

Human Rights Standards for Conservation

PART I

To Which Conservation Actors do International Standards Apply?

Jael E. Makagon, Harry Jonas and Dilys Roe

Discussion Paper

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This paper analyses the applicability of international human rights law to actors involved in protected area conservation, including States and State agencies, international organizations, businesses and NGOs. It forms Part I of a series of technical reports that will serve as a foundation for developing an accessible *Guide to Human Rights Standards for Conservation*. The authors are particularly keen to receive feedback on the analysis and conclusions presented.

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Foreword

In 2013 Natural Justice published the second edition of “The Living Convention”¹ – the first compilation of the full extent of international law relevant to Indigenous and Tribal peoples and local communities. It sets out the specific provisions of relevant international instruments in an integrated compendium, so that – for example – all provisions from across the full spectrum of international law that deal with ‘free, prior and informed consent’ are grouped under the same heading.

Building on its earlier engagement in the Conservation Initiative on Human Rights,² the International Institute for Environment and Development (IIED) is working with Natural Justice and an advisory group of Indigenous and other lawyers and practitioners to further develop the Living Convention to provide a clear articulation of minimum human rights standards for stakeholders working in the context of protected areas (PAs) and other effective area-based conservation measures (OCMs), as described in Aichi Biodiversity Target 11. As with the production of the Living Convention, our approach is based on existing international law and policy.

This Discussion Paper provides legal background and an analysis of the relevance of human rights standards to different conservation actors:

- Governments and their agencies,
- International organizations,
- Businesses, and
- Non-governmental organizations.

Subsequent documents in the series will include:

- An update of the Living Convention to provide the most up to date articulation of human rights standards relevant to protected areas and other effective area-based conservation measures, and
- A review of existing formal and informal grievance mechanisms available to parties alleging infringement of their rights.

Together, they will serve as a foundation for developing an easily accessible *Guide to Human Rights Standards for Conservation*, focusing specifically on conservation measures as articulated in Aichi Target 11. The Guide is intended to provide a mechanism for country-led, multi-stakeholder assessment of the development, implementation and outcomes of conservation initiatives focusing on PAs and OCMs and to enable a range

of actors to show how internationally- and nationally-defined standards are being addressed and respected.

We are extremely grateful to the members of the Technical Advisory Group for their comments on initial drafts of this paper and welcome further inputs from all interested parties as we prepare to discuss this work at the World Parks Congress in November 2014.

Dilys Roe and Harry Jonas, 6 June 2014

Summary

Despite increasing emphasis on the need for all agents involved in conservation to uphold human rights standards, injustices continue. One reason relates to the lack of clear guidance about the human rights obligations of conservation-related stakeholders, and lack of specificity about the rights and forms of redress Indigenous peoples and local communities have.

Specifically, while there has been widespread recognition that conservation initiatives can violate the human rights of local people, to the authors' knowledge there has not been a systematic and parallel analysis of the following three overarching questions:

- Which actors bear human rights obligations and responsibilities in the context of conservation initiatives;
- What are their obligations and responsibilities; and
- What are the grievance mechanism available to peoples and communities in cases of violations of their human rights?

This paper focuses on the first question and forms Part I of a three-part series of discussion papers and technical reports that will be produced in the lead up to the World Parks Congress in Australia, November 2014, and ultimately form the foundation for developing a *Guide to Human Rights Standards for Conservation*. It provides background on the sources and subjects of international law and extent to which this law is binding, includes a chronological overview of the evolution of international conservation law and policy particularly in relation to Indigenous peoples and local communities, and sets out the legal reasoning for the applicability of international human rights law to entities involved in protected areas as conservation initiatives, including States and State agencies, international organizations, businesses, and non-governmental organizations.

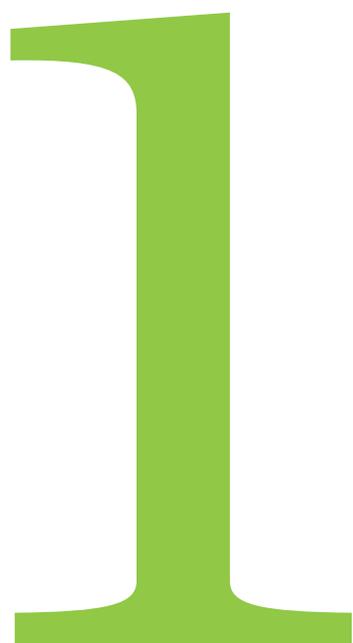
The paper draws the following conclusions:

- While there is an ongoing debate about the binding nature of various developments in international law, there is an evolving consensus that internationally agreed standards regarding the human rights of Indigenous peoples and local communities have been established through international instruments, custom, and other sources of international law.
- International law is a dynamic system that has evolved from generally being seen as applying only to states to one that is widely recognized as setting standards for non-state entities, including international organizations and businesses.
- Viewed through the lens of the United Nations Protect, Respect and Remedy Framework, in which the social license of businesses to operate gives rise to their responsibility to respect human rights, other entities with similar or even broader social licenses, such as NGOs and philanthropic entities, also have similar responsibilities to respect human rights.
- Overall, stakeholders involved in conservation initiatives, including states, international organizations, businesses and NGOs, have obligations and responsibilities with regard to human rights that should govern their behavior in the context of Aichi Biodiversity Target 11 and conservation initiatives more generally.

IIED and Natural Justice are particularly keen to receive feedback on these conclusions and comments on their implications. Do you agree that state agencies, international organizations, businesses and NGOs/ foundations should abide by human rights standards when planning, funding and implementing conservation initiatives? If so, what obligations and responsibilities are applicable each of these actors relevant to ensuring human rights standards are upheld in conservation initiatives?

Please contribute to the discussion by emailing comments or reflections to Harry Jonas harry@naturaljustice.org and Dilys Roe dilys.roe@iied.org

Introduction



1.1 Human Rights and Conservation

There are three major categories of external threats to Indigenous and Tribal peoples and local communities.³ The first consists of systemic pressures on the environment and biodiversity worldwide, including habitat loss, overexploitation of resources, pollution, invasive species, and climate change (as identified in Global Biodiversity Outlook 3).⁴ In general, these are driven either by the predominant market- or state-dominated economies' unsustainable patterns of resource extraction, production and consumption. The mainstream economic and governmental systems also promote rapid urbanization, loss of traditional languages and knowledge systems, dependence on imported and mass-produced foods and material goods, accumulation of capital, and elite capture, often also building on or exacerbating traditional inequities of class, caste, ethnicity, and gender. Due to the inextricable links between Indigenous peoples and local communities and the territories and resources upon which they depend, the loss of biological diversity is fueling the loss of cultural and linguistic diversity and inter-generational transmission of knowledge and practices. This in turn undermines social and cultural cohesion and sophisticated customary systems of caring for territories and resources.

The second category consists of the direct pressures on Indigenous peoples and local communities and their territories and resources. This includes two very different kinds of threats. The first pressure in this category is from industrial methods of extraction, production and development. These include, for example, land conversion for large-scale livestock farms or monoculture plantations, infrastructure and dams, industrial fishing and logging, and large-scale mines. The second pressure, paradoxically, results from exclusionary environmental and conservation frameworks and initiatives that undermine the rights and livelihoods of Indigenous peoples and local communities. The establishment of PAs and other OCMs in ways that exclude local populations contrary to human rights standards is one example of this dynamic.

The third category of threats has the potential to exacerbate the first two categories. There continues to be a widespread lack of effective legal recognition of a range of Indigenous peoples' and local communities' inherent rights, including to self-determination and self-governance, customary laws and traditional institutions, and customary rights to their territories, lands, waters, natural resources, and knowledge systems. They suffer continued marginalization from legislative and judicial systems and decision-making processes at all levels, impacts of discriminatory and fragmented legal and institutional frameworks, and exclusion from (or negative impacts of) governmental and corporate programmes

of so-called development, conservation, and welfare. This is compounded by a corresponding lack of non-legal recognition of the above rights. These factors – represented in Figure 1 below – actively undermine Indigenous peoples' and local communities' abilities to respond to the first two categories of external threats.

