

# THE LIVING CONVENTION



## VOLUME II

A METHODOLOGY FOR COUNTER-MAPPING  
AND RECENTERING INTERNATIONAL LAW

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INTERNATIONAL LAW

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## A METHODOLOGY FOR COUNTER-MAPPING AND RECENTERING INTERNATIONAL LAW

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# RATIONALE, INTEGRATED RIGHTS APPROACHES AND RECENTERING INTERNATIONAL LAW



## RATIONALE

Members of Indigenous peoples, local communities and peasant groups – and the community-based and non-governmental organizations that support them – often ask what their international rights are. It is a complex answer for at least three reasons:<sup>1</sup>

- The sources of the rights are diffuse. ‘Rights’ appear in specific provisions from across a range of instruments that are themselves located within distinct categories of laws such as human rights, environment, intellectual property, and culture;
- An individual’s or a group’s specific rights will depend on, among other things: a) whether they are Indigenous peoples or from other marginalized or minority groups; b) the uniqueness of their ways of life, for example, whether they are farmers, livestock keepers, forest-dependent, or fisher folk; and c) the nature of their self-defined territories and areas on which they depend, for example, whether they are coastal or marine areas, mountains, in or near externally-defined protected areas; and
- International instruments are of differing legal weight and each is signed, adopted or ratified by a different list of countries, which has a direct bearing on the value of the rights they provide for at the national and local levels.

As one of the responses to this, Natural Justice undertook research on the full spectrum of international law and jurisprudence relating to Indigenous peoples and local communities who strive – broadly speaking – to protect the integrity of their biological diversity and cultural heritage.<sup>2</sup> That report’s section on international law is ordered according to categories of laws such as human rights, biodiversity and climate change. Under those broad headings, the report details the relevant provisions in each instrument.

Although it is an effective way to comprehensively identify the full spectrum of relevant law at the international level, its accessibility to non-lawyers is inherently low. For example, an individual or a community or people who would like to know more

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<sup>1</sup> This is a significant simplification but highlights the point that, as a group of lawyers, we are unable to provide a concise answer to an important question.

<sup>2</sup> Jonas, H., J. E. Makagon, S. Booker, and H. Shrumm, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: International Law and Jurisprudence. (International Law and Jurisprudence Report)*. Natural Justice and Kalpavriksh, Bangalore and Pune. The report was produced as part of a larger project to explore the international, regional and national laws and jurisprudence that support or hinder the ability of Indigenous peoples and local communities to govern their territories, areas and natural resources. Available at: <http://naturaljustice.org/library/our-publications/legal-analysis>.



about their rights to free, prior and informed consent (FPIC) over activities relating to, among other things, their lands, natural resources and knowledge, would not find any easy answers in the report. Instead, they would be compelled to work through the whole document to pull together the provisions relevant to FPIC that, in this case, are contained in at least the following international instruments:

- United Nations (UN) Declaration on the Rights of Indigenous Peoples;
- International Labour Organisation (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (commonly referred to as ILO Convention No. 169);
- Food and Agricultural Organization (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security;
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization;
- Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities; and
- Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

The answers are there, but the format is cumbersome and hinders the accessibility of the information to the very individuals, communities and peoples it is intended to support. It became apparent that a more innovative approach would be required; one that built on previous work on integrated rights approaches.

## INTEGRATED RIGHTS APPROACHES

In the 1990s, together with Graham Dutfield, Alejandro Argumedo, and many others,<sup>3</sup> Darrell Posey<sup>4</sup> drew on a range of Indigenous concepts and movements to develop the concept of *traditional resource rights* (TRRs) as a political, juridical and ecological

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<sup>3</sup> In respective works over the years, Posey and his co-authors acknowledge the inputs of a wide range of people who provided inspiration on which the theory is based.

<sup>4</sup> More information about the life and work of Darrell Posey is available online: [http://en.wikipedia.org/wiki/Darrell\\_A.\\_Posey](http://en.wikipedia.org/wiki/Darrell_A._Posey). The authors consider him, among other things, a pioneering political *and juridical* ecologist who combined empathy, intellectual rigour and innovation to challenge established approaches to the issues to which he committed his life's work.

project to more accurately reflect Indigenous and traditional peoples' views and concerns in law.<sup>5</sup>

In the seminal paper *Indigenous Peoples and Traditional Resource Rights*, Posey describes TRRs as constituting “bundles of rights” already widely recognized by legally and non-legally binding international agreements, which include individual and collective human rights, and land and territorial rights.<sup>6</sup> TRRs take into account the spiritual, aesthetic, cultural, and economic values of traditional resources, knowledge and technologies, and, accordingly, recognize the rights of Indigenous peoples and local communities to control their use. In this context, TRRs is an integrated rights concept that recognizes the “inextricable link between cultural and biological diversity and sees no contradiction between the human rights of Indigenous and local communities, including the right to development, and environmental conservation.”<sup>7</sup>

TRRs emerged as the result of an explicitly *political* legal project to more accurately reflect Indigenous peoples' and local communities' views and concerns, and focused on integrating otherwise disparate legal regimes, instruments and provisions. The framework is founded on four processes:

1. Identifying bundles of rights expressed in existing moral and ethical principles;
2. Recognizing rapidly evolving soft law influenced by the customary practice of states and legally non-binding agreements;
3. Harmonizing existing legally binding international agreements signed by States, whereby areas of conflict between different agreements should be resolved, giving priority to human rights concerns; and
4. “Equitizing” the law to provide marginalized Indigenous peoples and traditional and local communities with favourable conditions to influence all levels and aspects of policy planning and implementation.<sup>8</sup>

The first two processes required what might be referred to as *legal mapping* ('lexography'), followed by what is referred to as *bundling*. By finding individual

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<sup>5</sup> See, for example: Posey, D., and G. Dutfield, 1996. *Beyond Intellectual Property Rights: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*. IDRC: Ottawa. For an overview of the full literature on traditional resource rights, see: Jonas, H., and H. Shrumm, 2012. *Recalling Traditional Resource Rights: An Integrated Rights Approach to Biocultural Diversity*. Natural Justice: Malaysia.

<sup>6</sup> Posey, D., 1995. *Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?* A paper prepared for a workshop on Indigenous Peoples and Traditional Resource Rights at the Green College Centre for Environmental Policy and Understanding, University of Oxford. Page 20.

<sup>7</sup> Posey, D., and G. Dutfield, 1996. Page 77.

<sup>8</sup> Posey, D., 1996. *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*. IUCN: Gland. Pages 16-18.

provisions that support Indigenous peoples' and local communities' rights from across a range of legal instruments and reordering them in a locally relevant and comprehensive manner, TRRs integrate an otherwise fragmented<sup>9</sup> international framework of rights relating to the links between biological and cultural diversity.

