied efficiently and transparently for that purpose; and
2. beginning to build the mechanisms to generate long-term funding streams in order to ensure the sustainability of critical land management initiatives.

By building alliances and developing synergies, CABI also positioned itself to persevere when conditions became more adverse, as in the case of its conflict with the current Bolivian Government.

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Rights-based approaches to natural resource management in buffer zone community forests:

Learning from the grassroots

Sudeep Jana

Introduction

Discussion of rights-based approaches (RBAs) within the context of protected areas (PAs) in Nepal is not straightforward. Rights-based approaches have to be considered in the context of Nepal's sociological, political and ecological history and, importantly, in the context of the myriad relationships between communities and nature. Key factors to think about include:

- the history and current trends in PA establishment, management, policies and practices;
- the history of conflict between PAs and local people[1];
- the politics of rights-based campaigns and grassroots social movements in and around PAs;
- the expanding democratic and political space of citizens;
- the interventions of civil society organisations and conservation agencies; and
- the influences of global discourse on PAs and conservation.

Together these underpin the concept of RBA in and around the PAs of Nepal.

Though RBA as a concept is not well understood or recognised in conservation debates, a few rights-based civil society organisations and some notable state initiatives are exploring opportunities in this domain. The guiding principles of RBAs, as understood in this context include:

- participation;
- democratic governance;
- equity;
- justice;
- free and informed, prior consent;
- local access and control over resources;
- local autonomy; and
- livelihood security.

The strength of RBAs is that they promote local people as rights holders, meaning that people are the rightful custodians of conservation and responsible actors, not merely passive beneficiaries. RBAs rest upon people's power, ecological and traditional knowledge, and social and cultural ecology. RBAs, however, are also ways to enhance people's power and protect rights that have, hitherto, been weak and unprotected. It is in these ways that RBAs add value to other socially oriented or participatory approaches to conservation.

Development of PA and buffer zone policies in Nepal

In Nepal, state led expansion of PAs thrived in the early 1970s and PAs now cover 19.7% of the total area of the country. PAs include 9 national parks, 3 wildlife reserves, 1 hunting reserve, 3 conservation areas and 11 buffer zones (DNPWC 2006). Historically, PAs were the exclusive domain of agencies, such as the centralised forest bureaucracy, the 'royal' family, the 'royal' Nepal Army, technocratic conservationists and international conservation organisations. The purpose of PAs, initially, was to protect flora and fauna. Local people were not consulted when they were established or about how they were managed. People's customary usufruct rights were curtailed. After PAs were established, suffering from human–wildlife interactions intensified, leading to rampant 'park-people conflict' (Paudel

and Bhatta 2008). While the PAs were accessible to the 'royal' family and the wealthy, local access was restricted. The army enforced restrictions in the PAs (Jana 2007a). The local people's relationship with, and dependence on, forests was completely ignored, and often led to the demise of their intimate relationship with nature. Dispossession from natural resources has had a serious effect upon poor, vulnerable groups and indigenous people (Ghimire 2003a, 2003b).

After nearly 20 years of state dominated exclusionary PA management and growing conflict between people and PAs, the government amended the National Park and Wildlife Conservation Act (1993) and subsequent regulations and introduced buffer zones (Jana 2007b). Buffer zones are legally defined as the areas surrounding the parks and wildlife reserves which are co-managed by the PA authorities and local communities. The buffer zones are intended to ensure a sustainable flow of biomass to meet local needs and to enhance local livelihoods. The expectation was that this would reduce pressure on the PAs (Bajimaya 2003). The buffer zone programme has enabled the PA management in Nepal to link conservation with local livelihoods. The legislation institutionalises a three-tiered, community-based, institutional model (see Table 1). More importantly, the legislation also makes significant provisions for sharing revenues generated from the parks and reserves with local communities (Paudel *et al.* 2007). Also in the 1990s, 'participatory and people oriented approaches' were gaining momentum in conservation practice. The most prominent example of this is the Annapurna Conservation Area. In Annapurna, a partnership between local people and conservation agencies successfully facilitated conservation of cultural resources and the sustainable use of natural resources for local livelihoods. (Bajracharya *et al.* 2008)

While there have been some positive outcomes, development initiatives and benefits in buffer zones have failed to reach the most marginalised communities (Adhikar and Ghimire 2003). In particular, natural resource dependent, indigenous people are often excluded from the benefits of buffer zone development programmes. This group includes 'lower' caste people, the landless, the poor and women, who carry the greatest cost of conservation, This occurs, in part, because community development initiatives do not match the priorities or protect the rights of these social groups (Paudel *et al.* 2007). Hence, the effectiveness of buffer zone development programmes in addressing poverty, including poverty exacerbated by the PAs, and in ensuring equity in benefit sharing has been widely contested. Buffer zone leaders in user groups, user committees and buffer zone management committees (BZMC) often represent the 'upper' class and 'higher' caste males (Paudel 2005a). The BZMC largely function under the control of the chief warden of the PAs, rather than as autonomous institutions of

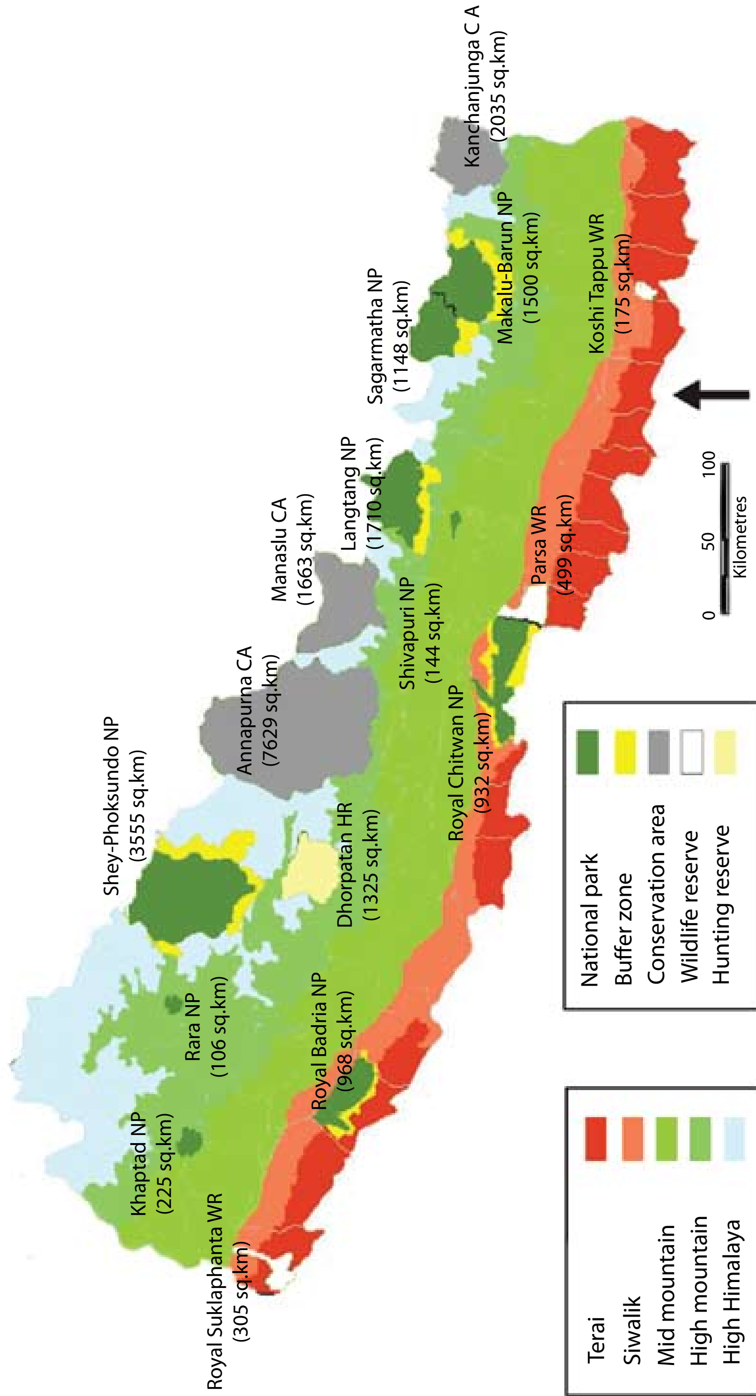

Figure 1. Nepal protected areas. Base map adapted from Nepal Department of National Parks and Wildlife Conservation 'Protected areas of Nepal' in Sagarmatha National Park Management and Tourism Plan 2007-2012

Table 1. Institutional structure for buffer zone management

Management institution	Level and participants	Rights and responsibilities
Buffer Zone Management Council (BZMC)	Whole PA buffer zone. Includes chairpersons of user committees and a PA warden serving as secretary	Share with user committee 30-50% of PA income from tourism, forest products sale, and other sources. Coordinate socio-economic development and natural resource management activities in the buffer zone.
User Committee	Village level. Includes chairpersons and secretaries from the user groups within the village	Facilitate formation of sub-committees or user groups, such as buffer zone community forest user groups. Prepare plans for community development and conservation to be approved by user groups. Execute conservation and management of natural resources including forest, fuel wood, grazing lands, drift logs, sand and stone, etc., upon approval from PA authorities.
User Group	Local level. Includes representatives from participating households	Comply with, and participate in conservation plans. Sustainable use of natural resources in buffer zone in line with tenure and access rights.

Source: developed by author

the people. Some of the most pressing needs in Nepal to be addressed include:

- access to justice against human rights violations and harassment by PA authorities and the army;
- rights and access to natural resources for livelihoods;
- compensation for damage caused by wildlife; and
- the autonomy of buffer zone councils and user committees (Khanal and Ghimire 2008).

Lessons for RBAs to conservation from buffer zone community forests

Buffer zone community forests (BZCF) are institutions supported by the buffer zone programme, specifically under a 1996 Buffer Zone Management Regulation. The BZCF model—despite some limitations—and experiences on the ground offer enormous potential to RBAs for conservation. Under the 1996 regulation, the PA authorities are authorised to designate a BZCF if a user committee desires a given forest area within the buffer zone as their community forest. Within such community forests, local people are granted access rights and management responsibilities. To date, some forest areas have been designed as 'community forests' under tripartite agreements between PA authorities, user committees and community forest user groups.

The concept behind the BZCFs is to reduce dependency on resources within the PAs, address local needs for forest products and conserve the forest so that it provides additional habitat for wildlife (Bajimaya 2003). The user committee has the authority to:

- prescribe the type, quantity and area to be used as a community forest;
- develop the management and distribution methods;
- set harvest times and fees for the forest resources necessary for local people's daily use; and
- undertake afforestation and other conservation initiatives.

Earnings generated from fees and the sale of forest products are deposited into the core funds of the BZCF. This has raised problems as the policy on the management of financial resources by the BZCF is not clear. The rights supported by BZCFs are coupled with responsibilities; the BZCF action plan has ultimately to be approved by the PA administration (DNPWC 1996).

By 2006 the PA authorities had ceded 27 BZCFs to local communities (DNPWC 2006). An ongoing study by Forest Action suggests that to date a total of 376 community forests, covering 169 034 ha (1690 km^2) have been transferred to local communities in and around the PAs.[2] Local communities collectively make decisions, protect and regulate the use of forest resources, manage plantations and sustainably harvest forest products in the buffer zones. Forest cover has expanded and intensified, and harvests of forest products have grown. Wildlife habitats have improved. The ecological and economic values of BZFCs are thus significant (UNDP

2004). However, there are few studies on the effect of increased buffer zone forests on human–wildlife conflict.

Jana Jagaran Buffer Zone Community Forest

The Jana Jagaran Community Forest has emerged as an exemplary BZCF among 17 such forests in the Koshi Toppu Wildlife Reserve buffer zone. The 520 households from Madhuwan Village that live in the buffer zone formed a community forest user group on their own initiative and began conserving the 14 ha forest in 2003. While relatively small, this buffer zone community forest is important. Forests are scarce in the villages in this buffer zone. Larger buffer zone community forests exist around other protected areas. Two important factors motivated the local community. First, illegal logging was reducing the forest cover in the buffer zone. Second, demand for forest and grassland resources was growing, and people were being denied access to the reserve (interview with BZCF President).

The proactive role of the community and their heightened sense of ownership of forest conservation have helped enhance biodiversity in the forest. One example of this is the success in conserving five tree species. These include Sisau (*Dalbergia sissoo*), Khayar (A*cacia catechu*) and Simal (*Bombax ceiba)*. Local people use five varieties of grass for feeding their

Local people in a community meeting discussing concerns around the Koshi Toppu Wildlife Reserve (Photo by Koshi Victim Society)

cattle. They have planted four types of medicinal herbs. There is also the occasional sighting of wildlife such as Arna (Asiatic wild water buffalo), wild elephants, wild boar, deer, porcupines, crocodiles and wild cats. The buffer zone has become an extended habitat for migratory and endangered bird species in the nearby Koshi Toppu Wetland, a Ramsar site. Buddhi Urau, an indigenous person and a member of the BZCF committee noted, 'There are hundreds of nests in a single tree. When hundreds of birds flock and fly, they almost block the vision of the sun in the sky.' Local people have maintained fences around the forest to keep wildlife out of their fields and settlements (interviews with community forest users).

The BZCF user group is characterised by a heterogeneous mix of socially and economically marginalised communities, such as Dalit and Musahar, and indigenous people, such as Jhangad, Majhi, Magar and others. The members of the forest users group freely collect edible wild vegetables, such as Niuro, and *Makoniya lahara*, which is used as cattle feed. Members are charged nominal fees to collect firewood, deadwood and grass from the community forest. Local members of user groups have also gained access, management responsibilities and use rights to driftwood. The driftwood is brought by floods down the river inside the reserve and has long been in demand by local people. Driftwood collection is also a source of paid work for poor households. Authorised and regulated by the BZCF committee, local people also collect grass, fallen wood, wild vegetables, *pater* (a thick grass used to make mattresses) and clay from the reserve area. Poor households in the community, such as the Sardar caste group who collect *pater* in and around the reserve area, are now authorised to collect it by the BZCF committee. Free access to *pater* had been restricted after creation of the reserve. The BZCF members regulate and monitor access to, and use of resources from the reserve as well as from the community forest. They have employed a *heralu* (local guard) to guard and monitor the area. The BZCF is also a good example of equity in resource use and access. The executive committee of the forest user group includes representatives from marginalised social groups and indigenous people (based on interviews and CDO experience).

On 14 March 2008, Jana Jagaran BZCF for the first time, acquired a 4-day permit from the Koshi Toppu Wildlife Reserve authority for the collection of *kathha* (a type of thatched grass used as a raw material for paper production) from the reserve. The executive committee of the BZCF then issued permits to its user group. The permit issued by the reserve authority to the BZCF states that, 'Since users of the BZCF extract *kathha* for their livelihoods, a permit for entry to the reserve for collection of *kathha* is issued exclusively to the members of the users group' (Jana 2008).

Syaubari Buffer Zone Community Forest

Syaubari BZCF, in Langtang National Park in north-central Nepal, is another exemplar of improved preservation of flora and fauna since local communities became responsible for the protection and conservation of their forest. In addition to subsistence agriculture and ecotourism, local communities are actively involved in conserving a critical forest habitat for wildlife. From the 340 ha of forest, a 133 ha forest was recently handed over by the national park authorities to the local users group. The Tamang indigenous people constitute the majority of the 138 households in the BZCF.

Prior to the proactive engagement of the local communities about 20 years ago, forest cover and wildlife populations, with the exception of wild monkeys, were sparse. Locals began to conserve the forest and later had it registered as a community forest at the district forest office. Vegetation cover has increased by up to 30% and ground cover by up to 70% (WWF Nepal 2008). The common leopard, wild boar, spotted deer, porcupine, Himalayan black bear and monkeys, common in the national park, are now also found in the forest. 'This is because of the community's active role in forest conservation,' remarked Jit Maya Bulun, a member of the forest user group, in an interview. Local people have planted pines and other plant species, and have banned soil collection. Erosion has been drastically

Syaubari Buffer Zone Community Forest (Photo by Sudeep Jana)

reduced. A recent study by WWF Nepal emphasised the biodiversity value of the forest, which hosts more than 40 tree species (including *Pinus* spp., *Rhododendron*, *Quercus*) and 29 animal species (WWF Nepal 2008).

Villagers control hunting and poaching and undertake group patrols once a week. One representative from each household joins the patrol. Tamangs have their own practices that reflect their strong social and cultural adaptation to nature. A small patch of forest cover (4 ha) in the BZCF is being preserved as a sacred forest, a burial site. There are strict restrictions on the cutting and collection of any forest products in that area. The Tamangs believe that the shadow of a sheltering tree keeps the dead body beneath it cool, and hence prolongs its decomposition. Cultural values are also associated with wildlife, and animals are hunted to offer as gifts to daughters. '*Lingo*', traditional wooden pillars on which to hang flags of religious value, are found in front of the houses, signifying the Tamangs' affinity with nature.

Local people collect forest products, such as deadwood, grass, fuelwood and medicinal herbs, in a sustainable manner. The community forest has generated substantial savings from the wise use of forest products. There is about US $ 5714 in the community forest fund. The fund was generated mainly from the nominal charges levied for the collection and harvesting of forest products and partially from the national park revenue channelled through the buffer zone council (author's interview with researcher in the area).

Dibyapuri Buffer Zone Community Forest (Chitwan National Park)

Wetlands on the fringes of Chitwan National Park (CNP) have been found to be immensely rich in biodiversity, and significant to the livelihoods of poor and indigenous people. Three wetlands, locally known as Gainda Tal (Lake), Devi Tal and Sanischar Tal, fall under the jurisdiction of the Dibyapuri BZCF of CNP. The wetlands cover an area of 8 ha and include grasslands, forest and part of the Narayani River. The wetlands face several serious threats to biodiversity. While the local indigenous fisher folk have often been blamed by non-fishing communities for affecting the wetland ecosystem, there are other factors. These include encroachment by agriculture, occasional flooding of the nearby Baula River and invasion by alien plant species, as well as destructive fishing practices by non-indigenous fisher folk (author's interview with conservation project staff in the area).

In mid 2005, Forest Action, an NGO facilitating the local communities' initiatives for conserving wetland ecosystems and improving local livelihoods, began to engage with local communities, indigenous people and institutions. (They particularly wanted to engage with user committee leaders and the buffer zone community forest users group.) Forest Action wanted to bring together all the local actors on a common platform for wetland conservation. The area is now being managed by a local wetland management committee that includes indigenous and non-indigenous local communities. They created an operational plan with provisions for wetland conservation and sustainable use. These provisions have been fully implemented in the annual management activities and the group maintains records of the periodic wetland ecosystem assessments (Forest Action 2008).

A participatory wetland assessment showed that species abundance and diversity increased and environmental services improved after local actors became involved in wetland conservation. Threats to wetland conservation have also been reduced. Unsustainable harvesting has been stopped. Local community efforts have been effective in controlling invasive species, such as *Mikenia micaranthes.* Controlled grazing has led to the growth of *khair* (*Acacia cattechu*) in the wetland areas. Local people have also cultivated and protected fruit trees and wild vegetables. They have planted various fruit seedlings, including mango, jackfruit, pineapple and several fodder trees on private lands near the wetlands. A part of the wetland is allocated to the indigenous communities to plant and manage wild vegetables as a source of income and food security. The 43 varieties of plant species (wild vegetables, fruits and edible aquatic species) and 12 fish species found in the wetlands are used by local people. People claim that there have been sightings of rare wildlife, such as the one horned rhinoceros, tigers, wild boar and deer (Forest Action 2008).

Traditional livelihoods and the wetland ecosystem are thus intertwined. The wetland ecosystem has been significant to nearby indigenous people and poor communities, such as the Bote, Mjahi, Musahar, Tharu and Dalits, as well as other higher caste groups. The area is open once a year for fishing. Poor households harvest wild vegetables for nine months of the year. However, there have been competing claims and interests over the wetland resources. Livelihood necessities of indigenous fishing minorities have often been the source of conflict with non-indigenous communities. There have been incidences when local Bote women—indigenous fisher folk—resisted the restrictions on fishing in the wetland imposed by the community forest users group. Local Bote women claimed that, traditionally, they had been fishing and accessing wild vegetables in the area for their livelihoods. The restriction was later lifted after persistent

protests from the Bote women. The conflict of interests between poor and indigenous people and non-indigenous communities was a key challenge in setting up wetland management. Devendra Adhikari, who worked as a field coordinator in the area, stated that 'non-indigenous communities wanted to develop the area as a tourist destination whereas the poor and indigenous people were concerned about access and use of the resources of the wetland for their livelihood'. This has, perhaps, remained one of the most serious challenges for the BZCF programme; to truly constitute a rights-based approach by realising social equity and involvement of the community within the buffer zone (CDO 2007).

A broader look at buffer zone community forests in Chitwan National Park

Management and sustainable resource use rights ceded by national park authorities to the user committee in Dibyapuri and other BZCFs around Chitwan National Park have been critical to the success of forest conservation within the buffer zone. The practice of allowing local communities to access driftwood brought by floods has led to collective management and distribution in the buffer zone. This has significantly reduced pressure on the resources of CNP. User committees in CNP are also given authority to manage the occasional harvesting of thatch grass in the core zone of the park. This has contributed significantly to curbing illegal extraction inside the park and resulted in more green grass for domestic livestock. The practice of collecting thatch is regulated and monitored by user committees. A recent study on the effects of decentralised governance on biodiversity in CNP, was carried out by Forest Action (Paudel and Bhatta 2008). The study suggests that the management roles and use rights of local communities in the buffer zones complement the conservation of biodiversity. Based on the practices in CNP and its buffer zone, the study infers that the BZCF contributes to biodiversity conservation. Local involvement in management decisions results in an ecologically sound PA and similar involvement in security arrangements leads to effective park protection. The experience of the 400 ha Bagmara BZCF, under the jurisdiction of the Bagmara User Committee of Chitwan National Park, also provides a successful example of the local community's proactive role in forest management and eco-tourism securing economic benefits (Paudel and Bhatta 2008).

