Petroleum development presents societies with both opportunity and risk— a double-edged sword. While the development of reserves can bring socioeconomic benefits, it will also bring with it a constellation of negative impacts. Thus, the public policy challenge is to maximize the positive impacts and minimize the negative impacts.

Throughout the 20th century, oil development has helped some societies become more prosperous, but in others led to social, economic, and environmental decay. Due to its unusual ability to cause problems, a former oil minister in Venezuela called oil "the devil's excrement". Although the history of oil and gas development around the world is rife with poorly planned and operated fields, reckless corporate behavior, environmental degradation, human rights abuses, and corruption, this history need not repeat itself. And as some geologists estimate that humanity has used about half of the commercially recoverable oil on Earth (about 1 tril-
What ARE Human Rights, anyway?

Conservation can undermine Human Rights...

…but conservation and human rights can also work in mutual support.

The challenge is to create a new paradigm for oil and society—a new way of doing business around the world that will create a more equitable, democratic, and environmentally sound economies from petroleum. A central issue in this new paradigm for oil is how the public is involved. Oil development can foster democratic governance or it can destroy it.

Two of the fundamental principles of democracy are: 1. access to information, or transparency; and 2. informed public participation in governance. It is important to distinguish between the two principles. Transparency implies simply that the public has easy access to government and industry information, and literally a "clear view" of what government and industry are doing. However, transparency does not necessarily mean that the public has a formal, active voice in the operations of government and industry—the concept of informed public participation. While transparency is passive—e.g. information is accessible—informed public participation is active—there is capacity to collect, synthesize, interpret, and understand information, and the capacity therefor to formulate informed opinions and to rationally influence policy.

Although we have considerable government transparency in the U.S. (through legal instruments described below) there exists a tragic lack of informed public involvement in petroleum policy. And in such a situation, vigilance atrophies, complacency thrives, and government policy drifts away from public interest and toward serving the industry. The lesson is that transparency is a necessary but not sufficient component of democratic governance. These two principles must be developed together in order to create stable, prosperous, sustainable societies.

Government transparency—the public right-to-know

The fundamental basis of democratic governance is that the government operates "by and for the people." As stated in the U.S. Declaration of Independence, governments derive "their just powers from the consent of the governed." The first amendment to the U.S. Constitution recognizes both the needs for an informed electorate as well as the right to free self-expression without fear of government repression. Constitutional scholars interpret the 1st amendment such that the public's "right-to-know" derives directly from and is a fundamental necessity for the
For democratic governance to work, its citizens must have an active voice in all the affairs of their government, and to have such voice they must be informed about the workings of their government. Thus, it is a fundamental responsibility of any democratic government to provide free and open access to government information, and allow for the active advocacy of public interests with such information.

Regarding the critical importance of the public's right to know, one of the fathers of American democracy, Thomas Jefferson, once wrote: Whenever the people are well informed, they can be trusted with their own government.

As citizens make the ultimate decisions regarding who will govern them and how they will govern, they must know what is going on in government. And while it is recognized that certain types of information can be kept secret (e.g. national defense, trade secrets, etc.), Thomas Emerson pointed out in "The Dangers of State Secrecy" that: As a general proposition, secrecy in a democratic society is a source of illegitimate power.¹

Emerson suggested that withholding of information by any part of the government is wrong for the following reasons:

- It is in direct conflict with democratic principles of decision making, and that no rational choice by citizens can be made in the absence of information;
- It is unjust and morally wrong, just as when due process with access to all relevant information is denied an individual by the judicial system;
- To the extent that information is withheld from a citizen, the basis of government control over him becomes coercion, not persuasion— the citizen is given no rational ground for analyzing a decision, but must submit to it by force;
- Secrecy is politically unwise, as it leads not to support but to disaffection— concealment of information leads to anxiety, fear, and extremism;
- Secrecy undermines confidence in government and produces a credibility gap.

The former director of the Associated Press, Kent Cooper, suggested that government secrecy was ultimately self-defeating because:

- confidence and loyalty thrive where people have the right to know.

Picture 2. The Trans Alaska Pipeline System marine terminal in Valdez Alaska, where over 15 billion barrels of oil have been loaded onto tankers for shipment south to market since its opening in 1977. (Courtesy State of Alaska)
patriotism springs from the people's own convictions, based not upon government propaganda but on full information on all sides of every question.

government power, backed by an informed citizenry, is unassailable, because through full availability to the news, an equal partnership between the government and the individual is established, based upon respect for the latter's right to know.

Instruments of government transparency in the U.S.

Freedom of Information Act (FOIA)
To counteract the tendency toward government secrecy in the U.S., the Freedom of Information Act (FOIA) was signed into law on July 4, 1966. The Act requires that "each agency, on request for identifiable records...shall make the records promptly available to any person." FOIA defines a public record as any record retained by any government body, including any document presented to any government body by any government or non-government body. The Act was amended in 1974 and again in 1995 to make it quicker, easier, more efficient and cheaper to access government information. In 1996, Congress passed "Electronic FOIA" to include electronic records.

FOIA provides the public access to files of federal executive agencies, and provides: that disclosure is the rule, not the exception; that all individuals have equal rights of access; that the burden shall be on the government to justify withholding of a document, not on the person who requests it; that individuals improperly denied access to documents have a right to seek injunctive relief in the courts; that there be a change in Government policy and attitude—toward openness. When FOIA became law, the U.S. Attorney General commented that "nothing so diminishes democracy as secrecy."

To file a FOIA request, a citizen must identify the proper agency, cite specific documents and/or topics, and demonstrate that releasing the material is in the public interest. FOIA allows documents to be withheld only for reasons provided by nine exemptions as follows: 1. national defense and foreign policy, 2. internal (personnel) rules, 3. exemption by another statute, 4. trade secrets, 5. internal records (that would not otherwise be available in litigation), 6. personal privacy, 7. law enforcement, 8. financial regulation, and 9. petroleum information (maps, geological information, etc.).

Some 26 nations have passed similar information access laws in the past 10 years—Japan, Thailand, Bulgaria, the U.K., South Africa, etc. The U.S. government receives over 2.5 million FOIA requests / yr., and spends about $250 million / year (about $1 / per U.S. citizen) in implementing the act. While some argue that this is excessive and unnecessary, citizen advocates counter that this is simply the cost a free nation must pay for government accountability.

The Privacy Act
The 1974 Privacy Act allows citizens to know what government agency records are kept on them; to read, correct, or append information in such files; and to prevent use of such files for other than their original purpose. The Act places restrictions on agencies on the sorts of information they can collect on private individuals, and in which such information can and cannot be communicated within and outside of government.
"Sunshine" laws were named as such from a former U.S. Supreme Court Justice who stated that "sunshine is the best disinfectant." The 1972 Federal Advisory Committee Act grew out of the desire of consumer groups for access to advisory group meetings between industry and federal agencies heretofore closed to the public. It requires prior notice of meetings to be published in the Federal Register, and that minutes and records be kept of the meetings. And, the "Government in the Sunshine Act" went into effect in 1977, requiring about 50 federal agencies to hold their meetings in public, with 10 exemptions similar to those found in FOIA. But even if under the exemptions an agency meeting may be closed, the Act requires records be kept—transcripts, recordings, minutes, etc.—that "fully and completely describe all matters discussed." The records of closed meetings may be subject to later disclosure through FOIA.

"Whistleblower" protections

The unauthorized leaking of information from government agencies, if it is to the public and in the public interest, is also protected to some extent by the Civil Service Reform Act (CSRA) of 1978. The Act is intended to protect from administrative retaliation a civil servant who discloses information (other than classified) which he/she believes shows "a violation of any law, rule, or regulation", or "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

State Information Access laws

All states in the U.S. also have Public Records Acts and Open Meetings Acts, as counterparts to federal FOIA and "Sunshine" laws. The state statutes, patterned in parallel to the federal statutes, are intended to make state and local government business as open and transparent as possible.

Conflict of Interest/Financial Disclosure laws

In order for the public to rationally decide whether a government official may have a conflict of interest regarding a particular policy issue, federal and state governments have enacted financial disclosure laws applicable for certain government officials. These generally require people running for an elected office and those appointed to senior government positions (Congress, President, Governor, Legislature, cabinet posts, commissioners, etc.) to report campaign contributions, financial assets, etc., so that the citizenry can see who is giving money to whom. Such financial disclosure requirements provide a disincentive to corruption.

[Note: The September 11, 2001 terror

Picture 3. The Exxon Valdez lies crippled at anchor in April 1989 after spilling over 11 million gallons of oil into Alaska's Prince William Sound. (Courtesy State of Alaska)
attacks on the U.S. lead to a significant reassessment of the U.S. government posture toward the collection and release of information. In general, the government expanded its abilities for collection of information and restricted the public's ability to access information.]

**Informed public participation**

Even in long-established democracies the relationship between government, industry, and the public is problematic and often fails to serve the common public interest. Although government agencies and legislative bodies are legally obligated to operate in the interest of the public, many regulatory agencies are too closely tied to the industries they regulate to provide effective oversight. Regulation and legislation in such a symbiotic environment tends to favor industry at the expense of the environment, social justice, and economic justice. Our ideal of a well-informed, participatory public, a government always receptive to public concerns, and a cooperative industry all working to protect the public interest is in fact far from the actual practice of democracy.

**Regional Citizens’ Advisory Councils—a model for public oversight of the oil industry**

To create a more equitable, transparent, and truly participatory process for important civil society activities such as oil and gas development, it is necessary to establish a well-funded, empowered, and independent citizens’ organization to provide oversight. The Regional Citizens’ Advisory Councils (RCACs) in Alaska represent such an initiative.

Prior to the 1989 Exxon Valdez oil spill disaster in Alaska, the oil companies and the state and federal governments conducted their business largely "out-of-sight / out-of-mind" of the public. With the Exxon Valdez Oil Spill, the political dynamic took a dramatic shift in response to an outraged local public. Shortly after the spill, the Alyeska Pipeline Service Company owners (a consortium of BP, ARCO, Exxon, Mobil, Amerada Hess, Phillipps, and Unocal) agreed to citizen demands to establish a citizens’ oversight council. To back up oil company promises to fund and cooperate with this new citizens group, the federal Oil Pollution Act of 1990 (OPA 90) mandated the establishment of two national demonstration RCACs in Alaska—one in Prince William Sound, and the other in Cook Inlet. [OPA 90 was the federal government’s response to the Exxon Valdez spill, and in addition to the RCACs, it also mandated the phase-in of double-hulled oil tankers in U.S. waters, stricter liability provisions, the establishment of an Oil Spill Liability Trust Fund, and more stringent safety protocols for tanker crews.]

In the OPA 90 RCAC provision, the U.S. Congress noted that "the pres-
ent system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation." and "only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus."

In December 1989, the Prince William Sound (PWS) RCAC was incorporated as a nonprofit corporation, and in February 1990, it entered into a contract with the pipeline owner, Alyeska.3 Through the negotiated contract, Alyeska agreed to provide four things to the PWS RCAC: $2 million in annual funding, adjusted for inflation; absolute independence from Alyeska; access to Alyeska facilities; and that the contract would continue "for as long as oil flowed through the pipeline".3 The Cook Inlet RCAC was incorporated in December 1990, and entered into a contract with a consortium of oil companies and tanker operators in its region—Cook Inlet Pipeline Co., Kenai Pipeline Co., Phillips Petroleum, Tesoro Alaska Petroleum, UNOCAL, Marathon Oil, and Cross Timbers—with an annual funding level of approximately $600,000.4

**Structure and function of an RCAC— the Prince William Sound, Alaska model**

These RCACs provide citizens an advisory role in oil issues in the region, monitor impacts, review spill prevention and response plans, and recommend continual improvements in the system. The concept is to give local citizens a direct voice in the corporate and governmental decisions that affect them and their communities. The group is the primary conduit through which government and industry communicate to the public on oil issues. In a real sense, the RCAC has become "the eyes, ears, and voice" for the local public on oil issues. The public relies on the RCACs to safeguard its interests and assure transparency in industry and government. This is a novel, and indeed experimental effort. Among RCACs, the Prince William Sound RCAC (PWS RCAC) is the largest. The PWS RCAC has three main structural components: the board of directors, the staff, and the committees:

**Board of Directors:** consists of 19 members representing the communities and major citizen constituencies affected by the Exxon Valdez Oil Spill—commercial fishing, Alaska Natives, aquaculture, conservation, recreation, cities, villages, and tourism. Board members are chosen by their respective institutions, and are thus ultimately accountable to the institution they represent. Both the Prince William Sound RCAC and the Cook Inlet RCAC (with a 13-member board) have several ex-officio, non-voting board members representing the relevant state and federal agencies.

All board members are volunteers,
receiving no financial compensation other than for travel expenses to attend meetings and other events (the compensation issue may need to be reconsidered in the emerging democracies in order to attract the best possible people to serve on citizen councils). The RCAC Board of Directors meets at least four times a year, and at each meeting, representatives of industry and government report on their issues of concern and operations and hear from the citizens regarding issues of importance to them. This regular interchange provides a line of communication vital to the interest of each constituency, and results in a constructive climate for problem solving.

The board is responsible for allocating the annual budget. The PWS RCAC has an annual budget that has averaged about $3 million (FY 2003 was $3.2 million) of which on average about 38 percent ($1.14 million/yr.) is devoted to staff, 33 percent ($1 million/yr.) for contracts and research, and 29 percent ($860,000) to office rent, supplies, equipment, and audits. An annual audit of all finances is conducted and approved. The U.S. Coast Guard also conducts an annual recertification of the group as being in compliance with the terms of OPA 90. All of the RCAC’s work is open to the public on whose behalf it operates, and interested citizens can attend and provide public comment as well. These checks and balances provide a high level of integrity and credibility to the process.

Staff: The day-to-day activity of the PWS RCAC is the responsibility of a paid staff of 18, located in two offices—one in Anchorage, where Alyeska headquarters are located; and the other in Valdez, where the pipeline terminal is located. Staffing includes an executive director, two deputy directors, public information manager, community liaison, finance manager, seven project managers, and administrative assistance (The Cook Inlet RCAC has a staff of six). The staff serves at the pleasure of the Council’s executive director.

Committees: Much of the council’s work is conducted by four technical committees, each with a dedicated staff liaison: Oil Spill Prevention and Response; Terminal Operations and Environmental Monitoring; Port Operations and Vessel Traffic Systems; and Scientific Advisory. These volunteer committees are appointed based on expertise, interest, and willingness to serve. The committees meet regularly to discuss any and all issues within their purview, draft and recommend policy actions to the RCAC Board, and conduct research approved and financed by the Board. The Cook Inlet RCAC has three committees: Environmental Monitoring; Prevention, Response, Operations, and Safety; and Educational Outreach.

Responsibilities: The work of the council is multifaceted. The broad mission is to organize citizens to promote the environmentally safe operation of the Alyeska Pipeline Service Company terminal in Valdez and the oil tankers that use it. Within this mission, the council reviews and submits written comments on operations of the pipeline terminal and tankers. This oversight, review, comment, and recommendation can cover state and federal legislation, regulations and permits, industry policy and procedure, and so on.

At the request of its committees, the RCAC commissions independent scientific studies and reports on relevant issues to the public, the media, government agencies, legislative bodies, and the industry. This research often forms the basis of policy recommendations. Conducted jointly with government
and industry, this research has fostered a more cooperative spirit among these groups, minimizing conflict and contention. The RCAC monitors and plays an active role in all spill drills and exercises, and recommends improvements in post-drill debriefing.

Not surprisingly, the initial relationship between citizens’ councils and the oil industry was somewhat distrustful, but gradually became dynamic and effective.

**RCAC successes**

The recommendations of the RCAC are non-binding, and government regulators and industry do not always take the council’s advice. Yet many recommendations are adopted because of the thorough research and vetting facilitated by the council’s public/industry/government framework that provides regular meetings to discuss research objectives, methodologies and results.

The successes of the PWS RCAC attest to the sort of cooperative problem solving that can be accomplished with genuine, informed public participation. Overall, the citizens’ council has been a primary driver in the improvement of the system for oil transportation through Prince William Sound, making it arguably the safest system anywhere in the world. The following are some of the more significant improvements that the RCAC either recommended or played a pivotal role in:

- Deployment of powerful, maneuverable tugs to escort all outbound, laden tankers
- Monitoring the compliance with phase-in requirements for double-hull tankers
- Installation of ice-detecting radar to warn of iceberg hazards in the shipping lanes
- Development of nearshore spill response strategies and contingencies
- Improved Vessel Traffic System (VTS) surveillance of all tankers in the system
- More stringent weather restrictions and speed limits for tanker traffic
- More stringent tanker inspection, in Alaska and beyond
- Advocacy for better government oversight, more personnel, and more funding
- Deployment of weather buoys along the shipping lanes for real-time weather
- Improved spill contingency plans, response equipment, and training
- Improved understanding of community impacts from technological disasters
- Conducted comprehensive environmental monitoring to assess oil impacts
- Pioneered the control of ballast water treatment to control exotic species
- The construction of a Vapor Control System to capture volatile hydrocarbon vapors released during tanker loading
- Improved fire prevention and response capability at terminal and on tankers

An official U.S. government review in 1993 of the two Alaska "demonstration" RCAC programs concluded that: “The demonstration programs have substantially increased the level of citizens’ involvement with the oil industry and with government regulators in the environmental oversight of oil terminal and tanker operations. Through vari-
ous projects and activities, the citizen councils have provided extensive input into matters such as oil-spill contingency plans, tanker navigation and escort procedures, and oil terminal operations. Industry and government officials acknowledge that many of the councils’ projects and activities have been helpful.”

As described in the "RCAC Retrospective", there have been many important lessons learned over the group’s history. Some lessons with relevance in other regions are as follows:

- Cooperation works better than confrontation.
- Conflict is inherent, but common ground is possible.
- Trust between citizens and industry is difficult to establish and even harder to maintain, but can be maintained by regular informal meetings.
- Sufficient funding is essential
- A citizens’ group can be independent with industry funding with proper safeguards.
- Agreeing on how to disagree reduces conflict
- Logic and using science make passion persuasive
- It pays to acknowledge industry and regulators when they act right
- All affected citizens should be represented on RCACs boards
- Board members do not have to be technical experts
- Funding should not have strings attached
- Advisory groups should be mandated by state or federal statute
- A clear mission and identity should be established early on

An overall lesson is that citizens are clearly more effective if they have formal relationships with those who make decisions that affect them.

The challenges and opportunities for establishing RCACs

Given the obvious benefits to public process regarding oil and gas issues in the United States that have derived from the establishment of these citizens’ councils, it is recommended that the citizens and governments elsewhere consider the establishment of such groups as well. Although there may be initial resistance to the concept within industry, government, and perhaps the public, none of this should prove insurmountable. The importance of these citizens’ councils is paramount—they are not government, they are not industry, but they are established and operated solely by and for the citizens of the region.

Although other RCACs could have similar characteristics to those in existence in the U.S., they should have a broader scope of responsibility. These RCACs could be empowered to provide over-
sight on all aspects of petroleum development in their region—permitting, exploration, production, transportation, refining, public revenue collection, risk management, and environmental compliance. The RCACs should provide oversight, advice, and advocacy on issues such as the following: where to allow petroleum development, rates of reserve extraction, Best Available Technology (BAT) standards, accident prevention and response preparedness, legal liability, environmental monitoring, regulatory reform, petroleum revenues and taxes, and so on. They should have a voice in the selection of export routes and transportation methodologies.

With regard to the public collection and use of petroleum revenues, the RCACs should monitor and advise government and the public on all industry financial matters—revenues, costs, taxes, royalties, etc. And, they should commission annual audits of both industry and government petroleum revenues.

All major constituencies in the regions should be represented, with directors being democratically chosen by their respective interest groups. The government should agree to become cooperative partners with these groups, granting them access to information and deliberations. The citizens’ councils should also advocate strong public access statutes similar to the United States FOIA, as well as open meetings acts and other public disclosure instruments.

Funding: Substantial and stable funding for such a group / groups is critical. The budget should be commensurate with the responsibilities of the new RCACs, and include sufficient funds to commission independent research and technical reports as the RCACs deem appropriate. If there is one thing that distinguishes the RCAC concept from other advisory structures, it is that the RCACs have sufficient funding to do the research that they feel is necessary, greatly enhancing the justification for their policy recommendations.

There are several possible avenues for financial support:

- **Direct funding by the petroleum industry:** Funding could come directly from the oil and gas companies and/or their consortia (as in Alaska), but must contain sufficient safeguards against industry bias and control. Industry funding would be best in the form of an endowment from which the RCAC could operate off the investment earnings.

- **Financial institutions requiring the establishment of RCACs as a condition of their loan:** Lacking direct support by the oil and gas companies, the International Financial Institutions (IFIs) could require companies receiving loans to establish and fund such independent, credible public participation as a condition of their loan. The IFIs could stipulate what sort of audit, review protocols, representation, and government and industry cooperation must be put in place to ensure the highest levels of integrity and effective action of the groups.

- **Government support:** The governments of the region could themselves establish and finance such citizen participation from public revenues derived from oil and gas projects, thereby removing industry from any direct role in the group’s budget.
Interim, start-up support from philanthropic, non-governmental organizations (NGOs): If none of the above financial instruments is attainable in the short-term, then the assistance of an outside, philanthropic NGO should be solicited. As the interim RCACs prove themselves a worthy mechanism for informed public participation in the region, then their funding should be picked up directly by government or industry.

A concern often voiced regarding establishing RCACs in the emerging democracies and other areas is that of financial corruption. And although the Alaska case is admittedly different, its structural safeguards against corruption are applicable anywhere. The RCACs commission annual financial audits by independent firms and report their results in their publicly available annual reports. Both the U.S. Coast Guard (the federal liaison agency) and Alyeska (the contracting oil industry body) have the right to conduct yearly financial audits of the RCAC—and on occasion avail themselves of this right. Thus there are straightforward audit and disclosure mechanisms that can prevent corruption.

Another related concern regarding the establishment of RCACs is possible industry co-option of the group. While there is no absolute safeguard against this tendency, the groups can be designed to limit this threat. RCAC members being accountable to their respective institutions, together with transparent activity, are the foremost safeguards against co-option. As board representatives have to report regularly to their host institution, it is the institution’s responsibility to ensure that its views and concerns are addressed. If an interest group feels its RCAC representative is not working for their interests, they can correct or replace that representative. Importantly, board appointments to an RCAC are made by the represented groups themselves—not the host government or industry. Ultimately, it is the citizens’ groups represented in an RCAC that control the process—not government or industry.

The other challenge to the RCAC concept in some emerging democracies is that of government persecution of citizen activists. This is an extremely serious, fundamental problem that must be addressed whenever and wherever it occurs. Democratic governance depends on the rights of citizens to free speech and dissent. Governments that fail to protect these rights must be challenged to do so by the international community. Democratic governments must have laws and regulations in force to aggressively prosecute any such actions against its citizens. The establishment of RCACs may help some governments that are wary of citizen dissent come to value public attitudes and insights.

Another result of citizen demands, regular oil spill response drills are held, using local fishing vessels. (Courtesy State of Alaska)
Conclusion— a new paradigm for oil and society

In closing, it should be underscored that the success of corporations in the 21st century will be measured not just by their bottom-line profits, but also by social and environmental responsibility, citizen involvement, ethics, justice, and honesty. Governments will be assessed by how well they protect the rights and interests of their citizens. In this regard, citizen's involvement is critical.

All nations should establish instruments of transparency and informed public participation as outlined above. This should include enactment of a Freedom of Information Act (FOIA), Open Meetings Act, Privacy Act, Whistleblower protections, and Conflict of Interest / Financial Disclosure laws for public officials. Further, petroleum producing states should require the establishment of Regional Citizen Advisory Councils (RCACs) for a nation's petroleum sector, to be funded either from government oil and gas revenues or from industry itself. Citizens need to be involved in the oversight of petroleum operations that will affect their lives, and to do this they will need an organization with money, staff, authority, broad representation, and most of all, independence.

The establishment of RCACs would provide an unprecedented level of transparency and informed public participation with regard to industrial activities in fulfillment of the promise of democratic governance— an important prerequisite to achieving a prosperous, equitable, just, and sustainable society.

Richard Steiner (afrgs@uaa.alaska.edu) is a Professor and Conservation Specialist for the University of Alaska Marine Advisory Program, based in Anchorage, Alaska. His specialty is ecological conservation, and he has worked internationally on conservation and sustainable development issues. His work regarding the Exxon Valdez spill included proposing Regional Citizens’ Advisory Councils. He has published on a broad array of conservation topics including oceans, fisheries, forests, macro-economic policy, endangered species conservation, maritime issues, oil revenues, citizen involvement and environmental democracy, war and environment, global warming, the global environmental crisis, and oil spill prevention. Prof. Steiner is a member of CEESP’s TGER and SEAPRIZE.

Notes
1 Emerson, 1974.
2 Foerstel, 1999.
3 PWSRCAC
4 CIRCAC
6 PWSRCAC, 1996.