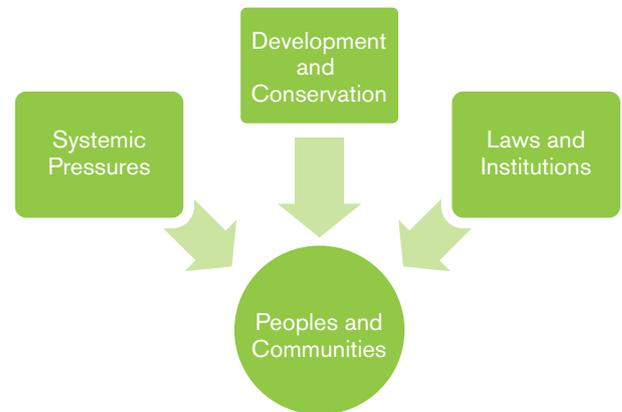


Figure 1: Indigenous and Tribal peoples and local communities are directly affected by a) systemic pressures, b) development and conservation, as well as c) laws and policies that undermine their resilience of those disturbances.

This initiative focuses on the human rights obligations of the *proponents of conservation initiatives* in the context of the widespread lack of respect for the rights of Indigenous peoples, tribal peoples and local communities.

1.2 Aichi Biodiversity Target 11

'Conservation' is a contested term and is not easily defined. The International Union for the Conservation of Nature (IUCN) defines conservation as: "the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations."⁵ This definition goes far beyond the realm of protected areas law and policy, to include a wide range of activities related to protecting elements of the biosphere. The Convention on Biological Diversity (CBD) has usefully enumerated a range of types of biodiversity or biomes. These include: agriculture; dry and sub-humid lands; forests; inland waters; islands; marine and coasts; and mountains. The CBD's crosscutting programmes illustrate the diversity of issues or activities that have a rights dimension, including: climate change; communication, education and public awareness; incentive measures; the Global Strategy for Plant Conservation; human health; environmental impact assessments; invasive alien species; protected areas; sustainable use of biodiversity; technology transfer; tourism; and traditional knowledge, innovations and practices.⁶

The extent of the activities that relate to the above biomes and crosscutting issues – as non-exhaustive examples – illustrates the importance of ensuring that any ‘conservation-related initiatives’ are conducted in accordance with human rights standards. It also emphasizes the immense number and type of potential conservation activities – a number beyond the scope of this initiative. In order to narrow the focus to a practical level, in the first instance we focus on area-based conservation efforts covered under the CBD’s Aichi Biodiversity Target 11.⁷

Aichi Biodiversity Target 11 (Target 11) is a product of the 10th Conference of the Parties (COP 10) to the CBD, which agreed in October 2010 on the new Strategic Plan for Biodiversity 2011-2020. The Plan outlines 20 Aichi Targets, which are organized under five strategic goals to achieve biodiversity conservation. Target 11 belongs to Strategic Goal C (*To improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity*), and addresses issues related to the conservation of terrestrial, inland water, and coastal and marine areas. Specifically, Target 11 states:

*By 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of **protected areas and other effective area-based conservation measures**, and integrated into the wider landscape and seascape.⁸*

Accordingly, Target 11 envisages two means to achieve the respective terrestrial and marine targets, namely a) PAs and b) OCMs.

PAs are defined by the CBD and IUCN, and elaborated in the IUCN protected areas matrix. Box 1 sets out the CBD and IUCN definitions of a protected area.

BOX 1: THE CBD AND IUCN DEFINITIONS OF A PROTECTED AREA

- **CBD:** “... geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.”
- **IUCN:** “... clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”

While there are differences between the two definitions, there is a “tacit agreement between the CBD Secretariat and IUCN that the two definitions are entirely compatible.”⁹ The IUCN PA matrix elaborates the forms of governance types and management categories possible for any given protected area.¹⁰ Broadly, these include four governance types (government, shared, private, and Indigenous peoples and local communities) and six management categories that range from Category I ‘Strict Nature Reserves’ and ‘Wilderness Areas’ to Category VI ‘Protected Areas with Sustainable Use of Natural Resources’. In this context, a PA is an increasingly well-defined concept that is the subject of a growing body of scholarship and guidance.¹¹

In contrast, the term ‘other effective area-based conservation measures’ is not well defined. A number of attempts are currently being made to address this deficiency.¹² Given this lack of conceptual clarity, this work will focus in the first instance on PAs and its scope will grow to include OCMs as that definition is agreed at the international, national and local levels.

1.3 Evolution of International Conservation Law and Policy

The modern conservation paradigm developed from a colonial mindset.¹³ The first state-designated strictly protected area – USA’s Yellowstone National Park, established in 1872 – led to the removal of the Native Americans from the area.¹⁴ As conservation initiatives grew in the 20th century into a worldwide effort involving national governments, international organizations, NGOs, and international funding mechanisms, the ‘Yellowstone model’ of national parks led to many conservation initiatives being designed, funded¹⁵ and implemented in ways that clearly violated specific Indigenous peoples’ and local communities’ substantive and procedural rights, including through forced removal and exclusion from decision-making.¹⁶ In this long-running and often fractious debate, the view that human rights impacts on local communities is outweighed by the ‘public good’ of conservation has been increasingly challenged.¹⁷ The contemporary emphasis is on all actors involved in conservation initiatives upholding human rights standards, which includes: governments, international organizations, businesses, and non-governmental organizations (including funders). This sub-section provides a chronological overview of the evolution of related international law and policy.

Since the adoption of the Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) in 1989, there has been an increasing level of attention paid at the international level to the effects of conservation

BOX 2: CONVENTION (NO. 169) CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES

Article 3(1): Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination

Article 7(1): The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 7(4): Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 14(1): The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Article 15(1): The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Article 16(1): Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

(2) Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

(3) Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

(4) When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

(5) Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 18: Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

initiatives on the people traditionally living in the target areas.¹⁸ ILO clarifies a number of rights relevant to, among other things, conservation initiatives. Box 2 sets out a number of important provisions.

The Earth Summit in 1992 also generated discussion about these issues. The CBD – one of the Summit's main outcomes – contains language that protects the rights of “indigenous and local communities”¹⁹ under Articles 8 (In-situ Conservation) and 10 (Sustainable Use of Components of Biodiversity), as set out in Box 3.

More recently, IUCN has grappled with the issue. In 2000, the IUCN Council adopted a Policy on Social Equity in Conservation and Sustainable Use of Natural

Resources, which sets out six major areas in which issues of social equity should be explicitly addressed.²⁰ The Vth World Parks Congress in 2003 led to the Durban Accord and Action Plan, which expressly voices concern that “many places conserved over the ages by local communities, mobile and indigenous peoples are not given recognition, protection and support.” That Congress heralded a “new paradigm” for protected areas based on a “commitment to involve local communities, indigenous and mobile peoples in the creation, proclamation and management of protected areas.”²¹

The CBD Programme of Work on Protected Areas, adopted in 2004, has a clear focus on promoting just

BOX 3: THE CONVENTION ON BIOLOGICAL DIVERSITY

Article 8(j): [Each party shall, as far as possible and as appropriate:] Subject to its national legislation, 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 and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 10(c): [Each party shall, as far as possible and as appropriate:] Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

conservation, and contains Element 2 on ‘Governance, Equity, Participation and Benefit Sharing’.²²

In 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples, which underscores Indigenous peoples’ right to self-determination and contains very clear language of relevance to conservation initiatives, covering the same core issues listed above regarding ILO 169. Subsequently, at the IVth IUCN World Conservation Congress, Resolution 4.52 ‘Implementing the UN Declaration on the Rights of Indigenous Peoples’ recognized that “the UN Declaration is the accepted international mechanism for relieving the tremendous pressures and crises faced by indigenous peoples throughout the world as they endeavor to protect indigenous ecosystems, including biological, cultural and linguistic diversity.” It makes very specific endorsements, calls, directions, acknowledgements, invitations and requests with regard to the full range of actors involved in conservation initiatives, as set out in Box 4.