Putting RBAs into practice: the role of civil society and local mobilisation

Putting RBAs into practice is not easy in PAs in Nepal. The roles of rights-based civil society organisations, and, more importantly, the proactive engagement of community-based organisations, are significant in demanding and realising the rights of local people around the PAs. The Community Development Organization (CDO) is a pioneer civil society organisation engaged in the rights issues of local people in the buffer zone of the lowland PAs in Nepal. It has been learning and practicing the concept of RBAs to conservation for almost a decade (see www.cdo.org.np for more information). The concept has been an integral part of its grassroots activism and advocacy for just conservation. To develop and execute RBAs in the buffer zone, a greater focus has been placed on community mobilisation and empowering the most marginalised. Despite advocacy and lobbying with actors at the national level, the strongest base has been primarily a grassroots campaign. Its activities include:

- grassroots community dialogues;
- local organising (especially of poor and marginalised groups, hitherto disorganised);
- training and discussion of local agendas (including rights violations and campaign strategies to secure rights);
- multistakeholder dialogues;
- nonconfrontational symbolic mass action; and
- much more.

Such efforts have often met with resistance from existing power structures, such as the broader buffer zone management committees and PA authorities. In fact, rights campaigns for just conservation have been accused of being 'anti-conservation' (based on CDO experiences).

The Protected Area People's Rights Federation (PARF) has been advocating and expanding the debate on rights in the protected areas of Nepal for the past several years. Grassroots campaigns led by PARF and facilitated by CDO have yielded significant achievements in expanding local people's usufruct rights over natural resources in and around lowland PAs (Jana 2008). The decision of the reserve authorities in Jana Jagaran BZCF to allow the BZCF to control the harvesting of natural resources in specific locations was not sudden. The BZCF leaders and local activists of PARF engaged in extended negotiation and dialogue with rangers and the warden of the reserve. 'This is a small victory, but an important one. It is because

Park affected locals protesting in Chitwan National Park (Photo by CDO)

of our ongoing mass campaign for the rights of the buffer zone populace that this was possible,' noted Devi Chaulagain, president of the BZCF and leader of PARF (CDO 2008). The advocacy and campaigning of the Federation of Community Forest Users Group in Nepal (FECOFUN), one of the largest civil society organisations in Nepal, have also been critical in expanding discussions on RBAs in the community forestry movement.

Reflections and conclusions on buffer zone community forests as RBAs in Nepal

The BZCF model in protected areas of Nepal can be understood to be following RBAs to conservation, but with several policy and practical shortcomings. The degree to which the BZCF framework supports comprehensive rights-based conservation would have to be improved or expanded within Nepal's historical, socio-economic, cultural, legal and policy context. This is critical to realising the ethos of RBAs, which link local people's rights to natural resources and environmental conservation. However, rights are accorded by the PA authorities to the BZCFs, at present, on the grounds of conservation goals rather than full acceptance

and internalisation of the natural resource rights of local people. The 'right to natural resources' is still dormant in the mainstream of human rights discussions in Nepal.

The experiences of the BZCFs discussed here illuminate important facets of RBAs to conservation in buffer zone areas of Nepal. There are also other cases where local people are conserving biodiversity and meeting their livelihood needs through emerging mechanisms that expand specific rights and responsibilities. One important lesson drawn from these experiences is that biodiversity conservation and local livelihoods can both benefit. Empowering poor and marginalised social groups by, among other things, granting rights to appropriately designed democratic institutions can be an important factor in:

- generating ecological and economic benefits;
- contributing to poverty reduction among natural resource dependent poor and indigenous people;
- mitigating the costs of conservation; and
- harmonising conflicting relations between people and PAs.

However, these benefits remain underestimated and poorly understood at present.

It is equally critical to acknowledge the challenges of promoting equity and good governance in the context of societies characterised by unjust social structures and hierarchical and asymmetrical power relations. In Nepal, the problems of the equity and participation of marginalised social groups —including poor and indigenous people—in resource management and governance in buffer zones are pressing. Even within the BZCF structures, poor and indigenous people are often excluded from decision-making processes. Their places have been captured by the local elite. This hints at a crucial paradox and a challenge to buffer zone institutions as effective RBAs. Giving 'rights' to the community does not necessarily translate into 'rights' for the poor and the most marginalised social groups. However, the specific cases discussed here demonstrate positive experiences, due in large part to the sensitive facilitating role of civil society organisations and/or the democratic leadership of the forest user groups' community leaders.

Though communities are preserving the BZCFs, the PA authorities have not handed over full ownership of forests in the buffer zones to local communities. BZCFs do not hold the autonomous status that community forests beyond the PAs enjoy. The autonomy of forest user groups in buffer zones is closely linked with the autonomy and sovereignty of the BZMC in general. Thus, while grassroots democracy and democratisation of resource use and governance are important, the full potential of a RBA is

also determined by the enabling legislative and policy environment of the surrounding PAs.

In conclusion, while buffer zone community forests present a promising potential for RBAs to conservation, the management and governance of buffer zones could be further improved and democratised. There are gaps in policies and practices. If, and how, improvements will occur depends largely on the policies and paradigms of PAs in general. Despite ample experience of community-based forest management and conservation, current PA policies in Nepal do not explicitly capture the philosophy of RBAs. However, progress is being made and RBAs offer considerable potential to build an equitable and effective system of PA management.

Important lessons for further RBAs to conservation in Nepal can be learned from the examples reviewed in this chapter, and other similar experiences. For instance, the rights agenda promoted within grassroots movements, campaigns and critical civil society groups in the lowland PAs of Nepal has been key to advancing rights in the area. The successful experiences in community forestry and conservation in areas, such as the Annapurna Conservation Area, provide important examples of partnership between local people and conservation agencies. The contemporary global discussions on the rights of indigenous people and local communities in relation to PAs also offer important know-how. Nepal is undergoing considerable political transition and RBAs can contribute significantly to the debate and reform of natural resource governance in the context of state restructuring and federalism.

Endnotes

1 The term is used to be inclusive of local communities and indigenous people.

2 This excludes existing BZCFs in Rara National Park, Parsa Wildlife Reserve and Annapurna and Manasalu Conservation Areas, due to lack of available and reliable data.

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Seeking respect for a Sherpa community conserved area:

Responsibility, recognition and rights in the Mount Everest region of Nepal

Stan Stevens

Introduction

On 25 May 2008 twenty-eight Sherpa leaders announced that they considered their homeland of Khumbu, which includes Sagarmatha (Mt. Everest) National Park (SNP) and the SNP Buffer Zone, to be an unofficial, indigenous peoples' and community conserved area (IPCCA). IPCCAs are places where conservation is carried out by indigenous peoples and other local communities through their customary or new values, institutions and practices (Borrini-Feyerabend *et al.* 2004, Dudley 2008). The announcement sparked a controversy in Nepal. Government officials and others took the position that a national park cannot be both a national park and an IPCCA and that indigenous peoples cannot declare IPCCAs. It was not considered relevant that the national park, in this case, was superimposed on pre-existing, centuries old, Sherpa conservation institutions and practices, Nor was it considered relevant that Sherpas continue to maintain those IPCCAs today. There was no public discussion of whether lack of recognition of IPCCAs may violate internationally-affirmed indigenous rights. There was also no acknowledgement that this lack of recognition fell short of international standards for the management of protected areas within the territories of indigenous people.

Part of the eastern area of the Buddhist sacred valley and Sherpa homeland of Khumbu (Sagarmatha National Park), with Mt. Everest (the Sherpa sacred mountain Chomolungma) at the upper left and the SNP buffer zone village of Khumjung and its sacred temple forest, community forest, and community grasslands (all Sherpa local IPCCAs in SNP) in the centre and foreground. (Photo by Stan Stevens)

This chapter presents a case study of rights, rights-based conservation and livelihoods in a contested IPCCA. I begin by discussing IPCCAs and indigenous rights. The chapter reviews the strong basis for recognising IPCCAs in international law. It highlights how indigenous peoples' rights to maintain IPCCAs are affirmed by a set of human rights and indigenous rights acknowledged in multiple international treaties and declarations. It underscores the substantial support for rights-based conservation and IPCCAs in policies and standards for protected areas, standards which have been adopted by the International Union for Conservation of Nature and Natural Resources (IUCN) and by the Parties to the Convention on Biological Diversity (CBD). A brief overview of the status of indigenous peoples and indigenous rights in Nepal and in Nepal's national parks is presented. Then the chapter focuses on the controversy over Sherpa leaders' efforts to gain respect for their IPCCAs in SNP. In examining that controversy the events of 2008 are discussed in the context of regional conservation history. This history includes Sherpa conservation stewardship carried out through a regional IPCCA and multiple local forest, grassland and alpine IPCCAs. It also includes issues arising from the superposition of SNP on existing Sherpa IPCCAs and the governance and management of SNP since 1976. From these perspectives Sherpa leaders' difficulty in gaining recognition and respect for their IPCCAs is discussed in the larger context of the lack of recognition of indigenous rights in Nepal's national

parks. The chapter concludes by emphasising Sherpa leaders' commitment to maintaining their IPCCAs and to working collaboratively with the Nepal government to ensure that Sherpa IPCCAs are integral to the future management of SNP.

IPCCAs and indigenous rights

> A particularly challenging situation is presented by Community Conserved Areas that lie within existing government-designated protected areas but where there is no formal recognition of the communities' ties to them and/or the management history and current practices. … Support to communities wishing to gain recognition of Community Conserved Areas that are now within designated protected areas requires exploration of both the state's and the communities' claims and concerns … the partnership between state and community in such cases is likely to be strongest when both rights and responsibilities are recognized (Borrini-Feyerabend, Kothari, and Oviedo 2004, p. 72).

Rights-based conservation has increasingly been advocated internationally since the 1990s (Colchester 1994, Stevens 1997b, Brockington *et al.* 2006, Campese *et al.* 2007, Campese and Guignier 2007). There has been particular emphasis on conservation which recognises the collective rights of indigenous peoples. Advocates have found in indigenous rights grounds for repudiating coercive physical and economic displacement long associated with exclusionary conservation enclosures and constructed, imposed uninhabited wilderness (Stevens 1986, 1997b, 2006, Colchester 1994, Neumann 1998, 2004, Spence 1999, Brockington 2002, Dowie 2005, Cernea 2006, Brockington and Igoe 2006). They have also found grounds for supporting conservation based on indigenous peoples's cultural values, practices, and governance. This is what I have referred to as 'conservation through cultural survival' (Stevens 1997b) and Nietschmann (1992, 1997) has called 'conservation through self-determination'. A decade ago international conservationists began to recognise that 'the acknowledgment of indigenous rights, including land and sea rights, subsistence rights and self-determination, is critical to the establishment and operation of effective protected areas' (Stevens 1997b, p. 7). Experience since then strongly suggests that the legal recognition of these rights by states is crucial. So, too, is a clear affirmation that recognition of these rights applies to the management of existing protected areas as well as to the establishment of new ones.

IPCCAs can be a particularly powerful form of rights-based conservation. Indeed, of all the protected area (PA) governance types, they and Indigenous Conservation Territories (ICTs) can represent the most complete and

effective recognition of indigenous peoples' and communities' collective rights to territory, self-governance and self-determination. (ICTs are PAs established by indigenous peoples on their customary lands, and often constitute large IPCCAs and/or include small ones.) IPCCAs affirm and promote:

- conservation;
- territorial and land/water ownership or custodianship;
- decision making;
- the protection and care of sacred places;
- livelihood continuity and security;
- maintenance of cultural, political, and economic institutions, traditions, practices and aspirations; and
- culturally and environmentally sensitive poverty alleviation and 'development'.

IPCCAs represent the free, informed decisions of indigenous peoples and local communities about their lands, lives and futures. Their declaration by indigenous peoples and local communities can also be a potentially effective means of seeking recognition and support from states and NGOs for rights-based conservation and for broader human and indigenous rights.

Most IPCCAs worldwide have not gained state recognition (Borrini-Feyerabend *et al.* 2004, Kothari 2006b, Borrini-Feyerabend *et al.* 2008b). These IPCCAs are maintained by indigenous peoples and local communities solely under customary law, not national law. They are thus, from the state perspective, *de facto,* not *de jure,* conservation areas and practices. They do not constitute legal expressions of recognised indigenous rights over territories, self-governance, cultural expression, or resource use and management. The declaration of IPCCAs by indigenous peoples and other local communities is often part of an effort to seek acknowledgement of, and respect for, rights rather than a reflection of state recognition of them. Declaration of an IPCCA often represents an appeal to the state, NGOs and others to respect the existence of IPCCAs. It appeals for respect for their conservation goals and policies and the larger sets of human and indigenous rights within which they are maintained.

IPCCAs are supported by international declarations and conventions on both human and indigenous rights—both individual and collective. Among the pertinent individual human rights are rights to freedom (including freedom of belief, speech, association and assembly), dignity non-discrimination in terms of race, ethnicity and gender, participation in cultural life, and 'substantive rights' to life, sustenance, shelter, health and

work. These rights can be interpreted to include rights to natural resources, livelihoods and the management of natural resources in ways which make their use sustainable. Human rights also include pertinent 'procedural rights' to information, justice and political participation.

Although many states assert that human rights apply only to individuals, key international instruments also make reference to collective rights. The UN Charter, adopted in 1945, in its preamble calls for 'relations among nations based on respect for the principle of equal rights and self-determination of peoples'. The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN in 1966, both affirm in Article 1 that 'all peoples have the right of self-determination' and 'by virtue of that right they freely … pursue their economic, social, and cultural development'. This right is also recognised in the Vienna Declaration and Programme of Action (1993). ICESCR and ICCPR also proclaim in Article 1 that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources …. In no case may a people be deprived of their own means of subsistence'. The Vienna Declaration (Article 20) advises that 'states should … recognise the value and diversity of their [indigenous peoples'] distinct identities, cultures and social organisation'. The UN Human Rights Committee has also recognised that livelihood practices and natural resource use are an important aspect of the rights of ethnic minorities 'in community with the other members of their group, to enjoy their own culture' as enjoined by Article 27 of the ICCPR (Sensi 2007, p. 36). This right is also recognised by the Vienna Declaration. Several other instruments similarly acknowledge that respect for individual rights requires recognition of collective cultural practices. These include affirmation of rights:

- to 'participate in the cultural life of the community' (Universal Declaration of Human Rights);
- to 'take part in cultural life' (ICESCR, Article 15);
- 'to profess and practice their own religion' together with members of their own community (ICCPR, Article 27, Vienna Declaration);
- 'to equal participation in cultural activities' (International Convention on the Elimination of All Forms of Racial Discrimination, CERD, Article 5);
- 'to own property … in association with others' (CERD, Article 5 and Universal Declaration on Human Rights); and
- to fulfil one's 'duties to the community' (Universal Declaration of Human Rights).

Collective rights, moreover, have been advanced specifically for indigenous peoples. A number of international instruments give powerful impetus to

rights-based conservation by recognising indigenous peoples' rights to own and control territory, use and manage natural resources, and maintain their cultures, self-governance, and self-determination. These rights provide strong grounds for indigenous peoples to conceive and implement IPCCAs and to expect them to be legally recognised and supported by states and NGOs.

Key international indigenous rights instruments, such as the UN Declaration on the Rights of Indigenous Peoples (the Declaration) and the International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169), recognise a large set of collective rights. These rights are specific to indigenous peoples and applicable to conservation contexts. There are, for example, at least 31 articles of the Declaration which are relevant to the establishment of protected areas, including IPCCAs, on indigenous peoples' lands. While not legally binding, the Declaration is expected to have considerable moral authority and is likely to influence the development of future international law. Many of these rights are also embodied in ILO 169, which is legally binding for those countries which have ratified it. In 2007 Nepal became the 19th state to sign ILO 169; it was the first mainland Asian state to do so and the first state signatory worldwide since 2002. The relevant rights in the Declaration and ILO 169 include those associated with four major, interlinked sets of rights (see Annex 1 for details):

1. individual and collective human rights and freedoms;
2. recognition of indigenous peoples' rights to maintain, strengthen, and revitalise customary political, social, economic and cultural institutions and practices;
3. self-determination, including self-governance and participation in decision making and policy development; and
4. indigenous peoples' rights to ownership and management of traditional lands.

These rights instruments lay such a strong foundation for supporting IPCCAs that it is difficult to conceive of a rights-based approach that does not include respect for IPCCAs. IPCCAs embody many human and indigenous rights which seem collectively to constitute a right to maintain the natural resource management and conservation stewardship of their territories through their knowledge, values, beliefs, institutions and practices.

The Convention on Biological Diversity (CBD), a binding 1992 international agreement which the Government of Nepal has ratified, provides further rights support for IPCCAs. Articles 8 (j) and 10 (c) of the CBD urge recognition and respect for the importance of indigenous

peoples' knowledge and practices for the conservation of biodiversity. The Parties to the convention, furthermore, made rights-based conservation central to their Programme of Work (PoW) on Protected Areas, which was adopted in 2004. Element 2 of the PoW on Protected Areas, which is devoted to 'governance, participation, equity and benefit sharing', is a strong statement of support for rights-based protected areas and endorses IPCCAs.

Rights-based conservation in protected areas, including IPCCAs, is also supported by a substantial body of International Union for Conservation of Nature and Natural Resources (IUCN) recommendations and 'best practice' guidelines. These include:

- the Durban Accord;
- the Durban Action Plan;
- 'Message to the Convention on Biological Diversity'; and
- many recommendations adopted at the 5th World Parks Congress (WPC) convened in 2003 by IUCN's World Commission on Protected Areas.

Among the relevant WPC 2003 recommendations are those on:

- Community Conserved Areas (V. 26);
- Indigenous Peoples and Protected Areas (V. 24);
- Mobile Indigenous Peoples and Conservation (V. 27);
- Good Governance of Protected Areas (V. 16);
- Co-Management of Protected Areas (V. 25); and
- Cultural and Spiritual Values of Protected Areas (V. 13).

These initiatives were endorsed by the 2004 IUCN World Conservation Congress. At the 2008 World Conservation Congress, members adopted further recommendations which support implementation of the UN Declaration on the Rights of Indigenous Peoples, rights-based approaches to conservation and IPCCAs. These include:

- Rights-based Approaches to Conservation (RES4.056);
- Supporting Indigenous Conservation Territories and other Indigenous Peoples' and Community Conserved Areas (RES4.049);
- Recognition of Indigenous Conservation Territories (RES4.050);
- Implementing the UN Declaration on the Rights of Indigenous Peoples (RES4.052); and
- Indigenous Peoples' Protected Areas and Implementation of the Durban Accord (RES4.048).

IUCN's World Commission on Protected Areas, in its *Guidelines for Applying Protected Area Management Categories* (Dudley 2008), moreover makes clear that:

> Especially in regions such as Latin America, North America, Oceania, Africa, Asia and the Arctic, many formally designated protected areas are at the same time the ancestral lands and waters of indigenous peoples, cultures and communities. IUCN has long adopted and promoted protected area policies that respect the rights and interests of indigenous peoples …. IUCN applies the following principles of good governance as they relate to protected areas overlapping with indigenous peoples' traditional lands, waters and resources:
>
> - Protected areas established on indigenous lands, territories, and resources should respect the rights of traditional owners, custodians, or users to such lands, territories and resources;
> - Protected area management should also respect indigenous peoples' institutions and customary laws;
> - Therefore protected areas should recognise indigenous owners or custodians as holders of the statutory powers in their areas, and therefore respect and strengthen indigenous peoples' exercising of authority and control of such areas. (Dudley 2008, p. 30)

Rights-based conservation grounded in recognition of collective indigenous rights provides a basis for reconfiguring the relationships between states and indigenous peoples (and often also between NGOs and indigenous peoples). These reconfigurations support new kinds of conservation and protected areas. Recognition of indigenous rights challenges the practices of nation-states which suppress ethnic diversity, regard indigenous peoples' homelands as frontiers suitable for annexation and erase local institutions and practices through imposed national administrative measures (Nietschmann 1994, Vandergeest and Peluso 1995, Scott 1998, Niezen 2003, Peluso 2003). Acknowledgement of indigenous rights requires that indigenous peoples be regarded as 'rights holders not stakeholders' in their homelands. This is a change in status with enormous ramifications for how state agencies and conservation NGOs interact with them and implement conservation programmes in their territories. Indigenous rights-based conservation requires that conservation be grounded in cultural affirmation and self-determination. This includes indigenous peoples' voluntary adoption and adaptation of values, institutions and practices, and a strong degree of participation in conservation planning and policy making. It supports protected area governance and management which recognise indigenous peoples' rights to territorial control and decision making, cultural affirmation and expression, and self-governance and self-determination.

Indigenous peoples, rights and protected areas in Nepal

Nepal has recognised 59 groups of indigenous peoples, who together constitute at least 37% of its national population. And, as has been made clear in current proposals to establish extensive autonomous regions for indigenous peoples, these groups can claim customary ownership of most of Nepal (Battachan undated, 2000, Lawotri 2001, 2005, Gurung 2003, 2006, Jana 2007). As mentioned, in 2007 Nepal ratified ILO 169 and voted in favour of the adoption of the UN Declaration on the Rights of Indigenous Peoples. The Sherpa and other indigenous peoples, however, may face a difficult struggle for rights recognition and right-based conservation. Nepal has long had a relatively poor indigenous rights record and this was an important factor in the 1996-2006 Maoist 'People's War'. It was also a cause for the rise in Nepal of an indigenous rights movement. The demands of the movement were for constitutional reforms, representation by indigenous peoples in the government and the creation of autonomous states for indigenous peoples in a federal Nepal. Indigenous peoples in Nepal have had few of the territorial, political, economic, cultural and other rights sought by the global indigenous peoples movement. Nepal's indigenous peoples were forcibly incorporated in the late 18th and early 19th century into a Hindu Pahari ('people of the hills') empire dominated by the Bahun and Chhetri castes. For two centuries they have been socially, politically, culturally and economically marginalised and oppressed by a Hindu Pahari national elite. Indigenous peoples do not have their own territories. Their lands have been seized and invaded, their institutions replaced, and their customs criminalised. Use of indigenous languages in local government and schools has been forbidden, and the boundaries of local and regional administrative units gerrymandered to divide indigenous peoples' territories and render them politically powerless. For the past half century they have been subjected to coercive assimilation policies and practices as the elite attempted to promote Hindu Pahari culture as the basis of a 'Nepali' nationalism and nation state. Many fundamental indigenous rights continue to be denied today (Limbu undated, Battachan undated, 2000, Lawotri 2001, 2005, Gurung 2003, 2006; Gurung 2006, NEFIN 2006, ICHRDD 2007). The history of indigenous peoples in Nepal has been a tragic, but familiar, account of 'internal,' Fourth World colonialism (Nietschmann 1994).