References/ Further Reading
CIRCAC, Annual Reports, publications, newsletter available from Cook Inlet RCAC. Kenai, Alaska, USA. ph: 907-283-7222; fax: 907-283-6102; e-mail: circac@circac.org; and on Worldwide Web: www.circac.org
Foerstel, H.N., Freedom of Information and the Right
Reflections on integrating a rights-based approach in environment and development

Gina E. Castillo and Marjolein Brouwer*

Abstract. The article reflects on how Oxfam Novib, a development organisation, has integrated a rights-based approach (RBA) in its general work and mission of poverty eradication, and what lessons can be learned by conservation actors. Although historically human rights, development, and conservation have had a rather uncomfortable relationship, the authors maintain that a rights-based approach and sustainable use of natural resources are compatible. An RBA to development seeks to transform the vicious cycle of poverty and marginalisation into a virtuous cycle in which people can seek the fulfilment of their rights from duty-bearers. The authors describe how Oxfam Novib has situated its work on the use of natural resources within the right to a sustainable livelihood. In practice, this means that at the local level, an RBA to environmental programs begins with a thorough analysis of local realities, and the inclusion of men and women in problem definition and proposal making. The analysis of who is accountable and how the situation can be redressed then informs the choice of strategies that can be used. Yet, many problems experienced at the local level are generated at higher levels. Hence, for Oxfam Novib, an RBA to environment requires changing policies, practices, beliefs and ideas, and building and reinforcing the capacity of rights holders and duty bearers. Moreover, seeking a government’s responsibility for environment, poverty and exclusion requires active citizenship. Responsibility for the environment calls for joint work in mutual solidarity, as everyone has an obligation towards each other, the earth, and future

* The views expressed in this publication do not necessarily reflect those of Oxfam Novib or Oxfam International.
A rights based approach (RBA) to development is important for conservation actors to understand not only because of the links between conservation and development, but also because development organizations have a breadth and depth of experience with RBA that may exceed that in the conservation sector, and therefore development organizations’ experience may provide important lessons.

While presenting our reflections and experiences, we will automatically touch on issues of natural resources, as both a RBA to development and anti-poverty work focus on women and men living in poverty. We posit that the physical environment is central to their well-being and livelihood practices. We further maintain that a human rights perspective on conservation issues offers additional benefits and challenges as compared with either conservation, anti-poverty, or human rights perspectives taken alone.

Before we begin, two caveats are in order. Historically, there has been discomfort between conservationists, development practitioners and human rights advocates. Some development practitioners and human rights advocates all too easily assume that, for conservationists, resource conservation and wilderness preservation are more important than people’s rights and livelihood opportunities. Likewise, environmentalists may distrust the priority which human rights activists are likely to accord to the human being over other species and ecological processes: “If the established human rights to life, health, property, culture, and decent living conditions are to be fulfilled for the majority of the world population rather than just a minority, and if those rights are realized in the pursuit of affluence rather than moderation, than a rapid depletion of natural resources is a likely consequence. An environmentalist may suspect that there is a structural contradiction between fulfilling existing rights for a growing population and effective protection of limited environmental goods.” 1 Obviously these are simplistic generalisations but historically human rights, development, and conservation have had a rather uncomfortable relationship. This is unproductive and there is much that all can learn from exchanging experiences and working together.

The second caveat is that we rec-
Introduction to rights and development

Although for those who live in poverty there is probably no distinction between ‘rights’ and ‘development’, human rights and development practitioners have worked rather independently. Traditionally, NGOs that worked on human rights concentrated on the protection of civil and political rights, on the basis of internationally agreed human rights instruments and using language of rights-holders and duty bearers. By contrast, development actors predominantly focused on improving living conditions and people’s empowerment, advancing social, cultural and economic rights in a pragmatic way and not necessarily framed in rights language.

Yet, the link between rights and development was reaffirmed in many authoritative international statements: the Charter of the United Nations (UN) refers to an intrinsic link between development and rights as do the twin International Covenants on Economic, Social and Cultural Rights (1966) and on Civil and Political Rights (1966). The UN Declaration on the Right to Development is even more comprehensive in saying: “The right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be full realized.”

In an RBA to development, people are seen as holders of rights, who have a claim on duty-holders, which include communities, governments at all levels, private sector, civil society, and external development partners.
In the late 1980s, the worlds of development and human rights converged. With the fall of the Berlin wall, the interdependence, indivisibility and interrelatedness of all human rights (economic, social, cultural, civil and political) could be reconfirmed at the World Conference for Human Rights in 1993. Within the development community, the topic of ‘human development’ gained ground, in which the well-being of the human person became the benchmark rather than macro-economic variables alone. People became the subject and agents of development. In an RBA to development, people are seen as holders of rights, who have a claim on duty-holders, which include communities, governments at all levels, private sector, civil society, and external development partners.

Oxfam Novib— a development actor

Oxfam Novib is part of Oxfam International, an international group of independent non-governmental organisations dedicated to fighting poverty and related injustice around the world. The Oxfams believe that poverty and powerlessness are avoidable and can be eliminated by human action and political will. In all of Oxfam’s actions, the ultimate goal is to enable people to exercise their rights and manage their own lives. The Oxfams maintain that preventing and reversing damage to the environment is essential in achieving sustainable livelihoods. The Oxfams support the work of more than 3000 counterparts in approximately 100 countries. They work together to achieve greater impact by their collective efforts, as is illustrated in box 1.

Box 1. Sahelian cotton farmers in Cancun

As of the early 1980s hundreds of village-based farmers’ associations were founded in the Sahel countries of West Africa. Intermediary NGOs, which invested in enhancing the organisational capacities of the village associations, received subsequent support from Oxfam Novib. Realising that local solutions were not sufficient, local groups of farmers, cattle owners, fishermen and women in different parts of the Sahel started forming national federations. With the help of the intermediary NGOs, they linked up with each other and formed regional unions. Meanwhile, Oxfam Novib shifted its support from the intermediary NGOs to the farmers’ and other sectoral associations and their federations. In 2000, Sahelian farmers’organisations set up a regional farmers’ organisation, ROPPA (Réseau des Organisations Paysannes et des Producteurs Agricoles de l’Afrique de l’Ouest). ROPPA was a response to the negative effects of globalisation on Sahelian cotton farmers whose income had dropped after the price of cotton fell on the world market. Sahelian cotton farmers were now confronted with American and European government’s subsidies to their own cotton farmers. In 2003, together with Oxfam International, ROPPA defended the interests of Sahelian cotton farmers, at the WTO meeting in Cancun.

The mission of Oxfam Novib is ‘to promote a global society where the socio-economic inequalities between rich and poor are eradicated, where the world’s prosperity is distributed more justly and where people and sectors of the population can learn about and respect each other’s culture, while working together on their development on the basis of shared accountability and mutual solidarity’. Operating from one central office in The Hague, Oxfam Novib works with civil society, governments and the private sector to halt poverty and injustice, believing that every member of this triangle (Figure 1) has a role and responsibility to act.

The Oxfams understand poverty to
be a state of powerlessness in which people are unable to exercise their basic human rights or to control aspects of their lives. Human rights are acquired at birth and belong to all human beings regardless of their colour, ethnicity, gender, sexual orientation, language, religion, etc. Human rights apply to all people wherever they live. The Oxfams believe that poverty is almost always rooted in human action or inaction. “It can be made worse by natural calamities, and human violence, oppression and environmental destruction”. Poverty exists between continents, between countries and between population groups. It is a symptom of deeply rooted inequities and unequal power relationships....

Poverty exists between continents, between countries and between population groups. It is a symptom of deeply rooted inequities and unequal power relationships which are institutionalised through policies and practices at the state, societal and household levels. Some of these are rooted in age-old injustices and others are more recent in origin. To end this state of poverty, ‘business as usual’ is not an option. In November 2000, the Oxfams decided to adopt a RBA.

Oxfam’s RBA: Principles

In adopting a RBA, Oxfam’s work became centred and framed around rights. Five Rights Based Aims became the cornerstone of Oxfam’s Strategic Plan, Towards Global Equity. Oxfam believes that all people have:

- The right to a sustainable livelihood (Aim 1)
- The right to basic services (Aim 2)
- The right to life and security (Aim 3)
- The right to be heard (Aim 4)
- The right to an identity—gender and diversity (Aim 5)

These rights are enshrined in international agreements and covenants, in the domain of human rights, labour rights (adopted by the ILO), environmental rights (ratified by individual states) and rights protected by humanitarian law (“the Geneva conventions”). Oxfam defined its programme around these five rights, which are interrelated, interdependent and indivisible: the right to a sustainable livelihood is hard to achieve without the right to be heard, nor can the right to an identity be exercised without due respect for the right to basic social services or the right to life and security.

In order to bring significant and sustained positive changes in the lives of people who are affected by poverty, injustice, insecurity and exclusion, Oxfam seeks changes in policies and practices at various levels: international, national, sub-national, community, and household levels. In this way, unequal power relationships that perpetuate poverty and marginality can be challenged and reversed. Table 1 illustrates the kinds of changes Oxfam supports to make this occur in practice.
Equity and justice are key principles for the realisation of these rights and are at the heart of all of Oxfam’s programmes. Other principles such as inclusion, responsibility, participation, citizenship and accountability have been worked out in ‘Global Change Objectives’ that the Oxfams have identified in their new Strategic Plan, Demanding Justice. All the world’s people carry responsibility for securing not just their own rights, but the rights of other people as well. Building an active worldwide citizenry, and strengthening the relationship between citizens and the State are key to an RBA. Everyone everywhere must be able to participate in changing the world into a fair place, where prosperity does not cause poverty and where social justice

---

**Table 1. Examples of rights-based changes in policies and practices**

<table>
<thead>
<tr>
<th>THE OXFAM'S FIVE AIMS</th>
<th>RANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>GOVERNMENTAL AND CORPORATE LAWS AND REGULATIONS AND THEIR ADHERENCE</td>
<td>RELIGIOUS, CULTURAL AND SOCIAL BELIEFS AND THEIR OBSERVANCE</td>
</tr>
<tr>
<td>Rights</td>
<td>Changes in Policy</td>
</tr>
<tr>
<td>To a sustainable livelihood</td>
<td>Parliament passing a law mandating an agrarian reform.</td>
</tr>
<tr>
<td>To basic social services</td>
<td>Ministries of Health and Commerce ruling that the importation and production of generic anti-viral medicines will be permitted.</td>
</tr>
<tr>
<td>To life and security</td>
<td>Interior Ministry emitting a decree prohibiting the public from carrying concealed weapons.</td>
</tr>
<tr>
<td>To be heard—social and political citizenship</td>
<td>Referendum and constitutional amendment requiring that local government consult citizens on budget planning and execution.</td>
</tr>
<tr>
<td>To an identity—gender and diversity</td>
<td>Managers Association adapting corporate guideline prohibiting ethnic discrimination.</td>
</tr>
</tbody>
</table>
has the same importance as economic
growth. Governments and civil soci-
ety need to be strong enough to ensure that
corporations meet social and environmental
standards. This entails building a world-wide
constituency for economic, social, cultural and
political rights, promoting inclusive citizenship and
participation; and changing ideas, attitudes and beliefs.

In international law, the state has the ultimate responsibility to protect and safeguard rights. In the virtuous cycle of an RBA to development (Figure 3), any actor (as rights holder) can seek redress from an identified duty bearer, and any actor (in his/her role of duty bearer) should make efforts to ensure that rights of others are met. An organisation such as Oxfam can switch roles and positions: it can be a duty bearer when it comes to the rights of its beneficiary groups, but, in another instance, together with the same beneficiary groups, it can act as a rights holder vis a vis the State, the duty bearer.

RBA and poverty
As mentioned, poverty is charac-
terised by a lack of power. People living in poverty have little or no control over their own lives. Poverty hits vulnerable groups harder and reinforces the vicious circle of poverty-powerlessness-conflict-environmental degradation-poverty. Oxfam Novib seeks to turn this vicious circle (Figure 2) of inequity into a virtuous cycle (Figure 3), in which women and men, as rights holders, can seek redress for violations of their rights and in which duty bearers take their responsibility towards rights-holders.

A RBA: How is it done?
To better understand to what extent and how Oxfam Novib and its counterparts work with an RBA, in 2005, we undertook an internal study. The study analysed 24 projects/programs of Oxfam Novib and its counterparts. In the absence of an Oxfam definition of the RBA, we developed an “RBA checklist” with elements, based on Oxfam principles and other characteristics, commonly identified for the RBA. These elements include: participation, holism, accountability, universality and interdependence of rights, non-discrimination and empowerment.
Analysing the interventions gave encouraging results. In all cases, organisations applied more than one of these elements. For example, in most cases, organisations have a holistic approach. This entails making a good analysis of the situation at hand and shedding light on who is to be held responsible for the state of injustice. The study also revealed that interventions that operate at multiple levels, such as the micro level (e.g. working with beneficiary groups) and macro level (e.g. influencing states), and where the supposed beneficiary groups actively participate, generate better and more sustainable results than interventions that either aim at 'service delivery' or 'advocacy' alone. Finally, the study revealed that what at first appears to be 'RBA', such as legal aid to indigent women, may not necessarily 'be' RBA, whereas providing technical assistance to farmer groups can qualify as RBA. The secret in identifying genuine RBAs lies in the analysis of the situation and in the process of seeking accountability and redress. In the above example, providing technical assistance to farmers can be as empowering as providing legal aid to women, provided that the organisation empowers farmers to claim their rights.

The study has helped Oxfam Novib to further define what good RBA practice is. An RBA comes first of all with an accurate holistic analysis of the reasons that generate inequality by and with those women and men who (continue to) directly suffer from poverty and injustice. How did the situation come about? Who can be held accountable? How can the situation be redressed? Who has the power to make changes? This analysis informs the choice of strategies that the organisation will use.

Obviously, many of these come back to general principles of ‘good programming’. What is new is how an analysis is weighed and labelled (injustice, violation of rights, inequality) and how redress is sought to set right what is wrong. Hence, what is important to emphasise is that from an RBA, the process is as important as the outcome. In conventional approaches to poverty reduction, it is only the outcomes that matter. Finally, the language of rights (based on internationally agreed conventions and treaties) makes a clear statement: rights are inalienable and universal for all people, without distinction as to gender, race, caste or religion.

RBA, poverty, and environmental degradation

The main catalyst for Oxfam Novib to integrate RBA and environment stems from the simple fact that the organisations we support work predominantly with the rural poor. Poverty continues to have a rural face. The livelihoods of rural poor men and women depend directly on unspoiled natural resources, from which they obtain food, housing, energy, water, medicine and income. When the natural resources they use are degraded, they have even fewer opportunities to get out of poverty. Therefore, environmental degradation further perpetuates the vicious cycle of poverty and exclusion. Moreover, poor people, particularly women, are generally most vulnerable to natural disasters such as floods or droughts because their limited access to assets means that they have low resilience to induced changes or shocks. Hence,
When a disaster strikes, they are plunged into deeper poverty.

Accordingly, the concept of sustainable livelihoods developed in the 1980s is key in guiding Oxfam Novib’s approach to environment. This concept emerged to redress many issues afflicting rural development at the time. Perhaps the issue of paramount importance for development practice and theory was returning agency to the people on whose behalf development was undertaken. The concept of sustainable livelihoods refocused development as *praxis* and *agency*. Chambers, for example, pointed out “the environment and development are means, not ends in themselves. The environment and development are for people, not people for environment and development”.14 He argued for an emphasis on “sustainable livelihoods” which enabled causal connections to be made between development and livelihood and between environment and livelihood. For development practitioners, the concept of sustainable livelihoods provided a basis for understanding the relationship between poor communities, their local environment and external socioeconomic, environmental, and institutional forces.

The other guiding concept that informs Oxfam Novib’s work on environment is power. For development practitioners, the Brundtland Report15 was a landmark in that it acknowledged and expanded the linkages between environment and development and highlighted that the distribution of power and influence lie at the heart of most environmental and development challenges. More importantly perhaps for Oxfam Novib was that the Report reiterated that many problems of resource depletion and environmental stress arise from disparities in economic and political power, so that resources of the physical environment are also about issues of control, power, participation and self-determination.

By uniting the concepts of sustainable livelihoods and power, Oxfam Novib wants to address issues of access to and control over natural capital by poor men and women. It also seeks to change the structures that perpetuated their exclusion and to promote the development of policies and institutions to protect and promote their interests. In funding environmental projects, guiding principles are participation, accountability, and empowerment, all of which are also part of RBA. These concepts and principles guide Oxfam Novib’s funding priorities when it comes to environment issues. A considerable amount of the environment work that is supported falls under the category of the right to a sustainable livelihood (Aim 1) and the right to be heard (Aim 4). The organisations that we fund start from the recognition that in rural areas the capacity to resist poverty and to improve livelihoods often depends on opportunities offered by natural resource-based production systems, conditioned by the wider economic, institutional, and political environment. The organisations assess which assets are used for existence (including those owned and those obtained through formal or customary rights or through exchange), how they are used in livelihood activities, and who uses which resources and for what ends. It is important to emphasize that livelihood activities are not narrowly conceived as purely utilitarian economic driven activities. Rather
livelihood activities are appreciated for the meaning they give to people’s lives and their aspirations. Hence, environment is also important for aesthetic, identity, and religious reasons.

Issues of access to and control over natural resources are complex and are determined by many of the same structures that generate poverty and exclusion. Even at the local level where natural resources are often described as “public” goods—open to everyone—in practice communities are not homogeneous and more powerful groups have easier access to these resources and hence can benefit from them more than others. In our experience, women, for example, are more likely to depend on open-access resources such as forests and wetlands for subsistence and income generation. Yet, when it comes to running or participating in institutions responsible for their management, women are impeded from doing so due to a number of barriers associated with class, class, ethnicity, etc. and to the difficulties of combining household and child care practices with public functions.

Accordingly, bringing an RBA perspective to environmental programs begins with a thorough analysis of local realities, men and women’s perceptions of the problem, and their proposals on ways of tackling them. Any attempt at RBA and environment must begin with a thorough understanding of local context, a power analysis (including an analysis of decision making powers and protection by law), of what needs to change, and how this change can come about. Control and therefore power are central to discussions of environmental management. It is particularly important to include marginal groups, ethnic minorities, and women, since they are often the ones who not only rely most heavily on the environment but also have knowledge of the environment and perceptions of what the problems are. Involving people in the analysis of problems means that they can be part of the solutions.

Thus, inclusion in problem definition and proposal making is the first step in empowering people to address the structures that generate and perpetuate inequality in the use of natural resources. Intervention strategies are then aimed at enhancing a group’s capacity to claim their rights, strengthening their voice in decision-making processes at all levels, and increasing their access to resources. Indeed, we find that although people may have some statutory or customary rights, often these are either unrecognised or unprotected by the state. In such cases, people are fairly easily displaced and not given proper compensation. Moreover, court and legal instruments are often inaccessible because of costs, corruption, or simply because they are often physically not easily accessible to poor people, particularly women.

Furthermore, many of the organisations that we fund operate in countries where external bureaucracies blame poor people for environmental degradation and where standard environmental packages are applied with no regard for local knowledge, local actors and the diversity between and within ecosystems. In their efforts to control the use of natural resources, powerful groups will create and cir-
culate myths that portray local users as the cause of environmental degradation. Peluso has noted that all too often state agencies depict local users as wild, uneducated, or backwards in their efforts to impose state resource management policies that benefit the powerful.16

Yet, experiences from numerous countries show that poor people are not to blame for the deterioration of natural resources.17 In fact, communities can play an active role in conservation when their own tenure and access rights are secured, when benefits are equitably shared, and when government provides a supportive legal and institutional framework that protects their rights. And although for some conservationists and state environmental agencies, conservation may entail keeping humans out, we have found the opposite. In the countries where we work, most progress is made on common ground—where securing environmental rights for local livelihoods also provides a basis for better stewardship.

This may be an unsatisfactory answer for some conservationists who believe that enclosure is necessary to protect biological diversity. Such a perspective clashes with the RBA that we adopt in our environmental work. Depending on the context, enclosures may seriously undermine the livelihoods of poor people who depend on them. More importantly, people are not simply bad or good stewards. They learn how to be good and responsible stewards of the environment. Culturally meaningful ways can be found to show men and women how they can best use and conserve natural resources. It is necessary to draw on both the insights of science and local knowledge to develop effective strategies for tackling conservation issues and empowering people. Empowering approaches need to be created to bring together different knowledge systems to promote collaboration and mutual learning.

Changing bad policies into good ones: Linking levels and actors

Oxfam Novib supports organisations to change bad policies and practices. Bad policy hurts people, especially poor people, and contributes to environmental deterioration. Good policy protects people, especially those who live in poverty, and protects the environment. Changing policies from bad to good, or creating policies that protect the interests of poor men and women requires a long-term vision.

Policy-making is a complex, tedious, messy and often untransparent process. It is nothing like the common perception of a rational objective problem solving process. In reality, policy making is infused with political interests, involves diverse social actors holding different kinds of power and representing different groups, and depends on different discourses and narratives.18 Given this, our general approach is to support spaces and practices that allow poor people, who historically have been ignored in the policy making process, to voice their concerns. This requires enhancing people’s capacity and supporting training and education (see Box 2). In our view, integrating an RBA approach to environment works to ensure that the policy-making process is both participatory, inclusive, and transparent.
Working at this level requires a long-term perspective to promote social learning and achieve sustainable results. This entails building relationships with different groups as they all have a role to play. Within this process, particular spaces and innovative means (see Box 3) have to be found to reach out to the most marginal, including women, ethnic minorities, and illiterates. It also entails supporting advocacy and lobby activities, as well as policy relevant research. Demands are more likely to produce change if they are accompanied with data and realistic suggestions about how change can be accomplished.

Box 3. Bringing the legal system to bear on the environment

The Bangladesh Environmental Lawyers Association (BELA) started in 1991 as an advocacy group of young lawyers developing techniques and strategies with the legal regime for environmental protection. The organization has adopted various means to create awareness amongst major actors and the common people. As a lawyers’ group, BELA has always emphasized and advocated...
wider participation in law making and policy planning.

Regarding achievements, Bangladesh’s first environmental litigation was filed and fought by BELA in 1994. In 1995, the Supreme Court directed the government of Bangladesh to implement the Flood Action Plan (FAP) only after following certain legal procedures that involve assessing compensation claims of the affected people. BELA also works on raising environmental law awareness amongst different groups. In a country with high illiteracy rates, this requires using stickers, cartoons, etc. Awareness raising is also done with young people. School students who are likely to bear the consequences of environmental degradation in the future have been identified as a target for BELA’s work. BELA launched an educational program to teach students about their environmental rights and duties. BELA has been undertaking training program for lawyers, NGO workers, journalists, statutory officials and others since its inception. These training programs increase the level of understanding about environmental issues and corresponding laws.

Source: Oxfam Novib files

Rights and responsibilities
Up till now, we have talked of rights and how they relate to environment and development. From a RBA, the state bears ultimate responsibility for upholding and protecting rights, including the right to live in a satisfactory environment. States must meet their responsibility and should be supported to do so.

Responsibility for environment, poverty and exclusion cannot be left to governments and powerful groups alone, however. It is too important for that. It needs to be everyone’s business. It requires fostering personal responsibility and a more active citizenship. A RBA to environment, even more than an RBA to development, calls seriously for joint work in mutual solidarity (or what Oxfam Novib calls ‘shared self interest’). Everyone has an obligation towards each other, the earth, and future generations. In particular, it requires engaging elites— those who have power— and convincing them that it is in their interest to share their power and privileges.

Reflections
For Oxfam Novib, working with a RBA means that we are constantly exploring and learning about the origins of poverty, rights violations, environmental degradation, and exclusion. On environment, our entry point is livelihoods and empowering poor men and women to claim and use natural resources in a sustainable manner. We look at sustainability holistically: sustainability relates not just to natural resources or physical capital, but also to the larger institutional framework. The right institutions are critical to assure sustainable use of natural resources. Therefore, a considerable amount of the work we support is focused on enhancing people’s capacities so that they can demand and participate in creating and/or reforming policies and institutions to better serve their needs and protect their rights.

Obviously, there are issues— trade-offs— that we struggle with. Trade off is a term that is often all too easily used in contemporary development work, particularly by economists. From the work that we support, poor people are continuously asked to make very painful trade-offs: sending a girl to school or keeping her home to fetch water 5km away from the house be-
cause the local river has become too polluted to use. These are the kinds of trade-offs that prevent people from realizing themselves, violate their rights, and can plunge them into deeper poverty and exclusion. How can trade-off issues be dealt with in a way that protects and promotes people’s rights and promotes sustainable development in a just manner?