At the same Congress, Resolution 4.056 proposed a ‘Rights-based Approach to Conservation’ that includes guidance to state and non-state actors “planning or engaged in policies, projects, programmes or activities with implications for nature conservation”, set out in Box 5. The Resolution was followed by a number of publications on the same topic to provide guidance and examples to conservation-related stakeholders.²³

At the Vth World Conservation Congress in 2012, IUCN adopted its Global Programme for 2013-2016, which focuses explicitly on rights-based conservation as one of three global results the Programme is aiming to achieve.²⁴ It also adopted a new Policy on Conservation and Human Rights for Sustainable Development (contained in Resolution 5.099 – Box 6), which sets out a framework for rights-related foundations of social equity and justice. IUCN had adopted several other relevant Resolutions and Recommendations; similarly, Parties to the CBD have adopted several Decisions in recent Conferences of

BOX 4: IUCN WORLD CONSERVATION CONGRESS RESOLUTION 4.052

The IUCN World Conservation Congress at its 4th Session in Barcelona, Spain, 5-14 October:

Endorsed the United Nations Declaration on the Rights of Indigenous Peoples;

Called on all IUCN members to endorse or adopt the UN Declaration, and to apply it in their relevant activities;

Directed the IUCN Council to form a task force to examine the application of the Declaration to every aspect of the IUCN Programme (including Commission Mandates), policies and practices and to make recommendations for its implementation;

Acknowledged that injustices to indigenous peoples have been and continue to be caused in the name of conservation of nature and natural resources;

Invited international organizations to provide all appropriate financial and other capacity-building measures to ensure participation by indigenous peoples and their communities in sustainable development;

Instructed the Director General and Commissions to identify and propose mechanisms to address and redress the effects of historic and current injustices against indigenous peoples in the name of conservation of nature and natural resources; and

Requested that the Director General make indigenous peoples’ role in conserving biological and cultural diversity a main concern of IUCN and future World Conservation Congresses, and present a statement of progress to the annual UN Permanent Forum on Indigenous Issues beginning in April 2009.

BOX 5: IUCN WORLD CONSERVATION CONGRESS RESOLUTION 4.056

Resolution 4.056 on “Rights-based Approach to Conservation,” lists the following principles concerning human rights in conservation in its Annex (prepared by the IUCN Environmental Law Centre):

1. Promote the obligation of all state and non-state actors planning or engaged in policies, projects, programmes or activities with implications for nature conservation, to secure for all potentially affected persons and peoples, the substantive and procedural rights that are guaranteed by national and international law.
2. Ensure prior evaluation of the scope of conservation policies, projects, programmes or activities, so that all links between human rights and the environment are identified, and all potentially affected persons are informed and consulted.
3. Ensure that planning and implementation of conservation policies and actions reflect such prior evaluation, are based on reasoned decisions and therefore do not harm the vulnerable, but support as much as possible the fulfilment of their rights in the context of nature and natural resource use.
4. Incorporate guidelines and tools in project and programme planning to ensure monitoring and evaluation of all interventions and their implications for human rights of the people involved or potentially affected which will support better accountability and start a feedback loop.
5. Support improvement of governance frameworks on matters regarding the legal and policy frameworks, institutions and procedures that can secure the rights of local people in the context of conservation and sustainable resource use.

BOX 6: IUCN WORLD CONSERVATION CONGRESS RESOLUTION 5.099

Resolution 5.099 adopts the Policy on Conservation and Human Rights for Sustainable Development which calls on IUCN to be guided by a number of principles, including:

1. Respect, protect, promote and fulfil all procedural and substantive rights, including environmental and customary rights, for just and equitable conservation;
2. Promote the implementation of the provisions of international conventions and policy processes which respect human rights in all approaches to conservation, whether multilateral environmental agreements such as the Convention on Biological Diversity or human rights instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) [...];
3. Take into account the multiple recommendations of the Vth World Parks Congress and the 2003 WCPA Durban Action Plan which refer to rights and which IUCN has endorsed concerning protected areas, including the acknowledgement of rights to the restitution of lands taken without free, prior and informed consent and the right to full and effective participation in protected area governance and management, in particular the targets under the Durban Action Plan's outcome 5 [‘The rights of indigenous peoples, including mobile indigenous peoples, and local communities are secured in relation to natural resources and biodiversity conservation’].
4. Ensure that IUCN programmes, projects, and activities undertaken, sponsored or supported by the IUCN, are assessed using international human rights standards. Such measures should include social, environmental, and human rights impact assessments prior to any project implementation.

the Parties relating to governance, equity, rights, tenure, and other related themes.

The Food and Agriculture Organization (FAO) has also developed policy that supports Indigenous peoples with regard to conservation and sustainable use of biodiversity. For example, Strategic Priority 6 of the Global Plan of Action for Animal Genetic Resources

(2007) calls on states to “support indigenous and local production systems and associated knowledge systems of importance to the maintenance and sustainable use of animal genetic resources.”²⁵ Furthermore, the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, explicitly state that they are intended to improve governance of

tenure with the goals of, among other things, realizing the right to adequate food, sustainable livelihoods and environmental protection.²⁶

In a related vein, the Conservation Initiative on Human Rights (CIHR) is a consortium of international conservation NGOs²⁷ whose stated goal is to “improve the practice of conservation by ensuring that participating organizations integrate human rights into their work” and promote the “positive links between conservation and rights of people to secure their livelihoods, enjoy healthy and productive environments and live with dignity.”²⁸ CIHR members have adopted a

number of overarching human rights principles to guide their work (Box 7).

As the above trend in international law and policy illustrates, the conservation paradigm is shifting²⁹ and there is evidence of efforts to effect concrete changes on the ground. Nevertheless, ‘unjust conservation’ remains a contemporary challenge and manifests itself in a number of ways. For example:

- Peoples’ and communities’ land and resource rights are not respected, particularly if their legal recognition in-country is weak or non-existent;

BOX 7: THE CONSERVATION INITIATIVE ON HUMAN RIGHTS PRINCIPLES

1. Respect human rights: Respect internationally proclaimed human rights; and make sure that we do not contribute to infringements of human rights while pursuing our mission.

2. Promote human rights within conservation programmes: Support and promote the protection and realization of human rights within the scope of our conservation programmes.

3. Protect the vulnerable: Make special efforts to avoid harm to those who are vulnerable to infringements of their rights and to support the protection and fulfilment of their rights within the scope of our conservation programmes.

4. Encourage good governance: Support the improvement of governance systems that can secure the rights of indigenous peoples and local communities in the context of our work on conservation and sustainable natural resource use, including elements such as legal, policy and institutional frameworks, and procedures for equitable participation and accountability.”

BOX 8: CONTEMPORARY EXAMPLES OF UNJUST CONSERVATION

Indigenous peoples and local communities who have recently been adversely affected by conservation-related initiatives include the following:

- The Endorois people in Kenya were not included in the designation of Lake Bogoria in Kenya as a UNESCO World Heritage site and continue to be denied inclusion in the governance and management of the lake;³¹
- A number of communities from distinct San peoples have been excluded from conservation initiatives in the Kalahari - such as the Central Kalahari Game Reserve - and face a renewed threat from the proposed establishment of a wildlife corridor;³²
- The Maasai’s land rights in the Gorongoro district of Tanzania have neither been recognized nor respected with regard to historical conservation initiatives – such as their expulsion from what became the Serengeti National Park - and the ongoing conflict in the context of a privately run hunting area;³³
- Between May and July 2011, Karen people were forcibly expelled from the Kaeng Krachan National Park in Thailand and continue to face exclusion from the area;³⁴
- Cree, Ojibwe, Oji-Cree and Algonquin Indigenous peoples of the Nishnawbe Aski Nation were excluded from the development of the Far North Act, 2010 - an Act with respect to land use planning and protection in the far north of Canada - which has led to the expropriation of their land without compensation, and transfer of power to the provincial government to override Indigenous peoples’ land use decisions.³⁵
- Shipibo Indigenous communities and neighbouring villages from the Imiria lake region in Ucayali, Peru, have expressed their opposition to the Imiria Regional Conservation Area, a protected area established in 2010 by the regional government of Ucayali, stating that it overlaps with their traditional territory.³⁶

- Peoples or communities and their representative institutions are not respected or involved in decision-making processes and the development of conservation initiatives that affect them;
- Inclusive and participatory cultural, social and/or environmental impact assessments are not undertaken to assess proposed initiatives;
- Peoples or communities are not given the opportunity to exercise their right to give or withhold free, prior and informed consent before the initiative is funded or implemented;
- Peoples' or communities' ways of life and livelihoods are adversely affected by initiatives, including by restricting their access and use rights or criminalizing certain activities; and
- Peoples or communities are forcibly evicted from and/or prevented from accessing their territories or areas, often with severe negative impacts on the full spectrum of their lives, including their cultures and languages.³⁰

The above list includes **substantive rights** – such as to land and natural resources, as well as **procedural rights** – such as to participation and the right to free, prior and informed consent. Box 8 provides a number of examples of Indigenous peoples and local communities who have suffered recent injustices due to conservation initiatives.