Since 1992 Nepal has established co-managed conservation areas and buffer zones which recognise some measure of local natural resource management and share some of the benefits of revenues from protected areas (Stevens 1997a, c, 2007). These 'progressive' policies and practices have received much national and international attention. They are, however, arguably

examples of the recognition of conditional privileges, not rights, and of co-managed PAs rather than PAs managed by indigenous peoples and local communities. Conservation areas and buffer zones, and their local resource management institutions, would not be considered to be IPCCAs except in cases where communities have *de facto* management authority. Moreover, such co-management approaches have not been extended to the national parks and wildlife reserves administered by central government. These have not been centres of rights-based conservation. That the national protected area system has been almost entirely established in the territories of indigenous peoples (Stevens 1997c, Battachan 2000) is not acknowledged. Indigenous peoples who live within and around protected areas are not recognised as such in national protected areas law or in Department of National Parks and Wildlife Conservation (DNPWC) regulations and management plans. Indigenous peoples are typically referred to as 'local residents,' 'local people,' or 'stakeholders,' a practice which Alcorn and Royo (2007) regard as a danger signal. In the past, indigenous peoples were displaced to create lowland national parks and wildlife reserves, none of which are inhabited today (Stevens 1993, 1997c, Jana 2007). Indigenous peoples continue to live within and use the natural resources of all but one of the Himalayan protected areas. But they have no defined 'rights'

Kongde peak, forests, and grasslands in Sagarmatha National Park, with interspersed Sherpa buffer zone settlements including the villages of Khumjung and Khunde (centre) and the seasonally-inhabited herding/agricultural settlement of Tashinga (foreground). All forests and grasslands in this photograph are customary Sherpa IPCCAs in which forest use and grazing continue to be managed by communities. The forests are also now governed by the Sherpa regional firewood collection management system established in 2002. (Photo by Stan Stevens)

to natural resource use or management. Indigenous peoples' access to natural resources has been sharply curtailed in the national parks without their consent. Additionally they have been little involved in protected area governance and management. Governance of national parks in the Himalaya, as in the lowlands, has been carried out by the state through authoritarian institutions and policies. These have often clashed with or undermined indigenous rights and have been resented and contested by indigenous peoples (Stevens 1993, 1997c, 2008d, Battachan 2000, Upreti and Adhikari 2006, Jana 2007, Paudel *et al.* 2007).

The controversy

The Khumbu region is the ancestral homeland of the Sherpa people, who are one of Nepal's recognised indigenous peoples. The region is globally significant as part of it was designated Sagarmatha (Mount Everest) National Park (SNP) and a World Heritage Site in the 1970s. It is now internationally appreciated that conservation in SNP is, to a significant degree, 'an achievement of Sherpa conservation stewardship' as well as national and international efforts. Khumbu is an 'outstanding example of a regional IPCCA that incorporates multiple local IPCCAs' (Borrini-Feyerabend *et al.* 2008b, p. 8-9). Sherpa conservation stewardship of Khumbu through IPCCAs, and the controversy sparked by their public affirmation or 'declaration' of this, was highlighted in the recent IUCN publication *Recognizing and supporting indigenous and community conservation: Ideas and experiences from the grassroots* (Borrini-Feyerabend *et al.* 2008b, see also Stevens 2008b).

In May 2008 Sherpa leaders adopted the Sherpa name *Khumbu Yulwi Tholenkyauw Densa* ('Khumbu community cared for, or looked after, area'), or Khumbu Community Conserved Area (KCCA). This signified that the Sherpa take responsibility for caring for all of Khumbu through their many local IPCCAs and regional conservation practices. IPCCAs are not legally recognised in Nepal. Nor is the Sherpa collective ownership of their territory or their management of their commons and sacred places within SNP. However, Sherpa leaders

> believe that the concept of ICCA [IPCCA] is useful to think about the links between culture and conservation. They emphasise the importance of reaffirming Sherpa culture and conservation in a time of social, economic, and cultural change. By conceptualising their own ICCA, [they] feel they are better equipped to address current challenges and threats to continuing Sherpa care and conservation of Khumbu. (Borrini-Feyerabend *et al.* 2008b, p. 5)

Sherpa leaders, moreover, hoped that by informally raising awareness of their conservation practices they could strengthen their care of their homeland as a sacred Himalayan valley and Buddhist sanctuary. Specifically, they sought to revitalise culture and commitment to conservation among Sherpa youth. They wanted to 'provide an encouragement for Sherpa to rededicate themselves "as a people" to the conservation of their homeland through strengthening Sherpa values and practices'. They sought greater respect and coordination from government agencies and national and international conservation organisations through what 'appeared [to be] a simple but powerful way to alert and inform conservationists of the Sherpa positive role' (Borrini-Feyerabend *et al.*, 2008b, p. 23).

Khumbu is rich in Sherpa IPCCAs of different scales. Some are many generations old and others are more recent (Stevens 2008b). These IPCCAs do not inherently conflict with SNP, and indeed greatly contribute to conservation in the park. This situation of a protected area (PA) being simultaneously 'legally' administered by the state and 'informally' or formally managed by communities through IPCCAs is common worldwide. Many state declared PAs have been established, as in the case of SNP, on lands which indigenous peoples and local communities have traditionally owned and occupied. Lands they have conserved through IPCCAs. While in some cases these IPCCAs have been lost or destroyed, in many others they continue to be maintained or communities wish to revive them (Kothari 2006a, b, Borrini-Feyerabend *et al.* 2008b). Such IPCCAs can be recognised, respected and supported within government, private and shared governance PAs of all IUCN categories. They can also provide the basis for indigenous peoples and community governed protected areas.

Recognition of IPCCAs within existing PAs supports their continuing contribution to conservation. Failure to respect and support IPCCAs can diminish or destroy their conservation effectiveness at great cost to PAs. Recognition of IPCCAs also adds important value to PAs by affirming internationally endorsed human and indigenous rights. It also brings PAs into line with IUCN and Convention on Biological Diversity (CBD) standards that affirm these rights as part of the 'new protected area paradigm'. For countries, such as Nepal, which are signatories to many legally binding, international, human rights instruments, recognition of IPCCAs within existing PAs can be considered essential to their obligations to honour and uphold human and indigenous rights.

In late July and early August 2008, however, Nepal's Department of National Parks and Wildlife Conservation (DNPWC) strongly rejected the idea that Khumbu can be simultaneously conserved both by the government as a national park and by an indigenous people through their IPCCAs. Sherpa leaders were informed that the KCCA was 'illegal' and

were pressured to 'withdraw' their declaration. Sherpa leaders were unable to persuade DNPWC officials that their IPCCA was informal and did not constitute either the unauthorised establishment of a new protected area or an effort to supplant SNP. Nor were they able to convince the DNPWC that they had no 'vested interest' in reaffirming their IPCCAs other than their commitment to conservation. They were unable to convince the DNPWC that they were acting on their own initiative and out of their own conviction and sense of responsibility, and not at the behest of international conservationists. In August 2008 Sherpa leaders accordingly withdrew their 'declaration'. They continue, however, to strongly support the concept of IPCCAs, to mobilise Sherpa efforts to strengthen their local and regional IPCCAs, and to seek respect and support for them. The DNPWC and Nepal conservation NGO staff continue to discuss whether (and how) to recognise IPCCAs in the future and whether to respect existing IPCCAs within national parks. There has been no further dialogue between the Sherpa and DNPWC officials about how acknowledgement of Sherpa IPCCAs can build stronger conservation alliances and foster greater mutual respect and support. There remains the possibility, however, that Sherpa affirmation of their IPCCAs can 'still be accepted in the spirit in which it was intended, and endorsed by the authorities. That would begin a sound process of cross-cultural communication and learning based on mutual respect and shared conservation goals' (Borrini-Feyerabend *et al.* 2008b, p. 23).

This episode highlights that the Government of Nepal has not yet adopted national laws which fully recognise and affirm human and indigenous rights in national parks. The DNPWC does not yet govern national parks through rights-based approaches. Nor does DNPWC recognise and support IPCCAs and other 'new protected area paradigm'conservation approaches in Nepal's national parks even though these are strongly endorsed by IUCN and Parties to the CBD. The controversy also suggests that the Nepal government does not yet appreciate that recognition of IPCCAs and other measures may be essential to comply with Nepal's obligations under international human rights and indigenous rights covenants to which it is a signatory.

Sherpa leaders have not advanced rights claims in announcing their intention to defend territory, culture, resources, livelihoods and self-determination in a country and a protected area system in which they feel that they, and other indigenous peoples, have been marginalised and discriminated against (Stevens 1993, 1997c, 2006, 2008c, d). The concept of a regional Sherpa IPCCA and recognition of local Sherpa IPCCAs, however, could be advanced on the basis of many moral and legal claims. These include claims to:

- culture;
- customary institutions;
- territory;
- self-determination;
- self-governance;
- decision-making authority over development and conservation;
- collective rights to settlement and natural resource use and management in support of both customary rural livelihoods and new careers in tourism; and
- assuming a rightful role in protected area governance.

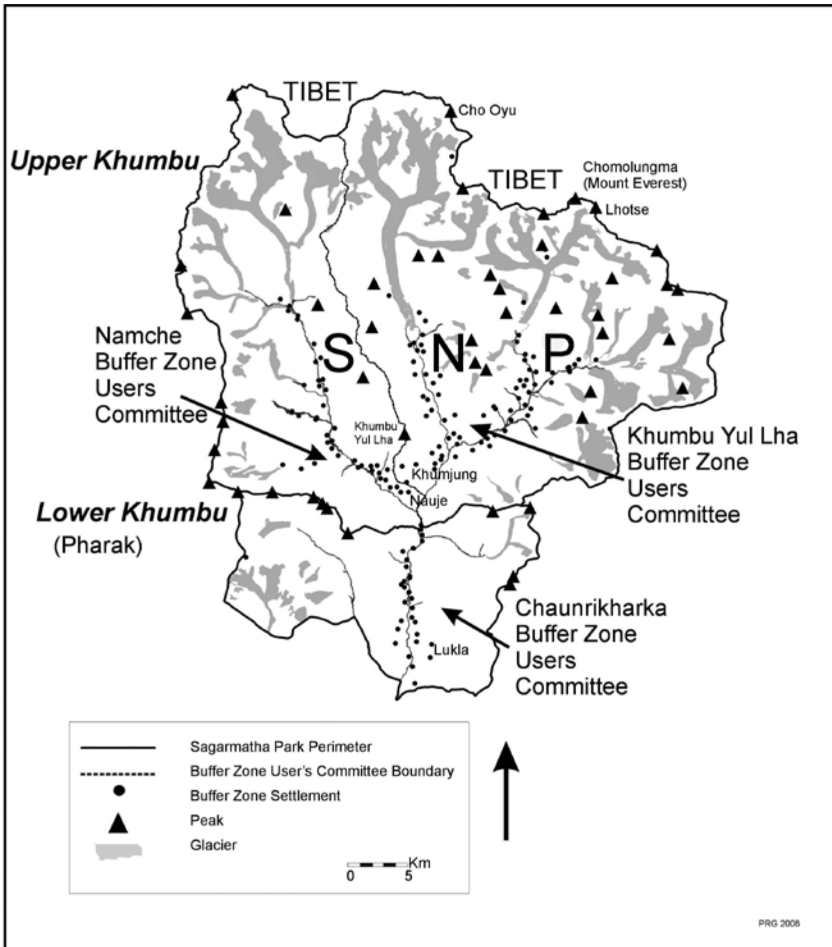
The Sherpa, which the Nepal government legally recognises as indigenous peoples (*adivasi janajati*), can claim such rights under ILO 169, which the Nepal government ratified in 2007. They can also claim these rights under earlier Nepal government human rights and international conservation commitments, including the Convention on Biological Diversity (see Borrini-Feyerabend *et al.* 2008a).

The Mount Everest region as an IPCCA

> We Sherpa people are very rich—we have so many CCAs (Sherpa leader, May 2008).

The area that Sherpa leaders conceive of as an IPCCA comprises a 1500 km^2 region of high mountains and valleys which ranges from 2200 m to 8848 m in altitude. Sherpas call the region Khumbu; some refer to upper Khumbu and lower Khumbu or Pharak. Khumbu is the homeland, a sacred landscape and source of livelihood for nearly 6000 people, more than 90% of them Sherpa. They live in more than fifty permanent villages and maintain additional dwellings in more than 120 seasonal herding and secondary agricultural settlements (Stevens 1993). The Sherpa conceive of Khumbu as a regional IPCCA which encompasses all of the Khumbu Sherpa settlements, sacred places and commons. It includes all of the area administered as SNP and its buffer zone. Khumbu, as a whole, is considered a Buddhist sacred valley and a Sherpa wildlife sanctuary protected by the Sherpa affirmation of Buddhist values. Nested within the regional IPCCA are many local IPCCAs through which individual settlements and associations of communities manage particular forests, grasslands and alpine areas.

This high altitude Sherpa homeland includes four of the ten highest mountains in the world and many other high peaks. Its extensive alpine areas, forests and grasslands are habitats of endangered or rare snow



Map 1. Khumbu, Sagarmatha National Park, and Sagarmatha National Park Buffer Zone. Not all settlements are shown. Settlements in both upper and lower Khumbu are part of the SNP buffer zone; they are not part of SNP or the SNP World Heritage Site. Basemap adapted from ICIMOD MENRIS SNP/SNPBZ Land Cover Map. (Map by Stan Stevens)

leopards, leopards, musk deer, red pandas, Himalayan black bears and other wildlife. The rich montane biodiversity and significant populations of endangered species thrive because generations of Sherpas have coexisted with them. The habitat and wildlife have been conserved through Sherpa values, institutions and practices. All regional wildlife has been protected because of the core Sherpa belief that they should not kill any form of life (Stevens 1993, 1997c, 2008b).

Through the concept of the KCCA, Sherpa leaders affirmed continuing responsibility for a cultural landscape which contains their sacred natural sites—mountains, forests, caves, springs and lakes—and extensive alpine

regions, forests and grasslands. They rely on this landscape for subsistence farming and herding, and for tourism development, and have historically shaped it through their land use and management practices (Stevens 1993). All Sherpa families continue to maintain organic farms whose potato and other fields are fertilised with manure and composted forest leaves. Many families also raise yaks and other cattle in upper Khumbu. IPCCAs manage their transhumance in most of the region through a system of rotational grazing zones. Most families supplement farming with jobs in mountaineering and trekking or by operating small family hotels. In many villages more than 80% of households earn an income from tourism. More than 20% of all families own and run hotels and over 250 Sherpa owned hotels constitute more than 95% of all regional hotels. The successful integration by the Khumbu Sherpa of customary subsistence practices and tourism has made them one of the most prosperous of Himalayan peoples. Significant regional and community differentiation in wealth, however, persists (Stevens 1993, 1997c, 2003).

Sherpa conservation in Khumbu is based on indigenous knowledge and values. Their values include protection of all wildlife (which has made the entire region a wildlife sanctuary for many generations); the sanctity of the region as a sacred hidden valley and the site of a number of sacred mountains and forests; and continuing community management of commons. The Sherpa regulate the livelihood uses of all of the region's forests and much of its rangelands. This is achieved either through customary village and regional management institutions (customary local IPCCAs) or through Sherpa, local and regional, forest management institutions and practices established in 2002, which constitute new regional IPCCAs. Sherpa conservation values, institutions, practices and achievements are reported in detail in Stevens 2008b.

Sherpa maintenance of local and regional IPCCAs is important to the sustainability of their livelihood practices. The *nawa* (*nauwa, naua*) system is a community and multisettlement IPCCA which regulates crop production, grazing and cutting wild grass for hay. This system operates through customary law, village assemblies and the work of elected, volunteer local officials (*nawa*). The *nawa* enforce the closing and opening of various land use zones. This ensures that livestock have sufficient winter grass and fodder, and distributes grazing pressure across alpine rangelands. It also keeps fields, alpine areas, grasslands and forests fertile by distributing manure and compost, and protects summer crops from livestock. Collecting firewood, the main source of energy in the region, is also regulated by IPCCAs. Maintaining adequate supplies close to settlements is essential for households and hotels. Collection is now regulated not only in community managed forests, but also by a Sherpa regional firewood collection management system in upper Khumbu that manages all forests

within SNP. Sherpa leaders are also promoting forest conservation through their administration of small-scale hydroelectric facilities and provision of fossil fuels as alternatives to fuelwood (Stevens 1993, 2003, 2008b, d).

Governance of natural resource use within national parks by communities through their culture and institutions is permitted as a privilege in SNP, unlike in other national parks. But it is not recognised as a right by the Himalayan National Parks Regulations (1979) or draft Sagarmatha National Park Regulations (2008). Sherpa IPCCAs are not recognised or mentioned in the draft SNP regulations or the *Sagarmatha National Park Management and Tourism Plan 2007-2012*, and these institutions, accordingly, have no formal status in SNP.

Sherpa IPCCAs, Sagarmatha National Park and the SNP Buffer Zone

> Official protected areas may have been established, knowingly or unknowingly, on top of pre-existing Community Conserved Areas, putting traditional practices and management systems at risk … this can have serious negative results for both the conservation status of the resources and the livelihoods of people. (Borrini-Feyerabend *et al.* 2004, p. 52)

SNP was declared against Sherpa wishes in 1976. Its history and present dynamics have been characterised by continuing tension and conflict between Sherpas and officials appointed by the DNPWC to manage Khumbu natural resource use and conservation (Stevens 1993, 1997c). Present Sherpa leaders believe that the national park is important because of its potential to buffer the adverse environmental effects of tourists and large, non-locally-owned hotels. But many Sherpas continue to be alienated and upset by policies and practices which they do not feel respect them as the indigenous people of Khumbu. Their participation in protected area governance is not valued nor are their culture, institutions and conservation stewardship sufficiently honoured. The Sherpa declaration of the KCCA is thus the latest development in a long struggle over identity, territory, rights and concepts of conservation. This struggle is not simply between the state and communities. It is between the indigenous Buddhist Sherpa people and the non-indigenous Hindu national elite who dominate national governance. This 200-year experience some Sherpas and other indigenous peoples describe as 'internal colonialism'.

SNP was established on Khumbu Sherpa community lands. The Nepal government had nationalised these lands in the 1960s even though it had previously legally recognised them as collective (*kipat*) Sherpa lands

(Regmi 1975). The national park includes not only mountains and forests sacred to the Sherpa people or to particular clans and villages, but also all of what were formerly community-owned forests and rangelands of the upper Khumbu villages. Sherpa villagers continue to use these 'national park' lands as commons. They manage them through customary and new institutions, not with any legal authority but as a privilege informally authorised by SNP and DNPWC officials. The park does *not* include the dozen upper Khumbu permanent settlements and more than 120 seasonal settlements. Because these many settlements were excluded, and because daily Sherpa use of natural resources within SNP is not considered to be 'habitation,' SNP has been represented by the Nepal government as an 'uninhabited' national park (Stevens 1993, 1997c). But Sherpa residents were not physically displaced, as occurred with other indigenous peoples and local communities in several other Nepal national parks (Stevens 1997c, Battachan undated, 2000, Jana 2007). Subsequent restrictions on their access to natural resources in SNP without their consent or compensation constitute economic displacement under policies adopted by the World Bank in 2002. This can be regarded as a form of involuntary population displacement by a protected area (Cernea 2006). In 2002 all of the upper Khumbu settlements, together with the 34 Sherpa villages of lower Khumbu and their surrounding commons, were designated the SNP Buffer Zone by the Nepal government. Lower Khumbu communities (but not upper Khumbu ones) have gained legal co-management authority to manage their forests and rangelands under DNPWC policies and SNP Buffer Zone management plans and regulations.

The lack of restitution of legal community management authority over commons in upper Khumbu remains a source of tension between Sherpa leaders and SNP officials. This is despite an informal understanding that upper Khumbu Sherpa can manage and sustainably use a range of 'national park' resources. These include grazing, wild grass for haymaking, building stone, beams (although not other building timber), water—including for irrigation and hydroelectric power—firewood (deadwood only) and forest biomass for compost. Although their authority is sometimes undermined by SNP interventions, Sherpa communities and institutions have exercised significant *de facto* management over natural resource use in extensive lands ostensibly administered by SNP. This includes all of SNP's forests and much of the temperate, subalpine and alpine rangelands. Grazing and cutting wild grass are coordinated by customary law, village assemblies and *nawa.* Felling trees for timber and gathering deadwood for firewood are administered by *nawa* and by elected local and regional Sherpa buffer zone leaders in coordination with SNP. Communities continue to prohibit all tree felling in temple forests and sacred forests declared generations ago by revered religious leaders and known as 'lama's forests'. In upper Khumbu,

Pangboche temple and village in the Sagarmatha National Park Buffer Zone and the Sherpa sacred lama's forest at Yarin in Sagarmatha National Park. According to oral traditions this sacred forest has been strictly protected against tree felling for four centuries. Sherpa stewardship of this forest as a local IPCCA continues today. (Photo by Stan Stevens)

buffer zone leaders introduced a forest management system in 2002 (with the authorisation and coordination of SNP) which regulates firewood collection throughout Khumbu. This new Sherpa IPCCA conserves forests through the implementation of designated harvesting areas, seasons and limits. Collection of firewood has fallen by more than 75%. This constitutes one of the most outstanding recent conservation achievements in the Nepal national park system (Stevens 1993, 1997c, 2003, 2008b, 2008d). Although the system disadvantages the poor, Sherpa leaders were able to gain acceptance for it because they arranged for alternative energy (hydroelectricity and fossil fuels) and because it was seen as legitimate management of Khumbu commons through Sherpa institutions. Remarkably, this system is not mentioned in the draft SNP Regulations or the *SNP Management and Tourism Plan 2007-2012*.

Recognising IPCCAs and rights in SNP

By declaring the KCCA, Sherpa leaders reaffirmed Sherpa responsibility for the care and conservation of Khumbu, announced their intention to continue this stewardship and sought national and international respect, recognition and support for Sherpa conservation values, institutions and practices. The non-confrontational language of the declaration emphasises

that it is an affirmation of Sherpa identity and culture rather than an act of opposition to, and rejection of, SNP. It provides an opportunity and constructive basis for government officials to acknowledge Sherpa institutions and their conservation contributions to SNP. Sherpa leaders welcome stronger collaboration grounded in appreciation of their culture, concerns, aspirations and special stewardship responsibilities. They hope that greater awareness and understanding of Sherpa IPCCAs will facilitate a new working relationship with DNPWC officials based on greater dialogue and mutual respect. Such a partnership will be strengthened by government recognition that Khumbu Sherpas are the indigenous people of the national park, that Khumbu is a Sherpa homeland as well as a national park, and that respect for Sherpa IPCCAs is critical to the affirmation of human rights and indigenous rights. Sherpa leaders are attempting to ensure that conservation according to Sherpa values and through their responsibility and stewardship will be integral to SNP planning and management rather than being undermined or compromised by it. They seek to ensure that Khumbu conservation continues to be achieved through Sherpa governance of IPCCAs as well as by central government and international initiatives. They want all regional conservation programmes to be informed by respect for Sherpa concerns and interests and carried out in partnership with them. If Sherpa leaders succeed, SNP may yet become a 'new paradigm' protected area; one which effectively upholds IUCN and CBD standards and affirms internationally-recognised, human and indigenous rights.