Using this methodology, Posey sets out a range of relevant binding and non-binding instruments from across a broad spectrum, bundled under the basic principles upon which TRRs are based.<sup>10</sup> In effect, this approach attempts to counter the abovementioned challenges that international law poses for Indigenous peoples, local communities and peasants. By reading and effectively reordering the pages of the legal landscape in an innovative way, like the cutting of an onion (Figure 1), Posey *et al.* reveal a novel formulation of an existing internal structure.



Figure 1

Looking at existing laws from a new integrated perspective enables a paradigm shift towards more comprehensive assertions of Indigenous peoples, local communities' and peasants' rights, and provides a conceptual framework for proposing systemic changes to the way laws are developed and implemented. This publication undertakes that task, applying the TRR methodology to the full spectrum of contemporary international law of relevance to the protection of the rights of Indigenous peoples, local communities and peasants.

## RECENTERING INTERNATIONAL LAW

The compendium (**Volume I**) promotes an overall methodological approach to the law that can be visually represented by a Venn diagram, as set out in Figure 2. The

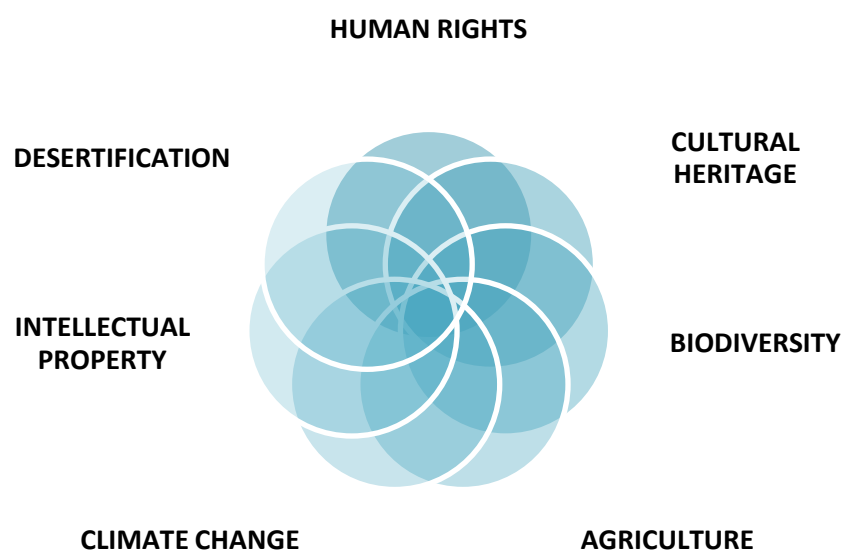
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<sup>9</sup> An interesting future question relates to whether the notion of self-contained regimes and *lex specialis* has any application in this context. Koskenniemi, M. 2006. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. International Law Commission. UN Document A/CN.4/L.682.

<sup>10</sup> These bundles of rights and their location within international agreements, identified by the Working Group on Traditional Intellectual, Cultural and Scientific Resource Rights, include: basic human rights; right to development; rights to environmental integrity; religious freedom; land and territorial rights; right to privacy; prior informed consent and full disclosure; farmers' rights; intellectual property rights; neighbouring rights; cultural property rights; cultural heritage recognition; and rights of customary law and practice. Posey, 1995. Page 17. Also reproduced in Posey, D., 1997. *International Agreements Affecting Indigenous Local Knowledge: Conflict or Conciliation*, Working Paper of the Avenir des Peuples des Forêts Tropicales, Whitstable. Notably, the Working Group also carried out a survey of 63 statements and declarations made by Indigenous peoples from which they identified 80 common demands. From these, they elaborated six main topic areas, namely: self-determination; territory; free, prior and informed consent; human rights; cultural rights; and treaties. Posey, 1996. Page 16.

Compendium should be seen as constituting the core of a number of areas of international law that are relevant to maintaining the integrity and resilience of Indigenous peoples', local communities and peasants' territories, areas and other social-ecological systems. Rather than continuing to see the bodies of law as separate, they can be re-conceptualized in terms of their common but differentiated recognition of the rights of Indigenous peoples and local communities to protect their territories, natural resources, and cultures.

The diagram below underscores this point, with the centre representing the provisions in each category of law of *most relevance* to humanity's relationship with nature, working out to less directly relevant provisions at the periphery of each.



**Figure 2:** Bodies of law presented as intersecting circles.

Studying the diagram leads to the emergence of a more radical reframing of international law. For the first time, the rights of Indigenous peoples, local communities and peasants relating to their territories, lands and waters are posited at the centre of the framework, forming the axis around which a range of instruments revolves. It begins to shift the emphasis away from the established way of thinking about the law as blocks of distinct instruments within which Indigenous peoples, local communities and peasants find rights of relevance to themselves, to one where their rights to protect their connection with nature becomes the fundamental determinant of the law's function, and thus its form. It is a case of reimagining or re-centering the law to privilege local social-ecological relationships and enshrine an ethic of reciprocal responsibilities between humans and nature.

# METHODOLOGY



## METHODOLOGY

Drawing on the above approach, we undertook the following steps:

- Critiqued international law from a local perspective;
- Reconsidered the current international legal framework in the context of the interconnectedness of territories and ways of life;
- Comprehensively reviewed the full spectrum of potentially relevant international law;<sup>11</sup>
- Selected specific types of instruments, guidelines and decisions (among other types of hard and soft international law) for inclusion in the Compendium;
- Identified the most relevant provisions within each selected instrument;
- Reviewed these provisions to distil their essence to a number of categories of rights that would (at this stage) adequately encompass all of the provisions;
- Grouped or ‘bundled’ the provisions under the relevant categories of rights; and
- Listed the rights in the Compendium in accordance with a generalized territory or landscape.

The next sub-sections set out these steps in more detail to provide clarity about what is and is not included in the Compendium and how the information is presented. It is hoped that this will better enable readers to engage critically with the methodology and in doing so, lead to the improvement and more effective use of the Compendium.

### A. CRITIQUE OF INTERNATIONAL LAW

Many laws directly undermine Indigenous peoples, local communities and peasants.<sup>12</sup> Laws are often at odds with justice. And even where laws are *prima facie* supportive, they can still be inherently challenging to Indigenous peoples, local communities and peasants intent on using them to protect their ways of life. These challenges manifest themselves in at least three ways.

First, laws have a tendency to compartmentalize otherwise interdependent aspects of social-ecological landscapes. While communities govern and manage integrated territories and land- and seascapes, States tend to view each type of resource and

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<sup>11</sup> See Annex I for the full list of instruments that were considered, as well as those included in the Compendium.

<sup>12</sup> For example, the Philippine Mining Act (1995) is shown to be in direct opposition to Indigenous peoples’ and local communities’ interests. Pedragosa, S., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: The Philippines*. Natural Justice and Kalpavriksh, Bangalore and Pune.

associated traditional knowledge through a narrow lens, drawing legislative borders around them and addressing them in isolation.