One of reasons for these continuing injustices relates to the lack of clear guidance either generated by or provided to conservation-related stakeholders about their exact human rights obligations, on the one hand, and specificity about the rights and forms of redress Indigenous peoples and local communities have in the context of conservation initiatives, on the other. Specifically, while there has been widespread recognition that conservation initiatives can violate the human rights of local inhabitants, to the authors' knowledge there has not been a systematic and parallel analysis of the following three overarching questions:

- Which actors bear human rights duties in the context of conservation initiatives;
- What are their exact obligations; and
- What are the grievance mechanism available to peoples and communities in cases of violations of their human rights?

This analysis is important because it can serve to provide clear guidance to all parties involved in conservation initiatives towards ensuring that human rights are not violated and are instead supported and in part realized by such activities.

International Law

2

2.1 Subjects and Sources of International Law

In order to understand the international obligations of conservation actors, it is necessary to provide a brief background on international law. Traditionally, international law has been viewed as a system governing interactions among states and states alone, except in certain exceptional circumstances.³⁷ While states are still viewed as the primary ‘subjects’ of international law, many courts and scholars are currently analyzing whether other entities, such as international organizations and individuals, can be subjects of international law as well.

Identifying the sources of international law is a topic of rich scholarly debate, and the discussion often begins with Article 38 of the Statute of the International Court of Justice (ICJ).³⁸ Article 38(1) identifies four sources:

1. International conventions,
2. International custom,
3. General principles of law recognized by civilized nations, and
4. Judicial decisions and the teachings of publicists.

Other than this latter category, which is referred to “as a subsidiary means for the determination of rules of law”, the statute does not specify that one source is more authoritative than another. Nevertheless, this list has traditionally been viewed as setting forth a general hierarchy in the order the sources are listed.³⁹

International conventions, i.e. treaties, have been called “the most important source of obligation in international law.”⁴⁰ Treaties operate on the principle of *pacta sunt servanda*⁴¹ as set forth in Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention), which provides that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴² Additionally, Article 18 of the Vienna Convention prohibits states that have signed the treaty or expressed consent to be bound by the treaty prior to its entry into force from engaging in acts that would defeat the object and purpose of the treaty. The concept of a treaty – or other source of international law – ‘binding’ its parties is important to understand in the context of the obligations of agencies involved in conservation initiatives, and is discussed more fully below.

The second source in Article 38, international custom, exists when there is a general practice that is accepted as international law. General practice can arise in a variety of different ways, including as a result of treaties, and “norms of treaty origin [can] crystallize into new principles or rules of customary law ...”⁴³ For example, in the United States federal court case of *Filartiga v. Pena-Irala*, the court looked to international instruments

(such as the UN Charter and the Universal Declaration), books and articles on human rights, and statements by the United States government to hold that “official torture is now prohibited by the law of nations.”⁴⁴ Importantly, the acceptance element, commonly referred to as *opinio juris*, need not be universal in order for a rule to form part of international law.

The third source listed in Article 38 is “general principles of law.” This has been interpreted by scholars to allow the ICJ to apply principles of law from municipal jurisprudence that is applicable to the relations of states.⁴⁵ Finally, Article 38 refers to judicial decisions and the teachings of publicists. With regard to judicial decisions, they do not serve as precedent in the domestic legal sense, but they are often “regarded as evidence of the law.”⁴⁶ The teachings of publicists are widely used, including in the work of the ICJ.⁴⁷

The other potential source of international law is resolutions of the UN General Assembly. There is scholarly debate as to the legal effect of UN General Assembly resolutions, and some have argued that they can “generate new customs.”⁴⁹ At the least, however, it is recognized that “they can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules.”⁵⁰

2.2 Binding Nature of International Law

International law is a system of authoritative norms that to a certain extent exerts control across jurisdictional boundaries.⁵¹ In measuring the authoritativeness of those norms, scholars often use the terms ‘hard law’ and ‘soft law’ to denote whether and to what extent the norm is binding upon its subjects. Although the terms could theoretically apply to categorize rules established by any source of international law, they are often used when discussing international instruments.⁵² Three general approaches to defining hard and soft law have been identified:

1. Legal positivist: associating the hard/soft law distinction with a binary binding/ non-binding dichotomy;
2. Constructivist: considering the purported hardness or softness of law as secondary to its social effects; and
3. Rational institutionalist: taking a multidimensional and continuous view of hard and soft law.⁵³

In the view of the positivists, hard law consists of binding legal obligations, whereas soft law refers to non-legally-binding commitments.⁵⁴ Soft law can thus be seen “as a codified instrument that is publicized, issued through an institutionalized process, with the aim of

exercising a form of authority or persuasion, even though the instrument is not formally legally binding.”⁵⁵

Constructivists, on the other hand, see the binary distinction between hard and soft law as illusory, because what matters is its impact on behavior, regardless of whether the law is labeled “hard” or “soft.”⁵⁶ They underscore the point that “international regimes can lead states to change their perceptions of their interests through transnational processes of interaction, deliberation, and persuasion.”⁵⁷

Rationalists acknowledge that unlike domestic law, “most international law is ‘soft’ in distinctive ways.”⁵⁸ In what has been called the most influential statement under this approach, two legal scholars argue the ‘hardness’ or ‘softness’ of a law can be determined based upon a continuum with three dimensions: a) precision of rules, b) obligation, and c) delegation to a third-party decision-maker such as an international secretariat or a dispute settlement body.”⁵⁹ Thus, hard law “refers to legally binding obligations that are precise – or can be made precise through adjudication or the issuance of detailed regulations – and that delegate authority for interpreting and implementing the law.”⁶⁰ Soft law, on the other hand, refers to legal arrangements that are weak along one or more dimensions of the continuum. Under this definition, a treaty that is formally binding – but delegated no authority for its interpretation, monitoring, and/or enforcement – would be considered soft law.

Regardless of the method used to categorize any particular instrument, it is clear that the use of soft law instruments is expanding as a process of norm creation in international law.⁶¹ Thus, it is not enough to simply categorize an international instrument as hard or soft and draw conclusions as to its value on that basis alone. Other factors must be considered because an agreement in treaty form does not itself ensure that hard obligations are created.⁶² Conversely, countries may comply with requirements set forth in soft law agreements that are expressly non-binding.⁶³ Therefore, to truly understand the legal weight of a particular instrument, it is necessary to look beyond its formal label to a variety of other factors that determine its effect.

It is also important to note that hard law and soft law each demonstrate unique advantages with respect to one another. Hard law instruments, for example, allow states to more credibly commit to international agreements, can directly effect national legislation, and can better provide for monitoring and enforcement of their provisions.⁶⁴ Soft law instruments, on the other hand, are said to be easier and cheaper to negotiate, are less of a threat to state sovereignty, provide greater flexibility, and allow states to be more ambitious and cooperative than they otherwise would be if issues of enforcement were present.⁶⁵ Soft law can also be seen as an early step along the continuum of a norm developing into hard law.⁶⁶ Additionally, international soft

law “may well influence lawmaking processes within domestic legal systems.”⁶⁷

One issue where the concepts of hard and soft law have garnered significant attention is with regard to the rights of Indigenous peoples. As discussed more fully below, their rights have increasingly come to be recognized across a broad spectrum of both hard and soft international instruments, including ILO 169 and the UN Declaration. Their rights have also been mainstreamed in other instruments, such as under the auspices of the Convention on Biological Diversity and the UN Framework Convention on Climate Change, and others. Additionally, new ways of contributing to international processes, such as through the United Nations Permanent Forum on Indigenous Issues, are being created and expanded. Furthermore, rights are being recognized in landmark decisions issued in the Inter-American human rights system, including the *Awasi Tingi*⁶⁸ and *Saramaka*⁶⁹ cases. These developments support the general thrust of both the constructivist and rationalist approaches by demonstrating that regardless of the formal labels applied to particular international instruments, the rights of Indigenous peoples and local communities are gaining meaningful recognition at the international level.