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Annex I. Rights instruments and provisions supporting respect for IPCCAs

Abbreviations

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
CERD	International Convention on Elimination of All Forms of Racial Discrimination
Declaration	UN Declaration on the Rights of Indigenous Peoples
ILO 169	International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries

Relevant Articles in the Declaration and ILO 169

(Key articles in bold)

I Individual and Collective Human Rights and Freedoms

Declaration 1, 2,

ILO 169 2, 3, 30

II Maintaining and Revitalizing Culture, Institutions, and Practices

Declaration **3, 5, 8,** 9, **11**, **12**, 13, 14, **15**, **20**, 24, **25**, **27**, **31**, 33, **34**, 35, 36, **40**

ILO 169 2, **4**, **5**, 6, **8**, 9, **13**, 17, **23**, 27, 28, 30, 31

III Self-determination, Governance, Participation

Declaration **3, 4, 5**, 18, 19, 20, 23, **26**, 32, **34**, 35, 39, 40

ILO 169 6, **7, 8,** 9

IV Ownership and Control of Land, Natural Resources, and Land Management

Declaration 10, 18, 19, 20, 23, 24, **26, 27**, **28**, **29**, **32**, **34**, 35, 36, 39, 40

ILO 169 **5**, **8,** 9, **14, 15, 16,** 17, 18

Key Passages from the UN Declaration on the Rights of Indigenous Peoples

Preamble

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources…

Recognizing and reaffirming … that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

Maintaining and Revitalizing Culture, Institutions and Practices

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions …

Article 8 (1): Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. (2) States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories, or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration …

Article 11 (1): Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures … (2) States shall provide redress through effective mechanisms, which include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual

property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12: Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; …

Article 13 (1): Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies … and to designate and retain their own names for communities, places and persons …

Article 15 (1): Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations …

Article 20 (1): Indigenous peoples have the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. (2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 25: Indigenous peoples have the right to maintain and strengthen their distinct spiritual relationship with their traditionally owned or otherwise occupied and used land, territories, waters, and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 31 (1): Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions …

Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and, in the cases where they exist, juridicial systems or customs …

Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Self-determination, Governance and Participation

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 35: Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Land, Resources and Management

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 23: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development …

Article 26 (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process … to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used …

Article 28: Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied or used or damaged without their free, prior and informed consent …

Article 29 (1): Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection …

Article 32 (1): Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources …

Internationally affirmed, human rights supporting IPCCA recognition

- Right of peoples to self-determination including economic, social, and cultural development

  UN Charter, ICESCR, ICCPR, Vienna Declaration

- Indigenous peoples' distinct identities, cultures, and social organization to be valued by states

  Vienna Declaration

- Collective cultural life, including religion

  ICCPR, ICESCR, CERD, Vienna Declaration, Universal Declaration of Human Rights

- Collective cultural life including livelihood practices, natural resource use

  ICCPR as interpreted by the UN Human Rights Committee

- Freely dispose of their natural wealth and resources and not be deprived of means of subsistence

  ICESCR and ICCPR

- Own collective property

  Universal Declaration of Human Rights, CERD

- Fulfill duties to one's community

  Universal Declaration of Human Rights

10

My rights, your obligations:

Questions of equity in Indonesia's protected areas

Moira Moeliono and Elizabeth Linda Yuliani

Introduction

Conservation and management of protected areas in Indonesia are typically the concern of the (central) state. The rights and initiatives of local people with respect to their natural resources are often ignored or considered illegal. For years, many protected areas existed mainly on paper, as the government lacked capacity to establish a sufficient presence in the field, and the areas remained 'protected' mostly because of remoteness and isolation. Local communities continued their traditional practices unmonitored by the state and only marginally linked to markets. Decentralisation, which started in 1999, paradoxically brought the state and communities closer. Central government, previously remote and abstract, is now represented by local government in direct and visible contact with communities. Local government has the mandate to promote development, that is, economic development and modernisation. Better access to government also brought markets closer, and with them, ideas of western style modern life and consumerism. As a result, conservation and management of protected areas, in particular national parks, have become battlegrounds between local people and the state.

On the one hand, local and indigenous people claim traditional rights over land and its resources, including the right to use and manage resources for economic gain. On the other, the state, that is the central government, claims ultimate control and takes on the duty to conserve these areas for the public good. Both sides put pressure on local government to support their claims. Local governments, for the most part, are struggling to bring development to their people. They perceive conservation and protected areas as burdens and constraints to 'development', especially since protected areas often contain the only remaining natural resources (Angi 2005, Indriatmoko 2005, Yuliani *et al.* 2007).

In an effort to promote good governance of protected areas and help resolve conflicts, CIFOR has conducted a series of studies using participatory action research (PAR) and adaptive collaborative management (ACM) approaches. The essence of an ACM approach is that management and governance are rooted in a process of conscious and intentional learning by a group of people dealing with a shared area of concern, with the intention of innovating for improvement or goal achievement (Prabhu *et al.* 2007).

The ACM facilitators worked with local communities and other stakeholders to catalyse an adaptive and collaborative management process designed to improve local, human and natural wellbeing (Colfer 2005). The ACM approach contributes significantly to self definition and social justice, principles shared with rights-based approaches as defined by Nyamu-Musembi and Cornwall (2004).

In facilitating the ACM process we focused on issues of empowerment, participatory decision making, equity and links between rights and responsibilities. Indeed the realisation that recognition of, and respect for, rights lie at the foundation of good governance has resulted in more explicit attention to rights. However, in many cases these rights are mainly articulated as 'rights to natural resources'. Experiences from three sites, Danau Sentarum National Park in West Kalimantan, the village of Baru Pelepat in the buffer zone of the Kerinci-Seblat National Park in Jambi and the Kutai National Park in East Kalimantan are highlighted.

Protected areas and local initiatives

The main objection to protected areas is that they have often displaced local or indigenous people and imposed the state as the 'owner' of lands and resources (Fay and Sirait 2002, Contreras-Hermosilla and Fay 2005). Protecting areas for conservation or reserves, *per se*, is not an alien concept in Indonesia. Many traditional and customary groups have established protected areas for generations.

The Kasepuhan people in West Java divide their territory into several areas, including a strictly protected area (Galudra 2005). In Sumba, areas of primary forest, known as *Tana Paita*[1], are excluded from the *Tana Kaba* lands designated for subsistence (Kapita 1970, Mulyana 2008). The Dayaks of East Kalimantan know the *Tana Ulen*[2] (Eghenter *et al.* 2003); and the people in Jambi know *lubuk larangan*, fish spawning areas in the river protected by local communities (Permatasari 2007, Surma *et al.* 2008). Frequently these areas served to reserve resources for later use rather than explicitly for conservation. The result, however, has been the conservation of biodiversity and sustainable use of resources.

The concept of nature reserves and national parks was, therefore, not as alien as is often suggested. However, the establishment of protected areas, in general, and national parks, in particular, did not build on local knowledge or conditions. Nor has there been a real effort to adjust the national policy for conservation to conform to local traditions. Indeed, since its inception, protected area policy in Indonesia has adopted concepts derived largely from the West (Rhee *et al.* 2004).

Lately, influenced by local and international pressure, more participatory approaches have been adopted. While the interpretation and practice of 'participation' might be questioned, on the whole, results have been positive. They have opened up more possibilities for local involvement in conservation. In the case of some national parks, the 2004 ministerial decree (No. P19/Menhut-II/2004) on collaborative management of protected areas has even provided local communities with the basis for negotiating rights.

Three cases

Danau Sentarum National Park

This largely wetland area covers some 132 000 ha in West Kalimantan and includes a diversity of ecosystems, from wetlands to hill forest. The park has always been inhabited by local Iban Dayaks, who are mainly farmers, and Malay fishermen. In times past, the Malay population shifted according to the fishing season, but these days most have settled within the park boundaries (see Giesen and Aglionby 2000 for a detailed description of the area). A growing population and encroachment (Indriatmoko 2008a), and pressure from large-scale oil palm plantations (Heri forthcoming) are the main threats.

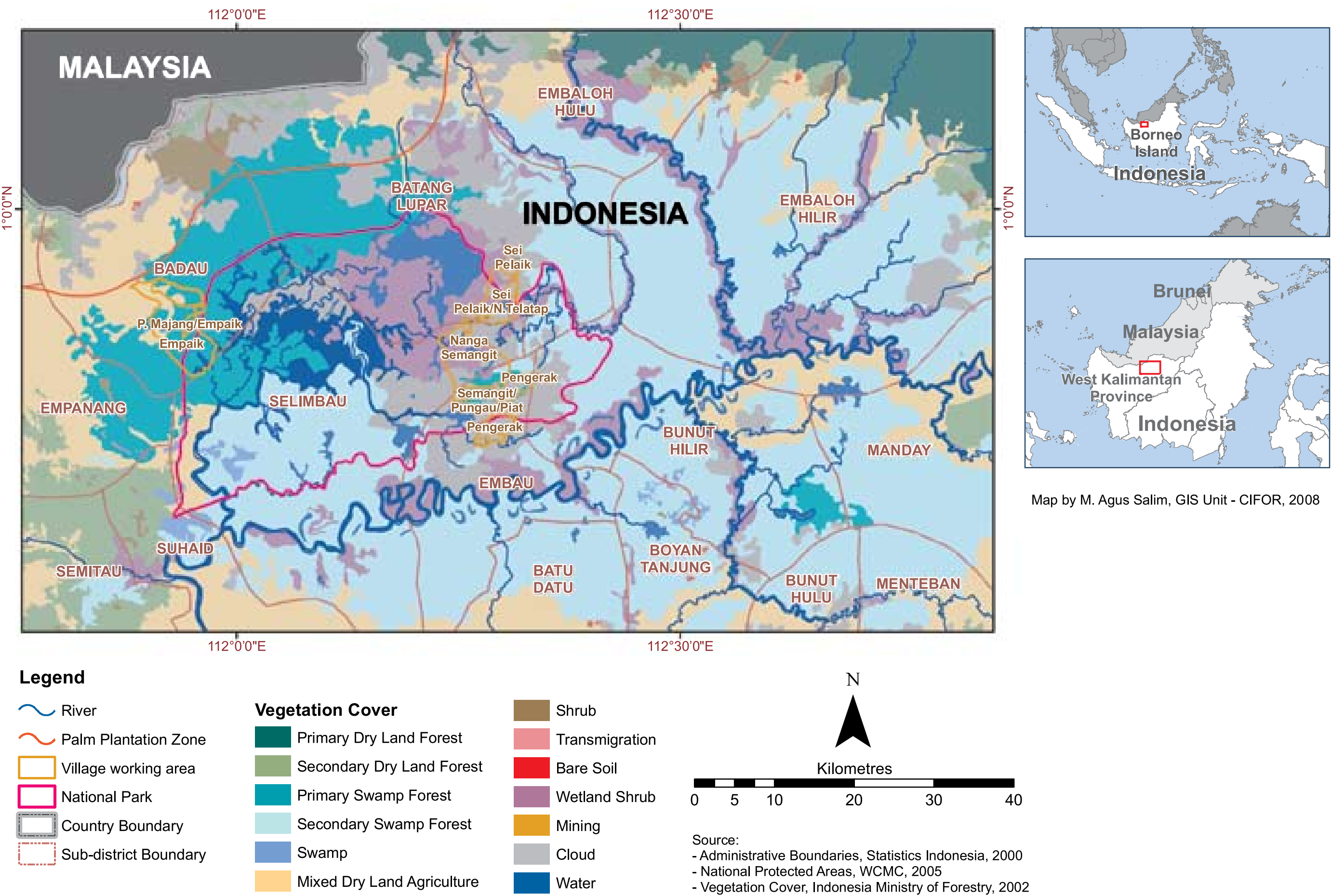

Figure 1. Map of Danau Sentarum National Park, located in Kapuas Hulu District, West Kalimantan Province, Indonesia

The emphasis of CIFOR's intervention was to promote good governance using an ACM approach. This focused on participatory decision-making processes and action research on conservation activities to improve local people's livelihoods (see Yuliani *et al.* 2008a, b, for further details of the approach).

Our research shows that multistakeholder, formal and informal processes are important means for breaking down social barriers and helping to balance power among stakeholder groups. Formal processes, such as workshops and training, and informal interaction during participatory fieldwork, built good relations, mutual trust and understanding (Indriatmoko 2006, Yuliani *et al.* 2008a). National park staff learned to accept local people's aspirations and knowledge, and to integrate these in the park management plan. More importantly, the national park authority recognised local people's rights to live in the park and is sincerely attempting to collaborate with these rights' holders. In return, local communities have come to better understand and accept the national park's mission, authority and roles.

The park authority was open to a bottom-up approach and made serious attempts to involve local communities in decision making. Nevertheless, their openness was challenged by the district government which focuses on regional economic development and short-term revenue. The local government often promises a more reliable cash income to local people, in particular to village elites. Therefore, the involvement of local people in decision making should be carefully organised to ensure good representation and avoid capture of the process by the elite.

Work by CIFOR and others shows that practical interventions which provide clear and concrete incentives can persuade people to conserve and use resources in a sustainable manner (see, for example, Mulder *et al.* 2000, Yuliani *et al.* 2008b). There are two positive examples of these practical interventions. The first is a micro hydroelectric generator built through a shared learning process facilitated by CIFOR (Indriatmoko 2008b). The second is a wild bee honey processing and marketing project supported by an NGO.[3] Understanding the links between the natural forest, the water supply and food for the bees has motivated communities to guard their forest (Heri, personal communication, 2008). A prerequisite, however, is the recognition of their rights to do so by other stakeholders.

Jambi

The Jambi ACM project was located in the village of Baru Pelepat, 65 km east of Kerinci Seblat National Park. Covering an area of 7265 hectares, the village is home to approximately 700 people comprising local ethnic

groups and migrants, and typified by wealth, gender and power inequalities (Kusumanto *et al.* 2005, Adnan 2008).

The project enhanced adaptive capacity and collaboration among the key stakeholders by engaging them in a learning process for more sustainable and equitable management of their forests. From 2001 until 2006, the project used PAR as the umbrella approach and ran through several learning cycles to solve their problems (see Kusumanto *et al.* 2005 and Munggoro *et al.* 2006 for details of the learning cycles). The project emphasised building social capital through multistakeholder meetings and participatory activities.

A first experiment took advantage of new laws on regional autonomy. These established elections for village parliaments. The field team focused on helping the local community learn how to organise and implement fair and democratic elections (Kusumanto *et al.* 2005, Diaw and Kusumanto 2005). The democratic election laid a strong foundation for the subsequent learning processes. These included determining and negotiating village boundaries, including rights to manage resources within the boundaries (Marzoni 2007), and strengthening women's rights in decision making (Permatasari 2007, Rodiah 2008).

The interconnected themes of the learning processes have generated some important outcomes (Moeliono 2006, Munggoro *et al.* 2006, Kusumanto 2007, McDougall *et al.* 2007, Adnan 2008). These include:

- improvements in human and social capital, in particular the ability to identify problems and use them as 'vehicles' for learning;
- improved relations, collective action and collective knowledge across stakeholders, for example better respect for women and youth, lower incidence of conflict amongst community leaders;
- improved capacity and confidence of women and youth to express their opinions in decision making and public meetings;
- strengthened local institutions; and
- better information flow among community members.

These outcomes and the democratic processes developed helped the communities to gain recognition of their control over a customary forest area and to set up local rules to manage and protect the forest. In other words, community empowerment led to the revival of traditions for communal management of customary forest. Community consultations led to the establishment of local rules and a management body which strengthened their claim for recognition by the district government (Indriatmoko *et al.* 2007).

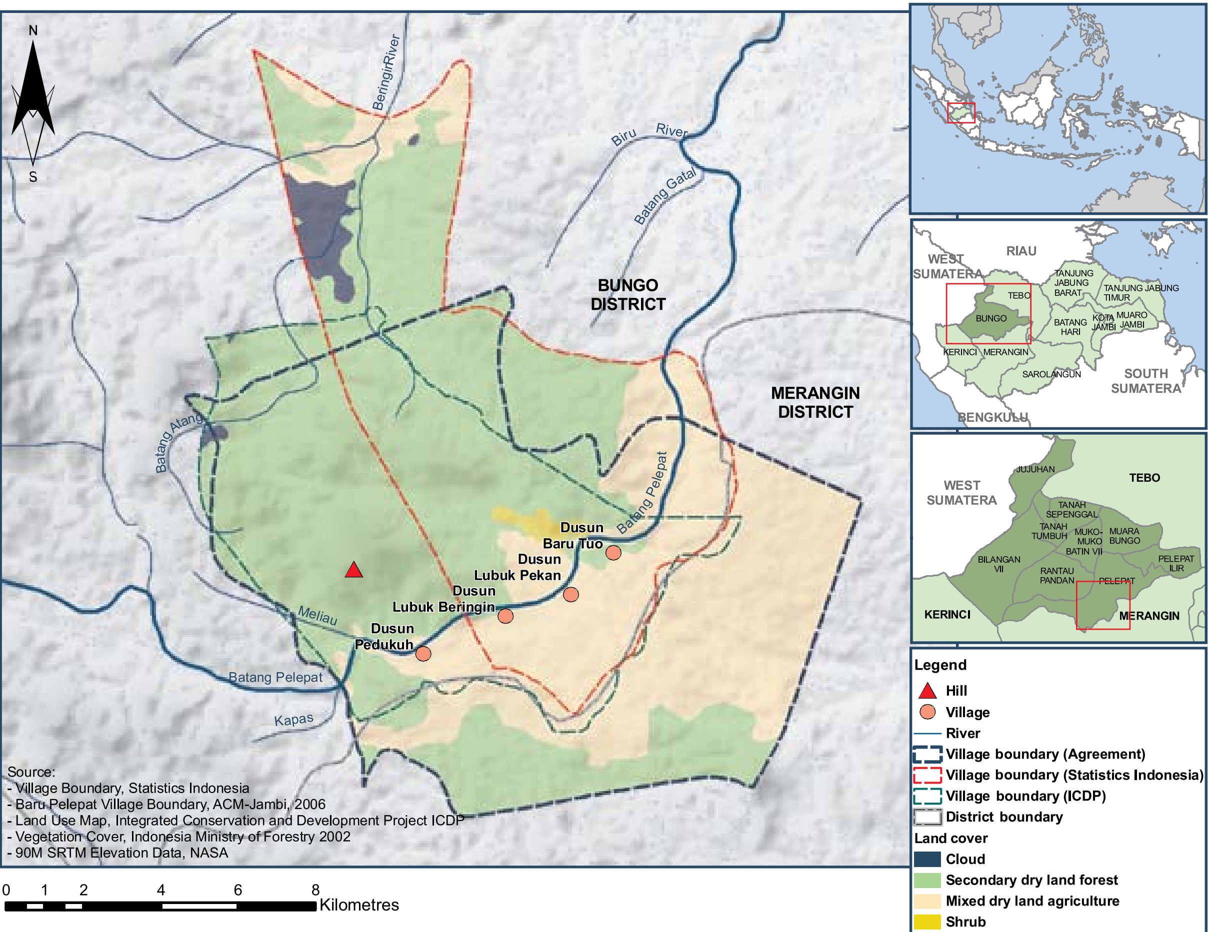

Figure 2. Map of Baru Pelepat Village, located in Bungo District, Jambi Province, Indonesia (see also Marzoni 2007)

Baru Pelepat provides an example of success in terms of customary forest management. Assisted by the research team[4], the community decided to designate and protect their customary forest. After much discussion and consultation, the community formulated and agreed a set of rights and responsibilities regarding local natural resources. These rules were later formalised as village regulations. At a later stage they became sufficiently confident to petition the district government for recognition of their customary forest and participated in discussions to draft a district regulation (see details of these processes in Pariyanto 2008 and Dobesto 2008).

It is also important to recognise that even when the rights to manage customary forest are assigned to local communities, those rights can be abused. There have been a few cases in Indonesia where customary forests, formally recognised by the district government, were 'sold' by the village leaders to timber companies, without the consent or even knowledge of their communities.

Kutai National Park

Kutai National Park in East Kalimantan is a park in crisis. Its value for conserving biodiversity of the increasingly rare lowland tropical rainforest was recognised in 1924 by a Dutch mining explorer. In 1934 some 2 million ha were declared forest reserve and in 1936 the Sultanate of Kutai declared 306 000 ha a wildlife reserve. This declaration was confirmed by the Republic of Indonesia in 1957 (*Karib Kutai* (Friends of Kutai) undated). The area was progressively eroded by settlements, timber concessions and industrial and urban expansion. In 1995, Kutai National Park was established with an area of just 198 629 ha.

Fires in 1983, 1994 and 1998, further encroachment by migrants and several resource extraction industries near the park (two coal mines, a gas plant, a fertiliser plant, an oil drilling plant and an industrial timber plantation) have caused severe degradation (*Karib Kutai* undated, Kaltim Prima Coal *et al.* 2003, Kutai National Park Authority and *Mitra Taman Nasional Kutai* (Kutai National Park Partners) 2007).

One emerging issue is recognition of the rights of the large population of migrants by the local government. These migrants are mostly from Sulawesi. Since the 1950s they have been coming to Kalimantan individually or in small family groups to make a better living (Vayda and Sahur 1996). They did not bring a tradition of communal management of resources, but claim land as their individual property. They do not have a strong emotional link to the land, merely considering it a vehicle to better their lives (Nanang *et al.* 2004). The park management agency is therefore concerned that, if given property, most people will sell the land to coal mining companies.