Also, there can be instances where maximizing short-term needs take precedence over long-term sustainability, as the urgent problems of immediate survival are likely to displace concern for long-term ecological integrity. When does achieving livelihood objectives compromise the livelihood opportunities of others within the same or future generations? The sustainable livelihoods approach recognizes these trade-offs, but does not yet suggest how they might be resolved. In theory human rights can compete with each other. In such cases it is up to the courts to decide which right will prevail. However, in the case of ‘personal integrity’ rights, even in the case of public emergency, no derogation of such rights is allowed, according to international human rights law. It is on issues such as these that more and deeper exchange is needed between rights-based development practitioners, conservation and environmental specialists, and people who have to weigh and make daily decisions to protect their own and their children’s future.

**Conclusion**

We have related how RBA to development seeks to transform the vicious circle of poverty and marginalisation into a virtuous cycle in which people can seek the fulfilment of their rights from duty-bearers. Operationalising a RBA to development requires prioritising a situational analysis that looks at issues of power and is done with the active participation of the people who are struggling to get their rights heard. Likewise, connecting rights to environment forces us to ask the same questions as those lying behind poverty and injustice. How has this situation come about? Who is responsible for its perpetuation? How can we redress the situation? Formidable challenges remain. In substantive terms, part of the challenge is to pursue more convincing analytical work. Another important part is to work towards changing policies, practices, beliefs and ideas. And finally there is need to further build and reinforce the capacity of both rights holders and duty bearers, so that the enjoyment of rights becomes a reality, rather than just an intention on paper.

Finally, a RBA to environment deserves and requires a sense of urgency that is shared by people, organisations, governments and business alike, and that transcends North-South thinking and fields of work—environment, development or rights.
...but conservation and human rights can also work in mutual support...

Gina E. Castillo (Gina.Castillo@Oxfamnovib.nl) has a Ph.D. in anthropology and works as livelihoods advisor at Oxfam Novib. In her spare time, she practices urban agriculture on her balcony. Marjolein Brouwer (Marjolein.Brouwer@Oxfamnovib.nl) holds master degrees in criminology and law and joined Oxfam Novib 11 years ago as a rights advisor. Before that she worked for various UN agencies and Amnesty International.

Notes
1 Boyle, 1996, p.3.
3 By the beginning of 2007, the Oxfam-group was made up of Oxfam Australia, Oxfam Solidarity (Belgium), Oxfam Canada, Oxfam Québec, Oxfam Deutschland (Germany), Oxfam France, Oxfam GB (Great Britain), Oxfam Hong Kong, Oxfam Ireland, Oxfam Novib (The Netherlands), Oxfam New Zealand, Internóm Oxfam (Spain) and Oxfam America (United States).
4 In 2004, Oxfam Novib had 148 million euro available for its work. Of this income, Oxfam Novib transferred 118 million euro to more than 800 counterparts (in over 18 core countries, 11 regional programmes, and one global programme).
5 Article 6 of Oxfam International’s mission
6 The primary frame of reference is the Universal Declaration of Human Rights (UDHR) and the subsequent International Covenants on Economic, Social and Cultural and on Civil and Political Rights (ICESCR and ICCPR, respectively). Together they form the International Bill of Rights, which contains the basic minimum conditions that all human beings are entitled to.
9 The study “How an RBA works in practice” can be downloaded from the RBA pages at www.oxfamkic.org. Hard copies can be obtained from the authors.
10 The full text of the checklist can be found in Annex 1 of the study.
11 Like many others, Oxfams struggles with how to define the people who benefit from Oxfam supported programmes. Oxfam Novib uses the words ‘project participants’ and ‘beneficiaries’. Oxfam America uses the word ‘primary change agents’. To our knowledge, none of the Oxfams uses the word ‘rights-holders’ for women and men who benefit from programmes.
12 Estimates of rural poverty range from 62% (CGIAR 2000) to 75% (IFAD 2001) of all poor people.
17 See Pimbert, 2006.
19 See article 4.2 of the International Covenant on Civil and Political Rights

References
Applying a rights-based approach to conservation—experience from CARE’s Rights, Equity and Protected Areas Programme in Uganda

Phil Franks

Abstract. Rights based approaches provide a lens and a tool box for understanding and addressing issues of governance and specifically the underlying causes of poverty, environmental degradation and injustice related to power. This article illustrates the application of this approach within CARE International and specifically in CARE’s Rights, Equity and Protected Areas programme in Uganda, emphasising procedural rights of access to information, participation and justice. The article demonstrates that working to ensure procedural rights can be an effective entry point for positive social and environmental impacts.

Human rights are the universal rights of all individual human beings, regardless of ethnicity, nationality, religion or sex, based on inherent human dignity. These include both substantive rights—i.e., to the substance of human well-being (life, food, housing, water, a healthy environment)—and procedural rights—i.e., to procedures that help protect and fulfill substantive rights (access to information, participation in and influence on decision-making, and access to justice/legal redress). All of the above mentioned substantive rights are enshrined in international human rights instruments with the notable exception of the right to a healthy environment.

There has been much progress in establishing procedural environmental rights in the last fifteen years. This progress comes in large part from Principle 10 of the Rio Declaration, but most notably from the Aarhus declaration, a European convention that establishes these procedural rights as a means to

Focusing on CARE’s work in Uganda, this article illustrates the application of a rights-based approach (RBA) to promote more equitable sharing of the costs and benefits of biodiversity conservation. This experience from Uganda shows the value of working with procedural human rights in addressing the relationship between human rights and environmental concerns.

A rights-based approach empowers people to understand, claim and exercise their rights.

Picture 1. Assessing the costs and benefits of Queen Elizabeth National Park using participatory environmental valuation.

(Courtesy Phil Franks)
deliver on the substantive right to a healthy environment. Although the Aarhus convention applies only in Europe, this convention has influenced work on environmental human rights in many other countries.a

The RBA empowers people to understand, claim and exercise their rights. In other words, the “states and their subjects” become the “states and their citizens with rights”. In law, rights are protected and fulfilled through placing a legal obligation upon a “duty-bearer”. RBA is as about holding duty-bearers accountable for protecting and fulfilling rights as it is about strengthening the provisions that define rights.

There is widespread recognition that in many developing countries protected areas (PAs) impose negative impacts on local communities living in and around these areas, and that in many cases these costs are not balanced by the benefits generated by the PA. In other words, the rural poor frequently experience a net negative impact (cost) on their livelihoods. Recent studies of two PAs in Uganda confirm this scenario. These studies also indicate that poorer households tend to bear higher costs in relative terms. So at least in these cases, it would appear that conservation activities may be undermining the substantive human rights of poorer, marginalised groups— notably impacts on the right to food arising from damage to crops by wild animals and displacement (reduced access and in some cases physical displacement from farming/grazing lands). Although the right to food exists in international law, it appears in the Ugandan Constitution as an objective rather than an explicit right within the chapter on rights. There is also no explicit endorsement within Ugandan policy or law of the principle that PAs should “do no harm”— the principle at the heart of the recommendation on Poverty and PAs of the 2003 World Parks Congress. So, although these internationally accepted rights and principles strengthen the moral case for action, they offer little in the way of practical means of addressing the problem.

The constitution of Uganda does, however, establish the substantive human right to a healthy environment, and in a few cases this has been used to the advantage of local communities. Viewed from a national (i.e. aggregate) level, Uganda’s PAs are certainly helping to contribute to protection and fulfilment of this right through securing environmental services (watershed protection, biodiversity conservation), but from the perspective of poor, park-adjacent communities, this does not compensate for the negative impacts of the PAs on their livelihoods.

CARE’s work with protected areas in Uganda has emphasised three major

---

Picture 2. Batwa leader Diveera on the land that she could lose to the park. (Courtesy Phil Franks)
which we have addressed primarily through procedural rights.

Although physical displacement of people resulting from the establishment or expansion of PAs has been a major problem in Uganda in the past, there have been few cases in recent years precisely because of the strengthening of property rights (including customary) and procedural rights. The case presented here is the result of an unfortunate mistake, but it illustrates efforts to use these rights to remedy the situation. The problem arose in 2002 when a bill was submitted to parliament to extend the boundaries of Bwindi Impenetrable National Park to include an area that was voluntarily (and amicably) vacated by local people with substantial compensation (financed by the World Bank). By mistake, the gazettement notice included an adjacent area where 120 families were still living. Based on past experience of the heavy hand of the state, local people feared the worst. But NGOs representing these people have been able to challenge this threat, firstly on the grounds that it violates their customary land rights, and second that even in the event of a case for compulsory purchase in the national interest, the government should have issued a statutory notice of their intention and paid “fair and adequate” compensation prior to acquisition of the land. The action of the government is thus unconstitutional.

It is assumed that the government will now amend the gazettement notice, but in the event that they fail to do so, the communities also have the constitutional right to challenge the action of the government in the courts.

In terms of benefits from PAs to adjacent communities, Ugandan law requires Uganda Wildlife Authority to allocate 20% of the park entry fees paid by tourists to communities bordering the PA. According to the Tourism Revenue Sharing policy of 2000, this is specifically intended to mitigate negative impacts of the PAs on these communities in recognition of the fact that they shoulder a disproportionate burden of the costs of conservation. In terms of implementation, the policy requires local government to take the lead in facilitating a transparent process of project selection, oversight, and accounting. The work of CARE and its local partners has focused on giving communities access to information on the law and policy, and promoting accountability of local government in fulfilling its obligations in the manner intended. Community-based monitoring of all stages of the revenue sharing process, including accounting for funds, and continuing through project completion, promotes accountability of

![Picture 3. The edge of Bwindi Impenetrable National Park. (Courtesy Phil Franks)]
local government. These efforts have highlighted many weaknesses, and resulted in improved implementation and informed policy revision. This work is part of a broader programme of CARE Uganda which promotes accountability in service delivery, including health and economic development services.

These examples illustrate how working with procedural human rights provides an entry point for addressing substantive human rights. These cases focus on issues of social equity in conservation that are relevant both to human well-being and the effectiveness and sustainability of conservation itself. In this work we have found that the substantive human rights and the “do no harm” principle provide a useful reference to inspire discussion and enhance the moral authority of the process. However, in practical terms, results have been achieved largely through working with procedural rights, and in particular the obligations these rights place on the relevant duty-bearers.

Rights are derived from many different regimes including local statutory and customary law, national statutory law, and international human rights instruments. Whether we are working with locally, nationally or internationally defined rights, CARE has found RBA to be an intrinsically valuable approach, particularly for addressing issues of governance of natural resources. RBA has proved to be a powerful lens and tool box. The lens helps us identify and understand the underlying causes of environmental degradation, poverty, and social injustice. The tools enable us to strengthen the way in which rights are defined and hold duty-bearers accountable for delivering on their obligations. Most fundamentally RBA helps us understand and influence the power imbalances that so often lie at the heart of problems of governance. Changes in power balance can be defined by, and anchored in, rights and duties, and to a large extent these will be procedural rights and duties. Over and above the contribution this work may make to protecting and fulfilling specific substantive rights, the empowerment that can be generated through working with RBA and procedural rights can be crucial to enhance the human dignity at the basis of all human rights.

Notes
3 CARE, AWF and IUCN, forthcoming.
4 Mugyenyi, 2006.

References
CARE, AWF and IUCN, a publication based on an unpublished 2003 work of Hatfield and Malleret-King “The economic value of the Virunga and Bwindi protected forests”, forthcoming.
WPC (World Parks Congress), Recommendation #29 on Poverty and Protected Areas, 2003.
In search of environmental justice—
linking land rights, livelihoods and conservation in South Africa

Wendy Crane

Abstract. South Africa’s Cape Action for People and the Environment Programme (C.A.P.E.) seeks to conserve the globally significant biodiversity of the Cape Floristic Region, while ensuring that people are engaged in the process and benefit from conservation opportunities. Often the product of top-down conservation planning and action, landscape scale bioregional programmes run the risk of negatively impacting human rights at the local level. C.A.P.E.’s strategy emphasises collaborative approaches and partnerships among private landowners and existing nature reserves to promote sustainable utilisation of biodiversity. This case study explores how this approach to conservation might conflict or be reconciled with land tenure rights, and opportunities for land-based livelihoods among impoverished farm dwellers in the Baviaanskloof area of the Eastern Cape.

South Africa is the third most biologically diverse country in the world, with between 250,000 to 1,000,000 species and exceptional levels of endemism. Unfortunately, this global treasure also has the highest known concentration of threatened plants, and the highest extinction estimates anywhere in the world. This reality coexists with an apartheid history of dispossession that produced a starkly unequal land ownership pattern along racial lines and widespread rural poverty. In this context the post-apartheid government must fulfil constitutional and international obligations to safeguard environmental assets as well as undertake land reform benefiting the previously dispossessed. Responding to the demands of the new democratic order, South Africa’s new Constitution—widely admired as one of the world’s most progressive—enshrines not only the right to environmental protection, but also the nation’s commitment to land reform and equitable access to natural resources. Inevitably, there is a continuous challenge of reconciling complex and often conflicting relationships between poverty, inequitable access to resources, and the protection of biodiversity.

Picture 1. The Baviaanskloof is an area of exceptional beauty and biodiversity, and an important water catchment. (Courtesy Wilderness Foundation)
Farm dwellers constitute one of South Africa’s most marginalised and poorest communities. Numbering nearly three million, they reside in insecure circumstances on mostly white-owned commercial farms. Poorly paid, geographically isolated and politically marginalised, their plight has worsened in the wake of agricultural deregulation post-1994, which has led to job losses, casualisation and evictions. Although farm dwellers are a key target group of the state’s land reform programme, legislation designed to secure and upgrade their tenure rights has so far provided them little benefit in practice.

To fulfil its constitutional and international obligations to protect the environment, the state promotes conservation on both public and private land. Recent years have seen the creation of biodiversity ‘mega-reserves’— large areas under some form of protection, based on the voluntary and cooperative participation of private landowners—in the Cape Floristic Region under the C.A.P.E. programme. Conceptualised as partnerships between private land owners and existing nature reserves, the focus is on exposing people to more sustainable ways of using the land and natural resources, promoting the adoption of conservation-conscious farming methods or other land use practices and, where possible, setting aside land for formal protection. This differs markedly from the ‘fences and fines’ approach—drawing boundaries, regulating entry, and penalising unauthorised use—typical of many conservation efforts in the past.

In this case study of the Baviaanskloof Mega-Reserve, I explore possible implications of this new approach for the rights and livelihoods of farm dwellers in the area. Recent national evidence of farm dwellers’ continuing vulnerability to evictions and loss of livelihood gives this question added importance. The analysis draws on my field research conducted in late 2005.

Description of the area

The Baviaanskloof, or “Valley of Ba-boons”, is situated in the western part of South Africa’s Eastern Cape Province (see Map 1). It is a 75 km long valley of varying width and depth, and lies between two parallel east-west running mountain ranges: the Baviaanskloof Mountains in the north and the Kouga Mountains in the south. The easternmost point of the valley is about 95 kms north-west of the coastal city of Port Elizabeth, and its most southerly point is 50 kms from the Indian Ocean.
The wider Baviaanskloof area is one of outstanding natural beauty and biodiversity, and an important water catchment. No fewer than seven of South Africa’s eight biomes are represented there— the Fynbos, Subtropical Thicket, Nama-karroo, Succulent Karoo, Grassland, Savanna and Forest biomes. It supports a high diversity of species, several of which are Red Data listed— including leopard (Panthera pardus), Cape mountain zebra (Equus zebra zebra), and grey rhebok (Pelea capreolus). It is at the convergence of two of the world’s top 25 biodiversity hotspots: the Cape Floristic Region and the Succulent Karoo. This natural treasure has led to part of the area being declared a World Heritage Site, along with seven other reserves in the Cape Floristic Region.

The surrounding area is facing growing socio-economic pressures. The local economy is based almost entirely on agriculture, involving a mix of pastoralism and irrigated crops (mainly citrus and deciduous fruit, but also some cash and seed production crops). Commercial agriculture is operating at or near to capacity and there is limited space for growth. An overall decline in the regional economy has been accompanied by a general depopulation. Agriculture is unlikely to provide the economic boost required to address growing unemployment, at least not in the current paradigm that favours large-scale commercial agriculture. Conservation-based tourism has been advocated as an alternative and sustainable form of land use with the potential to contribute to the local and regional economy.

While much of the Baviaanskloof is state-owned, in the western part of the valley some 50,000 ha remains under private— largely white— ownership. About 20 family-owned commercial farms here are entirely surrounded by protected area. Less than 800 ha is under cultivation, with the rest used for extensive grazing and browsing. Vegetable seed production, once a thriving industry with significant labour demand, has declined substantially following the cessation of farming subsidies and introduction of agricultural labour legislation. This has led to the loss of many permanent and casual jobs since 1994. Most farmers now practice mixed small stock farming, which is much less labour-intensive. Pensioners, farm workers and their extended families make up over 70 percent of the valley’s community, with many entirely dependent on government pensions and disability grants. The remainder are a mix of white farmers and their families, other landowners, civil servants, and even includes a small hippy community. The overall population currently stands at around 1000 and has been on the decline as people migrate to towns in search of work and subsidised housing.

A conservation history

Conservation in the Baviaanskloof goes back to 1923 when state-owned land in the area was proclaimed as a forest reserve and water catchment zone. Purchase by expropriation of key properties in the 1970s led to the consolidation of a provincial nature reserve system, a cluster of protected areas of which the Baviaanskloof Nature Reserve is the focal point. During the 1980s the particular importance of the Baviaanskloof Nature Reserve for biodiversity conservation and for the provision of essential ecosystem services (especially water) became more widely recognised. Additional land purchases increased the size of the reserve to about 175,000 ha by the turn
of the century. Further expansion of the protected area is continuing up to the present.

The long and convoluted boundary makes management of the conservation estate expensive. Due to its shape (see Map 2), the present protected area is exceptionally vulnerable to the ‘edge effect’ and the potential for conflicts with neighbouring landowners is high in terms of fire risk, predator poaching, alien vegetation, soil erosion, water wastage etc. This situation led to a proposal in 1997 to consolidate the western sector of the reserve through compulsory acquisition of all private land inside the Baviaanskloof. While this could yield many conservation benefits, the proposal failed to appreciate socio-political realities of the new South Africa and that the future of the reserve as a viable conservation area must take into account human communities and land use on properties adjacent to the reserve. The proposition that inhabitants simply be relocated to the nearby town of Willowmore met with fierce resistance from all sides of the Baviaanskloof community and was clearly no longer viable under the new democratic order. The essence of the proposal, however, was later taken up by C.A.P.E. when it identified the Baviaanskloof Nature Reserve and adjacent areas as a potential mega-conservation area—culminating in the present Baviaanskloof Mega-Reserve Project. Its underlying philosophy of “keeping people on the land in living landscapes” differs radically from the previous concept. Nevertheless, a legacy of expropriation in earlier decades and resettlement issues arising from more recent land acquisitions, coupled with anxieties and mistrust generated by the 1997 proposal, pose major challenges to the new strategy.

The Baviaanskloof Mega-Reserve Project (BMRP)

The BMRP is conceived as a 20-year process to conserve the area’s biodiversity, protect its critical role as a regional water provider, and deliver economic benefits to surrounding communities. According to project documents it will stimulate a ‘biodiversity economy’ by promoting alternative productive land uses—notably though not exclusively ecotourism. Under the auspices of the Provincial Department of Economic Affairs, Environment and Tourism (DEAET), a Project Management Unit (PMU) was created in 2003 to manage the initial phase of this process. The PMU operates under a sub-contract to the Wilderness Foundation, an Eastern Cape-based NGO, in a transitional arrangement aimed at building the provincial government’s capacity to manage the mega-reserve project after 2008. A Baviaanskloof Steering Committee (BSC) has been formed to oversee the implementation of the BMRP.

Expansion of the reserve is primarily directed towards voluntary inclusion of private land through the use of formal agreements with landowners.
In such an event, the BMRP is bound by a Resettlement Policy Framework and Process Framework (RPF/PF) designed to comply with World Bank social safeguard policies—a conditionality of GEF funding. The RPF/PF sets out quite stringent process and compensation standards in the event that the BMRP displaces people from land or productive resources. It explicitly covers farm workers and dwellers and offers far greater protection than the national Extension of Security of Tenure Act (ESTA).

The planning domain of the BMRP covers a vast territory around the existing reserve cluster, but certain areas are prioritised. The western part of the Baviaanskloof is a major priority as it represents a ‘hole’ in the core of the reserve (see Map 2). The discussion which follows is focussed on this area.

Farm dwellers, tenure rights and livelihoods in the Baviaanskloof
The BMRP is at an early stage and any discussion of impact on farm dwellers is necessarily speculative. Concerted effort by the PMU since 2003 to build a dialogue with the community has gone some way to allaying mistrust and suspicions. Through a ‘stakeholder engagement programme’ project staff have held numerous meetings with private landowners, farm labourers, local communities, organised agriculture and others.

A full-time community liaison manager and a landowner liaison manager conduct frequent interactions with different segments of the community. Throughout this process, it has been made abundantly clear that there will be no expropriation and that people will not be forced off the land. But there is scepticism about the ‘biodiversity economy’. To appreciate the different perspectives, it is useful to disaggregate the community based on varying patterns of land ownership.

Farm dwellers on private land face a different situation than those occupying land recently purchased by the state. A group of ex-farm dwellers now own a farm as a collective, under a land redistribution project. Other, mainly white landowners can be divided between those who depend on farming for their livelihood, and those who have recently purchased land for its nature-based tourism potential.

Farm dwellers on state land
Coleske farm was bought by DEAET from a commercial farmer in 2001 and now serves as western gateway into the reserve. The farmer moved off the land, leaving behind a community of around 125 farm dwellers. He had employed 8 permanent workers and many others on seasonal basis. Many were born on the farm, have lived there their entire lives and numerous relatives are
buried there. Initially, DEAET employed 45 people on a temporary basis under a state-funded Poverty Relief project, raising the community’s expectations of job-creation in the reserve. But there were problems in managing the workers. There were insufficient resources for supervision, and on occasion people were found playing dominoes at home during working hours. Relations soured between the reserve manager and the community. In 2004 the newly formed Eastern Cape Parks Board (ECPB) took over as statutory authority of the reserve. Poverty Relief funding ran dry and work stopped, virtually without notice. As the farm is now a protected area, the farm dwellers’ rights of access to resources such as firewood, clay, honey, natural medicines and grazing have become severely restricted. “Die kampe is so klein, ons donkeys is te swak om by die winkel uit te kom” (the designated grazing area is so small, our donkeys are underfed and too weak to reach the nearest shop). The farm store was closed down and people now walk over 30km for basic supplies. Unemployment has made younger people dependent on the pensions of their elders. “Al die jong mense met vrouens en kinders het by ons ouens ingetrek” (the younger families have had to move in with us old folks). The community’s continued existence has become increasingly precarious.

The PMU recognises that the Coleske case should trigger the Resettlement Policy Framework and Process Framework. People have lost jobs and access to natural resources. But moving the process forward is complicated by several factors. First, the ECPB— as management authority— has jurisdiction over resource access and utilisation in the reserve, so any agreements with the community require its consent. But the ECPB is very new and short on capacity. Second, there seems to be no consensus on whether the RPF/PF applies to Coleske. DEAET purchased the farm two years before the BMRP officially started, and some feel that DEAET should have handled any resettlement issues then under ESTA legislation. Instead the matter was left to linger and ECPB is reluctant to touch it. Meanwhile, there may well have been an influx of ‘relatives’ seeking employment or other benefits under a possible resettlement deal. To prove or disprove anyone’s legitimate tenure rights today will require a very tricky process of forensic sociology. Third, the RPF/PF was drawn up by C.A.P.E. without the involvement of the Eastern Cape government, raising questions about ‘buy-in’ from those now responsible for the BMRP. Fourth, delivering on the promises of the RPF/PF is hugely complex. As GEF funds cannot be used for implementing action plans arising from the policy, it requires budgetary commitments and synchronised planning from a multiplicity of government institutions at local and provincial level. In addition to alternative land and accommodation, the RPF/PF provides for alternative employment, training and “measures to guarantee that livelihoods do not de-
cline”— all equivalent to and preferably better than before. The RPF/PF process may be too institutionally complex to be viable, especially in the Eastern Cape where local government has been widely criticised for insufficient capacity and poor delivery.

While the PMU struggles to initiate the RPF/PF process and line up the various institutional actors, anger and frustration in the community is beginning to boil over. “Hulle het ons gesê da gaan altyd werk wees, maar die beloftes het verbreek” (they told us there would always be work, but the promises have been broken). Much is at stake— not just the fate of dozens of poor and vulnerable people, but the credibility of the BMRP itself and its approach to conservation. Across the Baviaanskloof coloured community, Coleske farm is now a constant reference point as to why conservation is bad for farm dwellers. As long as the Coleske case is not resolved in a way that is perceived as fair and just, the BMRP’s stated philosophy of ‘keeping people on the land in living landscapes’ is seriously undermined.

Farm dwellers on private land
Farm dwellers on private land have not yet felt the impact of the BMRP— it is too early to observe concrete changes in land use as a direct result of the project. Change for them will depend on whether or not landowners agree to alter the way they use their land to accommodate conservation concerns. This is driven strictly by economic considerations.