Second, the fragmentary nature of the law is compounded by the fact that laws are implemented by state agencies focusing on particular issues such as biodiversity, forests, agriculture, or Indigenous knowledge systems.<sup>13</sup> The result is that peoples' and communities' lives are disaggregated within law and policy, forcing their claims to self-determination into issue-specific sites of struggle (Figure 3).



**Figure 3:** The fragmentary nature of State law stands in stark contrast to the integrated nature of customary law.

Third, positive law (both international and State) often conflicts with the customary laws that govern communities' stewardship of natural resources.<sup>14</sup> For example, the understanding of 'property' under positive law is based on the private rights of a person (human or corporate) to appropriate and alienate physical and intellectual property. In contrast, communities' property systems tend to emphasize relational and collective values of resources.<sup>15</sup> Furthermore, the implementation of positive law

<sup>13</sup> For example, in some countries, different departments deal with genetic resources and traditional knowledge, respectively.

<sup>14</sup> Cotula and Mathieu, 2008, page 11.

<sup>15</sup> Tobin, B., and E. Taylor, 2009. "Across the Great Divide: A Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru". *Initiative for the Prevention*

tends to overpower and contravene customary law. A system that denies legal pluralism<sup>16</sup> has direct impacts on communities' lives, for example, by undermining the cultural practices and institutions that underpin sustainable ecosystem management.<sup>17</sup>

These three challenges, among others,<sup>18</sup> highlight the fact that the imposition of international and national laws, which are inherently fragmentary and based on static misperceptions of local realities, is likely to undermine the integrity and internal resilience of social-ecological systems. The implementation of such laws compounds these challenges by requiring communities to engage with disparate stakeholders<sup>19</sup> according to a variety of disconnected regulatory frameworks, many of which may conflict with their customary laws, institutions and decision-making processes.

Notably, the reiteration of these rights and laws set out in the Compendium (**Volume I**) has no intention of reinforcing the original limitations of international law in this area. Rather, it is to make the respective provisions more accessible and, in doing so, highlight the law's current shortcomings.

## **B. REIMAGINING THE LAW**

In this light, the existing international legal system requires reconstitution in order to support the integrity and resilience of local systems, not *vice versa*. By rejecting the orthodox and fragmentary approach to the constituent elements of a social-ecological landscape and replacing it with a framework modelled on the way Indigenous peoples, local communities, and peasants interact with their territories, natural resources and knowledge, *integration* – not fragmentation – becomes the new organizing principle.

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*of Biopiracy*, Year IV: 11, page 10. Such systems have been described as "...commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)." See Tsosie, R., 2007. "Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm". *Journal of Law, Medicine & Ethics*, 35: 396, cited in Tobin and Taylor, 2009, page 36.

<sup>16</sup> This type of system could be referred to as a 'legal monoculture'.

<sup>17</sup> Sheleef, L., 2000. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. Frank Cass: London, England, and Portland, Oregon.

<sup>18</sup> Others include the fact that for many Indigenous peoples and local communities, legislative and judicial processes can be particularly disempowering. With regard to international law, many communities simply do not know (or know how to find out) what rights and responsibilities are being agreed at the international, regional or national levels, or what precedents are being handed down by a range of courts.

<sup>19</sup> Examples include government agencies and officials, conservation and development NGOs, private sector companies, the media, and researchers.



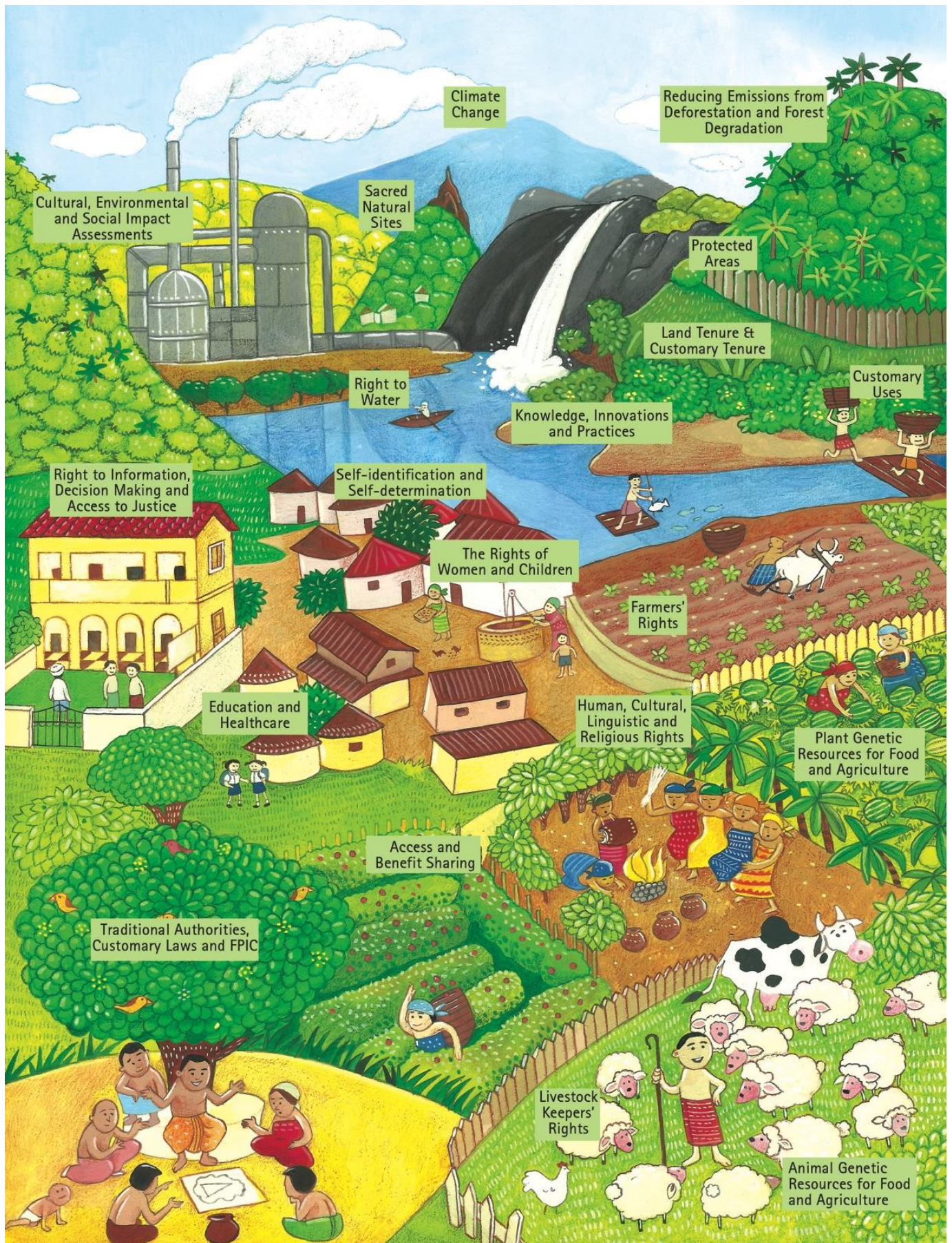


Figure 4: Countermapping the living and legal landscapes.