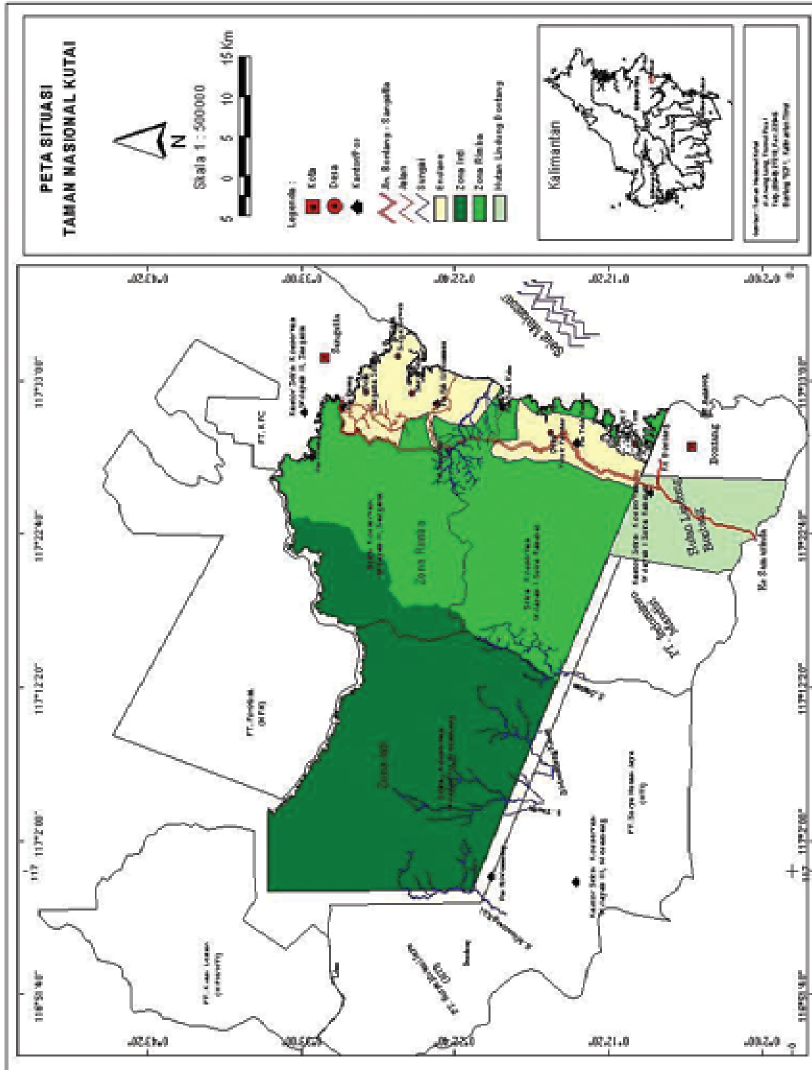

Figure 3. Map of Kutai National Park, located in three districts (Bontang Municipality, East Kutai District and Kutai Kartenegara District) in East Kalimantan Province in Indonesia

The local government's plan to 'give' land to migrants and excise these lands from the park must be understood in light of the decentralisation processes started in 1999. The larger district of Kutai was subdivided in 1999. As a result the park is now located in three districts: Bontang Municipality (2.5%), East Kutai District (80%) and Kutai Kartanegara District (17.5%). In 1997, the provincial government had already legalised three villages located in the park. In 1999, the local government in East Kutai proposed to convert a large part of the park (15 700 ha, in 2007 enlarged to 23 000 ha) to other uses (*Karib Kutai* undated). Although the Ministry of Forestry (MoF) had agreed in principle to establish an 'enclave', thereby recognising the rights of migrants, the enclave was never legally formalised. Over the next seven years the issue of the 'enclave' continued to be discussed at various workshops and meetings and used as political leverage at elections. A promise to provide legal rights to migrants during the 2006 district head election campaign triggered a protest by the local Dayak indigenous people. In mid 2007, they occupied and cleared some 500 ha of the park. They argued that they had respected the protected area status so far, but if migrants could have rights in the park, the indigenous people should have the same rights. Until recently the Dayaks have had no permanent settlement within the park boundaries. Many of these people have come from beyond Samarinda, the provincial capital located more than 100 km south of the park. The case is still pending. No actual rights have been recognised, neither have legal actions been taken against 'encroachers'.

Thus, general neglect by the central government, weak park management and pressure by local government to convert parts of the park to other uses have all provided opportunities for local people and entrepreneurs to encroach on the park. Buying and selling land is common, often involving employees of surrounding corporations. The six corporations nearby, while not actually encroaching, have ignored the conservation function of the park. They have undertaken community development activities, such as building public utilities or extending improved agriculture, which have had a negative effect on the conservation function of the park. The questions of who has what kind of rights, and who has which responsibilities, have become increasingly confused. As a result, Kutai has become a place where all stakeholders are breaking the law.

Research here was not part of the ACM projects, although similar approaches were used. The research explored the corporate social responsibility of the multinational industries and their roles in conservation and protection of the park. As a result of CIFOR's research, the corporations are now carrying out corporate social responsibility activities in a somewhat more accountable manner, and respecting the conservation function of the park. There are still areas to improve on, in particular in involving local government, getting the attention of central government and building social responsibilities. But

local government has clearly recognised the rights of long-term immigrants (as yet, without requiring the attendant obligations, such as the payment of land tax). However, it has failed to respond to the 'invasion' of indigenous people into the park. Thus rights and responsibilities are still confused.

The question of rights and responsibilities

Decentralisation and local autonomy have brought the question of 'rights' to the fore. For the first time, government is taking claims by indigenous people seriously. Over the last few decades, governance of natural resources in Indonesia has been coloured by the fact that rights are held by the government and responsibilities by the people. Decades of NGO lobbying, pressure from international organisations and reforms have led to talks about empowerment, participatory approaches and collaborative management, and the gradual adoption of a more rights-based approach. Full respect for human rights, however, is lacking. The government (MoF) remains very reluctant to relinquish its rights of control over forest land, especially over protected areas. This prevents local people from having a secure way of making a living. However, individual park agencies have learned the hard way that without recognising rights to resources people will not manage them responsibly. As a result, some park managers have taken the initiative and recognised the (limited) rights of local communities to park resources and have thereby achieved some degree of collaborative management.

These efforts were strengthened by the 2004 Minister of Forestry's regulation No. P19/Menhut-II/2004. This regulation provides a legal basis for park management agencies to work with local communities and also sets the guidelines for collaborative management of protected areas. Another improvement has been a ministerial decree, No. P56/Menhut-II/2006, which governs the zoning of national parks. This allows park management agencies to set aside areas for community use, indirectly recognising tenure rights. One challenge is that such special use zones should be compatible with the overall function of a protected area. In other words, 'special zones' should be 'special' from the perspective of conservation as well as local community use. Special use zones cannot be determined merely based on local claims. There need to be agreements between the authorities and the people on how to manage the area for both conservation and development. Establishment of these zones, therefore, needs preparatory efforts to empower local people. Their negotiation skills, in particular, need to be strengthened in order to develop local rules on rights as well as obligations, and to provide ways to exercise these.

When talking about tenure rights, in the case of Kutai, there is also a sense that these rights are absolute individual rights, where individuals are free to transfer these rights or treat the resources according to their wishes. This is often seen as a break with tradition which values communal property and local rules favouring conservation, as demonstrated in the cases of Jambi and Danau Sentarum. While individual property rights might not necessarily be bad, there need to be some communal management rules to protect the common interest, especially when environmental issues are at stake. There is a role for the state, whether central or local government, to regulate and to protect not only public interest, but also these rights.

With increasing demands for rights, the principle that rights entail obligations (Kapur and Duvvury 2006) becomes important. As described earlier, the success in Jambi of recognising rights was accompanied by agreement on a set of local rules for management, based on a strong communal tradition or strong leadership. Lacking this, the recognition of rights is too easily abused, and this is what was feared would happen in Kutai.

Consequently, when rights are at least partially recognised, local people have to relearn that rights are not absolute; property rights are as much about relationships between people as between people and the resource. In line with the conceptual model elaborated by Kapur and Duvvury (2006, p. 8), promoting good governance, therefore, should include efforts 'to raise levels of accountability and transparency in the development process by identifying rights holders (and their claims) and corresponding duty bearers (and their obligations)'. Further, government and local leaders should make sure there is a process of prior, free and informed consent in the establishment of protected areas.

The review of the three case study sites shows how local governments and the conservation agencies in the field have adjusted and adapted their management practices to local realities. The presence and role of local people is accepted and recognised. Park management is considering different types of zones to allow people to make a living while protecting the core zone of the parks. There have been efforts to involve local people in decision making on management of land and resources. Alternative collaborative schemes have been introduced and tried out.

The studies also show how applying a more rights-based approach and strengthening social capital leads to empowerment and improved bargaining positions vis-à-vis the local government. Further, providing skills and practical means at the same time will strengthen local capacity and awareness to fulfil the attendant responsibilities.

Finally, the cases also show that the recognition of rights, the development of local rules and identifying ways to bring development into conservation

areas, or conservation efforts to development areas, requires consistent hard work and the commitment of all stakeholders.

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Endnotes

1 *Tana Paita* is part of a primary forest considered sacred by local communities. All activities, including passing through it, are prohibited except for ritual ceremony.

2 *Tana Ulen* was, historically, an area excluded from the common use areas. Over time the concept has evolved to mean protection of natural resources allowing some use for communal purposes, for example bush meat for celebration, and construction material for village meeting halls.

3 The local NGO is the Riak Bumi Foundation, which has been helping local communities of DSNP since 1999 to increase their livelihood security through sustainable income generating activities. Through these NGO efforts, local communities in DSNP have successfully increased their income from honey production.

4 The Jambi ACM research team comprised researchers and facilitators from CIFOR and two local NGOs, Gita Buana Foundation and the Center for Study on Autonomy Law and Regulation

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11

Integrating gender equality and equity in access and benefit-sharing governance through a rights-based approach

Gabriela Mata and Adél Anna Sasvári

Introduction

The third objective of the Convention on Biological Diversity (CBD) is 'fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'. However, social, political and economic gender inequalities make it difficult for women to access many of the benefits derived from biological resources. These inequalities also make it difficult for women to participate in decision-making processes related to access to, and sharing the benefits of, genetic resources.

Given women's key roles in natural resource management and biodiversity conservation, mainstreaming gender equality and equity in access and benefit sharing (ABS) governance is necessary for achieving the third objective of the CBD. It is also crucial in realising the first two CBD objectives of conservation and sustainable use of biological resources. Existing inequalities between men and women jeopardise biological diversity conservation efforts and are an infringement of the 13th paragraph of the preamble of the Convention on Biological Diversity. This paragraph says that the Parties recognise 'the vital role that women play in the conservation

and sustainable use of biological diversity' and affirms 'the need for the full participation of women at all levels of policymaking and implementation for biological diversity conservation'. Furthermore, inequalities lead to violations of women's human rights. Adopting a rights-based approach to ABS implies that gender equality and equity must be mainstreamed in ABS and traditional knowledge (TK) governance.

This chapter explores the relationship between ABS and gender from a rights-based perspective. The first section presents the regulation of ABS within the CBD. The second section addresses access and benefit sharing of genetic resources from a gender perspective. The third section examines the implications of adopting a rights-based approach to ABS in terms of gender. Finally, conclusions and policy recommendations are presented.

Women make substantial contributions to the preservation of natural resources, genetic variation and traditional knowledge. Gender equality and equity in access and benefit sharing of these resources and knowledge are also demanded as a matter of human rights. Women at the Potato Fair in Tumbaya, Bolivia 2007. (Photo by Paz Bossio)

Access and benefit sharing within CBD

CBD Article 15 provides a framework for the implementation of the third objective of the Convention on 'fair and equitable sharing of the benefits arising out of the utilization of genetic resources'. This Article recognises the sovereign rights of states over their natural resources and asserts that the authority to determine access is subject to national legislation. It also stipulates that access to genetic resources shall be subject to prior, informed consent (PIC) and that access and benefit sharing shall be upon mutually agreed terms (MAT). Article 8(j) contains provisions to ensure the 'equitable sharing of the benefits arising from the utilization of knowledge, innovations and practices' of 'indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity'. These provisions on ABS are also linked to the provisions on access to, and transfer of, technology (Article 16); exchange of information (Article 17); technical and scientific cooperation (Article 18); the handling of biotechnology and distribution of its benefits (Article 19, paragraphs 1 and 2); and financial resources and financial mechanism (Articles 20 and 21).

Difficulties in regulating the use of resources and knowledge exported to third countries led to the adoption of the oftentimes bureaucratic ABS laws and policies. These have tended to stifle the collection of genetic resources and to restrict research and development, including basic research by national and foreign scientists (Tobin and Aguilar 2007). Consequently, the Fifth Meeting of the Conference of the Parties of the CBD created an Ad Hoc Open-ended Working Group on Access and Benefit-sharing. The working group was given the mandate to develop guidelines and other tools to assist Parties with the implementation of the ABS provisions of the Convention. The resulting *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* were developed and adopted in 2002. After the World Summit on Sustainable Development in 2002, the Conference of the Parties (COP) extended the mandate of the Working Group on ABS. It was required to elaborate and negotiate an international regime on ABS that would facilitate the effective implementation of the provisions in Article 15 and 8(j) and the three objectives of the Convention. Furthermore, at COP9 the Parties approved the 'Gender Plan of Action under the Convention on Biological Diversity', as contained in document UNEP/CBD/COP/9/INF/12, which invites Parties to support the Secretariat's implementation of the plan.

A gender perspective on ABS

> Gender equality entails the concept that all human beings, both men and women, are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles, or prejudices. Gender equality means that the different behaviours, aspirations and needs of women and men are considered, valued and favoured equally. It does not mean that women and men have to become the same, but that their rights, responsibilities and opportunities will not depend on whether they are born male or female. (Tobin and Aguilar 2007, p. 15)

The underlying problem

Gender differences, manifested in different expectations, rights, obligations and behavioural patterns for men and women are socially constructed and learned through socialisation processes. Gender roles are dynamic and culturally specific; they change in space and time. Gender is a part of a broad socio-economic context and is affected by other factors, such as race, ethnicity, economic status and age (UNDP 2007).

Both men and women play important roles in agriculture and conservation of biodiversity, though the unique inputs of women are often undervalued. Women make substantial contributions to preserving natural resources, genetic variation and traditional knowledge. They and their families' livelihoods depend to a large extent on access to these resources and to the benefits derived from them. In many countries, it is primarily women who save and manage seed. Up to 90% of planting material used in smallholder agriculture is seed and germplasm which women have produced, selected and saved (FAO 2001). Women also have a key role in growing and preserving underutilised species, which do not satisfy a large proportion of the world's food needs, but which communities use to supplement their diets. For example, in Yemen, women grow 'women's crops', such as groundnuts, pumpkins, leafy vegetables, cowpeas, cucumbers and sweet potatoes. These raise biodiversity and improve food security on the farm (NBSAP (Yemen 2005)). Women also play an important role in preserving the genetic diversity of many species because they have particular preferences. For example, Andean women choose a variety of potato that has the characteristics they want for cooking (Howard 2003). Rwandan women are reported to grow more than 600 varieties of beans and Peruvian Aguaruna women plant more than 60 varieties of manioc (FAO 2001). Yemeni women select and plant seeds of varieties with the characteristics they prefer, such as colour, size, genetic stability, disease tolerance, palatability and good processing qualities (NBSAP (Yemen 2005)). The value of women's knowledge is also apparent in traditional medicine. Up to 80% of the population of some developing countries relies mainly on traditional medicine: women tend

to have a different, and sometimes a greater, knowledge of wild plants and animals used for medicinal purposes than men (Sillitoe 2003, NBSAP (El Salvador 2000)).

Despite their importance, women's contributions tend to be undervalued and their interests and rights are often neglected. Inequalities that limit women's access to resources persist. For example, fewer than 10% of women farmers in India, Nepal and Thailand own land (FAO 2008). In some cases,

Case Study 1. The Natura—Ver-as-Ervas agreement and commercial use of traditional knowledge

Adapted from Laird and Wynberg 2008

In 2001, the staff of Natura, a Brazilian company that produces cosmetics, personal hygiene and perfume products, collected widely held traditional knowledge from people in the famous Ver-o-Peso market in Belem on a range of useful plants. Natura worked in collaboration with the market association Ver-as-Ervas as part of a verbal agreement, which they considered fair and standard practice at the time. Species incorporated into Natura products from this exchange included Breu branco, a resin produced from insect damaged trees, used traditionally as incense and in artwork and handicrafts, and extracted from the forest in Iratapuru. Priprioca, used traditionally as a perfume, and now grown in certified sustainable farms around Belem, was also used in a fragrance by Natura (CBD 2008a).

As the ABS policy in Brazil evolved and awareness grew of the need to compensate for the commercial use of widely known traditional knowledge, the women of Ver-as-Ervas sued Natura. Consequently, Natura entered into an ABS agreement with the association that included paying royalties, and providing upfront payment. This agreement has been signed by Natura and Ver-as-Ervas, but has not yet been approved by the Genetic Patrimony Management Council of the Environment Ministry, because of the complexity of the issue and lack of clear legal guidance on ABS related to traditional knowledge (CBD 2008a). In Brazil and many other states, ABS policies are under development in order to ensure the appropriate protection of the rights governing the use of traditional knowledge.

Natura is an example of a private company attempting to incorporate new and developing state, national and international ABS measures into their business practices, in part through establishing fair partnerships with local groups, including women. This case illustrates, among other things:

- the importance and commercial value of women's traditional knowledge in the personal care and cosmetic industries;
- lack of awareness within the personal care and cosmetic sectors of the need to enter into ABS agreements and ensure gender equality in prior, informed consent (PIC) procedures and negotiations of mutually agreed terms about the use of traditional knowledge; and
- a positive example of development of greater traditional knowledge protection by the state and the profit and non-profit sectors, including for the active participation of women in PIC procedures and negotiations of mutually agreed terms.

as in Kenya, though not precluded from doing so by law, women continue to face numerous difficulties in owning land (NBSAP (Kenya 2000)). An analysis of credit schemes in five African countries found that women received less than 10% of the total credit granted to small landholders (FAO 2008). Women in many societies also face limitations to their participation in decision-making processes at the local and international levels, including in relation to ABS. The effective inclusion of women and their concerns is limited because of cultural, social and economic constraints. Women may also face practical impediments, such as illiteracy, lack of access to information, limitations to mobility and household responsibilities that limit their opportunities to participate in decision-making processes (Tobin and Aguilar 2007).

To ensure the full and effective participation of women there is an urgent need to build women's capacity, enhance gender awareness and increase women's knowledge about their rights. Awareness raising activities should also include men in order to prepare the whole community for such changes. Women's underrepresentation in decision making means that their specific and essential knowledge of biological diversity conservation and ABS is not taken into account. Additionally, non-inclusive approaches fail to protect women's rights and interests.

Gender inequalities in access to resources, benefit sharing and participation limit the possibility of a 'fair and equitable sharing of the benefits arising from the utilisation of genetic resources'. Additionally they limit conservation and sustainable use of biological diversity. In the case of ABS, equitable access to resources and equitable benefit sharing will be unlikely to happen if gender inequalities are not addressed.

ABS and gender as recognised by the CBD

The preamble to the CBD recognises 'the vital role that women play in the conservation and sustainable use of biological diversity'. It affirms 'the need for [the] full participation of women at all levels of policy making and implementation for biological diversity conservation' (United Nations 1993, p. 145). The Convention makes no further specific mention of the role and rights of women with regard to biological diversity. But the preamble, as the introductory statement of the purpose of the CBD and the principles underlying its philosophy, implies that gender is to be taken into account in all aspects of the Convention. Furthermore, requirements in the CBD for prior, informed consent, mutually agreed terms and equitable sharing of benefits may establish avenues for promoting gender equity in ABS and traditional knowledge governance (Tobin and Aguilar 2007).

Box 1. CBD decisions acknowledging the importance of gender as related to ABS

CBD COP decision V/16, element 1 of the programme of work of Article 8(j) promotes gender-specific ways in which to document and preserve women's knowledge of biological diversity.

Annexes I and II to CBD COP decision VI/10, and the Annex to COP decisionVII/1 recognise gender as a social factor that may affect traditional knowledge.

CBD COP decision V/16 on Article 8(j) and related provisions recognise 'the vital role that women play in the conservation and sustainable use of biodiversity', and emphasise that 'greater attention should be given to strengthening this role and the participation of women of indigenous and local communities in the programme of work'.

Under the 'General Principles', the CBD programme of work on the implementation of Article 8(j) and related provisions calls for 'full and effective participation of women of indigenous and local communities in all activities of the programme of work'. (http://www.cbd.int/traditional/pow.shtml).

Task 4 of the programme of work on 8(j) also calls on 'Parties to develop, as appropriate, mechanisms for promoting the full and effective participation of indigenous and local communities with specific provisions for the full, active and effective participation of women in all elements of the programme of work, taking into account the need to: (a) build on the basis of their knowledge, (b) strengthen their access to biological diversity; (c) strengthen their capacity on matters pertaining to the conservation, maintenance and protection of biological diversity; (d) promote the exchange of experiences and knowledge; (e) promote culturally appropriate and gender specific ways in which to document and preserve women's knowledge of biological diversity Element 2. Status and trends in relation to Article 8(j) and related provisions' (http://www.cbd.int/traditional/pow.shtml).

On the basis of the CBD preamble paragraph, several CBD decisions acknowledge the importance of gender as related to ABS.

A major step towards gender equality under the CBD framework was taken at COP9 with the celebrated approval of the *Gender Plan of Action*. The CBD was the first multilateral environmental agreement to include such a gender agenda. This achievement in mainstreaming gender into environmental protection serves as a model for other agreements.

Box 2. Four strategic objectives of the gender plan of action under the Convention on Biological Diversity

1. To mainstream a gender perspective into the implementation of the Convention and the associated work of the Secretariat.
2. To promote gender equality in achieving the three objectives of the Convention on Biological Diversity and the 2010 Biodiversity Target.
3. To demonstrate the benefits of gender mainstreaming in biodiversity conservation, sustainable use and benefit sharing from the use of genetic resources.
4. To increase the effectiveness of the work of the Secretariat of the Convention on Biological Diversity.

Source: CBD (2008b)

Promoting gender equality and equity in ABS through a rights-based approach

As stated by the UN Inter Agency Common Understanding on the Human Rights-based Approach to Development, under a **rights-based approach** (RBA), human rights principles guide all programming in all phases of the programming process. This includes such phases as assessment and analysis, programme planning and design, implementation and monitoring, and evaluation.