Among other things, the PMU would like to see farmers withdraw livestock from degraded mountain sides and concentrate farming in the valley bottom. Restoration of wilderness would attract greater numbers of tourists, creating new income streams. For farmers, such a shift involves two types of risk. One is reduced income from reduced stock levels in the short term, against uncertain growth of a biodiversity economy in a more distant timeframe. Second, the current practice of extensive mixed stock farming enables them to spread their risk, while shifting to intensive single stock farming increases risk. Landowners whose livelihoods depend solely on farm income are unlikely to volunteer for such a scheme without income-replacement guarantees: “Daar moet ‘n waarborg wees” (there has to be some guarantee). If such guarantees were forthcoming (which seems unlikely) farmers could focus on a single stock type such as ostrich and cultivate land for animal fodder in the valley near the river, thereby enabling the surrender of significant land areas to biodiversity conservation and expanded tourist facilities. Another view is that such a scenario is inevitable. “We have to change our mindset, and fence ourselves in.”

As new landowners with an eye on ecotourism withdraw grazing areas from agriculture, nature is encroaching on farms and winning the battle slowly but surely: wild animals are increasing and predators moving in. Farmers may be forced to concentrate their crops and stock in central, fenced-in areas in order to protect them.

Whichever the case, most farmers interviewed expect neither positive nor negative impacts on labour and tenure rights of farm dwellers. Jobs lost from herd reductions would be few and could probably be replaced by alternative work, such as servicing camp sites, trail guides, horse treks, etc. Nor do they see much room for job growth. Farm workers themselves see it differently. Those interviewed consistently expressed concern that a reduction in
farm activity will place their jobs at risk, pointing at Sandvlakte farm as an example. The owner of this farm stopped farming some years ago to focus on ecotourism leaving many farm dwellers, especially women, without work. Most farm dwellers cannot see how they could possibly benefit from tourism enterprise on land belonging to someone else. “Ons bly op wit-man se grond” (we live on white man’s land). AnyTHING they do is by the grace of “die baas” (the master)— investment is a risk as permission can always be withdrawn. Who is going to put up infrastructure for a kiosk? Selling vegetables to tourists may be an opportunity, but a farm worker who fails to make him/herself available “om in te val” (to substitute) on Saturdays or Sundays risks losing his job because he is too inflexible. Everywhere, farm dwellers worry about their fate should the landowner decide to sell his farm to nature conservation— Coleske farm serves as a constant reminder.

Ex-farm dwellers at Sewefontein farm

Sewefontein is a land redistribution project. In 2001, a group of 75 landless people from the Baviaanskloof pooled their government housing grants to purchase the farm. Given the limited number of houses, the majority of shareholders do not reside there. Some live at Coleske while others live and work on other farms in the valley. Most intend to settle at Sewefontein at some point, when they get ill, old or for one reason or another can no longer remain where they presently are. Sewefontein is their ‘insurance policy’ against the ever-present threat of eviction. First and foremost, it offers them a secure place to live when they run out of options elsewhere; second is the possibility of generating some income. The latter is invariably associated with keeping livestock. For poor people livestock is crucial: “die hoofdoel op ‘n plaas” (the main aim on a farm). If people have a quick debt to settle they can immediately sell off an animal— the easiest and quickest way to convert a farm product into cash. Equally, they find it inconceivable to confine their livestock to the current camps— grazing and browsing in the hills is necessary from time to time when the camps do not provide enough forage. It is particularly in this regard that the Sewefontein community feels threatened by the BMRP’s conservation agenda. They worry about losing their hard-earned right to use their land as they wish: “Ons vrye reg gaan bekrimp raak” (our rights will be restricted), and about being squeezed out by conservation as the wilderness encroaches on them and their animals. “Hulle vernou ons; ons bergwêreld word verkoop of uitgehuur; ons veeplekke raak beknop-pig” (our mountains are being sold or rented; our grazing becomes limited).

The BMRP sees Sewefontein as an important opportunity to demonstrate how poor people can turn the biodiversity economy to their advantage. The farm itself holds considerable potential for ecotourism: stunning springs, space for a wilderness campsite, buildings suitable for conversion to guest houses. There is ample water to support intensive irrigated agriculture on smaller land areas. But before any of this can happen, the Sewefontein people have more basic problems to resolve. Like many land redistribution projects in South Africa, the large number of shareholders is the source of problematic group dynamics and continuous conflict over issues such as farm management, payment of wages to members working the farm, who is entitled to live in the existing houses, etc. There is general agreement that
the group’s size must reduce before any progress can be made in making Sewefontein a viable enterprise, and the PMU has agreed to take a back seat while a process of restructuring gets underway.41

Analysis and conclusion

The early stage of implementation of the BMRP makes this concluding discussion more speculative than evaluative. At the time of this research, the project was only two years into a twenty-year process. In addition, the plight of farm dwellers is set against a backdrop where many agricultural jobs have been and continue to be lost as a result of wider forces in the agricultural economy unrelated to the conservation agenda now being pursued. Nevertheless, the findings presented here point to some systemic and structural issues that reflect tensions in the BMRP’s attempts to reconcile biodiversity conservation with land tenure rights and land-based livelihoods of farm workers and dwellers.

First is the issue of land acquisition by the state as one element in the mega-reserve’s expansion strategy. Where this directly results in cessation of agricultural activity as on Coleske farm, and also Nuwekloof farm where 5 workers lost their jobs in 2003, it introduces the possibility of loss of livelihoods and increased impoverishment of farm dwellers occupying that land. Although purchase of this kind is intended to form only a small part of the overall land consolidation and expansion strategy, it has been the most visible and with visibly negative consequences. This creates a major image problem for the BMRP and its underlying philosophy that conservation be achieved in a manner that is embraced by local communities. Public perceptions are vital to this new approach to conservation. Cases like Coleske and Nuwekloof threaten to undermine its essence by fuelling suspicions that biodiversity conservation leaves poor and landless people worse off.

Second and closely linked to the above, social safeguard policies especially designed to protect poor people against these risks are proving very difficult to implement, for reasons mainly to do with institutional complexity and capacity. Moreover, the fact that neither the community nor the majority of the Baviaanskloof Steering Committee appear to know about the existence of these policies raises questions about openness and transparency. The RPF/PF is arguably the most important policy instrument spelling out the rights of people affected by expansion of the mega-reserve. As long as people at both ends of the power spectrum—the poor whose rights the RPF/PF is designed to protect, and the steering committee responsible for overseeing the project—remain unaware, their ability to realise these rights is seriously undermined. Without adequate measures to ensure
that decision-makers recognise and protect existing rights, they are potentially in jeopardy.

Third, while early speculations suggest that farm dwellers on privately owned farms may not suffer the negative consequences experienced by their compatriots mentioned above, unequal power relations on farms make it hard to see how they might actually benefit from a new biodiversity economy. To overcome this, deeply entrenched attitudes and prejudices on both sides must be addressed. Social relationships on many of South Africa’s farms are highly exploitative and unequal, but their persistence cannot be explained simply in terms of farmers’ control. It rests also in some measure on farm dwellers’ consent—consent which arises from structural conditions such as a deep-rooted culture of paternalism, and the lack of alternatives available to them. Questions that should be asked are: Who stands to benefit most? How can a social environment be created where farm dwellers can negotiate economic opportunities with their landowners on a more even-handed basis? What is required to create some visible success stories to demonstrate that the possibility of change for them exists? This will not happen by itself. Dedicated capacity is needed to forge a new social accord in the community, giving farm dwellers and other poor and landless people access to entrepreneurial opportunities— for example a micro-enterprise development professional with a social/community development perspective, based in the area and tasked with identifying and developing a number of projects that respond to this urgent need.

Fourth, two aspects of employment impact need careful monitoring over the coming years. One is the levels of labour absorption in current farming practice versus a biodiversity economy; the other is the different skill profiles the latter requires, and therefore the implications for a potentially changing profile of employees, along lines of class and gender and also, perhaps, race. Better-paid and more highly skilled jobs may privilege people who do not bear the brunt of job-shedding in farming. The present study came across a few cases where white middle-class individuals from outside the area were employed in tourism-related functions. While too anecdotal to be conclusive, such cases suggest a need for further scrutiny.

Fifth, the study reveals that biodiversity conservation may be risky for the rich as well as the poor. Expectations that farmers will be prepared to reduce the scale of their farm enterprise in favour of uncertain growth in ecotourism are tempered by the question ‘who carries the risk?’ In the context of the Baviaanskloof, just what it will take to persuade farmers to change their land use still seems poorly understood. An approach to conservation that relies on the voluntary participation of private landowners requires greater insight into this question.

Sixth, the claim that agriculture is unlikely to provide the economic boost needed to address unemployment cannot go unchallenged— for it begs the question: what kind of agriculture? Critics of South Africa’s land reform programme argue that land reform should include a process of agrarian restructuring that favours smallholder agriculture over the prevailing commercial farming model, if it is to tackle...
rampant rural poverty. International evidence as well as local research suggests that small-scale family type farm models are generally more efficient, create more on-farm employment, and are more supportive of biodiversity than large-scale mechanised farms. As this study shows, poor rural households seek, first, a secure place to live and land for small-scale production of food and market crops; beyond this, they value land for non-commoditised resources such as grazing, firewood, building and craft materials. In contrast, the state’s preference for capital-intensive commercial agriculture— informed by its largely neo-liberal macroeconomic paradigm— tends to undervalue the land uses of the poor. Challenging this paradigm may be beyond the scope of the BMRP, but is central to the issue at hand.

Two observations can be made about the inter-institutional relations that shape the BMRP. One concerns the Baviaanskloof Steering Committee (BSC). Its official mandate is to oversee, advise and facilitate the project, but in practice it functions more as a public relations forum bringing together a wide range of stakeholders on a quarterly basis. In itself this is a useful function, but it does tend to obscure where real power and oversight reside and this may compromise accountability, especially in relation to protecting poor people’s rights. More broadly, the highly complex institutional arrangements on which this project is built can generate inertia and paralysis, and raise doubts about the viability of conserving biodiversity while at the same time delivering social and economic rights to the poor. The aforementioned impasse in implementing social safeguard policies at Coleske farm is an example.

Finally, questions must be raised about the increasingly popular, yet arguably overstated belief that ecotourism can meet the challenge of reconciling biodiversity conservation, rural livelihoods and land rights. Although ecotourism is not the only element of the biodiversity economy being promoted by the BMRP, it appears to take centre stage. But stories of successful ecotourism ventures that involve poor rural people are scarce in southern Africa, and this applies equally to poor people in land reform projects. For the Sewefontein community, ecotourism should be seen as only one livelihood possibility among others available to them. It may contribute to farm income without being the major focus of income-generating activities. Government and conservation agencies should aim to provide support that can enhance multiple livelihood strategies.

This paper has identified systemic and structural tensions in current attempts to reconcile biodiversity conservation and farm dwellers’ rights and interests in the Baviaanskloof. There are unresolved critical questions about conservation-human rights connections, including those dealing with procedural rights (as with the role of the steering committee and the application of social safeguards) and with certain ‘negative’ rights (where communities have lost livelihoods and access to natural resources). The road ahead for the BMRP is difficult but deserves support.
The broader bioregional strategy for conservation that looks beyond formal protected areas in terms of planning, conservation and economic development is a positive response to much of the criticism that has been levelled against conservation in the past. But the complexity of the task cannot be underestimated. The Baviaanskloof Mega-Reserve will be an instructive space to watch in the coming years.

Notes
1 Sandwith, 2002.
2 Wynberg, 2002.
3 Republic of South Africa, 1996.
4 Centre for Rural Legal Studies, 2003.
5 Crane, 2006; Hall, 2004a, 2004b; Wegerif and Russell, 2005.
6 The term 'mega' is used because the area must be large enough to accommodate animal movements and gene flow over large distances, as well as encompass a gradient of habitat types.
7 South Africa’s Cape Floristic Region is one of the world’s top 25 biodiversity hotspots (see Myers et al., 2000).
8 C.A.P.E. is a multi-stakeholder initiative between government, civil society and the private sector to coordinate and maximize efforts to conserve the Cape Floristic Region.
9 See Wegerif and Russell, 2005.
10 Findings of this research were originally presented in a more extensive article published in Geoforum (see Crane, 2006).
11 Boshoff, 2005.
12 Clark, 1998.
13 Myers et al., 2000.
14 Boshoff et al., 2000.
15 Ibid.
16 Ibid.
21 The concept of a biodiversity economy is one where local economic development does not harm biodiversity, and where biodiversity resources are developed into economic opportunities.
22 Baviaanskloof Mega-Reserve Project, 2004b.
24 ESTA is the national law enacted to secure farm dwellers’ tenure rights and to prevent arbitrary evictions (see Department of Land Affairs, 1997), but is widely seen as providing relatively weak protection and notoriously difficult to enforce (see Hall, 2004b).
26 Interview with farm dwellers, August 2005.
27 Ibid.
28 Interviews with Matthew Norval, Project Manager, and Eleanor McGregor, Community Liaison Manager (PMU), August 2005.
29 Interview with Trevor Beeton, Department of Land Affairs, August 2005.
31 Interview with farm dwellers, August 2005.
32 Interviews with Matthew Norval, Project Manager, and Andrew Skowno, Conservation Planner (PMU), August 2005.
33 Interview with Chris Lamprecht, Chairman Baviaanskloof Farmers Association, August 2005.
34 Interview with Thys Cilliers, landowner and CEO of Baviaanskloof Mountain Passes Tours, August 2005.
35 Interview with farm dwellers, August 2005.
36 Ibid.
37 Interestingly, other landowners in the Baviaanskloof view the Sewefontein Trust as their own insurance against land expropriation for conservation purposes. (Interviews with Skillie Rautenbach, Department of Agriculture, July 2005; and Chris Lamprecht, Chairman Baviaanskloof Farmers Association, August 2005)
38 Interview with members of the Sewefontein Trust Committee, August 2005.
39 Ibid.
40 Hall, 2004b.
41 To this end, a Steering Committee has been formed involving inter alia Trust officials, Department of Agriculture, Department of Land Affairs, and Southern Cape Land Committee.
42 This culture is rooted in colonial tradition which described the farm as a family-like community and emphasised the master’s (often despotic) power over the ‘child’, his servant. For a discussion of this culture of paternalism see Du Toit, 1996.
43 I am grateful to Ruth Hall for pointing out this issue.
45 E.g. Hall, 2004b; Kepe and Cousins, 2002.
46 Van Zyl, 1996.
49 Members include local and provincial government agencies, NGOs, organised agriculture, academic institutions. BSC meetings are sometimes attended by landowners and other mem-

Wendy Crane (wendycrane@telkomsa.net) is an independent analyst and consultant in the field of sustainable development. She has worked for over 20 years in the international development arena across Africa and Asia.
bers of the Baviaanskloof communities.
50 Kepe et al., 2005.
52 Kepe et al., 2005.

References
Centre for Rural Legal Studies, Land Reform Options for Farm Workers: The uptake and impact of these on rural communities in the Western Cape, CRLS, Stellenbosch, 2003.
Du Toit A., The fruits of modernity: Law, power and paternalism on Western Cape farms, Programme for Land and Agrarian Studies Occasional Paper No. 3, University of the Western Cape, Cape Town, 1996.
In India, tribal people and other forest dwellers (TFD) are integral to the very survival and sustainability of forest ecosystems, including wildlife. However, historically TFD rights have not been adequately recognized, resulting in protracted injustices, including:

- **inadequate recognition of TFD land rights during the process of forest consolidation.** The traditional rights of TFD on forest lands were not adequately recognized and recorded in the process of consolidation of state forests, either during the colonial period or in independent India. As an example, many TFD still do not have a homestead or address of their own. They are people without legal identities, erroneously looked upon as encroachers on forest lands. The threat of eviction looms large in their psyche. Insecurity of tenure and fear of eviction from the lands where they have lived and thrived for generations are perhaps the main reasons why tribal communities feel emotionally as well as physically alienated from forest conservation.

- **lack of confirmation of ownership rights over minor forest products.** An emphasis on production forestry has somehow left the interests of the tribal communities in minor forest products (MFP) unrecognized. There has been no confirmation of ownership rights over MFP to forest dwellers. The collection and trade of most high value MFP is largely monopolized by the Corporations of the Forest Departments of various states, with TFD employed only as wage earners collecting MFP for the state.

The Act is a valiant attempt to balance forest dwellers’ rights with economic and environmental objectives.
Conservation and Human Rights

benefits of development schemes denied. Mainly due to their lack of clear land title, TFD are threatened with displacement resulting from demands for bringing more land under protected area (PA) status. Further, the land under their occupation is treated as illegal and therefore not serviced by development interventions for drinking water supply, health facilities or electricity.

It was against this background that The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was passed by the Indian Parliament in 2006 after several months of acrimonious debate. The Act is a valiant attempt to balance forest dwellers’ rights with economic and environmental objectives, and seeks answers to some key questions, such as “Who can live in forested areas? What rights do forest dwellers have over lands they have lived on for generations? Can they be relocated, and if so, on what justifications and under what terms?”

Overview of the provisions of the Act

The main rights recognized for the tribes and forest dwellers by the Act are:

(i) right to hold and live in forest land, under individual or common occupation, for habitation or cultivation for livelihood—specifically, scheduled tribes and other traditional forest dwellers living in forests for three generations will be entitled to a maximum of four hectares of land or area [per individual, family or community, as applicable] if that land has been under occupation prior to December 2005 (for scheduled tribes), or at least for 3 generations (75 years) (for other forest-dwellers).

(ii) right to access, use, or dispose of minor forest products, including through sale;

(iii) other rights of use or entitlements such as grazing (both settled and transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

To ensure conservation, the rights holders are empowered to protect catchment areas, water sources and other ecologically-sensitive areas.

Picture 1. Forest dwellers are heavily dependent on forest products for their livelihood. (Courtesy Pradeep Kumar)
What ARE Human Rights, anyway?

Conservation can undermine Human Rights...

...but conservation and human rights can also work in mutual support...

(iv) right of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(v) right of access to biodiversity, and community intellectual property rights over traditional knowledge related to forest biodiversity and cultural diversity;

(vi) right to protect, regenerate, conserve or manage any community forest resource that TFD have traditionally protected and conserved;

(vii) any other customary rights, excluding hunting.

To ensure conservation, the rightsholders are empowered to protect catchment areas, water sources and other ecologically-sensitive areas, as well as their cultural and natural heritage. Even though they will enjoy their customary rights, those now exclude hunting, trapping or extracting body parts of any wild animal. There are regulatory provisions to ensure sustainable practices and promote conservation in critical wildlife habitats, and these are being framed as further rules under the Act.

How the Act simultaneously addresses human rights and conservation

The present Act fulfils a need for comprehensive legislation giving due recognition to the forest rights of tribal communities and forest dwellers. More than 40 million of India’s most impoverished and marginalized people live in the country’s forests, including tiger reserves, wildlife sanctuaries and national parks. For years they have been neglected by the government and left to fend for themselves. For example, the pastoral Maldhari community in Gir Wildlife Sanctuary in Western India and the pastoral Gujjar community in Rajaji National Park in Northern India live simple lives in small mud houses hidden deep in the forests. They have no access to electricity, schools or health care. Their basis of livelihood is milk from their cattle, vegetables, collecting honey, and trading their produce in the local market for items like food grains. Some of them are illiterate and unable to count or use money.

Some conservation activists see it as essential for conservation success that forest dwellers be involved in conservation efforts and given a sense of ownership and responsibility over the forests. There is a symbiotic relationship between tribal people and conservation. The natural resource base forms the very foundation of their life support system. It is not only for food and water that they depend on forest— their customs and lifestyle are integrally interwoven with the forests. Only an inclusive forest management system can secure the active participation of forest dwellers in conservation.

It is natural for any human to have an attachment to his or her land, but in the absence of tenure rights it can hardly be expected that people develop a sense of ownership to forest land and, consequently, care about forest conservation. Insecurity of tenure forces people to think on short-term horizons and focus on immediate and exploitative benefits. Once the tribal people secure their own land, they will have the incentives to protect the forests in the vicinity. The realization that they have a permanent
stake in the land allocated to them and the adjoining forest land, will create a lasting stake in its conservation and dismantle the psychological barrier created by the perception of conservation as something imposed by outsiders (“their land, their rule”). As shown by the work of Kalpavriksh and other Indian activist groups, there are thousands of sites where communities have demonstrated the ability and willingness to protect forests and wildlife. However, they did not have the legal authority to counter threats and sustain their conservation results in such areas. The present Act finally provides backing for such initiatives.

Perceived threats to conservation and the situation of tribal people and other forest dwellers

The main challenge of the Act is to harmonize the potentially conflicting interests of recognizing forest rights of TFD, and protecting forests and wildlife resources. Unfortunately, the Act has, since its inception, generated a sharp division of opinions on political and ecological lines. For instance, some conservationists and journalists have commented that the Act will destroy “what remains of India’s forests”. Some of the main concerns expressed are enumerated below.

- There are no reliable estimates of the likely number of families eligible for the forest land rights that will be granted by the Act, therefore it is not known if the number of rights-holders could be a significant risk to existing forest cover. If too many people are allowed to live in the forest, they will degrade the habitat as their cattle graze in direct competition with prey like deer. Certain species such as tigers, rhinos, and elephants are vulnerable to pressures from human land use. These species are typically large-bodied, slow-breeding, and need large areas of habitat and vast resources for survival. Increased human habitation in forests may cause depletion of forest cover, resulting in significant ecological costs.

- While the Act does not allow cultivation of previously unoccupied forest land, if a family is allowed to use an occupied four hectare patch for cultivation, it is certain that the whole patch will be used for cultivation only, and that all forest-based requirements will be met from adjoining forests. One cannot imagine that just at the boundary of cultivated land there will be dense forest. There will be a gradient of degradation from the edge of the cultivated land to some point inside the forest. The whole forest may be dotted with cleared patches and surrounding degraded forest.

- The argument that the tribal people have been living in the forest for a very long time without degrading it really does not hold true any longer. The population of tribal people has increased and so have the impacts of their way of living. Many tribal people have been influenced by culture outside their own traditions. The total pressure on the forest is much higher than it was in the past.

- The Act has vested land rights not only with the tribal people, but also with other forest-dwelling communi-
What ARE Human Rights, anyway?

Conservation can undermine Human Rights...

...but conservation and human rights can also work in mutual support...

...but conservation and human rights can also work in mutual support...

ties. Politicians were unanimous in demanding the withdrawal of cases registered against forest-dwellers by forest officials. This was tantamount to legalizing encroachment. Further encroachment in the forests may be encouraged by the expectation that it will be regularized eventually by similar legislation in the future.

The definition of "traditional forest dwellers" in the Act provides scope for State Governments, land mafia and local elites to exploit the situation, which could in turn create or exacerbate local conflicts. There are many situations, for instance in the north-eastern States of India, in which individuals and communities from outside a region have occupied forest land recently, at the expense of the local tribal or other traditional forest-dwelling communities.8

Despite the Act, large-scale relocation of tribal communities from core areas of National Parks and Sanctuaries may take place.9 Given poor track record in relocating people affected by development projects, such as the Narmada Dam,10 or from sanctuaries such as Sariska and Gir,11 the possibility of large-scale relocation from core areas raises the spectre of loss of livelihood and hardship for TFD.

In spite of the above concerns, many people seem to believe that the positive aspects of the Act outweigh the concerns. In other words, the majority of commentators believe that this Act is a great beginning to link human rights with sustainable conservation in India.

Conclusion

There is no doubt that legislation was necessary, in India, to remedy the historical injustices against tribal people. Yet, the public debate revealed a sharp division of opinions: some hard-core conservationists have foretold a disastrous ecological future after the Act, while their human rights counterparts have argued that the Act should have included even stronger provisions for land rights. In the debate, the voices of several moderate conservation and human rights groups have been drowned out. But their message is nevertheless critical: we need to protect forests to protect livelihoods, and we need to establish clear livelihood rights to create a long-term stake in conservation. As The Telegraph, a respected Indian newspaper, puts it: where human rights, human and animal coexistence and the conservation of nature are concerned, "legislation is only a beginning for achieving such a difficult and delicate balance. This is the first proper attempt to implement a complicated issue of natural justice— the conferring or restitution of land and produce rights for forest dwellers".12 The authors of this paper agree and believe that the present Act can open new pathways to engage forest dwellers in conservation while ensuring the promotion of human rights.
Pradeep Kumar (pradeepifs@hotmail.com) is an Officer of the Indian Forest Service with responsibility for forestry and environment-related issues. Currently, he is posted as Conservator of Forests in the Government of Sikkim. P. Senthil Kumar (senthilkumarifs@yahoo.com) is also a member of Indian Forest Service and currently posted as Divisional Forest Officer in the Land Use and Environment Division of the Government of Sikkim. He is responsible for land use and environment-related issues.