While *The Living Convention* cannot change the deep structure of the international legal framework, it can *reimagine* the shape of those laws and the relationships between provisions that address similar issues, albeit in separate international instruments. Developing a new reading of the current legal landscape fundamentally changes people's perceptions of the law and opens up new legal and political possibilities therein.

As Figure 4 illustrates, this exercise can be thought of as 'counter-mapping the law'. Just as participatory mapping practitioners have worked with Indigenous peoples, local communities and peasants to map areas from their own perspectives, this approach counter-maps the law to make it more relevant to the localities to which it is intended to apply. Thus, while the actual topography of the international legal landscape remains unchanged, it is hoped that the Compendium illustrates a novel way of reading the 'lay of the law'. In this light, the law is divested of its current shape and reapplied to Indigenous territories and other social-ecological landscapes.

### **C. COMPREHENSIVE REVIEW OF INTERNATIONAL LAW**

The following areas of international law and policy were exhaustively researched for any references to the rights of individuals, communities and peoples as they relate to territories and social-ecological systems (writ large):

- Human rights, including Indigenous peoples' and peasants' rights;
- Cultural heritage under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO);
- Spiritual and religious integrity;
- Education and languages;
- Development;
- Rio Conventions (climate change, biodiversity and desertification), their subsidiary protocols, and important decisions of the Conferences of the Parties, including guidelines and codes of ethical conduct;
- Other biodiversity-related conventions related to wetlands and endangered species;
- Forests;
- Intellectual property;
- Land rights, including tenure, non-removal, governance, customary and sustainable use;
- Water rights;
- Food sovereignty;
- Agriculture and other relevant instruments under the FAO;
- International Union for Conservation of Nature (IUCN) Resolutions and Recommendations from the first four World Conservation Congresses and the Fifth World Parks Congress;

- Emerging joint work on biocultural diversity; and
- Procedural rights, including free, prior and informed consent, impact assessments, access to justice, and benefit sharing.

Annex I in **Volume I** sets out the full list of instruments and other relevant documents that were reviewed.

## **D. SELECTING ELEMENTS OF INTERNATIONAL LAW**

### ***Inclusions***

The Compendium could have included every possible provision relevant to the rights of Indigenous peoples, local communities and peasants from the full body of hard and soft international law. However, this was considered too broad an approach. Instead, criteria were developed to decide which instruments qualified for inclusion in the Compendium. The overriding rule applied to each international instrument, subsidiary protocol, guideline, or decision (etc.) was whether it was negotiated within the UN system and confers a degree of legal obligation on States with regard to the rights of Indigenous peoples and local communities. As per the TRR approach, both hard and soft law instruments are included in the Compendium. Annex I (Volume I) illustrates which of the reviewed instruments are included in this second edition of the Compendium.

The Compendium also contains rights related to issues such as labour, employment and social and health services. While these issues could be considered peripheral to the focus of this work, they are, in fact, critical to Indigenous peoples', local communities' and peasants' futures and are included for this reason.

### ***Exclusions***

Notably, while instruments such as the Tkarihwaié:ri Code of Ethical Conduct and the Akwé: Kon Guidelines were included, the Compendium does not yet contain decisions of the Conference of the Parties to the Convention on Biological Diversity that are not standalone sets of guidelines.<sup>20</sup> It was also decided that while this third edition of *The Living Convention* would not include all of the Rio Conventions' programmes of work, the CBD Programme of Work on Protected Areas (PoWPA) would be included to garner feedback on how such an exercise would work in practice. Similarly, while it excludes a range of voluntary guidelines developed under the auspices of the Food

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<sup>20</sup> One exception to this is to include UNFCCC COP, "Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention" (Cancun, 29 November-10 December 2010) FCCC/CP/2010/7/Add.1.

and Agriculture Organization, for example, on fire management<sup>21</sup> and responsible management of planted forests,<sup>22</sup> it does include the Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the context of National Food Security, for the same reason as PoWPA. It also omits IUCN Resolutions and Recommendations from World Conservation Congresses and World Parks Congresses because the IUCN does not operate within the UN system of international law making.<sup>23</sup>

Although the authors are aware of the critical developments and interpretations of non-treaty law relating to Indigenous peoples' rights, the Compendium does not yet include reports issued by the following mechanisms, primarily because such reports are directed towards UN bodies,<sup>24</sup> international organizations or States, and do not confer rights:

- UN Permanent Forum on Indigenous Issues;
- Expert Mechanism on the Rights of Indigenous Peoples;
- Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples; and
- Other relevant Special Rapporteurs such as those on Adequate Housing, on Right to Food, on Cultural Rights, on Minority Issues, on Human Rights Defenders, and on Human Rights of Internally Displaced Persons.<sup>25</sup>

Similarly, because of their non-binding nature, the Compendium also omits references to any sustainable development-related documents such as the Stockholm Declaration (1972), the Rio Declaration on Environment and Development (1992), Agenda 21 (1992), and the recent outcome document of Rio+20, *The Future We Want* (2012).<sup>26</sup>

In the same vein, important Indigenous peoples' declarations such as the (Rio+20) Indigenous Peoples International Declaration on Self-Determination and Sustainable Development are not included because they are not yet considered to have legal

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<sup>21</sup> FAO Voluntary Guidelines on Fire Management: Principles and Strategic Actions, 2006. Available at: <http://www.fao.org/docrep/009/j9255e/j9255e00.htm>.

<sup>22</sup> FAO Voluntary Guidelines on Responsible Management of Planted Forests, 2006. Available at: <http://www.fao.org/docrep/009/j9256e/j9256e00.htm>.

<sup>23</sup> However, IUCN Resolutions and Recommendations remain important for their contributions to international policy and discussion about their inclusion is warranted.

<sup>24</sup> For example, at its Tenth Session in 2011, the Permanent Forum voiced its support for recognition of Indigenous peoples as "peoples" and called for a change in the terminology used by the Convention on Biological Diversity to reflect this recognition. Tenth Session Report, at Paragraph 26.

<sup>25</sup> See Annex I.