Indigenous and Tribal Peoples and Local Communities in International Law

3

3.1 Indigenous Peoples

The naturalist framework of international legal theory during the European Renaissance recognized, at least to a certain extent, Indigenous peoples⁷⁰ as autonomous communities.⁷¹ Influential theorists during that time conceived of a “suprasovereign normative order” that within carefully defined logic recognized Indigenous peoples as owners of their lands.⁷² Despite allowing for the possible legitimacy of imposing a doctrine of trusteeship over Indigenous lands, title by discovery or papal grant over such lands was rejected.⁷³

By the late 1800s, however, that framework gave way to a conception of international law as “a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples.”⁷⁴ Under this approach, international law was a closed system concerned only with the rights and duties of states, whose existence depended upon recognition by other states. As a result, only states could participate in the formulation and application of international law. Along with this formulation came the methodical application of the doctrine of terra nullius, a legal fiction used to legitimize colonization of indigenous lands.⁷⁵

While there is no question that the state-centric focus of international law continues to this day, significant changes in the normative structure of international law have occurred in the past decades. James Anaya has identified three of particular importance. First, the substantial increase since the mid-twentieth century in the number of states that make up the international community has brought new cultures and perspectives to the international legal system. Second, non-state actors, including Indigenous peoples, are now able to participate in procedures that shape international law.⁷⁶ And third, a new international discourse focused on human rights is taking place that addresses the concerns of human beings and groups, concerns that were formerly considered to fall within the prerogatives of individual states.⁷⁷

Of significant importance among these developments is the drafting of instruments with special relevance to Indigenous peoples, in particular ILO Convention No. 169⁷⁸ and the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). Convention No. 169 is a binding treaty, and although only 22 countries have ratified it, it is viewed, even in countries where it has not been ratified, as illustrating the normative trajectory of international law.⁷⁹

The UN Declaration, on the other hand, is not legally binding in the formal treaty sense, since it was proclaimed by a resolution of the UN General Assembly rather than adopted and ratified pursuant to the Vienna Convention. Nevertheless, it carries legal authority for several reasons. First, such authority is

to a large extent inherent in a declaration of the UN General Assembly, “the most representative political organ of the world body”.⁸⁰ Indeed, the UN Declaration took over 25 years to finalize, and in doing so went through an institutionalized and transparent law making process that made it less prone to political whim and thus attached greater legal character to its norms.⁸¹ As noted above, UN General Assembly resolutions, if not sources of law themselves, can serve at the very least “as evidence of new customary international law.”⁸²

Second, the UN Declaration encapsulates well-established principles of human rights that are already integrated into human rights treaties, such as those making up the International Bill of Human Rights (IBHR).⁸³ On this basis it is suggested that it “is in significant part interpretive of the principles found in [widely ratified human rights] treaties that legally bind the states that have ratified them.”⁸⁴ Third, it reflects customary principles of international law⁸⁵ and an expectation that those states that voted for the UN Declaration will abide by its provisions.⁸⁶ In a landmark judgment by the Supreme Court of Belize, Chief Justice Abdulai Conteh states that: “[the UN] Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it.”⁸⁷

Further, the basic normative principles set forth in the UN Declaration can also be found in many other instruments, as well as decisions by several international bodies.⁸⁸ These include, for example, the collective rights affirmed in Convention No. 169, including ownership rights over traditional lands, rights to consultation, and rights to retain their own customs and institutions.⁸⁹ Additionally, the UN Human Rights Committee has affirmed that Article 1 of the International Covenant on Civil and Political Rights applies to Indigenous peoples.⁹⁰ And the Committee on the Elimination of Racial Discrimination has called on states to protect Indigenous peoples’ cultures and land tenure from patterns of discrimination.⁹¹ In sum, the UN Declaration “manifests a strongly rooted level of consensus about the human rights of indigenous peoples, and it also represents expectations of compliance with these rights.”⁹²

Activity on the part of states supports the legal authority of the UN Declaration. For example, the Bolivian government adopted national legislation in 2007 reflecting the exact content of the UN Declaration. Ecuador and Nepal have recently referred to the UN Declaration as a normative source in constitutional revision processes. In 2008 in Japan, the legislature recognized the Ainu as “indigenous people” and called for specific governmental action after the UN Declaration’s adoption. And despite initial

opposition to the UN Declaration, the Canadian House of Commons called on Parliament to implement the standards set forth in the UN Declaration.⁹³ Clearly, states are heeding the call in UN Declaration Article 38 to “take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

The UN Declaration is also being operationalized in the activities of the United Nations. For example, the UN Development Group, which “unites the 32 UN funds, programmes, agencies, departments, and offices that play a role in development,” has crafted Guidelines on Indigenous Peoples’ Issues (UNDG Guidelines) that are based on provisions in the UN Declaration.⁹⁴ The UNDG Guidelines notes that: “the [UN] Declaration sets out the rights that countries should aspire to recognize, guarantee and implement.”⁹⁵

The rights of Indigenous peoples and local communities are also being recognized in safeguards governing the implementation of international programs and projects. For example, parties to the UN Framework Convention on Climate Change (UNFCCC)⁹⁶ agreed to safeguards in the context of reducing emissions from deforestation and forest degradation (REDD) – and related conservation, management, and enhancements of forests (REDD-plus)⁹⁷ – that explicitly call for “[r]espect for the knowledge and rights of indigenous peoples and members of local communities” and their full and effective participation.⁹⁸ Additionally, several international financial institutions such as the World Bank and the International Financial Corporation have social and environmental safeguard policies that require them to respect the rights of Indigenous peoples and local communities.

As developments such as the endorsement of the UN Declaration and the formation of the UN Permanent Forum on Indigenous Issues illustrate, there is an increasing recognition that – beyond any technical legal discussion of whether ILO 169 has/has not been signed and ratified by a country or whether the UN Declaration is legally binding – the rights of Indigenous peoples are recognized and enshrined at the international level. As stated by James Anaya:

“This movement has resulted in a heightened international concern over indigenous peoples and constellation of internationally accepted norms that flow from generally applicable human rights principles. These norms find expression in the UN Declaration on the Rights of Indigenous Peoples and other international instruments, and are otherwise discernible in the ongoing multilateral and authoritative discussions about indigenous peoples and their rights.”⁹⁹

3.2 Tribal Peoples

Tribal peoples are defined as peoples who are “not indigenous to the region [they inhabit], but that share characteristics with indigenous peoples, such as having social, cultural and economic conditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs and traditions.”¹⁰⁰ Courts are also recognizing Tribal peoples as deserving of particular rights in relation to their lands and natural resources, as exemplified in the Saramaka judgement issued by the Inter-American Court of Human Rights that recognized the rights of the Saramaka people who are descendants of slaves of African origin.¹⁰¹

3.3 Local Communities

The increased recognition of individuals and groups under international law has not been confined to Indigenous peoples. Reference to ‘local communities’ has been included to a large extent in new international frameworks, especially in relation to the environment.

The term ‘local communities’ is not defined in international law. It is referenced, for example, 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.”¹⁰² The UN Convention to Combat Desertification (UNCCD) also requires parties to take relevant decisions “with the participation of populations and local communities ...”¹⁰³ Despite these prominent references, the definition of a ‘local community’ remains “ambiguous”¹⁰⁴ 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 2011.¹⁰⁵ 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.¹⁰⁶ Their recommendations – noted by COP 11 in 2012¹⁰⁷ – underscore that identity is a “complex and multi-dimensional issue”,¹⁰⁸ and as a result, self-identification as a local community should be foremost and essential in any list of characteristics. Other characteristics of “rural and urban communities living in various ecosystems” 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;

- 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) 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.¹⁰⁹

In the context of the increased global focus on biodiversity, food security and ecosystem processes,

local communities' rights are gaining prominence at all levels of law and policy.¹¹⁰

It is clear that this issue requires further engagement by Indigenous peoples, local communities and a range of supportive actors. While an internationally accepted definition of a particular group is not a prerequisite for protection,¹¹¹ ambiguity about key concepts can be misused to delay or otherwise adversely influence the clarity of the debate about the larger issues. The CBD meeting and subsequent decision of the Conference of the Parties referenced above represents a notable level of engagement with regard to local communities' rights, from an international perspective. Nevertheless, further work is required to evaluate whether this evolving definition is truly representative of local realities, and whether it is a useful approach to this multifaceted issue. This is especially relevant in contexts where the notion of who is Indigenous is highly contested, such as in many sub-Saharan¹¹² and Asian countries.

Another approach to the rights of 'local communities' is possible through the minority rights framework. With respect to land rights, the question of whether the protection of customary forms of tenure extends to national, ethnic, religious or linguistic minorities heavily depends on the extent to which the minority group's 'particular way of life' is associated with the use of land resources.¹¹³ The cultural rights protected under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 27 of

BOX 9: COMMENT ON THE DEFINITION OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES AT THE CBD

In this context, it is important to note that Indigenous peoples and local communities are still referred to as "indigenous and local communities" under the CBD. Specifically, the tenth session of the UN Permanent Forum on Indigenous Issues (2011) made the following recommendation to the CBD: "Affirmation of the status of indigenous peoples as "peoples" is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43 - E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago."¹¹⁷

Delegates at CBD COP 11 debated the issue at length and eventually agreed on the following compromise in Decision XI/14, section G, paragraph 2: "Noting the recommendations contained in paragraphs 26 and 27 of the report of the tenth session of the United Nations Permanent Forum on Indigenous Issues (E/2011/43-E/C.19/2011/14), requests the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions, taking into account submissions by Parties, other Governments, relevant stakeholders and indigenous and local communities, to consider this matter, and all its implications for the Convention on Biological Diversity and its Parties, at its next meeting, for further consideration by the Conference of the Parties at its twelfth meeting."