Notes
1 Government of India, 2005.
2 In the opinion of authors of this paper.
5 Madhusudan, 2005.
6 General impression of the authors of this paper.
7 General impression of the authors of this paper.
8 Madhusudan, 2005.
9 Core Areas: National Parks and Sanctuaries are required to keep certain areas inviolate for purposes of wildlife conservation. The areas may be determined by the Ministry of the Central Government dealing with Environment and Forests.
11 Shahabuddin et al., 2005.
12 Daily Telegraph, December 2006.

References

Reconocimiento y protección de los derechos humanos de los pescadores artesanales—las áreas marino-comunitarias una alternativa?

Patricia Madrigal Cordero y Vivienne Solís Rivera

Abstract. This article analyzes the legal viability of the recognition of a marine community conserved area. After reflecting generally on legal frameworks to jointly address human rights and conservation, the article proposes some concepts for effective recognition of artisanal fishers’ rights. We then review the process developed in Tárcoles, an artisanal fishing community on the Central Pacific Coast of Costa Rica. Working in collaboration, Coope Solidar R.L. (a cooperative for professional services for social solidarity) and Coope Tárcoles R.L. (an artisanal fishers cooperative) facilitated creation of a community area for responsible fishing. The objective was to secure traditional fishing rights and ensure the sustainability of artisanal fishing. This activity demonstrates that artisanal fishing is compatible with marine conservation by integrating conservation and development objectives and taking an ecosystem approach that could reduce poverty in coastal communities and enhance food security.

Resumen. Este artículo analiza la viabilidad jurídica del reconocimiento de un área de conser-
Las áreas de conservación comunitaria: un reconocimiento a procesos locales de conservación

Las áreas de conservación comunitaria (ACC) son una forma de entender, conceptualizar y justificar, situaciones que se han dado a lo largo del tiempo en todo el mundo. No es de extrañar entonces, que desde una perspectiva jurídica su justificación se encuentre no sólo en los marcos jurídicos de la conservación sino también en los de derechos humanos, tanto a nivel internacional como a nivel nacional. Las ACC no sólo reconocen que es importante conservar la diversidad biológica sino el acceso y la distribución equitativa de estos recursos. Su conceptualización integra conservación pero también desarrollo, calidad de vida y/o derechos humanos. Su fundamento reside en principios hartamente pregonados pero difícilmente aceptados, de que el ser humano tiene como tal una dignidad que debe ser reconocida, un libre albedrío que le permite tomar decisiones y una libertad que exige que éstas sean reconocidas. Esta dignidad debe ser reconocida no sólo a los individuos sino también a los colectivos, a las comunidades, a los pueblos y a las organizaciones.

El V Congreso Mundial de Parques Nacionales definió las Áreas Conservadas por Comunidades como aquellos “ecosistemas naturales y modificados que contienen una biodiversidad importante, prestan servicios ecológicos y poseen valores culturales, y cuya conservación está a cargo de comunidades indígenas y locales en el marco del derecho consuetudinario o por otros medios efectivos” (WPC Rec 5.26). Un Área de Conservación Comunitaria no es una categoría de manejo, es el reconocimiento de una forma de gobernanza, el reconocimiento de la toma de decisiones en un espacio geográfico por parte de comunidades locales o pueblos indígenas.

Un Área de Conservación Comunitaria no es una categoría de manejo, es el reconocimiento de una forma de gobernanza, el reconocimiento de la toma de decisiones en un espacio geográfico por parte de comunidades locales o pueblos indígenas.
Áreas Protegidas. Dicho plan recomienda a los Estados signatarios revisar sus sistemas de áreas protegidas de acuerdo a los tipos de gobernanza incluyendo aquella desarrollada por comunidades locales o pueblos indígenas.

Asimismo, el Plan de Trabajo reconoce un enfoque de equidad y participación para las áreas protegidas que han ampliado su espectro para añadir a los objetivos de conservación el reconocimiento de otras formas de gestión y gobernanza. Esta inclusión no es más que el reconocimiento de los derechos humanos de las poblaciones usuarias. Por otro lado, en este plan se reconoce que el porcentaje de áreas protegidas en el mundo ha aumentado, pero que no han incluido los ecosistemas más representativos, debilidad que se vuelve más evidente sobre todo en ambientes marinos.

El elemento 2 del programa “Gobernabilidad, participación, equidad y participación en los beneficios” incluye en el objetivo 2.1 la necesidad de promover la equidad y la participación en los beneficios. Su meta es establecer para el año 2008 mecanismos de participación equitativa tanto en los costos como en los beneficios derivados de la creación y administración de áreas protegidas. Entre otras recomendaciones sugiere: “2.1.2. Reconocer y promover el conjunto más amplio de los tipos de gobernanabilidad de las áreas protegidas en relación con su potencial de logro de las metas de conservación de conformidad con el Convenio, en lo que pudieran incluirse las áreas conservadas por comunidades indígenas y locales”.

Respaldo jurídico para la propuesta de un Área Comunitaria para la Pesca Responsable

El reconocimiento de los derechos de pesca artesanal, enfrenta serias limitaciones en los países que siguen el sistema romano francés, que parte de que el mar y la zona costera es un bien de dominio público. La forma tradicional en que se ha propuesto la utilización de estos bienes públicos o demaniales ha sido a través del otorgamiento de actos administrativos como las concesiones o permisos de uso. La gran limitación de estos instrumentos administrativos de derecho público es que otorgarían derechos exclusivos, o excluyentes de otros actores interesados. Dicho de otra forma, el beneficiario de una concesión adquiere el uso exclusivo sobre el bien que le ha sido otorgado.

El reconocimiento de derechos de pesca artesanal que han existido a lo largo del tiempo proviene por otra parte de una ideología de derechos humanos basados en la solidaridad, o por los derechos de la tercera generación, que implican el goce solidario entre quienes acepten las normas de uso basadas en la lógica, la ciencia y la razón.
ca, la ciencia y la razón. Tal es el caso de Coope Tárcoles R.L. cuya Asamblea General declara que un área comunitaria para la pesca artesanal responsable es aquella en donde no sólo sus asociados pueden ejercer derechos de pesca artesanal sino todos aquellos pescadores artesanales que se comprometan a realizar una pesca responsable.

Compartir el poder de acceso y uso a estos recursos que pareciera más fácil entregar en forma exclusiva a un actor, enfrenta obstáculos y dificultades conceptuales y metodológicas. No sólo no existen procedimientos específicos sino que además su justificación parte de una integración de principios y valores de la teoría de derechos humanos que todavía muchos juristas consideran “derecho natural”. Lo cierto es que alrededor del mundo, se está solicitando que el sector pesquero artesanal sea protegido en el acceso a los recursos pesqueros como una forma de reducción de la pobreza y de mantenimiento de la soberanía alimentaria. Este reclamo, desde un punto de vista de derechos humanos, no es otra cosa que un reconocimiento de los derechos económicos, sociales y culturales de los pescadores artesanales que a lo largo de las décadas han quedado rezagados.

Nomura afirma recientemente que “de acuerdo con las políticas pesqueras y los enfoques frente a la gestión, incluyendo los derechos de pesca, deben adaptarse a cada contexto concreto del país o de la zona en cuestión en función de su pesquería, su estructura social, su cultura local, etc. Actualmente se asignan derechos de pesca en el marco de programas a largo plazo como el sistema de desarrollo comunitario que funcionan en comunidades pesqueras del mar de Bering; los varios sistemas que derechos de uso territorial en la pesca (en inglés TURF) vigentes en Japón, Filipinas, Samoa y Fiyi; las áreas de manejo o explotación de recursos benticos chilenas o las unidades de gestión de playa que operan en Uganda, Tanzania y Kenia”.

**Problemática del sector pesquero artesanal: derechos económicos, sociales y culturales que no han sido garantizados**

Desde el año 2001 Coope SoliDar R.L. ha promovido espacios de intercambio y discusión con pescadores artesanales, no solo nacionales, sino también de las islas Galápagos, en Ecuador, y de Panamá. Como resultado de ese proceso se han identificado los asuntos que más preocupan a este sector, los cuales revelan claramente que los derechos económicos, sociales y culturales no han sido garantizados por el Gobierno y que existen grandes obstáculos para que el sector pesquero artesanal disfrute del goce y ejercicio de este tipo de derechos. Los principales problemas identificados por el sector pesquero artesanal que violan el ejercicio y goce de sus derechos son:

- derecho a la organización;
- derecho a la educación, el trabajo y la seguridad social;
- derecho a un trabajo digno;
- derechos ambientales y de acceso a los recursos naturales.

**1. Derecho a la organización**

Los pescadores artesanales perciben que dentro de su gremio es difícil organizarse, trabajar por metas comunes y enfrentar juntos los obstáculos que se les presentan desde afuera. Datos suministrados por el Instituto Costarricense de Pesca y Acuicultura, INCOPECA, dan cuenta de la diversidad de actores que se agrupan alrededor de la actividad pesquera. Esta diversidad queda representada en la tabla 2, donde se clasifica al sector por tipo de organización.
Como se observa en la tabla, el pescador artesanal cuenta con estructuras organizativas como asociaciones, Comités Locales de Pesca (COLOPES) y cooperativas. Estas estructuras organizativas han sido promovidas por el Estado o a través de la Cooperación Internacional, pero sin el apoyo y seguimiento necesario para su fortalecimiento. Esas organizaciones muestran grandes debilidades de gestión administrativa las cuales muchas veces llevan a su desaparición, este elemento está íntimamente relacionado con los problemas sociales que enfrenta el sector. Asimismo, el derecho a la organización se ve afectado directamente por la obtención de una remuneración inferior a los salarios mínimos y por la falta del derecho a la educación.

2. Derecho a la educación, el trabajo y la seguridad social

Estimaciones realizadas por el Informe Estado de la Nación para el año 2005, con base en la Encuesta de Hogares de Propósitos Múltiples del INEC, ponen de manifiesto el deterioro socioeconómico del sector pesquero artesanal y la necesidad de articular una estrategia interinstitucional para abordar la complejidad de los problemas de este sector tan importante para el desarrollo del país. El ingreso per cápita promedio del hogar es de $66.685,7 por mes. Para el 2005, el Ministerio de Trabajo definió para ocupaciones tipificadas como no calificadas un salario mínimo de $4.188 por jornada diaria, equivalente a $125.640 mensuales. Esto significa que, según los datos oficiales, el ingreso económico de las personas que se dedican a la pesca es inferior al salario mínimo. Por otro lado, la escolaridad promedio de los pescadores es de 5,7 años, como puede verse en la tabla 3, también elaborada por el Programa Estado de la Nación a partir de la Encuesta de Hogares de Propósitos Múltiples.
Ambos indicadores, educación e ingreso, revelan la precariedad del sector pesquero artesanal. Debe agregarse que el sistema de seguridad social hasta hace muy poco ha reconocido el derecho de los pescadores artesanales a una pensión por vejez, incapacidad o muerte. Es frecuente observar en las comunidades costeras personas mayores de 60 años que todavía se dedican a la pesca porque no tienen otra fuente de ingresos o que se desempeñan en otras labores relacionadas. En consecuencia, es posible afirmar que los derechos sociales en cuanto respecta al menos al trabajo, la educación y la seguridad social, permanecen en un estado de declaración formal en lo que al sector pesquero artesanal se refiere.

3. Derecho a un trabajo digno.
La realidad antes descrita, unida a la disminución de las capturas y de las áreas donde se puede pescar, es lo que despierta la inquietud de los pescadores por la búsqueda de nuevas opciones socioproductivas. Algunas comunidades pesqueras han buscado alternativas en el turismo o en proyectos de acuicultura. Sin embargo, preocupa que estas actividades puedan traer pérdida de valores o crear expectativas que no necesariamente serán satisfechas. Se reconoce que si no existen formas para distribuir los beneficios que genera el turismo, éstos no llegan a las comunidades pesqueras. Los proyectos de acuicultura que desarrollan algunas comunidades pesqueras están en una fase experimental, requieren asistencia técnica y aún les falta llegar a una etapa de distribución comercial que pueda ser replicada sin riesgo por otros grupos.

La apertura de espacios de reflexión al interior del sector pesquero permitiría que se analicen, sistematicamente, y compartan las lecciones aprendidas de las opciones socioproductivas que se promuevan, siempre y cuando se parta del respeto al ejercicio de un oficio digno como lo es la pesca artesanal y no de la necesidad de que los pescadores se dediquen a otro tipo de oficios. Como lo establece el Código de Pesca Responsable de la FAO, la pesca artesanal brinda empleos, seguridad alimentaria e ingresos para un país y el Gobierno debe establecer las políticas, estrategias y programas necesarios para su mantenimiento.

4. Derechos ambientales y de acceso a los recursos naturales
En todas las entrevistas, visitas e intercambios realizados, los pescadores artesanales mencionaron el impacto de las redes de arrastre sobre su actividad. Para ellos, la responsabilidad por la degradación ambiental y la disminución de la captura es en gran medida atribuible a los barcos camaroneseros. Esta situación afecta también las artes de pesca, cuando los rastreros se llevan los trasmallos. Algunas embarcaciones asumen los costos de estos daños. No obstante, son los camaroneseros quienes proporcionan la carnada para la pesca artesanal y existen relaciones entre ambos grupos.

El derecho a un ambiente sano y ecológicamente equilibrado se ve seriamente limitado al permitir el Estado la utilización de artes de pesca que dañan el ecosistema marino.
ecosistema marino. Paradójicamente, al tratar de identificar las amenazas para la conservación marina se señala al sector pesquero, sin establecer las diferencias necesarias que eviten las asimetrías en la distribución de la responsabilidad. Otro elemento que hace aún más difícil esta realidad es la marginalidad jurídica del sector. Las comunidades pesqueras están asentadas en la zona maritimo-terrestre y por lo general sus pobladores no cuentan con títulos de propiedad del lugar donde viven y trabajan. Por otra parte, la gran mayoría de ellos no tiene licencia de pesca.

En los últimos años, el desarrollo turístico y de bienes raíces ha aumentado la plusvalía de propiedades ubicadas en áreas costeras. Esto ha motivado un mayor interés de las entidades estatales en controlar el uso de las zonas públicas, lo que se ha traducido en una política de desalojos que afecta seriamente a los grupos pesqueros. Así lo han señalado, por ejemplo, los miembros de la Asociación de Pescadores de Zancudo, ubicado en el Pacífico Sur de Costa Rica, que se han organizado para enfrentar esta situación. La utilización de manglares, bienes públicos, también está provocando graves problemas entre usuarios como los piangüeros, que ahora requieren un permiso de extracción emitido por el Ministerio de Ambiente y Energía (MINAE), para lo cual se requiere un plan de manejo.

El establecimiento de áreas marinas protegidas (AMP) en algunos casos supone la reducción de las áreas de pesca, los pescadores se quejan de que no se les ha dado la debida participación en el proceso tendiente a zonificar y delimitar las áreas de pesca y de protección. En el Parque Nacional Marino Ballena, Pacífico Sur de Costa Rica, los pescadores aceptaron la creación del área bajo la creencia de que solo se restringiría la pesca de arrastre en sus aguas y que ellos podrían desarrollar su actividad de una mejor forma. Sin embargo, a la postre la categoría de manejo de parque nacional generó conflicto, pues limita el ejercicio de la pesca en todas sus modalidades, incluyendo la artesanal.

En otras áreas protegidas, como en Guanacaste, el conflicto ha llevado a presentar pliegos de peticiones al gobierno y a plantear una reforma al artículo 9 de la Ley de Pesca y Acuicultura, para que sea el plan de manejo el que defina las actividades que se pueden realizar en las áreas protegidas marinas. Además, se solicitó mayor participación en la elaboración de ese plan y, sobre todo, en la zonificación. El sector considera que, en la actualidad, los mejores lugares de pesca se encuentran dentro de un área protegida marina (AMP)... no obstante, los pescadores artesanales... tienen una actitud positiva frente a las AMP y la pesca responsable...
Los derechos a un ambiente sano y ecológicamente equilibrado también deben ser garantizados para el sector pesquero artesanal

En Costa Rica el respaldo legal de las áreas protegidas se encuentra en el capítulo VII de la Ley Orgánica del Ambiente de 1995. Contrariamente a lo que se puede creer por la fama internacional de nuestro país en este campo, lo cierto es que el Sistema de Áreas de Conservación ha funcionado en base a una integración de normas de diferentes leyes y a lineamientos políticos que no encontraron respaldo jurídico como tal, sino hasta la Ley de Biodiversidad en 1998. Las categorías de manejo que la Ley Orgánica del Ambiente (LOA) reconoce son:

- Reservas forestales
- Zonas protectoras
- Parques nacionales
- Reservas biológicas
- Refugios nacionales de vida silvestre
- Humedales
- Monumentos naturales.

No obstante, el artículo 32 deja abierta la posibilidad de establecer áreas silvestres protegidas según otras categorías de manejo que el Ministerio de Ambiente y Energía (MINAE) reconozca en un futuro. Como parte de los objetivos de las áreas protegidas, reconoce que deben asegurar el uso sostenible de los ecosistemas y sus elementos, fomentando la activa participación de las comunidades vecinas. El capítulo siguiente, número VIII, que trata sobre recursos marinos y costeros, establece que el Ministerio de Ambiente y Energía (MINAE) junto con las instituciones competentes pueden delimitar zonas de protección a determinadas áreas marinas, sujetas a planes de ordenamiento y manejo, a fin de prevenir la degradación de estos ecosistemas. Considerando que uno de los principios que inspiran la Ley Orgánica del Ambiente es el de la utilización racional para el mejoramiento de la calidad de vida de sus habitantes, el establecimiento de éstas áreas marinas pueden aceptar una gestión comunitaria de la misma. La Ley de Biodiversidad que fue aprobada tres años después, vino a ratificar lo establecido por la LOA en sus artículo 58, 60 y 61, brindando además como se dijo anteriormente el marco institucional que había venido funcionado, el Sistema Nacional de Áreas de Conservación.

En 1994, se constituyó el Instituto Costarricense de Pesca y Acuicultura, INCOPECO. Este instituto tiene también dentro de sus atribuciones dictar las medidas tendientes a la conservación, el fomento, el cultivo y el desarrollo de la flora y fauna marinas. Dicho de otra forma, la conservación, el aprovechamiento y el uso sostenible de los recursos biológicos del mar es el ámbito de competencia de esta institución. El otorgamiento de los actos administrativos relacionados con los recursos marinos compete al INCOPECO y el sector que regula es el sector pesquero.
El reconocimiento de los derechos tradicionales de la pesca artesanal en Tárcoles, y consiguientemente el reconocimiento de la existencia de un área comunitaria para la pesca artesanal, podría ser un insumo para la discusión del Grupo de Trabajo sobre diversidad biológica costera y marina, que ha solicitado información sobre experiencias de manejo integral marino costero con participación comunitaria para próxima reunión del SBSSTA. Su fundamento se encuentra en el reconocimiento del Estado de los derechos sociales, económicos y culturales del sector pesquero artesanal, el cual para el ejercicio de su oficio, la pesca artesanal, requiere del establecimiento de una estrategia interinstitucional que le reestablezca sus derechos de acceso a los recursos en la zona costera y en la zona marina, de los cuales depende su sobrevivencia económica y cultural. Por otra parte, el sector pesquero artesanal, ejerciendo una pesca artesanal responsable puede contribuir con los objetivos de conservación de la diversidad biológica.

El área comunitaria de pesca artesanal responsable en Tárcoles puede convertirse en un sitio de observación y aprendizaje sobre la integración de los derechos sociales, económicos, culturales y ambientales que promueve la normativa nacional e internacional. Pero sobre todo, representa una muestra de que aún existen oportunidades para los sectores más marginados.

Caso de Estudio. Tárcoles, un proceso local de conservación marina para la pesca artesanal.

Tárcoles es una comunidad ubicada en el pacífico Central de Costa Rica. La principal fuente de ingresos para sus habitantes ha sido a lo largo de estos años, la pesca artesanal. CoopeTárcoles R.L es una cooperativa que agrupa cerca de 40 pescadores y sus familias y fue constituida hace 20 años. Se dedica a la pesca y distribución de diferentes variedades de pescado mediante la gestión sostenible de los recursos naturales y culturales. A lo largo de los años, Coope Tárcoles R.L. ha sido la fuente principal de empleo en el distrito de Tárcoles, generando ingresos para un 50% de la población, recibiendo pescado tanto para sus asociados como para pescadores no afiliados de Tárcoles y sus alrededores, como Playa Azul y Tarcolitos. A notar que, según el Foro Mundial de Pesca, el pescador no es solamente el que sale en su embarcación a traer el producto, sino que incluye una serie de oficios asociados como los “lujadores” que son aquellos que se encargan de desenredar las líneas después de una jornada de pesca, y que ocupa principalmente a mujeres y jóvenes; a los “encarnadores” quienes preparan las líneas con la carnada; los trabajadores en los Centros de Acopio; transportistas e incluso los administrativos. Coope Tárcoles R.L. ha decidido asumir el liderazgo para conservar la diversidad biológica de los
Desde hace cinco años se desarrolla la relación de asociatividad entre Coope SoliDar R.L. y Coope Tárcoles R.L. que espera proponer soluciones y alternativas. A fines de noviembre del 2004 fue aprobado unánimemente en Asamblea General el primer instrumento voluntario desde el sector pesquero artesanal, el Código de Pesca Responsable de Coope Tárcoles R.L. Se han también desarrollado diferentes acciones, como la elaboración y ejecución de un Plan de Gestión Ambiental de la Planta, el cual ha sido reconocido con el Premio a la Innovación Tecnológica que otorga la Comisión Centroamericana de Ambiente y Desarrollo (CCAD) 2006. Desde mediados del 2005 se está llevando una Tabla de Pesca que recoge la información de las capturas diarias, el esfuerzo pesquero y los principales lugares de pesca, información que ha apoyado la toma de decisiones como la solicitud al INCOPESCA para monitorear la captura de la raya o la necesidad de realizar investigación participativa sobre la langosta en el Pacífico. Continuando con los avances para desarrollar una pesca responsable, la Asamblea General de Coope Tárcoles R.L. del 12 de junio del 2005, declaró el establecimiento para un Área Comunitaria Marina para la Pesca Responsable. Esta iniciativa se concibe como un proceso en construcción, en donde se solicita el acompañamiento a las instituciones competentes y a todos los sectores interesados.

El Concejo Municipal de Garabito, Gobierno Local de la Zona, en sesión ordinaria número 24 del pasado 18 de octubre del 2006, declaró al Distrito de Tárcoles como "Zona de Pesca Artesanal Responsable"; este reconocimiento se entregó en las propias instalaciones de CoopeTárcoles R.L. en una una sesión extraordinaria del Concejo Municipal de Garabito el 4 de noviembre del 2006, reconociendo los derechos tradicionales de pesca en esta área. El Área Comunitaria Marina para la Pesca Responsable que se propone pretende reconocer la importancia de la pesca artesanal como una actividad económica relevante para la creación de empleo, seguridad alimentaria y la erradicación de la pobreza de las poblaciones costeras; conservar los recursos marinos de la zona y reconocer el aporte a la conservación biodiversidad marina que brindan los pescadores artesanales de Coope Tárcoles R.L. Se está trabajando en el proceso de zonificación participativa con el conocimiento de los pescadores asociados; y un Reglamento de Uso con las medidas necesarias para la conservación de la diversidad biológica marina en esta área: artes de pesca, estacionalidad de la captura de ciertas especies, mejores prácticas pesqueras. Coope Tárcoles R.L. ha solicitado a las autoridades gubernamentales que se unan en su esfuerzo haciendo lo que por ley les compete.

Notas
1 En este proceso han trabajado los asociados de Coope SoliDar R.L., Vivienne Solís R., Patricia Madrigal C., Marvin Fonseca B., e Ivannia Ayales Cruz.
2 UICN, 2005.
3 La gobernanza se refiere a la interacción entre estructuras, procesos y tradiciones que determina cómo se ejerce el poder, cómo se toman las decisiones en asuntos públicos y cómo los ciudadanos y otros actores se manifiestan. Trata sobre el poder, las relaciones y la rendición de cuentas, quién tiene influencia, quién decide y cómo se rinden cuentas” (Abrams et al. 2003).
5 Nomura, 2006.
6 Este apartado ha sido tomado del documento en prensa “Consideraciones sociales del sector pesquero artesanal sobre el Corredor Marino de Conservación del Pacífico Este Tropical: primeras ideas hacia la incidencia social”, elaborado por Coope

Patricia Madrigal Cordero (patmadri@racsa.co.cr) es abogada, especialista en derecho ambiental de la Universidad de Costa Rica, y candidata al Doctorado en Derecho Ambiental de Alicante, España. Es miembro del Consejo internacional de Derecho Ambiental (ICEL), de la Comisión de Derecho Ambiental (CEL) y la Comisión sobre Política Ambiental, Económica y Social (CEESP) de la UICN, y colaboradora regional del Anuario de Derecho Internacional Ambiental, Oxford Press. Actualmente es gerente de la Cooperativa Autogestionaria de Servicios Profesionales para la Solidaridad Social, Coopesolidar R.L. Vivienne Solís Rivera (vsolis@coopesolidar.org) es bióloga graduada de la Universidad de Costa Rica, con una maestría en Ecología de la Universidad de Lawrence, Kansas, EUA. Durante 10 años fue coordinadora del Área Temática de Vida Silvestre de la Oficina Regional para Mesoamérica de la Unión Mundial para la Naturaleza (ORMA-UICN). Actualmente es Vicepresidente de la Cooperativa Autogestionaria de Servicios Profesionales para la Solidaridad Social, Coopesolidar R.L. y co-chair del "Theme on Governance, Equity and Rights“ de CEESP

Policy Matters 15, July 2007
Conservation and Human Rights

SoliDar R.L. con el apoyo de Conservación Internacional en el marco del proyecto Walton.