<sup>26</sup> See Annex I. For more on the UN conferences on sustainable development, see Doran, P., D. Paul, K. Ripley, N. Risse, J. Van Alstine, and L. Wagner, 2012. Summary of the UN Conference on Sustainable Development, 13-22 June 2012. Available at: <http://www.iisd.ca/download/pdf/enb2751e.pdf>.

weight at the international level.<sup>27</sup> While the Compendium currently omits otherwise important international and regional judgments<sup>28</sup>, work has begun to develop a publication to include this critical element of the normative international framework.<sup>29</sup>

The Compendium does not include any reference to regional human rights conventions<sup>30</sup> because they are not considered to be internationally applicable. It also excludes the operational policies and guidance documents of multilateral development banks and financial institutions such as the World Bank, because they were not adopted through international negotiations.<sup>31</sup> Although the above mentioned bodies, declarations, reports, and judgments (among other instruments) may fall outside of this publication's current purview, they are referenced in the annexes because they remain integral elements of an evolving political and legal landscape and should be consulted when considering the incumbent issues.

## **E. IDENTIFYING RELEVANT PROVISIONS**

The provisions of most relevance to the protection of Indigenous peoples' territories and other social-ecological systems were chosen from the selected instruments and subsidiary protocols, guidelines and decisions. This process could be described as 'counter-mapping' relevant rights from across a legal landscape.

While the Compendium tends to err on the side of inclusivity, the list of provisions it contains is not exhaustive. With reference to the selection of instruments (Step D) and within those the selection of provisions (Step E), it is not the intention of the Compendium to draw a stark line across swathes of law, forever including some instruments of provisions and excluding others. Instead, by bringing attention to the volumes of relevant instruments and supportive provisions and presenting the body of law in an integrated manner, this publication promotes a process of legal exploration beyond any perceived boundaries drawn either by an orthodox understanding of the law or by the Compendium (as currently articulated). In this way, dialogue about the key issues is promoted between a range of groups, and the body of work can continue to be developed over time.

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<sup>27</sup> See Annex III.

<sup>28</sup> See Annex II. For a recent example, see the recent Inter-American Court of Human Rights Case (No. 12,465) *Kichwa Indigenous People of Sarayaku and its Members*.

<sup>29</sup> Lynch, O., 2011. *Mandating Recognition: International Law and Aboriginal/Native Title*. Rights and Resources Initiative: Washington D.C.

<sup>30</sup> See Annex I.

<sup>31</sup> See Annex IV.

## **F. IDENTIFYING THE CATEGORIES OF RIGHTS**

Through careful review and deliberation of the full extent of the provisions, it was possible to identify a number of categories of rights. These rights were judged to encompass adequately the provisions identified in the mapping process. Nevertheless, these categories are not intended to crystallize into an authoritative list and would benefit greatly from further refinement.

## **G. BUNDLING PROVISIONS UNDER THE CATEGORIES OF RIGHTS**

Each individual provision was considered in the context of these categories of rights and included under the most relevant one. For example, ILO Convention No. 169's relevant provisions were included under the following categories of rights:

- Overarching Indigenous peoples' rights;
- Traditional governance systems and customary laws;
- Knowledge, innovations and practices;
- Education and languages;
- Development;
- Non-removal from lands or territories;
- Governance of territories, lands and natural resources;
- Benefit sharing;
- Local agricultural systems;
- Free, prior and informed consent relating to lands, waters and natural resources; and
- Information, decision making and access to justice;
  - Participation and decision making; and
  - Equality before the law and access to justice.

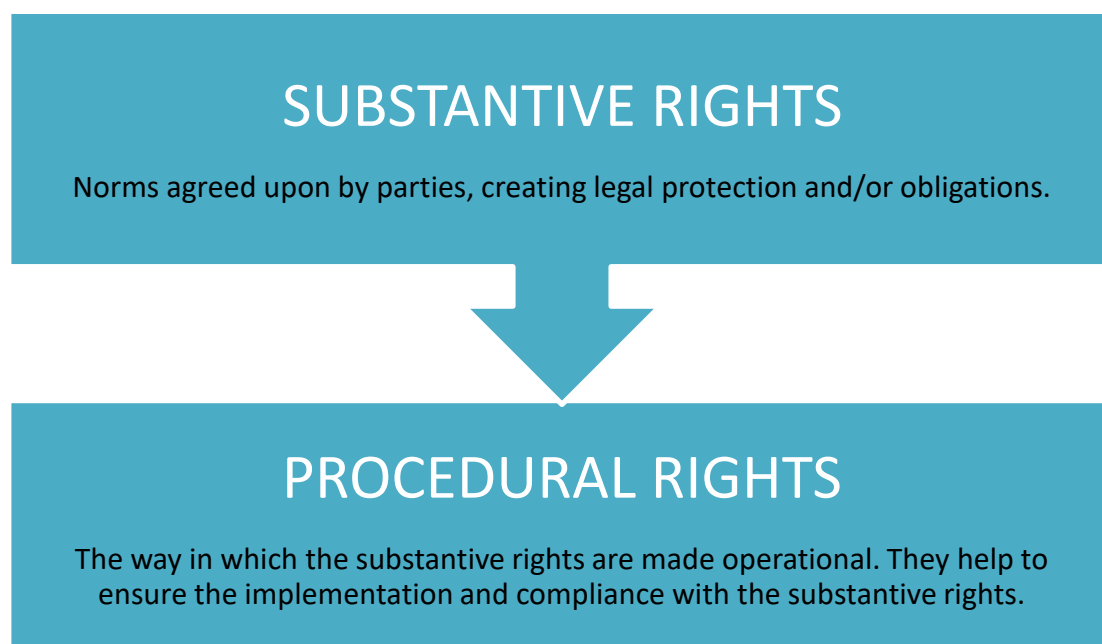
Within each category, it was initially considered useful to have the hard law provisions at the top, followed by non-binding provisions. However, due to the challenge related to legal weight (see Annex VIII, Volume I), this approach was *not* adopted, and the order in which the provisions appear does not intend to communicate anything about their relative importance or legal weight. Instead, any relevant targets (such as the Aichi Biodiversity Targets) are privileged within each category and appear at the top of the section. These are followed by provisions from instruments relating only to Indigenous peoples and peasants and then, general provisions.

Importantly, even though some provisions could clearly have been put under more than one category, for this publication, the provisions were not duplicated because it would greatly increase the length of the Compendium. In this light, the categories under which specific provisions are placed are merely indicative and are not intended

to ascribe categorical labels. This highlights the utility of an online version of the Compendium, which will be able to concisely include provisions in more than one rights category where relevant.

## H. DEVELOPING THE COMPENDIUM

In the context of what is described above, the Compendium’s internal logic is designed according to an actual territory or landscape. With reference to Figure 4 (the living/legal landscape), it begins with the substantive human rights of individuals, communities and peoples. It then works outwards to substantive rights relating to land tenure and non-removal from lands and territories, then across agricultural fields and into forests and dry lands.