Interestingly, parties at COP10 decided to hold the above mentioned 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..."¹¹⁸ In this light, the CBD clearly recognized the distinctive nature of Indigenous peoples and local communities in real terms, yet continues to conflate the groups in references within the text.¹¹⁹

the International Covenant on Civil and Political Rights (ICCPR) are relevant in supporting local communities' access to land or natural resources that are of intrinsic importance to the cultural life of minority communities. This is supported by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' call upon States 'to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs'.¹¹⁴ Legal experts have argued in this respect that "cultural life is not something to be pursued in detachment from economic and social life; it is interdependent with other human rights protections".¹¹⁵ In this regard, "cultural life also encompasses traditional livelihoods which are commonly under threat from natural resource development"¹¹⁶ and/or conservation efforts.

3.4 Individual and Collective Human Rights

Traditionally, human rights were viewed as being fundamentally individual in nature.¹²⁰ Although Common Article 1 of the ICCPR and ICESCR recognizes the right of "all peoples" to self-determination, states generally viewed the right as belonging to individuals.¹²¹ Indeed, much debate in the drafting of the UN Declaration centered around the collective rights enshrined in some of the provisions, including Article 3 regarding the right of Indigenous peoples to self-determination.¹²² However, "a consensus has developed that indigenous peoples have distinct collective rights, such as rights to land and natural resources, cultural integrity, environmental security, and control over their own development."¹²³

Responsibilities under International Law

4

A discussion of international law could begin at several points along its history, but of critical importance to this paper is the early 1900s, the time period in which “the appearance of human rights in the sphere of international law and organizations is often traced ...”¹²⁴ At that time, it was widely considered that international law was applicable only to states, with international responsibility attributed to states alone.¹²⁵ Since then, however, the potential for other entities¹²⁶ to bear international responsibilities has been extensively analyzed, and the following categories of stakeholders are discussed further below:

1. States and state agencies,
2. International organizations,
3. Businesses, and
4. Non-governmental organizations.

4.1 States and State Agencies

Classical international law developed with states as the primary subjects, bearing rights and obligations under the system. One set of obligations that has advanced rapidly in the last sixty years is the area of human rights,¹²⁷ which developed as a way to protect individuals from the arbitrary use and abuse of power by states.¹²⁸ It is now widely accepted that the fundamental principles of human rights form part of customary international law and are therefore binding on all states.¹²⁹

States are generally considered to be the “primary duty-bearers under international human rights law,”¹³⁰ and human rights law has traditionally focused on breaches committed by states or their agents.¹³¹ Beyond this basic point, states are now considered to bear human rights duties in other contexts as well. First, there is now general affirmation of the view that the state’s duty to ensure enjoyment of human rights includes preventing the violation of those rights by private parties within its jurisdiction.¹³² This responsibility is not direct, because there exists a “general principle” that the conduct of a person or group acting on its own behalf and not on behalf of a state is not considered to be the conduct of the state.¹³³ Nevertheless, states are responsible for failures to meet their international obligations, even when substantive breaches are caused by the conduct of others.¹³⁴ In sum, this means that states must both refrain from violating human rights through their own actions, and ensure that private parties do not violate human rights such that a state breaches its international obligations.¹³⁵ Second, states, when acting as members of international organizations such as the World Bank, should encourage those institutions to promote respect for human rights.¹³⁶

In addition, states have a legal responsibility to remedy violations of international human rights law.¹³⁷ As discussed further below, this is grounded in the recognition that the state’s duty to protect human rights can be rendered meaningless if it does not take steps to remedy private human rights abuses.¹³⁸ Additionally, states must ensure effective remedies when third-party human rights violations occur within their jurisdictions.¹³⁹

International Human Rights Standards

The most definitive interpretation of international human rights standards is set forth in the International Bill of Human Rights (IBHR), which is composed of the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (CESCR, 1966),¹⁴⁰ and the International Covenant on Civil and Political Rights (CCPR, 1966).¹⁴¹ Although the UDHR is not formally a treaty, “many of its provisions reflect general principles of law or elementary considerations of humanity,” and it identified the catalogue or rights that later instruments would seek to protect.¹⁴²

At the international level, these later instruments now consist of nine ‘core’ international human rights treaties covering certain human rights issues with greater specificity.¹⁴³ In addition to the CESCR and the CCPR, these core treaties are focused on eliminating racial discrimination and discrimination against women, prohibiting torture, and protecting the rights of children, migrant workers, and persons with disabilities, and protecting persons from enforced disappearance.¹⁴⁴ The UN also lists several “universal human rights instruments,” which include the Declaration on the Rights of Indigenous Peoples, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹⁴⁵ Also included in this category are instruments preventing genocide and establishing standards for treatment of prisoners of war.

In addition, several regional human rights instruments such as the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples’ Rights (African Charter, 1981) recognize human rights similar and related to those found in international instruments.¹⁴⁶ Taken together, these instruments protect a range of human rights that fall into several categories, including rights to: self-determination; property; life; property; health; equality and non-discrimination; freedom of movement; due process; work; and culture, among others.

Pursuant to these instruments, states that have agreed to be bound by them have legal obligations – both negative and positive in nature – to uphold human rights in a variety of important ways. For example, states may

not arbitrarily deprive anyone of his or her life, or subject anyone to torture, arbitrary arrest or detention.¹⁴⁷ Under the CESC, states recognize the rights of everyone to the enjoyment of physical and mental health, to education, and to take part in cultural life.¹⁴⁸

In terms of positive requirements, Article 2 of the CCPR, for example, requires states to adopt legislative, judicial, administrative, educative, and other appropriate measures necessary to give effect to the rights recognized in that instrument. Article 7 of the CERD directs states to “adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination” Additionally, states are required to regulate corporate activities related to human rights.¹⁴⁹ It is important to note that international legal requirements imposed on states apply to all branches of their governments.¹⁵⁰ For example, a particular state’s ministry of mines or other state agency acting within the scope of its authority is in effect the state for purposes of establishing rights and duties at the international level.¹⁵¹

Finally, as discussed above, treaties are not the only source of international law. International custom and general principles of law are also sources as well. In this regard, it is generally agreed that many provisions of the UDHR reflect customary principles of international law.¹⁵² Additionally, it is notable that “the standards contained in the Universal Declaration are consistently and routinely cited as being applicable to all States.”¹⁵³ Exactly which human rights have become part of customary law is subject to much scholarly debate, but it is important to acknowledge that even states which have not agreed to particular human rights treaties can be bound by similar human rights norms if those norms have become part of international custom or constitute general principles of law.

Indigenous and Tribal Peoples and Local Communities

Several broadly accepted human rights are particularly relevant to Indigenous and Tribal peoples and local communities. These include the right to self-determination, the right to cultural integrity, rights to consultation,¹⁵⁴ and rights to land, all of which are closely related to one another.¹⁵⁵ The UN Declaration affirms in Article 3 that: “Indigenous peoples have the right to self-determination.”¹⁵⁶ The right to cultural integrity is grounded in rights to equality and non-discrimination that “are at the core of the contemporary international human rights regime.”¹⁵⁷ As this right has gained acceptance it has developed to entitle Indigenous peoples to proactive measures to address past violations of their cultural integrity, as well as to prevent future violations.¹⁵⁸ Rights of self-determination and integrity “also uphold rights of effective participation of indigenous peoples in all decisions that affect them.”¹⁵⁹

One general characteristic of indigenous peoples is a deep connection to lands that they have traditionally occupied or used, and the natural resources thereon.¹⁶⁰ Generally, Indigenous peoples have depended upon on a secure land and natural resource base to ensure their economic and cultural viability. All of the rights discussed above – and many others – are implicated in the right of Indigenous peoples to their lands and natural resources, and indeed, “property has been affirmed as an international human right.”¹⁶¹

Of course, Indigenous peoples’ rights to land and natural resources are directly implicated in conservation activities. Thus, when engaging in conservation activities on lands traditionally occupied or used by Indigenous peoples, states and their agents should ensure that rights to self-determination, property cultural integrity, and effective participation in decision-making are upheld. For example, Common Article 1 of the CESC and CCPR provides that “in no case may a people be deprived of its own means of subsistence.” Conservation activities, such as the establishment of PA that prevent Indigenous communities from accessing their lands and natural resources, risk depriving them of their traditional means of subsistence, as well as to one of the most important aspects (if not the most important) of their cultural identity.