7 Coope SoliDar, 2006. Asociación: según la Ley de Asociaciones, para su creación se requieren como mínimo diez personas y su organización incluye una Asamblea General y una Junta Directiva. COLOPES: reúnen como mínimo a cuarenta pescadores artesanales y reciben el apoyo técnico del INCOPECSA. Su estructura se basa en una Asamblea General y una Junta Directiva. Cámara: estructura gremial que agrupa a diferentes organizaciones con un giro económico común. Cooperativa: según la Ley de Cooperativas, es una asociación voluntaria de personas con personería jurídica, duración indefinida y responsabilidad limitada, que se organiza a través de una Asamblea General con el mínimo de doce personas en el caso de las cooperativas de autogestión, o de veinte personas para el resto de las cooperativas. Tiene un Consejo de Administración, un Comité de Educación y Bienestar Social y un Comité de Vigilancia. Unión de cooperativas: según la Ley de Cooperativas, se constituye con hasta cinco cooperativas. Sindicato: asociación permanente de trabajadores constituida para el mejoramiento y protección de sus intereses económicos y sociales comunes.


Referencias


UIUCN, Beneficios más allá de las fronteras, Actas del V Congreso Mundial de Parques de la UICN, UICN Gland (Suiza), 2005.

UNEP-CBD-COP 8-31, Decisiones adoptadas por la Conferencia De Las Partes en el Convenio sobre la Diversidad Biológica en su octava reunión, 2006.

Using human rights instruments for biodiversity conservation

Svitlana Kravchenko

Abstract. This paper analyzes the connections between conservation of biodiversity and human rights. First, it discusses court cases in which substantive human rights, such as the right to life and indigenous peoples’ rights to land and property, culture, and self-determination, have been used to protect biodiversity. Second, it explains the role of procedural human rights, such as rights to information, participation in decision making and access to justice, in...
A connection between the field of human rights and the field of environment has been developing during the last two decades. Some people saw a conflict between human rights and environmental rights during the 1992 UN Conference on Environment and Development in Rio de Janeiro. By 2001, however, experts from both fields had come together and reached broad agreements during the Expert Seminar on human rights and environment organized by the United Nations High Commissioner on Human Rights and the United Nations Environment Program in Geneva. Using international human rights instruments for the protection of the environment, and for biodiversity conservation in particular, has in fact several advantages for citizens and non-governmental organizations (NGOs).

Human rights instruments are established in the form of UN Charter organs, such as the UN Human Rights Council, and UN human rights treaty organs, such as the Human Rights Committee under the Covenant on Civil and Political Rights and other bodies under other human rights treaties. Some (though not all) can be addressed by individuals, but these are not judicial bodies and have no direct enforcement powers. Human rights violations can be challenged more effectively in the regional human rights systems, namely the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court of Human Rights.

In contrast, most Multinational Environmental Agreements (MEA) and, in particular, the Convention of Biological Diversity (CBD), have no strong systems of enforcement that can be accessed by individuals. The CBD has dispute resolution and arbitration mechanisms for solving disputes between Contracting Parties concerning the interpretation or application of the Convention. Similarly, the Compliance Mechanism for the Cartagena Protocol on Biosafety under the CBD (which started its operation in March 2006), which is a non-judicial mechanism that includes provisions for offering advice or assistance, can only be invoked by other Parties. As for state challenges against other states’ non-compliance under MEA compliance, dispute, and arbitration mechanisms, these are rather rare because states are concerned about the possible consequences for their diplomatic relationship with other countries. Most human rights bodies, on the other hand, are available for the protection of biodiversity. The article demonstrates that international and national human rights instruments can be powerful tools for protecting biodiversity—often more effective than multinational environmental agreements.
complaints from non-state actors, such as citizens and NGOs.

**Substantive human rights and biodiversity**

Various human rights treaties have provisions that explicitly or implicitly recognize environmental rights. For instance, the San Salvador Protocol recognizes that everyone shall have the right to live in a healthy environment. Another example is the African Charter on Human and Peoples’ Rights, which says that “All peoples shall have the right to a general satisfactory environment favorable to their development.” The two human rights courts with the most highly developed environmental case law are in Europe and the Americas, even though the word “environment” is not mentioned in the Convention applied by either court.

**European Court of Human Rights**

The European Court of Human Rights has several cases in which the connection between human rights and the environment has been established successfully. There are no specific environmental rights in the European Convention on Human Rights. Despite this, the right to respect for private and family life and home (Article 8) has been used in cases such as Lopez Ostra v. Spain, Fadeyeva v. Russia, Taşkin v. Turkey, and other cases to stop pollution causing harm to the health, family life, and home of plaintiffs; to oblige governments to resettle affected people; or to demand compensation for damages.

In the case of Taşkin v. Turkey, in May 1997, the Supreme Administrative Court of Turkey had invalidated a permit issued for a gold mine that would use cyanide to extract gold from ore. The court considered that, in light of the Turkish state’s obligation to protect a healthy environment and the right to life, the permit did not serve the general interest, in part because of the danger of sodium cyanide to the local ecosystem. When the Prime Minister and other authorities intervened to issue new permits despite the decision of the Supreme Administrative Court, various courts ruled that those permits were illegal. Nonetheless, the government authorized mining and related production starting in 2001 and continuing thereafter. When the matter was brought to the European Court of Human Rights, the court ruled that the mining was a violation of the right to respect for private and family life, in breach of Article 8 of the European Convention on Human Rights. It also ruled that the government’s refusal to abide by the decisions of its own courts deprived the citizens of a procedural human right, namely the right to effective judicial protection in the determination of their “civil rights.” (The particular civil right at issue was the right, under Article 56 of the Turkish Constitution, to live in a healthy and balanced environment.)

![Picture 2. White Pelican and Pigmy Cormorant are two of 325 endangered species in the Danube Biosphere reserve. (Courtesy Prof. John E. Bonine)](image-url)
The Inter-American Court of Human Rights recognized indigenous peoples’ rights to land and property in the landmark Awas Tingni case, and protected biodiversity in the process of doing so. In this case, the Court held that the international human right to enjoy the benefits of property, affirmed in the American Convention on Human Rights, includes the right of indigenous peoples to the protection of their traditional lands and natural resources. The Court held that the State of Nicaragua violated the “property” rights of the Awas Tingni Community by granting a foreign company a concession to log within the Community’s traditional lands, even though the Community did not have official legal title to the lands. The Court ruled that Nicaragua must secure the effective enjoyment of their rights. This decision ensures better conservation and sustainable use of biodiversity by indigenous people.

Other petitions have been less successful, but the attempts continue. For example, the Inuit people of Alaska and Canada have argued that the adverse impact on wildlife from climate change, which generates changes in the location, number, and health of plant and animal species, violates their fundamental human rights to life, property, culture and means of subsistence. Some species will move to different locations; others cannot complete their annual migrations because ice they normally travel on no longer exists. Reduction of sea ice has drastically shrunk habitat for polar bears and seals, pushing them toward extinction. This has impaired the Inuits’ right to subsist by altering their food sources. The Inuit petition, which was formally filed against the United States, was rejected by the Inter-American Commission on Human Rights. The petitioner received a letter stating that the Commission “will not be able to process your petition at present... the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”

However, after the Intergovernmental Panel on Climate change issued a dramatic report about global warming in February 2007, the Inter-American Commission on Human Rights started a proceeding to consider the matter of climate-related human rights, inviting the Inuit to present testimony in March 2007.

### Procedural human rights and biodiversity in international law

Procedural rights, such as the right to information, to participate in decision making, and to access to justice in environmental matters, can be a powerful tool for the conservation of biodiversity. The CBD and the Cartagena Protocol on Biosafety contain procedural rights to information and participation in decision making concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity. Parties have to “consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public....Each Party shall endeavor to inform its public...
about the means of public access to the Biosafety Clearing-House." How the public can actually enforce its right of information, participation, and consultation is unclear, however. The mechanisms adopted to assess states' compliance with their obligations under the CBD and the Protocol do not allow the public to submit complaints.

In Europe, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context established that if a development project may affect the environment of another country, the public has a right to information and to participate during preparation of environmental impact assessments (EIAs). Transboundary effects can obviously have significant impacts on biodiversity. However, as with the CBD and the Cartagena Protocol, the procedures to measure compliance with the Espoo Convention do not provide the public any right to complain if their rights to information and participation are violated. Several other MEAs do not even provide information or participation rights to the public, depending instead on the good will of governments to implement the conventions wisely. Just as they do not provide such rights, the compliance mechanisms under these other conventions do not provide the public any way to complain if a country fails to meet its obligations.

**The Aarhus Convention**

In contrast to the relative ineffectiveness of the rights in various MEAs, a relatively new convention that does not in itself explicitly protect biodiversity or conserve protected natural areas does recognize procedural human rights that, when used properly, can promote the conservation of biodiversity. That convention is the Aarhus Convention on Access to Information and Public Participation in Decision Making in Environmental Matters. It is regional in scope, covering Western and Eastern Europe, the Caucasus and Central Asia, but has global significance. According to UN Secretary General Kofi Annan, this Convention "... is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations." The Aarhus Convention's procedural rights are being tested and defined in the Convention's Compliance Committee.

**The Danube Delta case**

The Danube Delta is the ecological heart of Europe for many wildlife species. Its waters and diverse habitats support biodiversity found in few other places. According to scientists at the World Wide Fund for Nature, the Danube Delta is "the most important wetland area in Europe." It is also the...
home to 325 species of birds and 75 species of fish, several of which are listed in species Red Books and threatened with extinction.21 “The estuaries are important biological environments in that they form the spawning ground for many economically valuable marine species.”22 The importance of the area is internationally recognized. The Danube Delta has been designated a “Global 200” site, one of the world’s most significant and diverse regions23 and as a Biosphere Reserve under UNESCO’s Man and the Biosphere Program in 1998.24 Part of the Danube Delta was also designated a Wetland of International Importance under the Ramsar Convention in 1995.

Despite these international recognitions, the Government of Ukraine decided to build a deep navigation canal through the heart of the biosphere reserve without proper environmental impact assessment.25

A further Joint Mission of international experts, representing the secretariats of the Convention on the Protection of the Danube River, the Ramsar Convention, the Bern Convention, the Aarhus and Espoo Conventions, and UNESCO, and led by the European Commission, visited Ukraine on 6-8 October 2004 and made recommendations in November 2004.26 Shortly thereafter, the Standing Committee of the Bern Convention on 3 December 2004 adopted Recommendation № 111 on the proposed canal through the Bystre estuary. It recommended that Ukraine suspend all works, thoroughly explore alternative solutions for creating or recreating a shipping canal in the Danube Delta, prepare an EIA Report considering all possible alternatives, minimise deterioration of important areas for biological diversity, and, in case of canal construction, provide for ecological compensation for any possible environmental damage.27
Committee under the Espoo Convention in July 2006 stated that the canal will have adverse transboundary impacts, and that no proper EIA, including adequate public consultation, had been prepared.

The government of Ukraine has paid little attention to any of these criticisms by international bodies operating under conservation and EIA conventions, and has only partly followed their recommendations. But the citizens of Ukraine, invoking their procedural human rights, have played an important role and have had some successful results. The Ukrainian NGO Environment-People-Law (EPL, formerly Eco-pravo-Lviv) has worked to stop the construction of the canal and to protect biodiversity using national and international legal tools. It sent petitions to the secretariats of the Danube, UNESCO and Bern conventions, and a formal compliant to the Implementation Committee though Espoo Secretariat. Its most successful complaint, however, has been communication to the Aarhus Compliance Committee.

EPL built its strategy on alleging the violation of procedural rights to information and participation in decision making in the EIA prepared for the canal. The Second Meeting of the Parties of the Aarhus Convention, in Almaty, Kazakhstan, on 25-27 May 2005, adopted Decision II/5b. This decision endorses the findings of the Compliance Committee, i.e., that Ukraine failed to provide for public participation of the kind required by article 6 of the Convention, and that Ukraine failed to provide information by the responsible public authorities according to article 4 of the Convention. After initially ignoring the rulings of the Aarhus Meeting of the Parties, the government of Ukraine has begun to respond to them. The second phase of the canal construction was stopped. A new EIA was conducted with public involvement, and some of the public comments were taking into account. The government is going to re-start the canal construction, however, and a transboundary EIA that meets international standards has yet to be organized by the government. Whether the procedural rights will be strong enough to stop the damage to the area is still uncertain, but efforts to ensure biodiversity protection in this area are continuing.

Procedural human rights and biodiversity in national laws

Procedural human rights also exist in national laws and are being used to protect biodiversity at the national level.

The Tashlyk Protected Area case

Another example of the use of procedural human rights to protect biodiversity is found in the Tashlyk Protected Area case in Ukraine. The government of Ukraine plans to furnish the construction of the Tashlyk Pumped Storage Hydro Station, to be included in the South Ukrainian nuclear power complex. The scheme is to supply the station with water from the South Bug River to provide full-time operation of the nuclear station. This will be possible by storing excess energy at night through pumping water into the reservoir, and then releasing it during the day when there is higher energy demand. In conjunction with this, the government made a decision to change the water level of the Oleksandrivsky reservoir from its previous...
level of 8 meters to 16 or even 20.7 meters. The rising water will cause harm to, and possibly extinction of, unique local biodiversity, including flora and fauna listed in the IUCN Red List and covered by the Bern Convention. At the time of this writing, many habitats of such species have already been covered by water. The flooded territory also had monuments and objects of cultural and historical value.

Complaints to international bodies and pleas to the Ukrainian government to respect the status of the protected area fell on deaf ears. Then EPL, the same Ukrainian NGO mentioned before, decided to use national laws that protect procedural human rights. Acting on behalf of two citizens living near Tashlyk, EPL went to court to seek a ruling invalidating an oblast (county) action that withdrew lands from the protected area. EPL has alleged that the project violates the right of the public to participate in environmental decision making because the station is being built without proper consultation with the public during the preparation of the EIA. EPL got its first taste of victory in January 2007. A trial court ruled that the action of the Mykolaiv Oblast (County) Council, i.e., the withdrawing of land from a protected area to allow flooding, without adequate notice and public comment, violated the environmental rights to public participation. The court ruled that withdrawing land from a protected area to allow flooding, without adequate notice and public comment, violated the environmental rights to public participation.

Conclusion

More and more experts in the previously separate fields of human rights and the environment are developing a common understanding and consensus about the benefits of cooperation. Indigenous peoples’ rights depend on the sustainable use of biodiversity, and can be used to help protect it. The right to life and the right to a healthy environment can reach their full potentials only in a rich, diverse, and unspoiled environment. In this light, the human rights approach can be a powerful tool for the conservation of biodiversity, as the field has established institutions and, in its regional human rights courts, the beginning of developed case law. Furthermore, the Aarhus Convention has stronger “teeth” in terms of compliance than any other multilateral environmental agreements. Similarly, human rights claims in national courts have some potential. In terms of doctrines and tools, substantive human rights can be used to achieve goals that are important to biodiversity conservation. Procedural rights can be
used to ensure that all stakeholders participate in decision making, which will in many cases lead to more effective conservation.

Svitlana Kravchenko (slana@uoregon.edu) received her J.D. and Ph.D. in environmental law in the former Soviet Union and her LL.D. in Ukraine. She taught domestic and international environmental law for 26 years at Lviv National University in Ukraine and continues to teach at the University of Oregon School of Law. Prof. Kravchenko is the author of 174 publications in the field of environmental law, including 12 books and book chapters. She founded and is the public interest environmental law firm Ecopravo-Lviv (now Environment-People-Law) in 1994 and has served as its president since. Dr. Kravchenko served as a Vice-Chair of the IUCN Commission on Environmental Law. She was involved in the negotiations of the Aarhus Public Participation Convention and the SEA Protocol under the Espoo EIA Convention as a “citizen diplomat.” She is Vice-Chair of the Aarhus Convention Compliance Committee.

Notes

2 The Human Rights Council replaces the Commission on Human Rights, which performed many of the same functions until it concluded its 62nd and final session on 27 March, 2006.
3 States that ratified the convention.
4 The Convention on Biological Diversity, Article 27, http://www.biodiv.org/convention/articles.shtml?a=cbd-27. The Parties concerned seek a solution by negotiation. If the problem is not solved, mediation by a third party is suggested. The next steps are arbitration, and ultimately submission to the International Court of Justice.
6 An exception is the Aarhus Convention’s unique compliance mechanism, which accepts communications from the public and has considered 17 cases during just 3 years of its operation. See Kravchenko (2005).
10 Fadeyeva v. Russia, 2005.
20 WWF, 2002.
22 Coleman et al.,
23 http://www.panda.org/about_wwf/where_we_work/ecoregions/global200/pages/regions/region159.htm
24 http://www.unesco.org/mab/BR-Ramsar.htm
29 http://www.epl.org.ua/a_cases_Pumped_StorageHS.htm.
30 Ibid.

References

Kravchenko, S., “Strengthening compliance with MEAs: the innovative Aarhus Compliance Mechanism”, pp. 245-254 in Durwood Zaelke, Donald Kaniaru, and Eva Kružíková (Eds), Making Law
Indigenous peoples, protected areas and the right to restitution— the jurisprudence of the Inter-American Court of Human Rights

Fergus MacKay

Abstract. The majority of protected areas were (and continue to be) established and/or managed in violation of indigenous peoples’ internationally guaranteed rights. It is a general principle of international law that violations of international obligations that result in harm create a duty to make adequate reparation, which includes a right to restitution. This article focuses on indigenous peoples’ right to restitution of their traditional lands, territories and resources, as that right has been elaborated by the institutions of the inter-American human rights system, especially the Inter-American Court of Human Rights. Jurisprudence articulating and upholding indigenous peoples’ property rights and right to restitution is examined, and a pending case that explicitly seeks restitution of indigenous lands incorporated into protected areas is discussed. The article looks at the interaction between human rights norms and the Convention on Biological Diversity (CBD), and argues that it is important that the nexus between these two bodies of interrelated law is given greater emphasis by governments and conservation organisations. Further, it argues that Article 10(c) of the CBD and its future elaboration in a decision of the Conference of Parties provides ample opportunity to officially merge environmental and human rights norms, and to ensure that the protection of biological diversity and ecosystems not only takes into account the rights of indigenous peoples, but is fully consistent with those rights.
One of the most pressing issues facing conservation groups, governments and indigenous peoples today is how to ensure the effective protection of biological diversity without compromising indigenous peoples’ rights. This is especially pertinent in connection with the establishment and management of protected areas. By some estimates, around 50 percent of existing protected areas worldwide are on lands traditionally owned by indigenous peoples, and in the Americas this number increases to over 80 percent. Additional protected areas, including marine areas, are also planned all over the world, many of them incorporating or affecting indigenous peoples’ territories. The vast majority of these protected areas were (and continue to be) established and/or managed in violation of indigenous peoples’ rights: *inter alia*, to own their traditional territories, to consent to decisions that affect them, and to secure access to subsistence resources and areas of religious or cultural significance.

It is a general principle of international law that “every violation of an international obligation which results in harm creates a duty to make adequate reparation.” Thus, governments that violate indigenous peoples’ rights by establishing protected areas within their traditional territories without their free, prior and informed consent are obliged to make reparations. One method of repairing violations is the restitution of lands and resources and the restoration of other rights abrogated in the establishment and management of protected areas.

This article focuses on indigenous peoples’ right to restitution of their traditional lands, territories and resources as that right has been elaborated by the institutions of the inter-American human rights system, especially the Inter-American Court of Human Rights (“the Court”). Because the Court has specified that an obligation to return or restore indigenous peoples’ lands is integral to the right to property, in addition to a specific remedial measure, I begin by looking at the rights indigenous peoples hold over their traditional territories in inter-American human rights law. This is followed by a discussion of the Court’s jurisprudence on the restitution of indigenous lands and a section describing a pending case that explicitly seeks restitution of indigenous lands incorporated into protected areas.

**Rights to Lands, Territories and Resources**

The primary organs of the inter-American human rights system are the Court and the Inter-American Commission on Human Rights (“IACHR”). These bodies supervise compliance with two main human rights instruments: the 1948 American Declaration on the Rights and Duties of Man and the 1969
American Convention on Human Rights ("ACHR"). The IACHR is competent to receive complaints about alleged violations of the American Declaration, which is applicable to all members of the Organization of American States ("OAS"), and the ACHR, presently applicable to 25 of the 34 OAS member states. The IACHR issues recommendations rather than binding decisions. The Court is competent to adjudicate contentious cases provided that the respondent state is a party to the ACHR and has accepted its jurisdiction (22 states have accepted the Court’s jurisdiction). The decisions of the Court are, as a matter of international law, binding on respondent states and may be executed in domestic courts.4

The IACHR and the Court have resolved a number of cases involving indigenous peoples’ rights to lands, territories and resources, and a large number of cases are presently pending. In their decisions and judgments the Court and the IACHR have repeatedly held that indigenous peoples’ property rights derive from their own laws, their land tenure systems, and their traditional occupation and use, and that these rights are valid and enforceable absent formal recognition in national laws.5

In the 2004 Maya Indigenous Communities Case, for instance, the IACHR observed that “the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a State’s formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.”6 It held that Belize is obligated to “effectively delimit and demarcate the territory to which the Maya people’s property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right.”7

In the Mary and Carrie Dann Case, the IACHR interpreted the American Declaration to require “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources....”8 It also observed that “general international legal principles applicable in the context of indigenous human rights” include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; [and to] the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied.”9

In the landmark Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua Case, the Court confirmed that indigenous peoples’ territorial rights arise from traditional occupation and use and indigenous forms of tenure, not from grants, recognition or registration by the state. The latter simply confirm and secure pre-existing rights. In its 2001 judgment, the Court held that “[a]s a result of customary practices, possession of land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”10 It ordered, among others, that “the State must adopt the legislative, administrative,
and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.”

These norms have been reaffirmed and further elaborated on by the Court in three further judgments issued in 2005 and 2006. In the 2006 Sawhoyamaxa Indigenous Community Case, for example, the Court observed that its jurisprudence holds that “traditional indigenous land ownership is equivalent to full title granted by the State [and]; traditional ownership grants the indigenous people the right to demand official recognition of their property and its consequent registration.” In the 2006 Moiwana Village Case, the Court held that Suriname had violated the right to property of a tribal community and ordered the state to adopt legislative and other necessary measures to restore and ensure the community’s property rights, “with the participation and informed consent of the victims” and neighbouring indigenous peoples.

The Court also established important norms in relation to displaced persons and communities in Moiwana, an issue that is highly relevant to protected areas, especially in Africa. It held that the many of the United Nations Guiding Principles on Internal Displacement “illuminate the reach and content ... of [the right to freedom of movement and residence in Article 22 of the ACHR] in the context of forced displacement.”

One of the Guiding Principles emphasized by the Court provides that “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.”

What this may mean in cases where indigenous peoples are threatened with displacement or have been displaced in relation to development projects or protected areas remains to be seen. Nevertheless, it is an important benchmark against which the design and implementation of these activities should be assessed.

It is important to note that the norms set forth above are not unique to the inter-American system. Indigenous peoples’ rights to own and control their traditional territories are also protected in similar terms under United Nations human rights instruments. The Committee on the Elimination of Racial Discrimination, for example, has called on state parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.” It routinely reaffirms this basic principle when examining state reports and in decisions under its urgent action procedure.

The Convention on Biological Diversity ("CBD"), an international environmental treaty, also addresses indigenous peoples’ rights, including in relation to the establishment and management of protected areas. Decision VII/28 on Protected Areas, adopted by the 7th Conference of Parties to the CBD, provides that “the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities. 

Indigenous peoples’ own research demonstrates that secure land tenure rights and control over traditional territory and resources are critical elements of the sound conservation, use, and management of biological diversity.
consistent with national law and applicable international obligations.”

These applicable international obligations are defined, inter alia, in international human rights law including the jurisprudence of the IACHR and the Court. Decisions of the CBD Conference of Parties represent authoritative interpretations of the CBD and thus are legally binding on state parties.

Article 10(c) of the CBD further provides that state parties shall “protect and encourage [indigenous peoples’] customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” This article, by implication, should also be read to include protection for rights to lands and resources and to require recognition and protection of indigenous institutions and customary laws relating to ownership, use and management of biological resources.