A rights-based approach calls for the recognition of the intrinsic link between human rights and development goals, including environmental sustainability. Based on this definition, adopting a rights-based approach to ABS would require analysing whether the processes and outcomes of ABS governance respect human rights. Do they respect the principles of equality and non-discrimination, as well as participation, inclusion and empowerment, and accountability and the rule of law? Therefore, implementing a rights-based approach to ABS implies the need to guarantee that mechanisms are in place to ensure that women's human rights are fully respected.

The human rights-based approach is founded on the assumption that respect for individual human rights, including gender equality, must be the base, and in the framework, of any civil, political, social, economic and development agenda. Human rights correspond to entitlements for rights holders and, at the same time, the duties of states. A human rights-based approach requires that state actions—of a legislative, administrative,

or policy/programme nature—are in line with the obligation to protect and promote human rights. The implementation of human rights obligations is not a matter of the good will of the state. It stipulates a legal obligation for which the state is accountable to the international community according to the rules of international law (adapted from Goonesekere 1998).

The principle of gender equality in rights and obligations is included in the Charter of the United Nations, the Universal Declaration of Human Rights. They are also included in the main international human rights instruments (Goonesekere 1998). Among these are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Gender equality is incorporated into the United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS) with respect to all rights guaranteed by the Declaration (Article 44). The importance of mainstreaming gender for the realisation of human rights, sustainable development and poverty eradication has also been recognised in a series of other international instruments and platforms.

Box 3. Human rights principles recognised within the UN Common Understanding

Adapted from UN Common Understanding

- **Universality and inalienability**: All people everywhere in the world are entitled to human rights, which no person or institution can take away from them.
- **Indivisibility, interdependence and interrelatedness**: Civil, cultural, economic, political or social rights are all inherent to the dignity of every human person and have equal status as rights. Such rights are interconnected; the realisation of one right often depends upon the realisation of another right.
- **Equality and non-discrimination**: All individuals are equal and are entitled to their human rights by virtue of the inherent dignity of each human person without discrimination of any kind, whether on the basis of race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or any other factor. This also implies an explicit focus on those who are most marginalised and/or most vulnerable to human rights abuses.
- **Participation and inclusion**: Every person and all people are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.
- **Accountability and rule of law**: States and other duty bearers are answerable for the observance of human rights. They have to comply with norms and standards enshrined in international human rights instruments that they are parties to. When they fail to do so, rights holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator.

These include Agenda 21 (United Nations Conference on Environment and Development 1992), the World Conference on Human Rights (1993), the Beijing Platform for Action (Fourth World Conference on Women, 1995), the Millennium Declaration (2000) and the Johannesburg Plan of Implementation (World Summit on Sustainable Development 2002) (Tobin and Aguilar 2007).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as an 'international bill of rights of women', codifies women's rights to non-discrimination on the basis of sex. It condemns discrimination in all its forms in the broadest and most comprehensive manner. It requires the Parties to the Convention to guarantee equal rights for women and men in respect of enjoyment of political, economic, social, cultural and civil rights or any other sector (Goonesekere 1998). The Optional Protocol to CEDAW provides individuals and groups of women with the right to complain to the CEDAW Committee about violations of the Convention. The enquiry procedure under the Protocol creates a reinforcement mechanism by enabling the CEDAW Committee to conduct enquiries into violations of any of the rights guaranteed by the Convention in countries that are state parties to the Optional Protocol. (Adapted from the UN Division for the Advancement of Women website).

Additionally, the RBA does not necessarily have to be restricted to rights currently recognised in human rights law, but can have a normative component. According to Johnson and Forsyth (2002, p. 1591), '[a]t the heart of this approach is the notion that governments, donors and societies in general have a responsibility to promote and maintain a minimum standard of well-being to which all people (irrespective of race, class, colour, gender and other social groupings) would ideally possess a right. Morally, it is argued that states, donors and societies should recognize and enforce rights that are necessary for 'survival and dignified living''. For example, the UK Department for International Development (DFID) argues that 'poor people have a right to expect their governments to address poverty and exclusion' (cited by Johnson and Forsyth 2002, p. 592).

CEDAW and other human rights instruments guarantee broad procedural and substantive rights for women. Among the CEDAW provisions most relevant to ABS is the requirement that state parties take 'all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development'. The provisions also require that state parties ensure that women have the right 'to participate in the elaboration and implementation of development planning at all levels' and 'in all community activities' (Article 14.2). CEDAW also enshrines women's

equal rights to conclude contracts and to administer property (Article 15.2) (Tobin and Aguilar, 2007).

As of February 2008, 184 parties to CBD were also parties to CEDAW; 105 of these are also parties to the Optional Protocol to CEDAW. State parties of both international instruments are accountable for guaranteeing gender equality in their national ABS policies, as well as in negotiations on the international ABS regime. Taken together with obligations under

Equitable access to resources and equitable benefit sharing will be unlikely if gender inequalities are not addressed (Photo by Paz Bossio)

CEDAW, the ABS related provisions of CBD require governments to ensure women's equal participation in decision making, negotiation of ABS agreements and equitable participation in benefit sharing (Tobin and Aguilar, 2007). Linking ABS to the relevant provisions of CEDAW and making use of the procedures provided by the Optional Protocol should lead to a progressive expansion of the Convention's influence. It should also result in the establishment of precedents in national courts and the CEDAW Committee in cases of discrimination against women in the framework of ABS (Tobin and Aguilar, 2007).

The important role played by indigenous communities in the conservation and sustainable use of biological diversity is recognised by article CBD 8 (j). Although DECRIPS is not a legally binding instrument, it may be highly influential in defining national ABS policies and the international ABS regime. The Declaration explicitly prohibits discrimination against women. It encourages states to legally recognise and protect indigenous people's rights over their lands and resources, as well as to maintain control, protect, and develop their intellectual property rights over their traditional knowledge (Tobin and Aguilar, 2007).

At the heart of ABS within indigenous communities is the participation of women in prior, informed consent and mutually agreed processes, and their control over biological resources and traditional knowledge. Customary law of indigenous communities plays a key role in defining the extent to which the women's rights enshrined by CEDAW and DECRIPS are realised. Potential difficulties may arise in reconciling the prohibition of discrimination against women by CEDAW and DECRIPS, and the rights related to self-determination of such communities. Finding the balance between cultural integrity and integrity of women's rights is a challenge which requires commitment, an open mind and willingness to compromise and change by all parties involved and all members of the communities (Tobin and Aguilar, 2007).

Adopting a rights-based approach could lead to positive outcomes in many areas of women's lives. As explained by Cornwall and Nyamu-Musembi (2004), a goal in adopting the RBA should be to change power relations in order to increase the probability that human rights will be respected. They go as far as to say that 'a rights-based approach would mean little if it has no potential to achieve a positive transformation of power relations' (Cornwall and Nyamu-Musembi 2004, p. 1432). If underlying power structures are not understood and confronted, inequalities may be perpetuated or even increased. Mainstreaming gender equality and equity in ABS and traditional knowledge governance can transform unequal social and institutional structures and remove the barriers that prevent women from having fair and equitable access to resources and to benefits.

Case Study 2. Participatory development of community intellectual property rights systems in Costa Rica, with particular attention to women

Adapted from Unidad de Equidad Social 2008

The Costa Rican law on biological diversity creates space for participatory consultation to determine the limits, requirements and nature of indigenous and local communities' intellectual property rights related to the use of biological diversity and associated knowledge. A project entitled 'Gender Equality within Access and Benefit Sharing of Biodiversity' (the project) has formed part of the participatory process set by the biological diversity law. Under the project framework, public and private sector institutions collaborated between September 2006 and September 2007 to develop a unique system of community intellectual property rights in Costa Rica. The project participants included the Technical Office of the National Commission of Biodiversity Management of Costa Rica, the National Board of Indigenous Peoples and the National Board of Farmers. IUCN Mesoamerica facilitated local, national and regional workshops, which promoted the full and effective participation of women. The project, including the workshops, resulted in:

- Development of legal and technical instruments that have a gender perspective and that support participatory approaches to prior, informed consent (PIC) and the negotiation of mutually agreed terms (MAT).
- Publication of the document 'State of law on access to genetic and biochemical resources of biodiversity, prior informed consent and sui generis community intellectual property rights, as well as its implementation, in Costa Rica.' This final document analyses the principal legal instruments and developed practices from the perspective of the conclusions coming out of the local, regional and national consultations.
- Design of principles and guidelines on gender equality with respect to prior, informed consent and benefit sharing from the use of genetic and biochemical components of biological diversity and associated traditional knowledge. The principles and guidelines sought to contribute to the elaboration of legal texts with a gender perspective.
- Strengthened coordination between the institutions involved. The National Board of Indigenous Peoples, the National Board of Farmers and the National Commission of Biodiversity Management of Costa Rica now work together as an Inter-sector Committee to promote this initiative. They provide the conceptual, theoretical and methodological inputs for the elaboration and execution of indigenous and local communities' intellectual property rights development. As a result, the partners have further developed their capacities to mainstream gender in prior, informed consent mechanisms and mutually agreed terms negotiations.

A rights-based approach to ABS could also be instrumental in conservation. Women's rights can be linked to incentives for sustainable use of resources. This is turn can have an important effect on the ways in which people manage and conserve natural resources (Johnson and Forsyth 2002).

If women and men who depend on biological resources have equal rights to access and benefit from these resources, they will have a greater incentive to manage these resources in a sustainable manner and to incorporate women's specific knowledge. In this way, mainstreaming gender equality and equity should also contribute to the other two objectives of the CBD; 'the conservation of biological diversity' and 'the sustainable use of its components' (United Nations 1993, p. 146). The incorporation of women's rights into conservation policies and programmes will contribute to gender equality and equity and women's empowerment. It will thus help ensure that the benefits of conservation are enjoyed by the whole community.

Conclusions and policy recommendations

- Research related to ABS should disaggregate data according to sex. This data is the essential foundation for gender sensitive planning. Research related to ABS should include analysis of the state of human rights, with particular attention to women's rights, and the underlying power structures.
- In order to ensure the full and effective participation of women, as a human right, mechanisms should be designed to ensure that women's knowledge and contributions are made visible, and are valued and protected.
- CBD and its associated Parties should identify the interests, needs and rights of women with regard to genetic resources through investigations, discussions and consultations. These will help to ensure respect for women's procedural and substantive rights as guaranteed by other international instruments.
- Gender equality, including women's rights, should be a key element in negotiations on the international regime for ABS and related traditional knowledge.
- ABS regimes must be designed and assessed in the light of human rights frameworks and international and national commitments to gender equality, including CEDAW and DECRIPS.
- The framework provided by the Optional Protocol to CEDAW should be utilised in the context of ABS. Precedents should be established for its use as an enforcement mechanism in cases of discrimination against women within the framework of ABS.
- Parties associated with the CBD should ensure no discrimination against women arises from the adoption of ABS law and policy.
- Gender mainstreaming would require that the Bonn guidelines, *sui generis* law and policy on traditional knowledge (TK), and ethical codes

of conduct for TK, also reflect respect for women's human rights in their provisions.

- Women's full and effective participation, as a human right, should be ensured in all aspects of, and forums about, ABS related issues. This should include involving local and indigenous women, gender environment experts and negotiators and mediators with gender specific capacity in ABS related negotiations. Such participation requires significant capacity building at the local, regional and international levels.
- Capacity building and empowerment (educational, technical, legal, financial) must be promoted to allow women and men to effectively participate in discussions and negotiations for agreements on access and sharing of benefits from genetic resources.
- The international community should promote the development and implementation of prior, informed consent (PIC) and mutually agreed terms (MAT) processes that are in harmony with the human rights of women, in a manner that promotes equality. To ensure women's active participation in decision making on PIC and MAT, they will need to be:
  - fully informed regarding the nature of the collective activity,
  - the intended use of the resources,
  - the potential value of the resources and benefit sharing opportunities, and
  - the range of potential benefits which may be negotiated.
- Various measures should be put in place to prevent misappropriation of traditional knowledge. These could include:
  - disclosure of origin requirements,
  - certification of origin/source/legal provenance of resources and traditional knowledge, and
  - development of databases and registers including information about gender in order to ensure respect for women's property rights.
- ABS negotiations should integrate a gender specific approach into mechanisms to guide the distribution of monetary and non-monetary benefits, including gender sensitive budgeting.[1]
- Information on gender aspects of ABS should be widely distributed and communicated in order to build the capacity of different stakeholders.
- In addition to mainstreaming gender in National Biodiversity Strategies and Action Plans and ABS legislation, there should be an assessment of the effects of their implementation in the light of the human rights of women and men (for example, gender impact assessment).

According to Selim Jahan (2003, p. 1), 'Development, if not engendered, is endangered—a simple statement, but with far-reaching implications. Any development, which bypasses half of humanity, both in terms of opportunities and outcomes, can neither be meaningful nor sustainable.' Human rights, sustainable development and environmental protection must go hand in hand. In the specific context of gender and ABS, a rights-based approach implies that women's rights should be systematically included into ABS related activities at all levels and stages. Such an approach will provide multiple benefits for biological conservation efforts. First it will ensure that conservation activities will use the resources and knowledge of the whole population. Second, it will guarantee that the implementation of CBD and ABS policies will be in line with international human rights standards and contribute to ending the existing inequalities between women and men, as well as support other development goals such as the eradication of poverty.

Endotes

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Reduced emissions from deforestation and forest degradation (REDD) and human rights

Kathleen Lawlor and David Huberman

What is REDD?

Deforestation accounts for an estimated 17% of global greenhouse gas emissions—more than the global transport sector (IPCC 2007). The burning and clearing of tropical forests is responsible for the majority of these emissions, due to their high carbon stocks and the rate at which they are being lost: approximately 13 million hectares per year (FAO 2005). Reducing emissions from tropical deforestation is therefore a necessary component of any strategy to avert catastrophic climate change. In addition to regulating the climate, standing forests provide many other important ecosystem services to society. These include provisioning food, fuel and water; regulating floods and the spread of disease; stabilising soil and maintaining plant pollination; and conserving cultural and aesthetic values (MEA 2003). However, because the values of these ecosystem services are not reflected in the prices of the commodities that often drive forest clearing (soy, beef, oil palm, timber), farmers, companies and governments—seeking immediate financial gains—often decide that forests are worth more cut down than standing. A new approach to battling tropical deforestation,

commonly referred to as 'REDD', seeks to provide positive incentives to tropical countries for forest conservation. The basic idea of Reduced Emissions from Deforestation and Forest Degradation (REDD) is to make standing forests more attractive than agricultural and timber products by valuing the carbon in forests for its climate regulating benefits.

The United Nations is currently considering including a REDD mechanism in international climate change policy. While many details of the overall REDD architecture have yet to be decided, a growing consensus points to a system where developed countries make payments to tropical countries for reductions in national deforestation levels, and such payments would be conditional on performance. This will involve estimating a reference scenario that projects the amount of deforestation that would have occurred in the absence of the payment. If deforestation is then reduced below this established baseline, then countries will be paid for the forest carbon emissions avoided. Some of the most debated issues regarding REDD include:

- how to set baselines;
- what scope of countries and forest carbon activities should be included;

Sustained access to forests for the harvesting of food, fuel, medicine, and other non-timber forest products is critical for rural livelihoods and substantive rights. Customary lands of the Dii people in the Mbe District, Adamaoua Province, Cameroon. (Photo by Kathleen Lawlor)

- to what extent REDD mechanisms should be linked to carbon markets;
- what the role of sub-national projects should be; and
- how concerns about impacts on indigenous and other forest-dependent communities will be addressed.

States are likely to use a variety of approaches to implement REDD. These may include:

- clarification of property rights;
- removal of agricultural subsidies;
- creation of new protected areas;
- stronger enforcement of forest laws; and
- payments to landowners for forest conservation.

The choice of policies and measures to reduce deforestation will, ideally, be based on an analysis of what drives deforestation in a particular country. However, the task is by no means easy. Tropical deforestation is driven by a complicated causal web of direct and underlying factors, which vary from region to region. (Geist and Lambin 2002, Kanninen *et al.* 2007).

How might REDD affect indigenous peoples and other forest-dependent communities?

Climate regulation is an important ecosystem service that forests provide globally. Yet there is concern that by valuing forests for this globally important service, REDD programmes could undermine some of the ecosystem services that forests provide locally, such as providing food, fuel and medicine to the millions of poor who live in and depend on the forests. REDD could create new incentives for states to restrict these people's access to forests. The insecurity of land tenure for many indigenous and other forest-dependent communities (Sunderlin *et al.* 2008) may make them especially vulnerable to this risk. Some potential risks to forest dwellers associated with REDD are:

- violations of customary land rights and harsh enforcement measures. These could lead to loss of access to forests for subsistence and income generation needs, land use conflicts, or physical displacement from forests;

- marginalisation by new land use zoning exercises. Governments might undertake such exercises to capitalise on forest carbon revenues for the state, stalling or reversing the recent trends of decentralising forest ownership and management responsibilities to communities;
- decoupling forest carbon rights from forest management or ownership rights, blocking communities' legal right to financially benefit from new forest carbon programmes;
- inability to participate in conservation payment programmes due to lack of property rights (to forests or forest carbon), lack of information, high implementation and transaction costs, or because historical contributions to conservation render them ineligible;
- exploitative carbon contracts. These could lead communities to unknowingly accept terms that sign away land use rights, assume liability for forest loss, or accept payments that undervalue the true opportunity costs of the land use foregone, which could create food security risks;
- capture by elites of intended REDD benefits, due to inadequate forest governance systems; and
- decreased production of food locally, creating food security risks and deepening poverty.

Yet, if well designed and governed, REDD also provides significant opportunities to positively affect forest-dependent livelihoods, notably by:

- encouraging governments to secure and formalise land tenure for forest dwellers (so that those closest to the resource have positive incentives for conservation);
- generating revenue that governments could direct to social services in rural areas (health care centres, schools, water systems, etc.);
- creating new income streams for forest dwellers if they are sub-national sellers in carbon markets, participants in conservation payment programmes, recipients of carbon fund distributions, or monitors of forest areas;
- maintaining forests' regulating ecosystem services, (flood control and disease prevention), which may enhance adaptive capacity in a changing climate, where risks of extreme weather and disease are projected to increase; and
- maintaining forests' provisioning ecosystem services (fuelwood, medicine, food), which may also help buffer communities from the shocks of reduced agricultural yields that may occur due to climate change.

Box 1. The Noel Kempff experience

One of the longest standing and most often cited examples of REDD-like projects is the Noel Kempff Mercado National Park project, in Bolivia, which was established in 1997. This project extended an existing protected area and succeeded in avoiding emissions of over 1 million tonnes of CO_2 equivalent between 1997 and 2005. This was achieved primarily by reducing slash and burn agriculture (Johns and Johnson 2008). The project, which covers over 800 000 ha of tropical forest, is expected to generate a reduction of close to 6 million tonnes in CO_2 emissions during its 30 year timeframe. The project includes activities for supporting local livelihoods as well as efforts to secure land tenure for indigenous people. However, the Noel Kempff project has also attracted some criticism, notably with regards to a perceived lack of consultation in the early stages of project design. Some villagers felt excluded from the project, which they felt was carried out without their prior consent (Asquith *et al.* 2002). There have also been concerns related to the benefits generated by the carbon credits. These seem to have accrued to state agencies, local governments and conservation organisations instead of local communities (May *et al.* 2004, Robertson and Wunder 2005, Griffiths 2007).

Sharing benefits: a matter of effectiveness or equity?

Whether and how REDD revenues and benefits will be distributed to forest communities is a contentious issue. Experiences with REDD-like projects have so far yielded mixed results (see Box 1). Many indigenous and other traditional communities point out that they have helped preserve and protect tropical forests historically. They insist that REDD regimes should compensate them for their role in forest conservation (Manaus Declaration and Areas of Consensus and Disagreement 2008). Signatories to the Manaus Declaration agreed that REDD regimes should '… recognise the capability of sustainable management of forests as exercised by indigenous peoples and traditional communities, as well as the historical role of these peoples and communities in the conservation and in the equilibrium of global climate and to develop a compensation system' (Manaus Declaration Areas of Consensus and Disagreement 2008).

Similarly, many argue that participation in the international REDD regime should not be restricted to countries with historically high rates of deforestation (UNFCCC 2008). Here, both the international regime and national conservation payment programmes run into complicated questions of 'additionality'. Proving 'additionality' means showing that deforestation has been reduced and that such reductions would not have happened in the absence of the programme. 'Additionality' is an important concept for the international REDD regime. It is especially so if REDD mechanisms

are integrated with carbon markets and emitters are allowed to offset emissions with reduced deforestation credits. Credits are not additional if they represent reduced (or avoided) emissions that would have happened anyway. Such non-additional 'reductions' would be easy to achieve and if credits are issued for them then carbon markets could potentially be 'flooded' with a large number of 'hot air' carbon credits. This increase in supply would decrease the price of carbon credits, and, along with it, the incentives for emitters to make reductions themselves or to invest in clean technologies (Angelsen 2008, Karsenty 2008). Further, paying for forest conservation that would have happened anyway is not efficient.

Yet it is difficult to know what would have happened in the absence of new incentives. Deforestation that would have occurred in the absence of a REDD programme cannot be observed. Thus proving 'additionality' is based on an estimate of deforestation that is *projected* to occur. However, the past does not perfectly predict the future. Countries with low deforestation rates in the past could increase their deforestation rates in response to changing economic conditions and incentives. These incentives could, in fact, be created by REDD itself. The expansion of commercial agriculture, for example, driving deforestation in one country could simply shift to another country if incentives are not in place for both countries to protect their forests. This risk of deforestation drivers shifting is known as 'leakage'. Risks of leakage undermining the system can be minimised by increasing the scope of systems that track land use change and offer conservation incentives (Murray 2008).

The international REDD negotiations seem to recognise these risks. There is a growing consensus that incentives for forest conservation should also be provided to those countries that have historically conserved forests, already reduced deforestation, or increased forest area. This can be done in ways that adequately guard against leakage yet also protect carbon markets from the risks presented by non-additional credits. For example, incentives for reducing deforestation in countries with historically high deforestation can be provided through the carbon market while incentives for maintaining forests in countries with historically low deforestation rates can be provided through fund-based mechanisms (Olander *et al.* 2009). Establishing high baselines for countries producing reduced deforestation offsets would help to keep the supply of these credits in check and avoid 'flooding' the carbon market (Angelsen 2008). Developed countries could also adopt deeper increase their emissions reductions targets to create more demand for carbon credits (Angelsen 2008).