**Figure 5:** The internal structure of the Compendium.

Finally, it enters the realm of legislatures and judicial systems by addressing the procedural rights afforded to individuals, communities and peoples. In this light, the Compendium’s internal structure, illustrated in Figure 5, is a case of form following function.<sup>32</sup> Both the preamble and operative provisions of the Compendium are implicitly structured in this way.<sup>33</sup> Despite the blurring between the two categories, to

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<sup>32</sup> Phraseology adapted from: “It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things super-human, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law.” Sullivan L., “The Tall Office Building Artistically Reconsidered.” Published Lippincott's Magazine (March 1896).

<sup>33</sup> Notably, the authors considered organizing it along the same lines as the UN Declaration on the Rights of Indigenous Peoples, but felt that using that framework could be critiqued for trying to “extend” Indigenous peoples’ rights to local communities. The landscape approach seemed more

assist the accessibility of the document, it is divided into two categories: substantive rights and procedural rights.<sup>34</sup>

## I. THE COMPENDIUM'S TEXT

While the methodology draws heavily on Posey *et al.*'s integrated rights approach, the Compendium *integrates* but does not intend to *merge* the referenced provisions. The rights of Indigenous peoples, for example, are found in a number of focused and hard-fought instruments (such as the UN Declaration on the Rights of Indigenous Peoples - UNDRIP), as well as in specific provisions from other international instruments (such as Article 8(j) of the Convention on Biological Diversity - CBD). To merge them with a number of other less specific rights runs the risk of diluting their significance. Nothing in this document should be used in any way to undermine the fundamental rights codified in instruments such as the UNDRIP or the CBD. To underscore this point, all provisions that appear in the Compendium from instruments solely relating to Indigenous peoples (i.e. ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples) are identified with an asterisk (\*).

Critical to the Compendium's credibility is its objectivity. The document is a statement of fact and represents the relevant law as it exists at the international level. Accordingly, the Compendium does not contain any new language. Each of its provisions is reproduced directly from the original international instrument, with two possible additions. In the first instance, footnotes are inserted into the provisions to provide cross-references and commentary where deemed useful. In the second instance, where a provision cites either the document from which it is taken or another international instrument without providing sufficient clarity about the specific instrument to which it refers, the name has been added in italics to increase the document's readability. The example in Box 1 illustrates the approach.

**Box 1: Illustrative example of a situation where an addition to the text was necessary to ensure clarity**

**Original:** *Recalling* that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the Convention, and recognizing that this Protocol pursues the implementation of this objective within the Convention.

**Edited:** *Recalling* that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the *Convention on Biological*

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appropriate. As per the thrust of this section, there is nothing fixed about the framework used, and debate about the most useful way to structure the Compendium in the future is welcome.

<sup>34</sup> The authors hope that providing clarity about the underlying structure of the Compendium will foster discussion about ways to improve this aspect of the methodology.



*Diversity*, and recognizing that this *Nagoya Protocol* pursues the implementation of this objective within the *Convention on Biological Diversity*.

Notably, there is variance in the terminology used throughout the Compendium. For example, provisions from ILO 169 refer to “tribal and indigenous peoples”, the UN Declaration on the Rights of Indigenous Peoples refers to “indigenous peoples”, and the Convention on Biological Diversity and its subsidiary instruments used to refer to “indigenous and local communities” until recently. While Indigenous peoples have been calling for all international instruments to recognize them as ‘peoples’, not all have yet done so.

Following from the above point, the law is inherently political. For this reason, it is important to avoid decontextualizing provisions from the broader social, political and economic contexts within which the respective instruments were developed. The role of such movements and larger processes in shaping each instrument is critical to achieving a nuanced understanding of the actual provisions and in understanding the trajectory of the law.<sup>35</sup> Referring to the original instrument to contextualize each provision is therefore important.

In the same vein, international law is, to a great extent, State-centric, with primacy generally given to state sovereignty and economic interests. The majority of instruments reviewed are the outcomes of inter-governmental negotiations that often lack the full and effective participation of Indigenous peoples or local communities.<sup>36</sup> As a result, the overall rights-centric approach and language are at odds with many Indigenous peoples’ and local communities’ worldviews. Thus, while international law is setting an increasingly high standard for upholding the rights of Indigenous peoples and local communities - indeed, the provisions in the Compendium represent a high-water mark in this regard - the current standards do not necessarily represent a zenith in real terms.<sup>37</sup>

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<sup>35</sup> Bavikatte, K., and D. Robinson, 2011. “Towards a peoples history of the law: Biocultural jurisprudence and the Nagoya Protocol on access and benefit sharing.” *The Law, Environment and Development Journal* 7(1). Available at: <http://www.lead-journal.org/content/11035.pdf>.

<sup>36</sup> ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples are notable exceptions. Also see: Expert Mechanism on the Rights of Indigenous Peoples, 2011. *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-making*, UN General Assembly, A/HRC/18/42, Annex Paragraph 1 (noting that “Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society. This has had a negative impact on their ability to determine the direction of their own societies, including in decision-making on matters that affect their rights and interests.”).

<sup>37</sup> In jurisprudential terms, this exercise presents the law as it stands (a positivist approach) and not what many Indigenous peoples or local communities may consider to be the optimum substantive or procedural standards (a natural law approach), which have been practicably unattainable due to the state-centric nature of international law.

INDIGENOUS PEOPLES, LOCAL COMMUNITIES,  
PEASANTS AND LEGAL WEIGHT



# INDIGENOUS PEOPLES, LOCAL COMMUNITIES AND PEASANTS

This short note sets out the international definitions of Indigenous peoples, local communities and peasants. The distinctions are extremely important, as conflating them can lead to a diminution of each relative to the other.

## Indigenous Peoples

Indigenous peoples are recognised as having particular characteristics by various documents and bodies. Although there is no single definition, James Anaya, the former UN Special Rapporteur on the Rights of Indigenous Peoples, argues that Indigenous peoples are "*indigenous*, because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity."<sup>38</sup> The key characteristics of Indigenous peoples, as enunciated by José R. Martínez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his "Study on the Problem of Discrimination Against Indigenous Populations", is set out in the box below.<sup>39</sup> The source of Indigenous peoples' rights, therefore, is an extensive connection to the land of their ancestors and the critical importance that has for their identities and contemporary ways of life.<sup>40</sup>

### Box 2: Key Characteristics of Indigenous Peoples

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form, at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

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<sup>38</sup> Anaya S., 2004. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2nd ed., page 3, original emphasis.

<sup>39</sup> See Cobo report submitted to the UN Subcommittee on the Prevention of Discrimination of Minorities, 1986, UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. The information in the box is taken from paras 379-382.