These conclusions are supported by the analysis of the Secretariat of the CBD, which explains that:

In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.

Finally, in line with UN human rights treaty bodies, the IACHR has consistently held that indigenous peoples’ informed consent is required in relation to activities that affect their traditional territories. As a general principle, it observes that inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”

This right to consent applies to traditionally-owned indigenous lands and territories, and is not restricted to indigenous property rights as recognized by national laws. Parallel to this, the Court has ordered that states “refrain from actions— either of State agents or third parties acting with State acquiescence or tolerance— that would affect the existence, value, use or enjoyment” of indigenous peoples’ property at least until such time as their property rights are secured in law and fact. Similar orders have been issued in the Court’s provisional measures jurisprudence.

These conclusions are further supported by indigenous peoples’ own research on the measures needed to implement and give effect to Article 10(c). Conducted in five countries around the world, these studies demonstrate that secure land tenure rights and control over traditional territory and resources are critical elements of the sound conservation, use, and management of biological diversity. They also show that indigenous peoples’ institutions and customary laws are intrinsic to biodiversity and ecosystem protection and management, and have evolved based on detailed and long-standing interactions with the natural environment.
The Right to Restitution

In international law, violation of a human right gives rise to a right of reparation for the victim(s). Reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The UN Special Rapporteur on the right to restitution, compensation and rehabilitation states that, “Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.”

Similarly, the Court has consistently held that “Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*), which includes the restoration of the prior situation ...” and compensation or other forms of indemnification for material and immaterial damages.

In the 2005 *Yakye Axa Indigenous Community Case*, the Court first addressed indigenous peoples’ right to the restitution of their traditional lands. Among others, it determined that a violation of the right to property had occurred because Paraguay had failed to effectively restore and secure the rights of the Yakye Axa to their traditional lands, large parts of which were held by private persons. It ordered that the state identify these traditional lands, regularize the indigenous people’s ownership rights, and establish a fund for the expropriation of privately held lands to ensure their return, free of charge, to the

Similar violations were also found in the *Sawhoyamaxa Indigenous Community Case*. Reviewing its jurisprudence, the Court explains that indigenous peoples maintain their property rights in cases where they have been forced to leave or have otherwise lost possession of their traditional lands, including where their lands have been expropriated or transferred to third parties, unless this was done in good faith and consensually. Thus, according to the Court, “title is not a prerequisite that conditions the existence of the right to restitution of indigenous lands.” Note that the Court has elaborated this right of restitution as part and parcel of indigenous peoples’ right to property rather than as a separate remedial measure.

The Court also examined the temporal scope of indigenous peoples’ right to restitution in *Sawhoyamaxa*. It held that the right to restitution continues as long as indigenous peoples maintain some degree of spiritual and material connection with their traditional territories. Evidence of the requisite connection may be found in “traditional spiritual or ceremonial use or presence; settlement or sporadic cultivation; seasonal or nomadic hunting, fishing or harvesting; use of natural resources in accordance with customary practices; or any other factor characteristic of the culture of the group.” The Court further held that if indigenous peoples are prevented by others from maintaining their traditional relationships with their territo-
ries, the right to recovery nonetheless continues “until such impediments disappear.”

If a state is unable to return indigenous peoples’ traditional lands and communal resources for “concrete and justifiable reasons,” compensation or the provision of alternative lands is required. In such cases, the Court requires that indigenous peoples’ consent be obtained, “in accordance with their own consultation processes, values, uses and customary law,” with regard to choices about the provision of compensation or alternative lands.

While neither the IACHR nor the Court have had occasion to apply the above jurisprudence to a case involving protected areas, this is only a matter of time. One case is presently pending before the IACHR that directly requests restitution of indigenous lands incorporated into protected areas (discussed below). Additionally, although the IACHR and the Court have yet to address indigenous peoples’ rights in the context of protected areas, in addition to applying the norms enumerated by the Court, they are also likely to be persuaded by the jurisprudence of the UN Committee on the Elimination of Racial Discrimination (“CERD”). This is all the more likely given that the provisions utilised by CERD (protecting property and participation rights) employ similar language to that found in relevant provisions of the ACHR.

CERD has articulated two main interrelated rules applicable to establishment of nature reserves in indigenous peoples’ territories. First, in 2002, the Committee held that “no decisions directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent” in connection with a nature reserve in Botswana. Second, with regard to a national park in Sri Lanka, the Committee called on the state to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.” More generally, CERD has recognized that indigenous peoples have a right to restitution of their traditional territories and resources, which in principle also applies to nature reserves, stating that: “Bearing in mind its general recommendation 23 on the rights of indigenous peoples ... where they have been deprived of their lands and territories traditionally owned, or such lands and territories have been otherwise used without their free and informed consent, the Committee recommends that the State party take steps to return those lands and territories.”

Picture 2. The Lower-Marowijne river has been home to indigenous peoples’ for over 4,000 years. In the 1970s its beaches attracted city dwellers who obtained land titles and dispossessed the indigenous communities. Atlantic Coast beaches, frequented by sea turtles, have been declared nature reserves without the indigenous peoples’ consent. (Courtesy Ellen-Rose Kambel)
The Case of the Kaliña and Lokono indigenous peoples

A case is presently pending before the IACHR that, *inter alia*, explicitly seeks the restitution of indigenous lands that have been converted into protected areas. This case was submitted by the Kaliña and Lokono indigenous peoples of northeast Suriname and complains about three nature reserves within their territory, all created pursuant to Suriname’s 1954 Nature Protection Act: the Galibi Nature Reserve (1969), the Wane Kreek Nature Reserve (1986) and the Wiawia Nature Reserve (1966). The Wane Kreek Reserve alone covers an area of 450 square kilometers, some 50 percent of the indigenous peoples’ traditional territory.

These reserves were established without the Kaliña and Lokono’s participation and consent, and they negatively affect their rights on an ongoing basis. This is acknowledged in the Galibi Nature Reserve Management Plan 1992-96, which states that, “Although the government discussed the establishment of the Galibi Nature Reserve with the local population, the villagers were not involved in the decision-making process. They were confronted with the reserve as a *fait accompli*, something to which everyone would have objections.”

Suriname’s Nature Protection Act makes no reference to the existence of indigenous peoples, nor does it recognize or protect their ownership rights to their traditional territories. The same is true for Surinamese law in general. Article 1 of the Act provides that “For the protection and conservation of the natural resources present in Suriname... the President may designate lands and waters belonging to the State Domain as a nature reserve.” As indigenous territories are legally classified as state lands (state domain), this provision permits the state to unilaterally declare any indigenous territory or part thereof to be a nature reserve by decree. The Act also makes no provision for the exercise of indigenous peoples’ rights within nature reserves. Rather, under the Act, hunting, fishing or damage to the soil or the flora and fauna within the reserves are strictly prohibited and punishable.
as criminal offences. While this prohibition remains in force for indigenous peoples, large-scale bauxite mining, authorized by the state, is taking place in the Wane Kreek Reserve.

Applying the IACHR and the Court’s jurisprudence to this situation, it is clear that the Kaliña and Lokono peoples’ have protected property rights in and to their traditional territory irrespective of whether these rights are recognized in Suriname’s domestic laws. The nature and extent of these property rights is defined in the first instance by the indigenous peoples’ customary laws and traditional tenure systems. As explained by the Court, “traditional ownership grants the indigenous people the right to demand official recognition of their property and its consequent registration.”

Also, until such time as the Kaliña and Lokono’s property rights are secured in law and fact, Suriname is further obligated to “refrain from actions— either of State agents or third parties acting with State acquiescence or tolerance— that would affect the existence, value, use or enjoyment” of their property rights. Irrespective of whether title is recognized and secured in domestic laws, the state must seek indigenous peoples’ consent prior to undertaking or authorizing activities that may affect their traditional territories.

Where the Kaliña and Lokono have been dispossessed of their traditional lands without their consent— as is the case with the protected areas— and provided that they continue to maintain some degree of material or cultural/spiritual connection to these lands (which they do), they hold an ongoing right of restitution that is integral to satisfying their property rights. These lands therefore must be returned unless the state can demonstrate that there are ‘justifiable and concrete’ reasons that prevent it doing so. This is a requirement that will be very difficult for the state to satisfy unless the areas’ protected status itself is judged to be a justifiable and concrete reason.

If we assume for the sake of argument that the IACHR or the Court will find that the protected status of land constitutes a valid excuse from the restitution requirement— an unlikely outcome in my view— application of the Court’s jurisprudence should further require that the interests of the state in maintaining its proprietary rights in the protected area be weighed against the rights and interests of the Kaliña and Lokono.

In undertaking such an analysis, the Court stresses that indigenous peoples’ territorial rights are fundamentally related to collective rights of survival, and that their control over territory is a necessary condition for the reproduction of culture, their development and life plans, and their ability to preserve their cultural patrimony.

It should also be noted in this context, that the Court also has held that restricting or denying indigenous peoples access to their traditional means of subsistence are prohibited by the ACHR. In Moiwana Village, for instance, the Court presumed the existence of material harm, inter alia, on the grounds that the community members’ “ability to practice their customary means of subsistence and livelihood has been drastically limited.”

Given indigenous peoples’ fundamental and compelling interests in maintaining their relationships with their territories,
the state will be hard pressed to demonstrate that its interests are paramount and should prevail. This is especially the case given the size of the protected areas (more than 50 percent of the Kaliña and Lokono’s traditional territory) and the fact that indigenous ownership *per se* does not preclude the continuation of ecosystem or species protection measures, or even the continuation of the protected areas themselves. Indeed, the Kaliña and Lokono would argue that they are more effective at protecting these areas than the state has been or is likely to be in the future. The continuation of protected area status would nevertheless have to be negotiated and consented to by the Kaliña and Lokono.

Finally, there is a general rule of international law that a state cannot be held liable for its acts and omissions that predate its accession to an international treaty. Suriname would argue that it acceded to the ACHR in 1987 and therefore that alleged violations of that instrument in relation to the protected areas are inadmissible because all were established prior to that date. However, while upholding this rule, the Court held that it is permissible to examine possible violations of the ACHR that originate in events predating acceptance of its jurisdiction insofar as they concern related “effects and actions” that are ongoing and continuous. The Court’s approach is also subscribed to by other international courts and tribunals, including the IACHR and the International Labour Organization in cases involving indigenous peoples, which routinely exercise jurisdiction over alleged breaches of international law that began before the date of a state’s ratification and continue thereafter.

In the context of the Kaliña and Lokono, the ongoing and continuing effects and consequences of the establishment of the nature reserves include denial of their property rights and denial of access to and security over their subsistence and other resources. These deni-
als constitute violations of the ACHR, which, although originating in events prior to Suriname’s accession to that instrument, are presently actionable. This is obviously relevant beyond the confines of the specific case in Suriname and would apply to protected areas throughout the Americas (and beyond, given that the principles are very similar under United Nations human rights instruments). The admissibility of ongoing and continuous effects, coupled with the Court’s jurisprudence with regard to the right to restitution, therefore raise questions about the legitimacy on human rights grounds of most protected areas affecting indigenous peoples in the Americas.

**Concluding remarks**

The preceding issues are not new to the conservation community. Indigenous peoples’ territorial rights and the right to restitution were extensively discussed at the 2003 World Parks Congress, and the *Durban Accord: Action Plan* acknowledges that there is “an urgent need to re-evaluate the wisdom and effectiveness of policies affecting indigenous peoples and local communities.” The Accord’s ‘key targets’ include full respect for the rights of indigenous peoples in relation to all existing and future protected areas; and, by 2010, the establishment and implementation of “participatory mechanisms for the restitution of indigenous peoples’ traditional lands and territories that were incorporated in protected areas without their free and informed consent ....” However, there appears to be little will to fully pursue these targets on the part of governments or conservation organizations.

What is new is the post-Durban jurisprudence of the Court that affirms and provides additional detail about the nature and extent of indigenous peoples’ territorial rights and the right to restitution. This jurisprudence also demonstrates that respect for these rights is not a matter of discretionary conservation policy and targets, but is instead a matter of international legal obligation for the countries of the Americas and Caribbean. The 2004 decision on protected areas adopted by the CBD Conference of Parties should also be read constently with this jurisprudence and thus provide a much needed human rights perspective to our understanding of international environmental law in this area. Indeed, the two bodies of law should not be viewed as mutually exclusive but as interrelated and complementary. This will require a substantial reformulation of protected areas laws and institutions, both to remedy past violations of indigenous peoples’ rights and to ensure that these rights are protected in the future.

It is also important to bear in mind in this context that the jurisprudence of the Court has also been incorporated by reference into the Inter-American Development Bank’s (“IADB”) 2006 Operational Policy 7-65 on Indigenous Peoples. This policy requires special safeguards for indigenous peoples in projects that directly or indirectly affect their traditional lands, territories and resources, and specifies that “one of those safeguards is respect for the rights recognized in accordance with the applicable legal norms.” The definition of ‘applicable legal norms’ includes ratified international treaties “as well as the corresponding international jurisprudence of the Inter-American...
Court of Human Rights or similar bodies...”66 This is relevant to the subject at hand because the IADB is now one of the primary implementing agencies in the Americas for Global Environment Facility-funded projects. Therefore, in principle, GEF projects implemented by the IADB, including protected area projects, must respect the rights of indigenous peoples, among others, as elaborated in the jurisprudence of the Court.

The post-Durban failure to achieve meaningful progress towards meeting the key targets on indigenous peoples does little to build confidence and leaves those so inclined few options other than to invoke domestic and international legal remedies to challenge the validity of protected areas and their management regimes. The Kaliña and Lokono case is one of the first international cases and others are sure to follow. While the details of that case may be peculiar to Suriname, the situation is not that different from many other countries around the world.

Article 10(c) of the CBD and its future elaboration in a decision of the Conference of Parties provide fertile ground to begin to address some of the deficits in conservation practice related to indigenous peoples’ rights. They also provide ample opportunity to merge environmental and human rights norms and to ensure that the protection of biological diversity and ecosystems not only takes into account the rights of indigenous peoples, but is fully consistent with those rights. This will require addressing land and resource tenure rights, recognizing indigenous peoples’ right to control and freely determine how best to utilize their territory and resources, and developing and implementing a framework for negotiating mutually acceptable and beneficial conservation agreements with indigenous peoples. By supporting this, conservation organizations and governments can demonstrate that they are serious about achieving the Durban targets, protecting biological diversity, respecting human rights, and engaging in respectful relationships with indigenous peoples.

Notes
1 Amend & Amend, 1992.
2 See, Handl 2002, p. 85-110, (explaining the bases in international and comparative law for cultural and subsistence lifestyle damage claims by indigenous peoples.)
4 Article 67 of the American Convention on Human Rights provides that “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.”
6 Report No. 40/04, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize), 12 October 2004, at para. 117.
7 Id. at para 132 (footnote omitted).
9 Id. at para 130 (footnotes omitted).
10 Mayagna (Sumo) Awas Tingni Community Case, August 31, 2001, Series C No 79, at para. 151.
11 Id. at para. 164.

Fergus MacKay (fergus@euronet.nl) is the Coordinator of the Legal and Human Rights Programme of the Forest Peoples Programme.
...but conservation and human rights can also work in mutual support...

No. 124; Sawhoyamaxa Indigenous Community v. Paraguay, supra.

13 Sawhoyamaxa Indigenous Community, supra, para. 248.

14 Id. at para. 128.

15 Moiwana Village v. Suriname, supra note 46, para 128-35.

16 Id. at para 209, 233.

17 Id. at para 210.

18 See, also, Case of the Massacres of Ituango v. Colombia, Judgment of 1 July 2006. Series C No. 148; Kankuamo Indigenous Community v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of July 5, 2004, at Resolution 3 (requiring immediate measures to protect the right to freedom of movement including those to permit displaced indigenous persons to return to their traditional lands); Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of March 6, 2003, at para. 9 (an Afro-Colombian tribal community who “are all in a situation of equal risk of ... being forcibly displaced from their territory, a situation that prevents them from exploiting the natural resources necessary for their subsistence”); and Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of February 7, 2006, para. 9, 12.


20 Moiwana Village, supra, at 111.

21 Id.

22 See, for instance, Mackay, 2005 and Mackay 2006.


24 Decision VII/28 Protected Areas, at para. 22. In, Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting. UNEP/BDP/COP/7/21, pp. 343-64.

25 This is acknowledged in the Adis Ababa Principles and Guidelines on Sustainable Use of Biodiversity, adopted in 2004 by the VIIth Conference of Parties to the CBD, especially in Principles 1 and 2.

26 Traditional Knowledge and Biological Diversity, UNEP/CBD/TKBD/1/2, 18 October 1997.

27 The results of these studies are summarized in M. Colchester 2006.


29 Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans, 2 March 2006, para. 214; Mary and Carrie Dann Case, supra, para. 131; Report No. 40/04, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize), 12 October 2004, para. 142. These issues are discussed in greater detail in S.J. Anaya 2005.

30 Mary and Carrie Dann Case, supra, at para 131.

31 Moiwana Village Case, supra, at para 211; and Mayagna (Sumo) Indigenous Community Case, supra, para 164.


33 Van Boven 1993.

34 Id. at p. 57.


36 Yakye Axa Indigenous Community Case, supra, para. 217.

37 Sawhoyamaxa Indigenous Community, supra, para. 248.

38 Id.

39 Id. at para. 128

40 Id. at para. 131.

41 Id.

42 Id. at 132.

43 Id. para. 138-9.

44 Yakye Axa Case supra, at para. 151 and; Sawhoyamaxa, supra, para. 135.


47 Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, 15/05/06. UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 17.


49 See, Report on Admissibility and Merits No. 09/06, Twelve Saramaka Clans, supra, at para. 230 and, Moiwana Village, supra, para. 86(5).


51 Id. Art. 5: “Within a nature reserve it is prohibited: a) to purposely or negligently damage the condition of the soil, the natural beauty, the fauna, the flora, or to perform acts which harm the value of the reserve itself;” and, Art. 8: “Violation of this law will be punishable with imprisonment not exceeding 3 months or with a fine of one thousand guilders maximum.”

52 Id. at para. 128.
Conservation and Human Rights

53 Moiwana Village Case, supra, at para 211; and Mayagna (Sumo) Indigenous Community Case, supra, para 164.

54 Yakye Axa Case, supra, para. 146.

55 Case of the Masacres de Ituango v. Colombia, 1 July 2006. Series C No. 148; Kankuamo Indigenous Community v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of July 5, 2004, at Resolution 3 (requiring immediate measures to protect the right to freedom of movement including those to permit displaced indigenous persons to return to their traditional lands); Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of March 6, 2003, at para. 9 (an Afro-Colombian tribal community who “are all in a situation of equal risk of ... being forcibly displaced from their territory, a situation that consists in exploiting the natural resources necessary for their subsistence,”); and, Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures), Order of the Inter-American Court of Human Rights of February 7, 2006, para. 9, 12.

56 Moiwana Village Case, supra, at para. 186-7.


58 Report No. 26/00 (Admissibility), Village of Moiwana, 7 March 2000, para. 18; and, Report No. 60/99 (Admissibility), Ovelario Tames., 13 April 1999, para. 26 and 27.

59 Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers. Doc.GB.273/15/6; GB.276/16/3 (1999), at para. 36. See also, Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sullermik Inusussitassiuqeqartut Kattuffat (SIK). Doc. GB.277/18/3; GB.280/18/5 (2001), para. 29.


61 Id, at p. 26.


64 Inter-American Development Bank 2006.

65 Id, at 8.

66 Id, at 5.

References


http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf

http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_vol02_06_eng.pdf


The role of parliaments in fostering environment-related human rights

Hanna Jaireth

Abstract. This article argues that parliaments can play a significant role in protecting environment-related human rights, and that NGOs should encourage this, while mindful of the potential limitations of such involvement. While some parliaments already make a contribution to the protection of environment-related human rights (examples are included in this paper), improvements could be made and more parliaments could become engaged. The paper outlines the benefits for NGOs of focusing action on parliaments rather than on other governance sites.

Environment-related human rights

It is generally accepted that humanity and global biodiversity are endangered by unsustainable production and consumption, and by the degradation of the planetary environment. The declining ability of some areas to provide a decent quality of life for significant human populations, and the disproportionate impact that some segments of the human population have on others, raise human rights issues. But so do other local matters from inappropriate development on indigenous peoples’ land to forced resettlement, denial of access to customary territories and resources, poorly administered town planning regimes, inappropriate aircraft flight paths, the siting of waste disposal facilities or the denial of access to information or the right to protest.¹

Multilateral treaty obligations, such as those in the international human rights covenants and conventions, and environmental treaties such as the Convention on Biological Diversity, tend to be vaguely worded concerning the linkages between human rights and the environment. They do not yet explicitly recognise a fundamental and distinct human right to a safe and healthy environment. And yet, many well-established civil, political, economic, social and cultural rights can apply to environmental concerns and sustainable development.²

Environment-related human rights in the international bill of rights include the rights of minorities; the right to equality before the law; to life; to protection of the family and the rights of the child; to privacy and reputation; to peaceful assembly and association; to freedom of expression; to take part in public life; and to a fair trial. Non-binding multilateral declarations also

1. Walk Against Warming outside of the ACT Legislative Assembly on the International Day of Action on Climate Change, 4 November 2006. (Courtesy Dave Long and the Conservation Council for Canberra and South East Region)
tend to recognise the human rights and environment linkages.

The interdependence of human rights and sustainable development is the subject of ongoing discussion within the UN, and was recognised in the Implementation Plan agreed at the Johannesburg World Summit on Sustainable Development. The implementation of the UN Millennium Development Goals has been linked directly with international human rights obligations. The 1994 Ksentini report to the UN Human Rights Commission on the links between human rights and the environment stimulated broad ranging international discussions, but not yet the development of specific international instruments.

Several regional agreements recognise a broad human right to a healthy environment, but some regional initiatives have failed to give appropriate recognition to environment-related human rights. For example, among the web-accessible reports to the 2006 Asia Pacific Forum on National Human Rights Institutions, only India’s and Thailand’s mentioned environmental rights.

More than 100 national constitutions protect environmental rights, and parliaments can be required to not legislate inconsistent with these. Domestic judiciaries in various countries have affirmed the right to a healthy environment in constitutional or statutory litigation. Some jurisdictions also have statutory bills of rights, which were enacted following consultative exercises.

The recognition of environment-related human rights provides a foundation for broader global standard-setting, and compliance reporting by diverse social actors. But it is more important for enabling the domestic implementation of these recognised rights. Encouraging parliaments at all levels to recognise and protect these rights can be an effective means of ensuring their realisation. There is also growing international interest in protecting the rights of human rights defenders, including those of activists promoting environment-related human rights.

The role of parliaments, and committees in particular

Parliaments, which are often representative or partially-representative bodies, are arguably as well-placed as the judicial institutions to insist on adherence to internationally-recognised standards protecting basic human dignity. Both types of governance institutions have embarrassments on their record. But for parliaments, a temporary capacity to deny rights with impunity may reflect electoral will, authoritarian rule, or majority government. These causes are impermanent, and it is up to social actors to insist that their environment-related human rights are recognised and protected. The Commonwealth Parliamentary Association has taken a
commendable lead in capacity-building for parliamentarians in the general area of human rights, but more can be done with environment-related human rights.

In the exercise of their legislative powers, most parliaments have enacted a panoply of legislation concerned with environment-related human rights to resources (land and other property rights, native title, co-management, gender-based rights etc), access to information, due process, privacy, non-discrimination etc, although these do not often explicitly acknowledge their rights-based genealogy. Although the terms and implementation of this legislation may fail to deliver on its promise, this is likely to result in on-going campaigns. For example, the limited gains from native title legislation in Australia continue to rankle with social justice proponents, including Indigenous Australians. So does governments’ tendency to frustrate the implementation of freedom of information legislation. But this does not deny the potential of parliaments to enact rights-affirming legislation, and simply invites more effective campaigning and the mobilisation of authoritative (or otherwise influential) networks to provide advice supporting reform.

With a broader human rights focus, parliaments can ensure that all legislation it enacts is human-rights compliant. ‘declarations of compatibility’. Several jurisdictions also permit the judiciary to issue ‘declarations of incompatibility’, where legislation cannot be interpreted as consistent with human rights but leaves it to the parliament to remedy the breach. Despite such legislation, political exigencies, including a commitment to parliamentary sovereignty and a reluctance to regulate extra-territorial trans-national corporate activities, can thwart well-intentioned commitments.

The case law that these statutory declarations of rights have produced do not include radical judicial pronouncements on the scope of environmental rights, but this could have hardly been expected. Judiciaries in most countries are usually reluctant to intervene where large-scale resource-allocation questions are at issue, and where governments already regulate the market. There have, however, been a few litigation wins for complainants in extreme cases. The failure of litigants to succeed in court should not be a deterrent to engaging parliaments on environment-related human rights issues, however, as the political arena can be effective for resolving values-based conflicts, provided political communities are effectively engaged on the issues.