In addition to ensure that they and their agents do not violate human rights through conservation activities, as noted above, states are required to ensure that private parties do not engage in similar violations.¹⁶² States often partner with NGOs in the implementation of conservation initiatives, such as the establishment, governance and management of protected areas.¹⁶³ States should ensure that the actions of the NGOs or other private entities with which they partner respect international human rights obligations, and, where they do not, provide affected communities with an effective remedy for violations of their human rights.

4.2 International Organizations

The term ‘international organization’ is subject to interpretation and has been defined in different ways. The Vienna Convention defines an international organization simply as “an intergovernmental organization.”¹⁶⁴ Article 2 of the International Law Commission’s (ILC) Draft Articles on the Responsibilities of International Organizations states that ‘international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities”¹⁶⁵ However, an entity can lack legal personality but still be considered an international organization.¹⁶⁶ For purposes

of this discussion, we will use the term broadly to refer to distinct entities established by an agreement such as a treaty or constituent document that have states as members.¹⁶⁷

The touchstone for most analysis regarding international organizations as subjects of international law is the ICJ's advisory opinion in the *Reparations* case.¹⁶⁸ In that case, the ICJ was asked to determine whether the UN had the "capacity"¹⁶⁹ to bring claims against a state responsible for injuring an "agent of the United Nations in the performance of his duties ...".¹⁷⁰ The court concluded that the United Nations "is an international person" with the capacity to bring an international claim against an entity which has caused injury to it. As part of this conclusion, the court determined that the UN "is a subject of international law and capable of possessing international rights and duties."¹⁷²

The UN itself serves as an umbrella institution for several international organizations. These include a number of "specialized agencies,"¹⁷³ such as the Food and Agriculture Organization, the International Labour Organization, the World Intellectual Property Organization, UNESCO and the World Bank Group. Additionally, the UN also houses a number of funds and programmes such as the UN Environment Programme and UN Development Programme that could arguably be considered international organizations themselves. Other important international organizations include the World Trade Organization, regional banks, such as the African, Inter-American and Asian Development Banks, economic organizations such as the Organization for Economic Cooperation and Development, and IUCN.

International organizations have played a central role in establishing norms and mechanisms for giving effect to universal human rights. Notably,¹⁷⁴ "the United Nations has been the central forum for developing and enforcing human rights norms",¹⁷⁵ which is no surprise given that one of its purposes involves "promoting and encouraging respect for human rights and for fundamental freedoms for all ...".¹⁷⁶ The UN Human Rights Council is a subsidiary organ of the UN General Assembly, and six treaty-monitoring bodies under the UN General Assembly monitor, among other treaties, those that make up the International Bill of Human Rights.¹⁷⁷

Additionally, human rights considerations have influenced the World Bank's aid granting criteria,¹⁷⁸ and the lending policies of the World Bank and the International Finance Corporation (IFC) recognize or incorporate, at least to a certain extent, human rights standards.¹⁷⁹ For example, one of the World Bank's safeguard policies provides in part that: "This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples."¹⁸⁰ The work of international financial

institutions is now regulated by objectives such as the protection of Indigenous peoples' and women's rights and promoting the rule of law.¹⁸¹

In addition to the safeguards of the World Bank Group, the safeguards of several other international financial institutions also call for respect for human rights. For example, in introducing its new Integrated Safeguards System in 2013, the African Development Bank stated that it "views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples' Rights."¹⁸² The Inter-American Development Bank's Operational Policy on Indigenous Peoples defines "indigenous rights" as encompassing "applicable international norms in force for each country," including the Universal Declaration of Human Rights and other treaties in the International Bill of Human Rights, as well as Convention No. 169.¹⁸³

Today, many international organizations – and entities that share substantive characteristics with international organizations – engage in or support conservation initiatives. For example, the Conference of the Parties¹⁸⁴ to the Convention on Biological Diversity has adopted a Programme of Work on Protected Areas, wherein protected areas are viewed as "the cornerstone of biodiversity conservation ...".¹⁸⁵ IUCN lists assisting countries and communities to designate and manage systems of protected areas as one of its main areas of expertise.¹⁸⁶ IFIs, in particular the World Bank, are instrumental in funding conservation projects, such as the Amazon Region Protected Areas Project, the purpose of which is to expand and consolidate the protected areas system in the Amazon Region of Brazil.¹⁸⁷ Another major effort related to conservation in which international organizations are deeply involved is REDD-plus.¹⁸⁸ For example, the World Bank is the trustee of the funding mechanisms of the Forest Carbon Partnership Facility, a partnership among several countries focused on implementing REDD-plus activities.¹⁸⁹

Just as international organizations have been instrumental in mainstreaming human rights, they are also "bound by customary international law, including customary human rights law."¹⁹⁰ In this context, "international organizations are responsible for breaches of the obligation to respect internationally recognized human rights, primarily those characterized as customary law and jus cogens norms."¹⁹¹ In the case of UN specialized agencies, they are bound by the principles of the UN Charter, which includes "promotion of and respect for human rights."¹⁹² Additionally, international organizations by definition include states, the primary duty-bearers under human rights law, as part or all of their members. It would make little sense for such states, which have ratified international human rights instruments, to be able to violate those

instruments through the actions of an international organization.¹⁹³ Consistent with this approach, the ILC Draft Articles on the Responsibility of International Organizations prohibit international organizations from rendering aid or assistance in maintaining a situation where human rights are not being protected.¹⁹⁴

As noted above, conservation activities can lead to human rights violations where they infringe upon peoples' right of self-determination,¹⁹⁵ deprive a people of its means of subsistence, or breach other human rights norms. In this context, international organizations are bound to ensure that they do not implement or support conservation activities that violate human rights, particularly the rights of Indigenous peoples and local communities, who often bear the brunt of such activities. International financial institutions involved in conservation activities should ensure that they abide by their safeguard policies regarding human rights. Further, in line with their duty to promote human rights, specialized agencies of the UN should be proactive in preventing conservation initiatives that infringe upon the human rights of indigenous peoples and local communities. The forms of positive action taken should be tailored to the specific situation, but it could include providing assistance to Indigenous peoples and local communities whose rights have been infringed.

4.3 Businesses

Background

The issue of the rights and duties of businesses¹⁹⁶ under international law has received an increasing amount of attention over the last two decades. Multinational corporations have been called the “most powerful” of non-state actors.¹⁹⁷ Legal obligations have been imposed on corporations in treaties, and corporations – through international investment agreements, for example, are now considered to possess “an independent capacity to bring an international claim in some areas of international economic law ...”¹⁹⁸ Thus, “corporations have the capacity to bear direct, enforceable rights and obligations under international law, even if the obligations explicitly directed towards corporations are not common.”¹⁹⁹

Many guidelines exist that govern the behavior of businesses at the international level. For example, the Organization for Economic Co-operation and Development (OECD) has developed Guidelines for International Enterprises that call on enterprises to “[r]espect the internationally recognised human rights of those affected by their activities.”²⁰⁰ Additionally, the Food and Agriculture Organization’s Voluntary Guidelines on the Responsible Governance of Tenure provide that: “Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises

should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.”²⁰¹ The UN Global Compact, an initiative of the UN Secretary-General, sets out ten principles for businesses to commit to with regard to human rights, labor, the environment, and anti-corruption.²⁰² With regard to human rights, the UN Global Compact provides: “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses.”