Within countries, national governments will also have to consider leakage and 'additionality'. They will likely seek to apply policies and measures that most efficiently reduce deforestation (offer the most 'additionality'), yet

they will also need to guard against in-country leakage. In regions with the highest deforestation rates (Brazil and Indonesia), commercial agriculture and logging are the main direct drivers of deforestation (Bellassen *et al.* 2008, Hansen *et al.* 2008). Small-scale agriculture and wood harvesting contribute much less to deforestation; this is mainly because the poor simply do not have the capital that it takes to clear large areas of forest (Chomitz 2007). And the further communities live from roads and markets, the less they contribute to deforestation (Chomitz 2007).

Therefore, if governments want to reduce national deforestation rates by making conservation payments to landowners, they may overlook individuals and communities that appear to pose little threat to forests. However, communities that have historically conserved forests may not always do so. Populations grow and cultures change. Further, REDD itself could change the way communities use land. There may also be

The UN DECRIPs specifices that the rights of indigenous peoples include the rights to own and exercise control over activities on the lands they have customarily occupied and used. Ngobe-Bugle indigenous territory, Panama. (Photo by Kathleen Lawlor)

leakage from new REDD conservation areas to forest communities' lands. Exclusion from REDD schemes could provide communities with a perverse incentive to clear forests. Further, in some regions (such as the Congo Basin), deforestation and degradation are primarily driven by small-scale agriculture and wood harvesting (Bellassen *et al.* 2008). For all these reasons, it could be in the interests of tropical governments to make sure that forest people have positive incentives for conservation.

Whether human rights norms and standards provide the basis for an equity argument to pay forest communities for their historical conservation is not entirely clear. However, as the above discussion shows, an argument based on programme effectiveness could also be made. In all cases, where forest dwellers are asked to bear some of the costs of national REDD programmes, such as restricted forest access, human rights norms are instructive regarding how REDD benefits should be shared. We now discuss what insights human rights norms provide regarding the design of REDD.

How would a rights-based approach to REDD deal with risks, opportunities and benefits distribution?

There is an array of human rights instruments relevant to REDD. These could form the basis of a rights-based approach (RBA) to the design of an international REDD regime and the implementation of national programmes. The following section analyses the implications of a non-exhaustive set of relevant rights instruments and provisions for a RBA to REDD. It reveals how a RBA to REDD might deal with the aforementioned issues, guarding against risks and promoting opportunities for forest communities while striking an equitable solution to the benefits distribution issue.

Indigenous peoples' rights

Much of the current discussion on guarding against risks to forest communities from REDD has focused on the internationally recognised rights of indigenous peoples (see Box 2). The 1989 International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) outlines the special rights of such peoples regarding activity on their customary lands. Relevant passages of ILO 169 include the following:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives … and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. (Article 7)
>
> The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. … Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. (Article 14)
>
> … the peoples concerned shall not be removed from the lands which they occupy. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations. … Persons thus relocated shall be fully compensated for any resulting loss or injury. (Article 16)

In 2007, with 143 nations voting in favour, the United Nations approved the Declaration on the Rights of Indigenous Peoples (DECRIPS or Declaration), which was first introduced in 1977. There were only four nations that voted against it's passage: Canada, New Zealand, Australia (which changed its position and signed in 2009) and the United States (Graman 2007). The Declaration's language is similar to, though stronger than, that of ILO 169. It emphasises the requirements that parties grant legal title to indigenous peoples' customary lands and ensure their **free**, **prior**, and **informed consent** for any activity on, or their resettlement from, their lands. The following passages of the Declaration are worth noting in the context of REDD:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (Article 10)
>
> Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. (Article 26)

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. (Article 27)

Both ILO 169 and DECRIPS provide a strong foundation for indigenous peoples to assert that their lands be legally titled and that their free, prior, and informed consent (FPIC) be given for any activities on, or their resettlement from, their lands. The requirement that states grant legal title is especially important since the vast majority of forest area is still owned by the state in most tropical countries (Sunderlin *et al.* 2008). The absence of legal title can complicate communities' abilities to assert FPIC (Finer *et al.* 2008, Anaya and Grossman 2002).

Implications for a rights-based approach to REDD: An international REDD regime based on ILO 169 and DECRIPS would guard against the risk that states could take away land from indigenous people in order to capture REDD revenues. For countries implementing REDD, alignment with these instruments could lead states to clarify land tenure as an initial step in national programmes. Such exercises would need to be carried out with the transparent and meaningful participation of indigenous people.

Box 2. REDD and indigenous people at the UNFCCC

Throughout the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, there has been a great deal of contention regarding how an international agreement should guard against negative effects on forest dwellers. Representatives of civil society and traditional and indigenous groups have become increasingly vocal in the negotiations and some may withhold their support for REDD if they believe the international agreement does not include adequate safeguards to protect forest dwellers. Much of the discussion has focused on the internationally recognised rights of indigenous people. At the recent 14th Conference of the Parties to the UNFCCC (December 2008) in Poznan, Poland, discussions over the language in the draft decision related to REDD were heated (see, for example, Accra Caucus on Forests and Climate Change 2008). Following COP14, the UNFCCC requested parties and observers to submit their views on how to address concerns about indigenous and other forest-dependent communities in the international agreement. The European Union's submission notes that 'the effective implementation of the provisions on REDD in a future climate agreement will depend on the involvement and cooperation of local communities and indigenous peoples' (UNFCCC 2009). The submission outlines several areas where indigenous people have a role to play in REDD implementation (such as data collection and monitoring). Further, it notes that safeguard policies could be used to ensure that REDD does not undermine basic human rights.

However, adherence only to ILO 169 and DECRIPS would leave out many of the relevant human rights of indigenous people and members of the many forest-dependent communities who are not technically considered indigenous. This could raise particular concerns in the African context, where state ownership of land dominates (Sunderlin *et al*. 2008) and concepts of indigenousness are complicated.[1] For example, there are hundreds of thousands of indigenous Pygmy people that live in the Congo Basin who are severely marginalised. They are in serious need of safeguards to protect and promote their rights and dignity. Yet there are also many other forest-dependent poor people of Bantu descent who have inhabited the area for thousands of years, but who are not commonly described as 'indigenous'. Many of these communities also lack secure tenure and are thus vulnerable to the risks, cited above, that REDD creates for forest communities.

International universal human rights

Other human rights instruments and case law outline additional human rights norms and standards that could be relevant for reduced deforestation mechanisms and forest-dependent people (including, but not limited to, indigenous peoples).

Right to Property: Article 17 of the 1948 Universal Declaration of Human Rights, as well as other human rights instruments, defines the right to hold property as a human right. Article 17 states, 'Everyone has the right to own property alone as well as in association with others'. Article 21 of the American Convention on Human Rights also upholds the right to hold property:

> Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

An important precedent is established by the case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In this case the Inter-American Court of Human Rights found, in 2001, that the state must obtain consent from indigenous communities for activities on lands they have historically occupied and that the state must enact procedures to grant these communities legal title to their lands in order to uphold the Right to Property, as defined in Article 21 (Anaya and Grossman 2002). The recent landmark case of the *Saramaka People v. Suriname* is also relevant. In 2007, the Inter-American Court on Human Rights found that Article 21 indicates the right of the Saramaka people to property. It was further found

that this right requires the state to grant them legal title to their customary lands. However, while the court found that the Saramaka people have the right to also own the natural resources on their land, this does not prohibit the state from granting concessions on their territory to logging and mining companies (as in this case) or to other concessionaires (as the case may be) because the state may still restrict the 'use of property in circumstances that are defined by law and that are proportionate to the achievement of a legitimate objective' (Harrison 2008). Yet, in order for the state to place such restrictions on the right to property the Court ruled that Suriname must undertake the following steps:

1. produce an Environmental and Social Impact Assessment before granting concessions;
2. engage in informed consultation with the affected community, to gain the community consent necessary for 'major developments'; and
3. share with the affected community the benefits that are produced as a result of the property rights restrictions placed on their lands (Harrison 2008).

The Court also ordered Suriname to compensate the Saramaka People for the damages the logging had inflicted upon their lands (Harrison 2008).

Implications for a rights-based approach to REDD: The right to property could be interpreted to mean that people have a right to possess legal title to lands which they have traditionally occupied. A rights-based approach to REDD, that takes the human right to property into consideration and follows this interpretation, would ensure that land titling exercises are undertaken for the general population. The rulings of the Inter-American Court of Human Rights may prove to be particularly relevant if states claim ownership over forest carbon, including forest carbon on lands traditionally occupied and used by communities. Based on these rulings, a rights-based approach to REDD might take the stand that where states decide to overrule peoples' right to property (in order to create new protected areas or grant forest carbon concessions to a third party, for example), affected communities must be adequately informed, and receive not only compensation, but also share any REDD revenues that the new conservation efforts produce. The creation of new protected areas or forest carbon concessions could also be considered a 'major development' for which communities would need to provide consent.

Right to development: The 1986 UN Declaration on the Right to Development speaks of the rights of people to participate in the development decisions that affect their lives. Article 2 specifies that, 'States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful

Customary lands of the Dii people in the Mbe District, Adamaoua Province, Cameroon. (Photo by Kathleen Lawlor)

participation in development and in the fair distribution of the benefits resulting there-from.'

Implications of a rights-based approach to REDD: It could be argued that the right to development points to the need for people to participate in land use zoning, property rights reforms, and decisions regarding the management of forest carbon revenues. This instrument could also be interpreted to mean that REDD benefits should be distributed among all forest dwellers, including those who have historically conserved forests and do not appear to be at risk of future deforestation.

Right to means of subsistence: Some commentators also highlight the relevance of Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Article 1 specifies that, 'In no case may a people be deprived of its own means of subsistence'.

Implications for a rights-based approach to REDD: This could be interpreted to mean that forest communities cannot be denied access to food, medicine and fuelwood in forests (Brown *et al.* 2008).

Conclusion

These various human rights instruments, and the standards they put forth, provide a normative basis for establishing a REDD system based on human rights. In such a system, forest people would have continued access to their land, and would participate in the decisions affecting how forests are used, who owns them, how populations are compensated for any costs they bear

and how REDD revenues are shared. Policies to make these principles operational could require citizen participation in the design of new REDD programmes and land tenure reforms, revenue transparency mechanisms and grievance mechanisms, and the FPIC of indigenous and other affected communities (Lawlor *et al.* forthcoming).

REDD policies and measures will have important implications for both procedural rights (rights to FPIC and participation) and substantive rights (rights to property and wellbeing). Whether the resulting impacts on forest-dependent communities are positive or negative will largely be a function of whether or not, and how, both sets of rights are respected. Important procedural responsibilities of governments relate to transparency, participation and accountability. Ongoing negotiations have yet to provide a clear picture of what a future REDD regime might look like (see Box 2). As such, the implications of REDD for the rights of forest-dwelling communities are still largely unknown.

Yet there is potential for the international REDD regime to adopt a rights-based approach—either explicitly, by referencing rights; or implicitly, by referencing principles or adopting policies that have a normative basis in human rights law. A rights-based approach to REDD could contribute to the overall success of the scheme by enhancing its political acceptability and reducing risks of reversal by granting those living in forests secure tenure, conservation incentives and engaging them in monitoring and enforcement. Framed this way, negotiators may in fact conclude that the overall sustainability of an international REDD regime depends on its capacity to ensure that both substantive and procedural rights are respected.

Endnotes

1 The World Bank Group's social and environmental policies remark that, 'There is no universally accepted definition of 'Indigenous Peoples' (IFC, 2006). Dove notes that, 'Whereas the connotations of popular use of the term indigenous focus on nativeness, formal international definitions focus more on historic continuity, distinctiveness, marginalization, self-identity, and self-governance.' (Dove 2006). And while ILO Convention 169 offers a definition of indigenous and tribal peoples based on these latter concepts, the Convention is clear that, ultimately, determinations of indigenousness are to be made by people themselves. The Convention states that, '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.'

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13

What have we learned and where do we go from here?

Jessica Campese, Terry Sunderland, Thomas Greiber and Gonzalo Oviedo

Introduction

Rights and social justice are no longer 'sideline' issues in conservation. Indeed they are increasingly at the fore. As shown in Chapter 2, a host of major international organisations that support conservation and natural resource management have issued public statements, organisational policies, programmatic guidance and other instruments addressing the rights and social justice implications of their work. These instruments reflect growing recognition that such issues must be understood and addressed as a core part of conservation. The early experiences with rights-based approaches (RBAs) to conservation captured in this volume also reflect this recognition; they are worth examining, then, for what they can tell us about the promises and challenges of RBAs.

This chapter looks across the cases and derives broad lessons learned. As explained in the opening 'Roadmap', our intent is not necessarily to highlight 'model' cases. Rather we want to share and learn from real-world examples, from diverse actors implementing what they see as rights-based approaches to conservation and natural resource management. While the

cases vary considerably from one to another, common themes do emerge. These provide substantial insight into how RBAs to conservation could be developed, implemented and further strengthened. We also raise additional questions and considerations for RBAs going forward.

Form and content of rights-based approaches

What are the 'rights-based approaches' being illustrated?

The conceptualisations of 'RBA' vary widely. Indeed, as mentioned at the outset, some readers may not agree that every case here can rightly be called 'RBA' in the most comprehensive sense. However, each case illustrates legal, policy, programme or project actions that help to identify and address the (positive and negative) relationships between human rights and conservation. This includes helping to ensure that rights are respected in the course of conservation activities. It also includes harnessing mutual benefits in support of just and sustainable ends for both nature and human communities. Taking the cases together, RBA appears to offer great potential for conservation practice to align itself with a fundamental respect for, and advancement of, human rights. At the same time, it is clear that RBA in the conservation context is an emerging, often contested approach, and one that requires much further thinking and development.

Which rights are being addressed?

The cases address a mix of procedural rights, including participation, information and access to justice, and substantive rights including:

- access to and use of water, forest, coastal and other resources;
- access to services and an adequate standard of living, including food and housing;
- equity, including gender equity and freedom from discrimination;
- property and land tenure;
- culture, including the continuation of customary institutions;
- self-determination; and
- a healthy and safe environment.

These rights are recognised in a variety of international, national and local institutions and instruments, including amongst others:

- The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169); and the UN Declaration on the Rights of Indigenous Peoples (DECRIPS);
- National law, regulation and policy, for example, the South African Constitution; Australian Native Title law; Bolivian and Colombian land and tenure rights provisions; and legal and policy mechanisms supporting benefit sharing and community resource access around protected areas in Indonesia and Nepal;
- Multilateral organisations', NGOs', and other non-state actors' policies, such as the World Bank social safeguards; and
- Customary laws and norms, such as Sherpa customary tenure rights and conservation practice in and around Sagarmatha National Park (Mount Everest, Nepal).

What is the scope of RBAs?

Chapter 1 suggests that the scope of RBAs to conservation can range from taking systematic measures to refrain from interfering with people's pursuit or enjoyment of their rights (respecting rights) and assisting and influencing other duty bearers and rights holders not to infringe on rights (supporting rights protection) to harnessing the potential for natural resource governance to improve human wellbeing (supporting rights fulfilment). No case is solely at one extreme or the other of this continuum, and most are in different positions with respect to different issues. Several cases also illustrate that the question of whether actions 'respect, protect, fulfil' rights is determined, in part, by the perspective and role of the actor being analysed. In Crane *et al.* the duty bearing, government department is taking measures to both *respect* the Coleske community's rights in the short run (replacing lost labour and not infringing on their legal occupancy rights), and support rights *fulfilment* in the longer run (ensuring that people remain in an environment in which they can fulfil their rights, whether on or off the farm). The NGO partner is helping to *protect* these same community rights. It is doing this by informing and building the capacity of both the responsible state actors and the community to understand what the latter's

rights are and what practical measures are demanded. Painter describes a case in which the *Capitanía de Alto y Bajo Isoso* (CABI) is taking advantage of the enabling environment to demand *respect* for their customary (land) rights and further *fulfil* their rights by negotiating expanded legal support from the state. CABI is also seeking *protection of* their rights with regard to an oil company building a pipeline on their land. In its partnership with CABI, the Wildlife Conservation Society (WCS) is respecting and helping to protect rights, within their conservation efforts. In the *conversatorio* (Springer and Studd), the World Wide Fund for Nature (WWF) and its partners are supporting protection and fulfilment of (substantive and procedural) rights. They are facilitating a process in which state actors, local community members and others can negotiate specific natural resource management and service provision agreements. Generally, support for greater rights fulfilment through conservation appears primarily in cases where there are clear, positive synergies between the two, as discussed further below. In all cases, however, the distinctions between, and practical implications of 'respecting, protecting, and fulfilling' rights in the context of RBAs to conservation requires further exploration and clarification.

Few examples in this collection are 'comprehensive' in the sense of systematically assessing and responding to all potentially relevant rights issues. Treatment of substantive rights around natural resource access and land tenure is pervasive. However, broader social and economic rights, such as adequate housing, safe working conditions and the right to development, are relatively underrepresented. At the same time, not all rights are relevant or pressing in all cases. Most cases deal with a range of interrelated rights, often without strictly delineating them. Even where there is a focus on a particular right—access to and use of water in Laban *et al.*, and gender equity and equality in Mata and Sasvári—the authors also address a broader range of related issues, including procedural rights. That distinct rights are treated in integrated ways likely reflects, among other things, their indivisibility and interrelatedness and also the difficultly in clearly defining the boundaries and scope of any particular RBA.

Finally, in some cases (for example Springer and Studd), natural resource governance processes that were not conceived of as 'rights-based' from the outset do, in fact, generate processes and outcomes in line with RBAs. In such cases, rights-related outcomes can be an unintended outcome, rather than a result of conscious, up-front design. Whether or not such cases should be categorised as 'RBA' is a point open for debate, but in all cases they provide useful lessons.

What scale are RBAs operating at?

The cases in this collection focus on different levels and scales. The rights claims are generally those of local individuals or groups. The key duty bearers, however, include community members, local government, national government and international organisations. The rights claims also draw on instruments and institutions from many levels, such as customary norms, sector policy, national law and international law. Laban *et al.* explicitly focus on local level rights and responsibilities. They do, however, recognise that local conditions are created, in part, by their broader (political) circumstances and draw on international instruments in defining the right to water access. The arguments for greater Indigenous Peoples' and Community Conserved Areas (IPCCAs) support, advanced by Stevens, are directed primarily to national level actors, but concern local Sherpa communities. In Crane *et al.* the rights of the local Coleske community are recognised in the national constitution and international donor policy, and are to be upheld by duty bearers at the national and international level. The *conversatorio* (Springer and Studd) primarily brings together local stakeholders, but is supported by national law and an international conservation organisation. For REDD, Lawlor and Huberman examine international and regional instruments, and promote international, national and project-level mechanisms aimed at better protecting the rights of local, forest communities.

What is different about a 'rights-based approach'?

As discussed in Chapter 1, examining 'rights-based approaches' begs the question of how they differ from, or add value to, other methods for integrating social concerns in conservation processes and outcomes, such as pro-poor conservation, and collaborative and participatory approaches more generally. Following the establishment of Yellowstone National Park, one of the main approaches to conservation for a century was the establishment of protected areas from which people were essentially excluded (Adams 2004). However, in recognition of the diverse problems and basic inequity associated with protectionism, this means for conserving biodiversity has given way in the past twenty years to a more participatory and people centred approach (McShane and Wells 2004). Several authors (Crane *et al.*, Laban *et al.*) suggest that RBAs are a further step or elaboration in this evolution. While other, socially oriented approaches may have laid the ground work for, or even been transformed into, RBAs, how do we ensure that rights approaches go beyond a 'repackaging' of existing activities in response to new incentives and trends?

Resolving the question of how RBAs differ from, and add to, all other approaches is outside the scope of this publication. However, reflecting on

all the chapters and on our own understanding, we can point to several important and distinct potential values. RBAs can, among other things:

- create a stronger foundation for addressing human wellbeing considerations by recognising that doing so is a matter of duty or responsibility;
- establish a stronger foundation for acceptance, consensus and collaboration from all stakeholders by leveraging the human rights framework, which draws on widely recognised standards;
- be more comprehensive than 'participatory' approaches, more generally, by including all rights applicable in a certain context;
- provide greater clarity about the nature and scope of all actors' rights and responsibilities, and thus establish clearer criteria against which to assess the effects and interactions between conservation and human wellbeing;
- increase the capacity and opportunities of both rights holders and duty bearers, including the most vulnerable, to fulfil their entitlements and obligations;
- enhance accountability by linking rights with specific corresponding obligations;
- strengthen understanding of the profound linkages between human and ecosystem wellbeing; and
- engender consideration of conservation and rights interactions at both the broad community level, and the individual and group levels, which can provide a powerful addition to approaches that fail to adequately address inequities and vulnerability within and across communities.

This potential added value notwithstanding, drawing too strict a distinction between RBAs and other conservation approaches may not be appropriate or useful. Many of the 'RBA' methods and tools highlighted in this volume are common to other approaches designed to incorporate issues of human wellbeing. Further, RBAs are being carried out as part of a larger set of approaches, motivations and outcomes. In other words, rights realisation in these cases is generally taken up as one issue among many, including conservation effectiveness. Rights and responsibilities do not provide standalone guidelines, but are, rather, components of broader strategies and governance processes.

Policies, processes and tools for RBAs to conservation

The cases illustrate a mix of strategies, design features and tools that, taken together, can support the integration of rights in conservation in a variety of contexts. Some common features are explored here.

Upholding procedural rights for themselves, and for realisation of substantive rights

Each chapter deals, to some degree, with efforts to uphold procedural rights, such as the rights to participation, information and access to justice. In line with previous explorations of RBAs in the conservation context (Franks 2007), several cases demonstrate that procedural rights, and particularly the participation of local people and institutions, can be effective entry points to defining and upholding substantive rights. Laban *et al.*, Springer and Studd, Crane *et al.*, Mata and Sasvári, Stevens, and Lawlor and Huberman indicate that a key feature of RBAs is a collaborative decision-making process in which all parties can understand, negotiate and realise their rights and obligations.

Generating disaggregated information on the status of rights and responsibilities

Several cases demonstrate the importance of disaggregating information so as to understand the pressing issues and identify the most vulnerable groups. Mata and Sasvári specifically point to gender disaggregated data as a prerequisite for rights consistent benefit sharing arrangements. Similarly, Laban *et al.* posit that such information is a critical component for achieving rights and accountability in water resource development and management.