There are a range of parliamentary opportunities for asserting and protecting human rights, as parliaments are supposed to hold the executive arm of government to account. A range of opportunities in parliamentary chambers can be used to debate and scrutinise executive actions: question time, speeches on matters of public importance, adjournment debates, and debate in the committee of the whole. In general, however, parliamentary committee work is recognised as the most
influential scrutiny mechanism.

There is potential in establishing (where they do not exist) and strengthening and clarifying the terms of reference of parliamentary standing committees for the scrutiny of legislation, regulations and subordinate instruments. Such committees can influence the development of human rights cultures in governance institutions and can develop expertise in specialised areas, such as environment-related human rights. These committees review bills and advise the parliament if they unduly trespass on rights and freedoms, make them unduly dependent on insufficiently defined administrative powers or non-reviewable decisions, inappropriately delegate legislative powers or insufficiently subject the exercise of legislative power to parliamentary scrutiny. For example, the UK Parliament’s Joint Committee on Human Rights reviews legislation. Typically such committees refer to domestic law, international human rights law and the law and jurisprudence of other jurisdictions as sources for the standards they apply for their scrutiny work. Ministers usually respond formally to issues raised by the committee and, if the concerns are accepted, may amend the offending legislation or develop remedial administrative procedures. The correspondence is usually on the public record, but issues identified tend to be muffled in technical or oblique language, which may be ignored, and direct recommendations are rarely made.

Many parliaments have standing or select committees with ‘environment’ and/or ‘sustainability’ in their terms of reference. Such broader reference or legislative parliamentary committees can undertake substantial and detailed scrutiny and policy development work. In the Australian Capital Territory, the Standing Committee on Planning and Environment has canvassed the human rights implications of planning proposals and reform legislation. Other committees may focus on indigenous peoples, on mobile or settled communities, or on the legislative and policy frameworks for the sustainable development for these communities. As they tend to operate in a rather independent way, their attention to human rights issues tends not to draw on the expertise of the scrutiny committees. It is thus incumbent on stakeholders, MPs and committee staff to develop expertise on human rights issues and apply it to general committee work.

There have been several inquiries in recent years that demonstrate how parliamentary committee work can foster environment-related human rights. The 2005 Report of the Canadian House of Commons Standing Committee on Foreign Affairs and International Trade, for example, made far-reaching recommendations on the need for Canadian companies operating in developing countries to be more accountable for environmental and human rights violations. It called for stronger incentives and regulatory measures to encourage corporate social responsibility (CSR) and better compliance with international human rights standards. It also called for an investigation into the impact of TVI Pacific Canatuan mining project in Mindanao (Philippines) on the indigenous rights.
What ARE Human Rights, anyway?

Conservation can undermine Human Rights... but conservation and human rights can also work in mutual support... and human rights of people in the area, and on their environment. The government’s non-regulatory response disappointed some civil society stakeholders, including Amnesty International, but the report provides a lightning rod for further lobbying. The government response proposed a series of national roundtables to discuss the report’s recommendations and co-operative international work to clarify the CSR framework; expressed support for the UN Secretary-General’s special representative on human rights and transnational corporations; and expressed a commitment to incorporating human rights best practice into projects’ due diligence processes, improving advisory services; and improving corporate transparency. In Australia, a similarly groundbreaking report was the 2006 report of the Parliamentary Joint Committee on Corporations and Financial Services on corporate responsibility.

Despite the potential for work in this area, some parliamentary committees have not given a high priority to environment-related human rights. The European Parliament’s Environment Committee, for example, seems not to have focussed on environment-related human rights despite the relatively strong human rights institutions in Europe. Some other parliamentary committees have not explicitly recognised the human rights aspects inherent in their recommendations. In Zambia for example, the Committee on Local Governance, Housing and Chiefs’ Affairs recommended in 2006 the development of mechanisms for sharing revenues from game licence fees between the Zambia Wildlife Authority, district councils and local communities, without referring to the human rights aspects of this issue (such as rights to culture, equality before the law and right to property).

Some parliamentary committees monitor or scrutinise the findings other oversight bodies such as human rights commissioners, ombudsmen, auditor-generals or commissioners for the environment. Public Accounts Committees tend to scrutinise Auditor-Generals reports. Some parliamentary officers focus are more specifically on environmental issues. New Zealand, for example, has a Parliamentary Commissioner for the Environment (PCE) appointed for a 5-year term by the Governor-General on the recommendation of the NZ Parliament. The Environment Act 1986 establishes the office of the PCE and details the Commissioner’s powers

Pictures 3 and 4. Citizen action can be an important part of the campaign for parliaments to better protect environment-related human rights, such as this ‘Walk Against Warming’ (see also Picture 1). (Courtesy Dave Long and the Conservation Council for Canberra and South East Region)

Policy Matters 15, July 2007
and functions. Through their scrutiny of budget estimates and appropriation legislation, parliaments can also insist on pro-human rights budgets.

### Advantages and benefits

There are several advantages in seeking parliamentary engagement on environment-related human rights in a political rather than purely legal sense. Committee recommendations, if accepted by government, can lead directly to reform. If not agreed, or if additional and dissenting comments are included (usually on party lines), the differences between parties on issues becomes transparent and can provide guidance for electors or political campaigns.

A distinct advantage of a parliamentary focus is that all members of parliament (MPs) and witnesses appearing before a parliamentary body, and all work done in the course of parliamentary proceedings, are protected by the privileges and immunities of parliament. This means that no legal action, including actions for defamation, can be instituted as a result of anything said or done during those proceedings. This is a powerful advantage in liberal democracies. Some jurisdictions have conferred an additional protection for activists outside the parliamentary context, by restricting the ability of corporations to pursue strategic litigation to silence critics (SLAPP litigation), and/or to sue for defamation. Of course, environmental and human rights activists are still detained in many jurisdictions (with notorious examples recently in Turkmenistan, China, Indonesia and Russia), but this does not reduce the protective mantle of parliaments in jurisdictions that better recognise democratic freedoms. Permitting dissent and attempting to resolve it peacefully and politically is a far better governance approach for long-term peace and stability, and parliaments that insist on compliance with human rights standards are likely to have greater legitimacy and authority amongst the less powerful in society.

The powers that are available to parliamentary committees are also substantial, and can be exercised without significant financial expense. Parliamentary committees’ ability to call for persons and papers can be an effective means for ensuring that ministers and others are held accountable and responsible to the parliament and stakeholders. Usually, witnesses are willing to provide submissions and evidence to parliamentary committees and to voluntarily appear as witnesses. On the other hand, various powers, privileges and immunities can be invoked to encourage reluctant witnesses to cooperate.

Conduct that amounts, or is intended or likely to amount, to an improper interference with the free exercise by a house or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member, may be an actionable contempt of parliament.

MPs can become effective proponents of environmental causes related to human rights.

MPs can become effective proponents of environmental causes related to human rights for instance by canvassing issues in correspondence, speeches or debates inside or outside parliament. This can contribute to the education of the broader public about the issues. Parliamentary engagement is also likely to increase media interest. But the effectiveness of an MP or committee depend on their level of interest and engagement; their expertise or capacity; the political make up of the parliament and the committee; the strength
of stakeholder activism; competing priorities; governance standards; and practices in the polity and media reactions.

Disadvantages and risks
It needs to be acknowledged that there are many constraints facing campaigns which focus on parliaments for better rights protection. Often by the time legislation has reached parliament, it has been substantially negotiated and endorsed by a cabinet and/or political caucus. In such cases, the likelihood of significant amendments being agreed is correspondingly slim. Early engagement during policy-development stage, focussing on bureaucracies as well as elected representatives, may be more effective.

Parliamentary scrutiny mechanisms may be politically constrained. The constitution of the parliament or strength of a political movement can lead to or inhibit reforms. Where there is a minority government or an upper-house not controlled by the majority party or parties, parliamentary leverage is stronger. On the other hand, if there is a majority government or weak opposition and cross-bench, parliamentary committees seem more vulnerable to being captured by the executive, or to having recommendations ignored. Weak and partisan committees may reflect a lack of MPs’ experience and poor understanding of the democratic benefits of strong and effective parliamentary (as distinct from partisan) checks and balances. If influential and expert human rights champions have been elected to parliament, such advocates can present arguments in principle and precedents justifying reforms. Sadly these individuals tend to be rare, or suppressed by party or executive discipline.

There may also be more practical constraints. Scrutiny of bills committees, for example, are often limited in their effectiveness by the absence of a clear definition of the human rights standards against which they assess legislation, and by the tradition of only obliquely identifying issues for parliament’s consideration, rather than suggesting recommendations for amendment(s). The legalistic representation of human rights issues and the lack of a broad-based human rights culture generating political resonance (with some exceptions such as rights to trial and due process), may weaken lobbying efforts. The abstract nature of environment-related human rights can also be a limiting factor, as are the disciplinary silos within which committees and ministries operate, and the poor definition of the terms of reference of parliamentary scrutiny committees.

Conclusions
While there are many factors inhibiting the recognition and realisation of environment-related human rights, these are not insurmountable. There are advantages in better focussing parliaments on human rights issues, including environment-related human rights. These have been noted briefly, and have several constraints. Some realistic targets for progress in this area are:

- the enactment of domestic laws (where these are not in place), requiring all legislation to conform with international standards on human rights, including environmental rights;
a better engagement and development of expertise on environment-related human rights by MPs, political advisers, committee staff and other stakeholders;

- the establishment of parliamentary commissioners for the environment or the express inclusion of environment-related human rights in the mandate of human rights commissioners;

- the creation of parliamentary committees with a specialist human rights focus;

- the clarification of the terms of reference of legislative scrutiny committees to better recognise environment-related human rights;

- the formation of working groups on human rights and the environment in associations and organisations such as the Commonwealth Parliamentary Association, the Inter-Parliamentary Union, and regional bodies, and regional governance institutions;

- the strengthening of linkages between parliaments, the non-government sector, and UN institutional activities, and particularly those concerned with environment-related human rights, such as inquiries and reporting by Special Rapporteurs, UN scrutiny of country reports, communications to treaty bodies etc;

- parliamentary scrutiny of National Action Plans on Human Rights which implement the Vienna Declaration and Program of Action with a view to ensuring that they address environment-related human rights.

Notes

1 See for example: Police v Beggs [1999] 3 NZLR 615; Dennis v Ministry of Defence [2003] Env LR 34; Baggs v UK [1981] 52 DR 29; Arrondelle v UK [1977] 19 DR 186 and DR 26; Andrews v Reading Borough Council [2005] 256 (QB)8; Lopez Ostra v Spain (1994) 20 EHRR 277, Guerra v Italy (1998) 26 EHR 357; Oneryildiz v Turkey [2002] ECHR 491; amongst other determinations, many of which were unsuccessful for the complainant. Litigation in India on the right to clean air demonstrates the potential for protracted conflict over environmental rights and the potential for significant reforms to be achieved: see Greenspan Bell et.al.2004.


10 The South African Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. See Hayward, 2005.


12 Commonwealth Human Rights Initiative and Com-

Hanna Jaireth (mhsjaireth@netspeed.com.au) is Secretary to the ACT Legislative Assembly’s Standing Committee on Planning and Environment, but the views expressed herein are personal. Hanna has a longstanding interest in the law and politics of sustainable development. She co-edited with Dermot Smyth, Innovative Governance: Indigenous Peoples, Local Communities and Protected Areas (2003), is actively involved with community environmental organisations and is a member of CEESP/TGER and TILCEPA and of other IUCN Commissions.
...but conservation and human rights can also work in mutual support...

References


Hayward, T., Constitutional Environmental Rights, Oxford University Press, 2005.


Conservation and Human Rights


Conservation, protected areas and humanitarian practice
Nicholas Winer, David Turton and Dan Brockington

Abstract. In recent years there has been increasing concern about the impacts of conservation on local and indigenous communities. This concern has come from both within and beyond the conservation community. In particular the impacts of protected areas have come under close scrutiny—a long list of case studies highlight evictions, forced resettlement, reduced or lost access to important resources and sources of income. Although protected area planning is the responsibility of government ministries, some of the big international conservation NGOs have been the target of criticism concerning these impacts. Yet, despite the existence of relevant case studies, and some “sensationalist” articles in the popular press, the evidence about the impacts of protected areas on human rights is often weak and anecdotal. The establishment of protected areas remains one of the principal conservation tools for the maintenance of biodiversity. As the demand for greater biodiversity protection competes with growing demands for access to agricultural and grazing lands, many conservation organisations are increasingly linked to efforts to better understand the impact of conservation on local people and the potential role of such people in promoting and benefiting from conservation. This has opened up a larger debate about the priorities to be adopted by conservation organisations, both large and small. This paper argues that it is high time to develop a set of agreed humanitarian principles, against which conservation organisations could hold themselves publicly accountable, as a way to maintain the public’s
The concept of the National Park as a fully protected area has its origins in Western European and American concerns for wilderness and its preservation. The first Parks were established in the USA in the 19th century and shortly afterwards the model found its way to Africa and the rest of the world. The basic assumption was that ‘wilderness’ landscapes were free of human intervention and that only their separation from potential future encroachment could guarantee the integrity of their conservation status. This status was originally conceived as having more to do with emblematic or charismatic scenery than any currently understood concept of biodiversity conservation.

The establishment of protected areas remains one of the principal conservation tools for the maintenance of biodiversity. The 2004 World Database on Protected Areas includes over 105,000 sites covering 19.7 million km². The expansion of this area remains central to the work of the Convention on Biological Diversity which believes that. “Experience shows that a well designed and managed system of protected areas can form the pinnacle of a nation’s efforts to protect biological diversity..... Such a system complements other measures taken to conserve biological diversity outside protected areas.”

In other words, the parties to the Convention believe that the protected area model has stood the test of time. The model itself has been expanded and modified by IUCN’s categorisation.
The expansion and reform of the category system has substantially contributed to the expansion of the global protected area estate. But the weaker forms of protection are treated sceptically by significant sections of the conservation community who insist that the only valuable protected areas are the more strictly protected category I-IV models. New pressures are being put on landscapes as growing human populations compete for diminishing resources; in some cases growing wildlife populations are pushing ever outward generating increased conflict over those same resources and in turn challenging established land use priorities. The increasing impoverishment of many marginal rural and agro-pastoral communities in the face of declining fertility, over-population and worsening terms of trade for their products means that their socio-economic predicament can no longer be ignored by conservation managers. There must be few today who feel that it is morally sound, economically viable, administratively feasible or environmentally sustainable to pursue the sort of bleak, doomsday vision summed up in the above quotation by the Serengeti’s founding father Bernhard Grzimek in 1960.

There are today hardly any untouched landscapes. Many of those deemed most precious for their biodiversity values have hosted indigenous peoples for millennia and would not have reached their present state without some degree of human intervention. This understanding, coupled with the sheer weight of socio-economic pressures and the dubious environmental sustainability of cutting off parks from their surrounding areas, has led to a review of the role of the National Park in the wider landscape. Two important recognitions have emerged to date at least in part of the conservation community:

1. National Parks, as ecological islands in seas of land degradation, are not functionally sustainable. This recognises the influence of the surround-
ing areas on the ecological integrity of parks and the important role that migratory corridors play in maintaining bio-diverse populations.

2. Those living in and around protected areas need to realise some benefits from their proximity in order to compensate them for the associated costs. This implicitly recognises that most protected areas are unlikely to achieve their conservation objectives without the cooperation of those who live within and around them.

The establishment of a protected area results in the immediate reduction of future land use options. So while the benefits of a protected area system may be perceived at the national, regional and international level, the costs are disproportionately borne by those who live closest to the protected areas and whose capacity to pay for reductions in land use opportunities are often lower than the national average—namely, the rural poor. This was never the intention of the framers of the Convention on Biological Diversity and it contradicts the Convention’s targets for 2010 which aim “to significantly reduce the current rate of biodiversity loss at the global, regional, national and sub-national levels and contribute to poverty reduction and the pursuit of sustainable development, thereby supporting the objectives of the Strategic Plan of the Convention, the World Summit on Sustainable Development Plan of Implementation and the Millennium Development Goals.”

The problem is that many of today’s protected areas function as barriers to expanding human economic activity. A great number of programmes and projects have been designed which attempt to address the economic implications of this bleak fact. These activities are often piecemeal responses that involve local peoples in developing products for tourism markets and generating employment within the local tourism industry. But tourism is a fickle global industry that is often culturally insensitive. In addition, little tourism revenue goes directly to those most affected by the presence of a protected area. As a result, revenues generated by protected areas have rarely, if ever, been seen by their local recipients either as a sufficient compensation for loss of access to natural resources or as an adequate incentive to support conservation. Local people are rarely considered responsible and responsive enough to become managers and custodians of lands and resources they have lived with for centuries. It is even rarer that local peo-

---

Revenues generated by protected areas have rarely been seen by local recipients as a sufficient compensation or an adequate incentive to support conservation.
people actively support and lobby for the creation of national parks. In all of the Americas there are few national parks established as a result of lobbying by an indigenous people, the first such one was only established in 1995.¹⁰

There is clearly not just a practical difference, but also an ideological one in the conception of the role and value of a protected area. This difference is not just another expression of the north-south divide but also of the urban-rural divide. How a citizen of the USA, Europe or of a major conurbation in a developing country values conservation is inherently different from that of a marginal land user in a developing country whose land use and therefore livelihood options are placed under increasing threat from a variety of sources of which conservation is perceived as only one.

Conservation has not, by and large, been seen by either local residents or national and regional planners as an integral component of development planning. Conservation organisations have consequently found themselves working in ‘islands’ of biodiversity feeling besieged by the surrounding socio-economic interests. The advent of the MDGs [Millennium Development Goals] and the World Bank/IMF’s PRSPs [Poverty Reduction Strategy Papers] has made it much more important for conservation initiatives to demonstrate their linkages to poverty reduction, and thereby to enter the mainstream of national development planning. On the one hand, these major multi-lateral initiatives offer opportunities to link protected areas to larger land use development processes and ensure a flow of funds and other resources capable of supporting the integration of conservation into the national development agenda. On the other hand, a failure to demonstrate linkages between conservation and poverty reduction risks leaving conservation programmes further isolated from national planning processes and less able to attract funds.

This may not be of critical importance to well funded conservation organisations or to purely research based activities, but it does mean that clear expectations now exist that conservation can and will play a role, not just in conserving biodiversity but also in reducing poverty. This in turn means that the way conservation organisations interact with the traditional custodians of land in and around protected areas falls under a brighter spot light.

Many recent conservation initiatives make some effort to engage with local groups in order to provide them with alternative sources of income, in recognition of the fact that their user rights have been adversely affected. However successful or otherwise these efforts
may be, the commitment to provide economic and cultural incentives to support conservation promotes both conservation and development. In so doing it moves towards a reconciliation of the previously conflicting philosophical underpinnings of development and conservation. The uncoupling of such a linkage would return conservation to authoritarian preservationist management regimes unwilling to recognise the local cultural, economic and environmental costs of conservation.

The problem

“There is often widespread conflict between the interests of rural peoples and the interests of biodiversity conservation within protected areas. Time and time again the premise of many nature reserves across the developing world has been the same: the forcible uprooting of resident and mobile populations, often coerced violently to relocate somewhere else.……The new enthusiasm for private investment in, and private management of, nature reserves has the potential to be a new and potent force for social disruption in rural areas.”

"Involuntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out.……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.”

Despite both the rhetoric and targets of the Convention on Biological Diversity there is a growing sense of frustration among certain sectors of the conservation community with ‘inclusive’ approaches to biodiversity—those that recognise the moral and practical importance of including community actors as active participants in the management of conservation areas. Notwithstanding the broad scientific understanding that most protected areas are too small to function as effective ecosystems for biodiversity conservation, there is a growing belief that a return to stricter definitions of conservation may be both scientifically and morally justifiable. According to this ‘narrative’ biodiversity conservation is, on the one hand, incompatible with the presence of human beings and, on the other, of such importance as to constitute a moral obligation. This view holds most sway amongst a number of conservation scientists who also understand that the current protected area network is insufficiently extensive to satisfy rigorous scientific definitions of ecosystem, or biodiversity, conservation. They therefore propose an expansion of the area under protection, which should be free of human interaction and managed by a central authority. A range of justifications is given for this position:

- Biodiversity loss is so rapid and extensive that there exists an overwhelming moral obligation to act to preserve it.
- Community based conservation principles and practises are not rooted in science and draw on romantic, unverifiable images of traditional relationships between peoples and the environments they live in.
- The weakness of common property institutions undermines the potential sustainability of community based approaches.
Wider community based development actions rarely result in successful species conservation.

The community development components of conservation draw scarce financial resources away from protection and into development.

Protected areas do work and the scale of the threats to biodiversity justify a significant strengthening of their scope and implementation up to and including authoritarian enforcement measures.

This position gains strength from advocates of protected areas who do not recognise the costs displacement from protected areas can bring. There are, among this group, those who claim that there is insufficient empirical evidence to substantiate the contention that establishing national parks compromises the welfare of people who live in or around them.14 This position supposes that restricting human activity (which tends to be integral to conservation policy), without recompense might not necessarily affect welfare, when simple logic suggests it must. It also ignores a long and growing list of case studies and surveys which overwhelmingly indicate that eviction and exclusion have caused impoverishment and discontent.15

At the same time we must also recognise that the evidence about the impacts of protected areas could be stronger. Among the case studies referred to in the previous paragraph, there are many that are weak or merely anecdotal. There is also a problem of missing system and order in the enquiry into the social impacts of protected areas. This makes it hard to obtain an adequate overview of their social impacts. And, although the literature on the social impacts of displacement is growing, it still lacks a systematic analysis.16 This weakness makes it hard to discern regional and historical patterns in the nature and experience of different forms of displacement, or the distribution of benefits from protected areas.

It is clear that, for the foreseeable future, protected areas will remain key components of any national or international biodiversity conservation programme. Our concern is to address the absence of an international consensus
on the responsibility of those who pro-
mote protected areas to ensure that
their costs are not ‘externalised’ in the
form of increased costs borne by local
communities.

The creation of a protected area can
bring with it a range of possible impacts
on local communities, from forced evic-
tions on the one hand to integration
into management structures and the
development of new roles and respons-
ibilities for them on the other. There
is, at present, little to alert community
members to the likely impact on them
of a change in land use caused by the
establishment of a protected area.
Experience shows, however, that the
overwhelming risk is that local com-
munites, already amongst the poor-
est of the poor, will become even more
impoverished and therefore increasingly
alienated from the goals of biodiversity
conservation.

It is therefore desirable, for both ethical
and practical reasons, that conservation
NGOs and multilateral institutions com-
mit themselves to a set of ‘conserva-
tion principles’ that espouse minimum
humanitarian standards consistent, at
least, with the inter-
national obligations
of host governments
engaging in multi-lat-
erally funded projects
that involve significant
changes in land use.
It is appropriate that
those whose land use
options have been
changed for larger,
nationally driven,
policy reasons should
be able to rely on a
consistent minimum
set of standards that safeguard their
interests. There are a number of policy
and operational manuals published by
organisations such as the World Bank,
The African, Asian and Inter-American
Development Banks and the OECD.
Each of these publications sets standard
operating procedures for loan or grant
agreements. They may or may not be
appropriate in every detail, but they do
outline the importance given to the sub-
ject by the wider development commu-
nity which now views even restrictions
on access as a form of displacement
requiring remedy.17

In addition, major conservation bodies
such as IUCN18 and WWF19 have tried to
address these issues. “The international
community has affirmed that all peoples
have human and environmental rights.
These are rights that should guide the
distribution of the material benefits
and limit the environmental costs of
economic growth”.20 While the recom-
mandations and policies elaborated by
such organizations are clear statements
of intent, it is high time to look at what
can be done to bring together the rhet-
oric of institutional support for rights
with the reality on the ground.

Nicholas Winer (winer_nicholas@yahoo.es) is an Honorary
Fellow of the Institute of Development Policy and Manage-
ment at the University of Manchester and an independent
consultant specialising in Natural Resources Management
after spending twenty years managing rural development
and natural resource management projects in Africa.

David Turton (david.turton@queen-elizabeth-house.oxford.
ac.uk) is a Senior Associate of the Department for Interna-
tional Development at the University of Oxford, where he
was formerly Reader in Forced Migration and Director of the
Refugee Studies Centre. Before moving to Oxford he taught
in the Department of Social Anthropology at the University
of Manchester. Dan Brockington (daniel.brockington@man-
chester.ac.uk) is a Lecturer at the Institute for Development
Policy and Management in the University of Manchester. His
research examines the social impacts of protected areas and
he has conducted a global review of eviction from protected
areas using published and grey literature. Nick, David and
Dan are all members of CEESP/ TGER.

Notes
1 Grzimek and Grzimek, 1960.
3 Adams and McShane, 1992.
4 CBD http://www.biodiv.org/programmes/cross-
cutting/protected/default.asp
References