<sup>40</sup> Cobo report submitted to the UN Subcommittee on the Prevention of Discrimination of Minorities (1986). Martínez de Cobo, 1986, UN Doc. E/CN.4/Sub.2/1986/7

- Occupation of ancestral lands, or at least of part of them;
- Common ancestry with the original occupants of these lands;
- Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- Residence in certain parts of the country, or in certain regions of the world;
- Other relevant factors.<sup>41</sup>

Today, Indigenous peoples' rights are enshrined in a recognized body of human rights law and are the focus of two major international instruments; namely, ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.<sup>42</sup> Importantly, the rights of Indigenous peoples were developed within the framework of general human rights, which are considered inherent, indivisible, interrelated, and inalienable.<sup>43</sup> Therefore, they should be considered as human rights that are clearly elaborated for the special circumstances of Indigenous peoples.

The rights of Indigenous peoples have also been on the agenda of other international bodies like the Rio Summit Agenda 21 (Section III 23.3), which devotes a whole chapter to Indigenous peoples,<sup>44</sup> and, more recently, in the Rio+20 outcome document, "The Future We Want". Indigenous peoples' rights are also invoked in a number of statements and declarations made by Indigenous peoples, including the Indigenous Peoples International Declaration on Self-Determination and Sustainable Development (2012).<sup>45</sup>

### **Box 3: Self-Identification**

On an individual basis, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group). This preserves

<sup>41</sup> United Nations Department of Economic and Social Affairs, Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples*, PFII/2004/WS.1/3, page 2, para. 2.

<sup>42</sup> There were initially four States against the adoption of UNDRIP (Canada, the USA, New Zealand, and Australia), however, each has since reversed this position endorsed by UNDRIP.

<sup>43</sup> The UN Declaration on Indigenous Peoples Rights, when adopted in 2007, was considered a non-binding text (see <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>). However, in 2010 the Third Committee stated that the Declaration "should be regarded as a 'political, moral and legal imperative' without qualification" (see <http://www.un.org/News/Press/docs/2010/gashc3982.doc.htm>).

<sup>44</sup> See Chapter 26.

<sup>45</sup> Available at: [http://www.iwgia.org/news/search-news?news\\_id=542](http://www.iwgia.org/news/search-news?news_id=542).

for these communities the sovereign right and power to decide who belongs to them, without external interference.

## Local Communities

The term, ‘local communities’, is not defined in international law. It appears for the first time in Article 8(j) of the Convention on Biological Diversity (CBD), which calls on Parties to “respect, preserve and maintain knowledge, innovations and practices of indigenous *and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”<sup>46</sup> Despite this prominent reference, the definition of a ‘local community’ remains “ambiguous”<sup>47</sup> and is not as well developed or widely accepted at the international level as that of ‘Indigenous peoples’. This issue became the subject of a dedicated meeting held under the auspices of the CBD in July 2011.<sup>48</sup>

At the meeting, a group of representatives of local communities and experts on the related-issues agreed that any list of defining characteristics of local communities should be broad and inclusive, and allow for a clustering of unique cultural, ecological and social circumstances to each community.<sup>49</sup> In their recommendations, they underscore that identity is a “complex and multi-dimensional issue”,<sup>50</sup> and, as a result, self-identification as a local community should be foremost and essential in any list of characteristics. Other characteristics include:

- Lifestyles linked to traditions associated with natural cycles (symbiotic relationships or dependence), the use of and dependence on biological resources and linked to the sustainable use of nature and biodiversity;

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<sup>46</sup> CBD Article 8(j). Emphasis added. At the tenth CBD Conference of the Parties, the Conference of the Parties (COP) decided to hold an “ad hoc expert group meeting of *local-community representatives* ... with a view to identifying common characteristics of local communities, and gathering advice on how local communities can more effectively participate in Convention processes, including at the national level, as well as how to develop targeted outreach, in order to assist in the implementation the Convention and achievement of its goals.” Para 21, decision X/43 on the multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity Decision available here:

<http://www.cbd.int/decision/cop/?id=12309>.

<sup>47</sup> UNEP/CBD/AHEG/LCR/INF/1, page 4. This document contains a background paper produced by the Secretariat of the Permanent Forum on Indigenous Issues on the concept of local communities for an expert workshop on the disaggregation of data.

<sup>48</sup> Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, 14-16 July 2011. UNEP/CBD/WG8J/7/8/Add.1.

<sup>49</sup> UNEP/CBD/WG8J/7/8/Add.1, page 12.

<sup>50</sup> UNEP/CBD/AHEG/LCR/1/2, page 2.

- The community occupies a definable territory traditionally occupied and/or used, permanently or periodically. These territories are important for the maintenance of social, cultural, and economic aspects of the community;
- Traditions (often referring to common history, culture, language, rituals, symbols and customs) which are dynamic and may evolve;
- Technology/knowledge/innovations/practices associated with the sustainable use and conservation of biological resources;
- Social cohesion and willingness to be represented as a local community;
- Traditional knowledge transmitted from generation to generation including in oral form;
- A set of social rules (e.g., that regulate land conflicts/sharing of benefits) and organizational-specific community/traditional/customary laws and institutions;
- Expression of customary and/or collective rights; and
- Self-regulation by their customs and traditional forms of organization and institutions.<sup>51</sup>

Beyond the CBD,<sup>52</sup> courts are also recognizing non-Indigenous communities as deserving of particular rights in relation to their lands and natural resources, as exemplified in the *Saramaka* judgment handed down by the Inter-American Court of Human Rights.<sup>53</sup> In the context of the increased global focus on biodiversity, food sovereignty and ecosystem processes, local communities' rights are gaining prominence at all levels of law and policy.

### **Peasants**

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (2018), describes a 'peasant' as someone who "engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land". Additionally, the Declaration applies to:

- Any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and

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<sup>51</sup> UNEP/CBD/WG8J/7/8/Add.1, page 12.

<sup>52</sup> It should also be noted that ILO 169 applies to "tribal peoples" as well as Indigenous peoples. ILO 169 Article 1(a).

<sup>53</sup> *Saramaka v Suriname*, Inter-American Court of Human Rights (Ser. C) No. 172 (28 November 2007) (IACHR No. 172). For further information, see Jonas H., et al. 2012. International Law and Jurisprudence Report.

handicrafts related to agriculture or a related occupation in a rural area. It also applies to dependent family members of peasants.

- Indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless engaged in the above-mentioned activities, and
- Hired workers, including all migrant workers regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.<sup>54</sup>

## LEGAL WEIGHT

As the creation of international law has proliferated and evolved over the years, a perceived dichotomy has emerged between so-called “hard” (binding) and “soft” (non-binding) international law. The Compendium consists of provisions from international instruments that fall within both of these categories. However, the Compendium at this stage does not provide the reader with insight into the binding nature, i.e. legal weight, of each of those provisions. To do so would greatly complicate the text and, as discussed below, many questions surrounding the binding nature of international law remain unresolved. Nevertheless, we recognize this as an important issue, and are working to address it comprehensively in the online version of the Compendium. Additionally, Annex VIII provides a detailed analysis of the question in the context of the Convention on Biological Diversity (CBD). This section provides a brief synopsis of the issues.<sup>55</sup>

Hard law is generally created by treaties that are adopted and enter into force pursuant to the Vienna Convention on the Law of Treaties (Vienna Convention) and customary international law. Soft law, on the other hand, is often created by instruments that are explicitly voluntary and thus non-binding. It is not considered to be “law” in the classical sense and does not bind parties / States.<sup>56</sup> Although soft law does not create legal obligations, it is often based on moral norms and can be used to influence the course of international politics. Over time, soft law can also become binding through formal acceptance or by it becoming customary international law.<sup>57</sup>

Increasingly, international obligations are being created not through the Vienna Convention’s treaty-making process, but rather through decisions issued by

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<sup>54</sup> UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, 2018. Article 1.