Addressing inequitable power relations

Processes and mechanisms which better assess and equalise power relations between rights holders and duty bearers, and enhance the opportunities for rights holders to claim and realise their rights, feature as key RBA components in several cases. Through the *conversatorio* (Springer and Studd) rights holders and duty bearers are able to engage in facilitated negotiation and dialogue around coastal resource management issues and agree upon strategies to address them. The water resource governance process described

by Laban *et al.* helps local water users, including the most marginalised, to engage with water resource management authorities, local government and other duty bearers and stakeholders to collectively identify water rights and responsibilities. In Crane *et al.* an NGO based project management unit and the responsible government department collaborated to secure legal representation for the Coleske Community. This was one of several steps to help ensure that farm dwellers' constitutional rights were respected in the creation of a new protected area

Several cases (though perhaps still surprisingly few) discuss important power differentials within and across communities. Examples include gender inequity within communities (Laban *et al.*, Mata and Sasvári), marginalisation of indigenous people and less powerful communities in lowland forest buffer zones (Jana), and elite capture of community level benefits (Moeliono and Yuliani, Lawlor and Huberman).

Importance and limitations of tenure and access rights as parts of RBAs

Land tenure and natural resource access rights appear as key considerations in several cases, often serving as both ends in themselves and as facilitating factors for securing other rights (see Springer and Studd, Moeliono and Yuliani, Crane *et al.*, Jana, Painter, Stevens, Strelein and Weir). Collective tenure and secure access to natural resources are also raised as important components in creating an enabling environment for sustainable use and the continuation of customary conservation institutions (see Painter, Stevens, Moeliono and Yuliani, Jana, Strelein and Weir). Lawlor and Humberman point to clarification, strengthening and compliance with land tenure and use rights (including the free, prior and informed consent of indigenous peoples) as a prerequisite for effective and equitable Reduced Emissions from Deforestation and Forest Degradation (REDD) mechanisms. However, Moeliono and Yuliani, and Jana both demonstrate that there can be detrimental consequences for both conservation and rights objectives where tenure and natural resource access rights are granted in the absence of clear responsibilities or mechanisms to protect vulnerable persons within communities,

Linking rights and responsibilities

Relationships between rights and responsibilities are at the heart of RBAs to conservation. Duty bearers are responsible for upholding rights. Rights holders also have responsibilities, including not harming the rights of others. Laban *et al.* focus explicitly on the importance of mutual accountability in

rights-based approaches to water resource management. Painter, Stevens, and Strelein and Weir present cases in which indigenous peoples' customary institutions for conservation, and their conservation contributions, are part of the grounds upon which rights claims are made. Moeliono and Yuliani describe the costs for both conservation and local livelihoods arising from a (property) rights regime that lacks sufficient elaboration of corresponding responsibilities.

At the same time, respect for fundamental rights should not be contingent on a corresponding adherence to conservation organisations' objectives or intentions. In all cases, responsibilities must be fairly distributed. Local people should not be made 'responsible' for the opportunity costs, or other costs, of conservation, as Strelein and Weir suggest has sometimes been the case with the interpretation of Native Title law in Australia.

Synergy, alliances, and mutually supportive pursuit of rights and conservation

Going beyond rights vs. responsibilities around natural resource access and use, several cases highlight ways in which meeting rights and conservation objectives can be mutually supportive and positively synergistic. In the experiences of WWF and WCS (Springer and Studd, and Painter), a shared vision of sustainable livelihoods and cultures between a conservation NGO and local communities formed a powerful basis for RBAs. Crane *et al.* describe a scenario in which the realisation of rights might be more easily achieved if the parties were to seek greater opportunities for synergy. That is, the parties need to find ways in which the communities facing displacement could live and work within the protected area. Strelein and Weir go perhaps further, highlighting the danger that RBAs could give conservation a solely anthropocentric lens. They promote instead a vision for conservation and respect for rights grounded in awareness of the inherent and deep connectivity and mutual dependence of those two components. (For more on this conceptualisation of connectivity, see Weir 2008.)

Where RBAs are based on recognition of the mutually supportive and mutually dependent nature of human and ecosystem wellbeing, they can go beyond safeguarding against infringements, and support further fulfilment through conservation. In other words, these cases demonstrate scenarios in which greater biodiversity and natural resource sustainability and greater rights realisation become mutually reinforcing, including through proactive partnerships between conservation actors and local, rights holders (the editors thank Springer for her contributions to these points).

However, while synergies between rights and conservation objectives should be sought wherever possible, RBAs cannot be limited to such contexts. This is a key criticism in Strelein and Weir's review of how Native Title legislation in Australia has been applied. They argue that protection of indigenous peoples' rights should not exclude economic development beyond their traditional livelihood strategies. RBAs must be applicable in cases where rights and conservation objectives are, or appear to be, in conflict. In fact, it is in such cases that the value of RBAs may be greatest. They can provide a framework for identifying what rights and responsibilities must, at a minimum, be upheld in the trade-offs between human wellbeing and conservation objectives.

Recognising local leadership, knowledge and expertise

The strong leadership, knowledge, and capacity for innovation of local individuals, organisations, and peoples can be critical factors in initiating a RBA. This is illustrated in the Bolivian Chaco (Painter), the Mt. Everest area (Stevens), lowland Nepali buffer zone forests (Jana) and several other cases. Supporting the development of new community institutions and leadership was an important factor in the cases described by Laban *et al.,* Springer and Studd, and Crane *et al.* Australian Native Title law recognises (customary) land rights, but also draws on the traditional institutions, knowledge and capacities of indigenous peoples. Mata and Sasvári, in addition to advocating for gender equity and equality as a matter of right, emphasise the importance of women's knowledge and contributions to conservation and agro-ecological sustainability. While respecting rights should not be contingent on such conservation contributions, RBAs that recognise, respect and support people's expertise may go further in moving beyond basic rights compliance and find new paths for making conservation and further rights realisation mutually supportive.

Utilising multiple protected areas categories and governance arrangements

The cases involving protected areas (PAs) and landscapes suggest that RBAs can involve an array of PA categories and governance arrangements in meeting both conservation and human wellbeing objectives. Examples include mixing more and less utilised areas (Jana, Crane *et al.,* Stevens, Painter) and opening space for local people's leadership and participation in PA governance wherever possible. This is advocated for by Stevens, and Lawlor and Huberman, and demonstrated by Jana, Painter, Moeliono and Yuliani, and Strelein and Weir. Several cases, such as Crane *et al.* and

Painter, suggest that such combinations might be facilitated by operating at the landscape level. However, as Crane *et al.,* Moeliono and Yuliani, and Jana also demonstrate, innovative approaches to PA establishment and management, if poorly designed, do not *necessarily* result in rights consistent outcomes or effective conservation.

Capacity building … for rights holders AND duty bearers

Cutting across all of the above mentioned categories, and pointed out in some way in most of the cases, is the importance of capacity building for both rights holders and duty bearers. Capacity building in this sense comes in a variety of forms, but in all cases it involves actions that help rights holders and duty bearers better identify, understand and act on their respective entitlements and obligations. It is both an input to, and a product of, the kind of participatory processes described in Springer and Studd, Laban *et al.* and Painter. Capacity building is also important in cases where legal obligations are not being upheld. In Crane *et al.* a state agency is specifically charged with assisting another state agency (the duty bearer) and representatives of a local community (the right holders) to understand the latter's legal tenure rights and the responsibilities of both parties.

Enabling and mitigating factors in the broader environment

The choice and effectiveness of the policies, processes and tools described above are both enabled and mitigated by history and the broader political, socio-economic and cultural context in which they are carried out. At the same time, however, actions of rights holders and duty bearers can transform what might otherwise be seen as exogenous factors. Some key themes regarding the role of the 'broader' RBA environment are described below.

History

A clear, if unsurprising, message throughout the chapters is that 'history matters'. Conservation policy and practice, social and cultural relations, land use patterns and a host of other historical trends help frame the current rights-conservation dynamics. This is demonstrated by Crane *et al.*, Moeliono and Yuliani, Laban *et al.,* Strelein and Weir, Painter, Stevens, Springer and Studd, Jana, and Lawlor and Huberman. In several cases

the RBAs themselves have evolved over time as laws and attitudes have changed (Crane *et al.*, Springer and Studd, Jana, Moeliono and Yuliani, Strelein and Weir). The history of Sherpa efforts to gain greater recognition of their conservation contributions and customary rights as an indigenous people (Stevens) is significant. It is the long history of their relationship with the land, the more recent history of protected areas establishment and management, and ongoing political changes that have defined the current conflict and approach. REDD raises many rights concerns because—in addition to being still unclear in its own right—it will be implemented within historical contexts of often poor forest governance and weak tenure rights, and thus may exacerbate vulnerabilities and inequalities (Lawlor and Huberman).

Political, socio-economic and cultural relationships

The political, socio-economic and cultural relationships between rights holders and duty bearers (for example, between local people and states or NGOs, and between people within and across local communities) also greatly affect the design and outcomes of RBAs. Painter, and Springer and Studd describe cases in which conservation NGOs are partnering with local people to pursue common interests in upholding rights to land tenure and sustainable use of natural resources. In both cases the effects of this alliance were made stronger by the presence of a favourable political environment. Strelein and Weir illustrate that the legal frameworks addressing indigenous peoples' rights in Australia, and their interpretations, have changed over time and in response to changing political orders and attitudes. Water management and rights challenges in Palestine, as described by Laban *et al.*, are framed by ongoing international political conflict and economic and social marginalisation at the international and community levels. The extension of rights of access to, and use of, protected area buffer zones in the lowlands of Nepal (Jana) are made possible, in part, by the emerging democratic political regime. At the same time, continued social marginalisation of certain groups, including indigenous peoples, contributes to the inequitable distribution of benefits across buffer zone communities. With respect to REDD, international politics are one of the factors shaping the debate and likely policy responses around rights concerns (Lawlor and Huberman).

Legal and policy support and access to justice

In many cases, legislative and (government and non-governmental) policy instruments preceded and underpinned the formation of the RBA. This is particularly true in the case of communal land rights claims available to

people in Australia (Strelein and Weir), Bolivia (Painter) and Colombia (Springer and Studd). Rights related policies and other commitments of non-state actors are also of direct relevance. In South Africa (Crane *et al.*) the World Bank's social standards served as part of the impetus and guiding mechanism for addressing the Coleske community's rights. As illustrated in Chapter 2, many such non-state instruments and policies now exist, and can serve as models for further elaboration and implementation.

However, legal and policy frameworks are only useful where they are upheld, and ensuring compliance presents a serious challenge in many contexts. One of Stevens's key arguments for greater state recognition of, and support for IPCCA is that Nepal has a legal mandate to do so, having signed ILO 169 and DECRIPS. Failure to meet obligations may sometimes be an issue of awareness and capacity; Crane *et al.*, for instance, explain that part of the reason state agencies were not upholding their responsibilities under new tenure laws was that they did not understand their nature and scope.

Instruments recognising rights may mean little in the end if there are no complaint resolution mechanisms or other means of access to justice when responsibilities are not upheld. In the cases in this volume, such mechanisms are often described as a general component of a broader dialogue and negotiation process (for example, Springer and Studd, Laban *et al.*) or formal legal processes (for example, Crane *et al.*, Strelein and Weir, Mata and Sasvári). Clear and effective complaints and redress mechanisms are an important component of a RBA and will require greater attention and action going forward.

Advocacy, innovation and leadership … changing the landscape for RBAs

As discussed, political, economic, social, legal and other supports (or constraints) influence the choice and effectiveness of rights-based strategies. At the same time, several cases also demonstrate that innovation, advocacy and leadership from rights holders and their partners can change the political and legal landscape, and gain new ground for the respect and realisation of rights. In other words, RBAs are not necessarily contingent on the pre-existence of legal support. The act of implementing or advocating for rights can, in itself, change the scope and nature of legal and policy support. Stevens, Jana, Painter, Moeliono and Yuliani, Crane *et al.,* Mata and Sasvári, and Lawlor and Huberman all demonstrate the central importance of advocacy for realising and expanding rights. As described by Jana, local community activism has helped raise awareness and action on rights issues around protected areas and has secured greater access to resources in buffer zones. However, community effectiveness is also likely tied to

recent expansion of the political space for such activism and democratic response, as discussed above. Lawlor and Huberman present REDD as an emerging arena in which indigenous peoples, local communities and their partners are struggling to define the rights issues in REDD. They are also demanding mechanisms to ensure that these issues are systematically addressed in policy and project implementation.

Scalability, replicability and momentum

The policies, processes and tools described in the cases vary in terms of whether or not, or how, they can be scaled up and replicated. Crane *et al.* focus on the case of a very small community within a larger landscape in which many people face a similar dilemma. The lessons learned with the Coleske community are already being applied by state agencies and other actors in the landscape. How effective they will be remains to be seen. Springer and Studd describe some success in using a rights-based, participatory process for resource management in multiple areas, but also stress that this is not a simple process of replication. Laban *et al.* describe a framework for participatory water management that has already been replicated in many sites throughout the region, though the specific issues and approaches vary.

Several cases also show that, once in place, RBAs can set precedents and generate interests and demands that result in 'momentum', or greater realisation of rights over time. This includes greater support from the state (Painter, Jana, Crane *et al.*), but also extends to other duty bearers. In the Bolivian Chaco (Painter), the initial biodiversity conservation and land rights focus contributed to enhanced capacity and opportunity for the *Capitanía de Alto y Bajo Isoso* (CABI). This led to CABI defending indigenous peoples' rights in other arenas, including in negotiations with the private sector over development of an oil pipeline. Springer and Studd cite the institutional learning and capacity for addressing rights that has developed within WWF, local communities and other partners as a result of the first *conversatorio* processes. This may contribute to momentum for broader use of the approach.

Resolving the tough conflicts

Several cases present RBAs developed in the context of existing or potential conflicts between human wellbeing and biodiversity objectives (for

example, Crane *et al.*, Jana, Moeliono and Yuliani, Stevens, Lawlor and Huberman, and, in some respects, Strelein and Weir). They address the potentially negative consequences for people and/or nature when RBAs are not carefully designed (Moeliono and Yuliani, Jana, Strelein and Weir). Most cases also focus implicitly or explicitly on rights that align relatively comfortably with conservation objectives. These include resource rights for people engaged in small-scale resource use (Springer and Studd, Jana) and protecting customary tenure, access and conservation practices (Painter, Stevens, Strelein and Weir). These are important examples that should serve as encouragement for those seeking similar opportunities. However, it is less clear in such cases how RBAs can operate if rights holders' ambitions and claims are directed towards more intense use or are otherwise incompatible with biodiversity conservation goals. In perhaps the most direct example of this dilemma, Strelein and Weir raise the concern that the interpretation of Native Title law in Australia precludes economic development. Only Crane *et al.* directly deal with the question of just compensation for relocation.

Another challenge likely to arise in RBAs to conservation involves conflicts *between different rights*, and between rights holders with legitimate, but *competing, claims*. How can a scarce natural resource be best managed—for conservation and human rights—when it is used to fulfil multiple basic rights, such as insufficient water supplies being used for both domestic and agricultural purposes? How can fair resource sharing arrangements be made between different rights holders, such as upstream and downstream communities relying on the same scarce watershed resources for basic livelihood needs? While addressed to some degree in the cases in this publication, this is an issue that will require much greater attention in the future.

Resources and inputs required for effective RBAs

To the extent that they require new information, time, partnerships, training, negotiation and other activities, RBAs present additional costs. Several cases specifically mention the need for time and a contextually appropriate process to develop. Stevens frames the Sherpa leaders' IPCCA declaration as one step within a larger strategy that has been, and will continue to be, carried out over the years. Springer and Studd specifically refer to the role that a long lead time played in the success of the *conversatorio* process.

RBAs also require financing, but how, and by whom? In the case of CABI in the Bolivian Chaco, their negotiations with sponsors of the Bolivia-Brazil gas pipeline ultimately resulted in a US $ 1 million private trust

fund to generate a permanent source of revenue for management of the protected area. In Crane *et al.* part of the funding for the rights analysis and negotiations came from donor funding. In this instance the donor stipulated that further funding would be withheld if the social justice and rights issues were not resolved in line with their policies. These are useful examples, but not ones that are necessarily easy to replicate. The question of what new costs RBAs present, and who is to pay them, remains open and challenging.

Sustainability

While it is clear that it takes time for a RBA to develop and become effective, the question of whether or not these approaches are *sustainable* in the long run is open. Given the links between RBAs and their broader environment, it seems inevitable that shifting political, social, economic and cultural circumstances will affect the sustainability of approaches developed in particular contexts. How will RBAs hold up under less favourable political climates? How will existing arrangements for local resource access and use rights hold up when challenged with new pressures, for example from climate change, migration, or other factors? These questions hold potentially serious challenges for RBA sustainability. At the same time, strategies for RBAs will presumably evolve along with circumstances, as conservation approaches have always done.

Governance—bringing it all together

Many of the themes across the cases and the lessons learned can be tied together under the umbrella of (natural resource and broader) governance. As discussed in Chapter 1, natural resource governance can be understood as 'the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say in the management of natural resources—including biodiversity conservation' (IUCN RESWCC3.012).

Commonly recognised elements of 'good' (that is, effective and equitable) governance include:

- transparency;
- access to information;

- access to justice (including a means of resolving conflict and disputes as they arise);
- participation, legitimacy, and voice (genuine involvement in decision making);
- fairness;
- coherence;
- performance;
- subsidiarity;
- respect for human rights;
- accountability; and
- rule of law (fair, transparent and consistent enforcement of legal provisions) (adapted from Borrini-Feyerabend *et al.* 2004).

Many of these elements are also core to the RBAs illustrated in this volume. These include respect for human rights, but also information, access to justice, public participation, accountability and rule of law. The RBAs to conservation are, then, in a sense, also contributing to improved governance. Likewise, improved governance could in many respects pave the way for effective RBAs.

Shared and community governance—including where rights holders and duty bearers are brought together in processes in which they can understand the claims and duties at stake, and negotiate fair outcomes—is a key feature in many cases (Laban *et al.*, Stevens, Moeliono and Yuliani, Strelein and Weir, Jana, Springer and Studd, among others). Within these examples, however, are also illustrations of problems for conservation and human wellbeing that can arise where community governance does not sufficiently protect the rights of more vulnerable individuals (Moeliono and Yuliani, Jana).

The cases in this volume illustrate that RBAs must take account of both local natural resource governance processes and the broader systems of governance in which conservation, development and pursuit of human rights interact with one another. RBAs are significantly affected by, and in turn affect, the political, historical, legal, socio-economic and cultural systems in which they are embedded. In other words, as discussed in Chapter 1, the 'interactions among structures, processes and traditions that determine how power and responsibilities are exercised'—i.e. governance—are also the factors shaping the way that conservation will affect rights, and determine what options are available for addressing those effects. Thus, RBAs must engage with the governance systems in which they are being carried out.

Conclusions

A clear lesson in this volume is that there is no blueprint for RBAs to conservation. However, the general picture of RBAs that emerges is one in which deliberate laws, policies, processes, methods and tools are employed to ensure that rights holders, particularly the most vulnerable, and duty bearers, among other things:

- understand what their rights and responsibilities are;
- understand how those rights are (or might be) linked to conservation in positive and negative ways;
- have the capacity and opportunity to advocate for, claim and fulfil rights, including those of the most vulnerable;
- have the capacity and opportunity to understand and fulfil responsibilities; and
- have full access to effective and equitable systems of justice or conflict resolution when rights and responsibilities are not upheld.

The approaches to creating and sustaining these conditions vary across cases, but some common features emerge. They are described in the sections above and include supporting procedural rights, linking rights and responsibilities, equalising power relations, facilitating capacity building, recognising and engaging with local leadership and expertise as well as other factors. For any approach, the historical context and broader environment will influence the choice and effectiveness of the RBA strategies. For this and other reasons, the longer-term sustainability of the RBAs presented in this volume cannot be assumed to be secure, and would require more time to verify. At the same time, however, taking, or advocating for RBAs can change the political and social landscape, and generate new interest and opportunity for greater rights realisation within conservation. More generally, RBAs can support improved governance, but such approaches are also, in turn, shaped by the governance systems in which they operate. In all cases, RBAs are neither a standalone solution for effective and equitable conservation, nor silver bullets, but they do provide a promising way forward.

This volume also leaves open many challenging questions. We propose the points below for more thorough exploration and action in the future. Addressing these and other dimensions of RBAs can improve understanding and create greater opportunities for integrating human wellbeing, justice and biodiversity sustainability.

Rights holders and duty bearers need time, experience and dialogue with each other to 'learn by doing', and both positive and negative experiences must be documented and widely shared. This should include more in-depth

analyses of RBA cases. The analyses should include such basic questions as: what rights approaches are; what (internal and external) factors facilitate their success; who they benefit and how; what the costs are and for whom; and at what scales, scopes, and timeframes they can operate. It should also include more concrete examples of the practical implications of respecting, protecting and fulfilling rights within the context of conservation. As part of this, further clarification is needed regarding the scope and nature of the obligations of non-state actors towards rights.

The conservation community and its partners can also engage in further development and testing of rights-based methods and tools that can operate across a range of circumstances, including those where 'win-win' solutions are not achievable. Focus should also be given to culturally appropriate processes and methods that empower and learn from the expertise of rights holders.

Finally, conservation actors should seek opportunities to enhance their and their partners' understanding and capacities for addressing rights. This should include moving beyond 'business as usual' and engaging with the broader governance systems and historical, political, socio-economic and cultural contexts in which they operate.

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The links between human rights and biodiversity and natural resource conservation are many and complex. The conservation community is being challenged to take stronger measures to respect human rights and is taking opportunities to further their realisation. 'Rights-based approaches' (RBAs) to conservation are a promising way forward, but also raise a myriad of new challenges and questions, including what such approaches are, when and how they can be put into practice, and what their implications are for conservation.

This volume gives an overview of key issues and questions in RBA. Rights and social justice related policies of major international organisations are reviewed. Case studies and position papers describe RBAs in a variety of contexts - protected areas, natural resource management, access and benefit-sharing regimes, and proposed reduced emissions from deforestation and forest degradation (REDD) mechanisms. No one blueprint for RBA emerges. However, there are common themes: supporting both procedural and substantive rights, linking rights and responsibilities, equalising power relations, providing capacity building for rights holders and duty bearers, and recognising and engaging with local leaders and local people.

RBAs can support improved governance but are, in turn, shaped by the governance systems in which they operate, as well as by history, politics, socio-economics and culture. Experience and dialogue will add to a fuller understanding of the promises and challenges of RBAs to conservation. The aim of this volume is to contribute to that discussion.