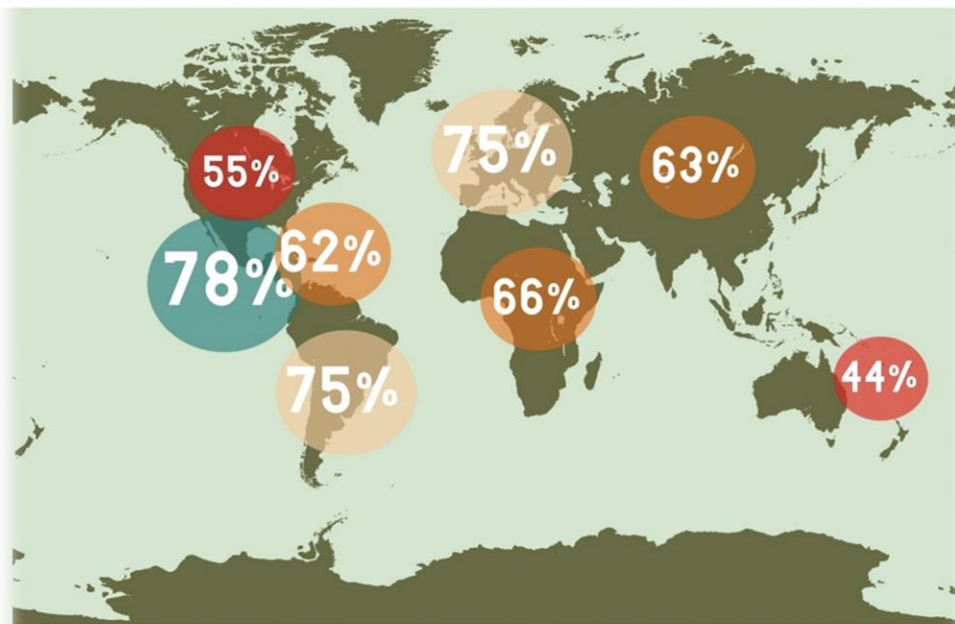
<sup>55</sup> For more information, see: J. Eli Makagon, 2012, *Analyzing the Binding Nature of COP Decisions Through the Convention on Biological Diversity* (Natural Justice, New York).  
<http://naturaljustice.org/library/our-publications/articles>.

<sup>56</sup> Shaw, M., 2008, *International Law*. 6<sup>th</sup> ed. Cambridge University Press, 118.

<sup>57</sup> Shaw, M., at 118.

Conferences of the Parties (COP) to international treaties such as the Convention on Biological Diversity. There is much debate over the legal weight of such decisions. Arguably, because they were not created strictly pursuant to the Vienna Convention, such decisions cannot be called hard law.<sup>58</sup> However, some commentators have suggested that if Parties understand obligations contained in COP decisions to be mandatory and agree to abide by those terms, legal obligations can be created outside of the formal treaty-making process.<sup>59</sup>

Although, at present, there is little clarity on the precise legal weight of COP decisions, it is hoped that State practice in response to such decisions and continuing legal analysis by commentators and practitioners will help clarify where COP decisions fit within the hard/soft law continuum – or whether an entirely new way of understanding and describing the legal nature of international law may be necessary.



**Figure 6:** Current level of ratification (by region) of the instruments included in this Compendium (see Annex IV for data)

<sup>58</sup> Brunee, J., 2002, *COPing with Consent: Law Making Under Multilateral Environmental Agreements*. 15 *Leiden Journal of International Law* 1, 32.

<sup>59</sup> Brunee, at 32, 33.



# THE RIGHT TO RESPONSIBILITY



## THE RIGHT TO RESPONSIBILITY

The horizon leans forward,  
Offering you space to place new steps of change.  
Here, on the pulse of this fine day  
You may have the courage  
To look up and out and upon me, the  
Rock, the River, the Tree, your country.

**Maya Angelou, *On the Pulse of Morning*<sup>60</sup>**

Accessing useful legal knowledge often takes significant amounts of time and money. It is hoped that this publication further illustrates the importance of *democratizing the law* by providing information about important rights and responsibilities in a form that is readily accessible to the people to whom it is of most use.

In light of this publication's focus on rights (due to the nature of international law), the irony is that many Indigenous peoples, local communities and peasants downplay the assertion of individual rights<sup>61</sup> in favour of affirming their responsibilities to care for their communities and territories.<sup>62</sup> While rights rely on a claim of entitlement by virtue of being human,<sup>63</sup> responsibilities are the result of mutually supportive relationships. In this context, the above Compendium can be seen as a body of law that has been agreed internationally to support Indigenous peoples' and local communities' *right to responsibility*.<sup>64</sup> Only by being recognized and supported in their roles as responsible stewards of their territories and areas will they be able to properly fulfil their self-imposed duties.<sup>65</sup>

Looking ahead, this publication represents one element of a much larger process and is itself a work in progress. It is the authors' sincere hope that it contributes to the ongoing work in this area and, by promoting an unorthodox reading of an existing legal

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<sup>60</sup> Maya Angelou, *On the Pulse of Morning*. Available at: <http://www.america.gov/st/texttrans-english/2009/January/20090112155227berehellek0.2457697.html&distid=ucs>.

<sup>61</sup> This is the case, at least in the first instance. Whereas Western systems privilege rights over responsibilities, many Indigenous and traditional communities espouse the opposite.

<sup>62</sup> A range of Indigenous peoples and local communities have expressed this, among other ways, through community protocols. See: <https://naturaljustice.org/community-protocols/>

<sup>63</sup> Schmitz, H.P. and Sikkink, K., *International Human Rights*, in *Handbook of International Relations* (2nd edition 2012), at 1.

<sup>64</sup> There appears to be little work done in this area. It would be interesting to explore the right to responsibility within the group that hopefully forms to advance this work.

<sup>65</sup> Jonas H.D., Shrumm H.C. and S. Subramanian, 2013, *The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia* (UNU-IAS and Natural Justice: Yokohama/Cape Town).

landscape, helps Indigenous peoples, local communities, peasants and their supporters to identify 'space to place new steps of change'.