Businesses themselves are also developing or directly participating in the development of guidelines that reference human rights.²⁰³ These include the Equator Principles, which constitute a risk management framework developed by and for financial institutions “primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making.”²⁰⁴ The preamble to the Equator Principles states that: “We therefore recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development, including fulfilling our responsibility to respect human rights by undertaking due diligence in accordance with the Equator Principles.”²⁰⁵ The Roundtable on Sustainable Palm Oil, an organization that includes oil palm growers and NGOs, among others, has developed principles wherein its members “recognize, support and commit to follow the United Nations Universal Declaration of Human Rights and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”²⁰⁶ These are just some examples of the increasing attention paid by businesses to international human rights.²⁰⁷

At the UN level, since as early as 1970s there have been efforts to develop corporate human rights standards.²⁰⁸ After earlier attempts to develop such standards failed to garner support, in 2008, the UN Special Representative on business and human rights John Ruggie presented the “Protect, Respect and Remedy” Framework to the UN Human Rights Council.²⁰⁹ The UN Human Rights Council welcomed the 2008 Framework Report and asked Ruggie to continue his work and operationalize the Framework. In 2011, Ruggie submitted the Guiding Principles to the UN Human Rights Council, who endorsed them the same year. This marked the first time that “UN member states adopted a common position laying down standards of expected behaviour from business with regard to human rights.”²¹⁰ In addition to being endorsed by the UN Human Rights Council, the Guiding Principles have been broadly accepted by human rights NGOs as well as businesses and business organizations.²¹¹ However, this acceptance is by no means universal.²¹²

For purposes of this work, we focus extensively on the Guiding Principles due to their widespread acceptance at the international level. For example, the Guiding Principles are reflected in the OECD Guidelines, as well as in the human rights chapter of the Guidance on Social Responsibility from the International Organization for Standardization (ISO 26000). The Guiding Principles have also informed the IFC's revised Sustainability Framework and Performance Standards. A reference to the Guiding Principles was further incorporated into the European Commission's renewed strategy for corporate social responsibility (2011-14). The ASEAN Intergovernmental Commission on Human Rights (AICHR) has chosen corporate social responsibility as the topic of its first thematic study, stating that the aim is to produce "an ASEAN Guideline that is fully compliant with the UN frameworks, especially the Protect, Respect and Remedy Framework for Business and Human Rights and the Guiding Principles for Business and Human Rights which were endorsed by the UN Human Rights Council."²¹³

Although the Guiding Principles are clearly being incorporated in a broad array of policies, we do not suggest that the Guiding Principles are the only way to view corporate responsibility, nor are we endorsing the position of the Guiding Principles on the responsibilities of corporations (or duties of states, for that matter) under international law. Rather, we acknowledge that the drafters of the Guiding Principles took a pragmatic view toward their development, and that this view had important effects on the content of the Guiding Principles. Because questions of rights and duties of non-state entities at the international level are so complex, the Guiding Principles, which have influenced or been endorsed by a broad array of organizations, help serve as a useful framework to analyze those questions.

Substance of the Guiding Principles on Business and Human Rights

The Guiding Principles, as their name suggests, are grounded in three basic principles²¹⁴ that are set out in Box 10.

The first part of the Guiding Principles is dedicated to the state duty to respect, protect and fulfill human rights. Part of this duty is protecting against human rights abuses by third parties, including businesses. States should clearly establish the expectation that businesses domiciled in their territories respect human rights both at home and abroad. Ruggie also set out several operational principles for states to follow in meeting their duty. These include enforcing laws requiring business to respect human rights, providing guidance to businesses on how to respect human rights, and encouraging (and, where appropriate, requiring), businesses to communicate how they address human rights impacts.²¹⁹ Additionally, the Guiding Principles direct states – when acting as members of multilateral institutions such as the World Bank – to ensure that those institutions do not hinder business from respecting human rights, on the one hand, and encourage them to promote businesses' respect for human rights, on the other.²²⁰

The second part of the Guiding Principles focuses on the corporate responsibility to respect human rights. Specifically it suggests that businesses "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."²²¹ This responsibility "is a global standard of expected conduct for all business enterprises wherever they operate" *and it is independent of states' abilities and/or willingness to fulfill their own human rights obligations.*²²² In addition, "it exists over and above compliance with national laws and regulations protecting human rights."²²³ This point is critical because it elevates the responsibility on businesses above what is either mandated or enforced at the national level to call on them to at least meet internationally agreed minimum legal standards.

According to the Guiding Principles, the minimum human rights standards that businesses must respect are those set forth in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.²²⁴ The Guiding Principles establish that businesses should "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when

BOX 10: RUGGIE'S GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

1. States, as "the primary duty-bearers under international human rights law," must respect, protect and fulfill human rights and fundamental freedoms.²¹⁵
2. Business enterprises should respect human rights, which in essence means that they should do no harm.²¹⁶
3. As part of states' duty to protect against business related human rights abuses, they must ensure that effective remedies are in place order to ensure that the duty is not rendered meaningless.²¹⁷ Notably, this third principle is limited to human rights abuses that occur within a state's territory and/or jurisdiction.²¹⁸

they occur”, and that they should “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”²²⁵ Businesses should have policies and processes in place for: meeting their human rights responsibilities, conducting human rights due diligence to prevent and address human rights impacts, and remediation of adverse human rights impacts.²²⁶ Operational principles in the Guiding Principles expand on these requirements, and a significant portion of the Guiding Principles focuses on due diligence. The process of identifying and assessing adverse human rights impacts should “involve meaningful consultation with potentially affected groups and other relevant stakeholders ...”²²⁷

It is important to note that business activities covered by the Guiding Principles include both actions and omissions of businesses.²²⁸ Related to this, the concept of doing no harm “is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination policy might require the company to adopt specific recruitment and training programmes.”²²⁹

The third part of the Guiding Principles returns the focus to states and their duty to provide an access to remedies when human rights abuses occur within their jurisdiction. The duty to provide access to remedy is premised on the idea that states’ duty to protect human rights would be effectively meaningless without punishment and redress for human rights violations. The Guiding Principles make clear that grievance mechanisms can be both judicial or non-judicial in nature, and that businesses should establish or participate in grievance mechanisms “for individuals and communities who may be adversely affected.”²³⁰

Relationship Between the Guiding Principles and International Law

Ruggie called the endorsement of the Guiding Principles “the end of the beginning,” in reference to his view of the Guiding Principles as a common starting point from which further progress could build.²³¹ At the outset, the Guiding Principles caution that they should not “be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.” In an earlier review of the IBHR and other key human rights treaties, Ruggie concluded that those treaties did not “impose direct legal responsibilities on corporations.”²³² However, he did acknowledge that corporations were under growing scrutiny from international human rights mechanisms, and that the core human rights treaties would be central to defining corporate responsibility for human rights in the future.²³³

According to Ruggie, the source of companies’ responsibility to respect human rights as set forth in the Guiding Principles flows from societal expectations²³⁴ rather than human rights law.²³⁵ “Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company’s social licence to operate.”²³⁶ Ruggie emphasizes a distinction between this responsibility and “issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”²³⁷

Although Ruggie drew this distinction, he linked the content of societal expectations to “human rights as they are set out in international law – in particular, the major human rights and labor conventions.”²³⁸ This is important because it went beyond the general recognition at that time that corporations should respect human rights. By specifying that the human rights that must be respected by corporations are those set forth in the IBHR and other legal instruments, Ruggie provided the link between societal expectations and international law.

In the context of Aichi Biodiversity Target 11, corporations are not yet involved to the same extent as state agencies, international organizations, and NGOs. Nevertheless, private PAs are a growing element of the global PA estate and, in this context, corporations have a moral duty not to infringe upon the human rights of indigenous peoples.²³⁹ These duties are set forth in the Guiding Principles, and include, at a minimum, the IBHR and the ILO Declaration on Fundamental Principles and Rights at Work. Additionally, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has “pointed to the need to complement the UN Framework on Business and Human Rights with an environmental dimension to ensure the protection of the rights of indigenous peoples.”²⁴⁰ These include prior informed consent, benefit-sharing and impact assessments related to business activities taking place on traditional lands or traditionally used natural resources.²⁴¹

4.4 Non-governmental Organizations

There is no consensus on an exact definition of NGOs.²⁴² Today, hundreds of entities exist that either classify themselves as, or can be classified by others, as NGOs. These include organizations that focus on human rights, conservation, and community issues.²⁴³ They can be domestic or international in nature and generally can be understood as private structures that are not led or controlled by the state.²⁴⁴ Like corporations, NGOs are now acting transnationally at an unprecedented scale.²⁴⁵ For example, large NGOs – such as Greenpeace and Amnesty International – participate in international decision making processes

by advocating new international policy agendas and proposing changes in existing international legal regimes.²⁴⁶ NGOs have been involved in the preparation of a wide range of international treaties, such as the Convention on International Trade in Endangered Species (CITES), the World Heritage Convention, and the CBD.²⁴⁷ NGOs also contribute to the enforcement of international law by serving as monitors for state compliance, as well as through participation in international institutions.²⁴⁸ Through their direct contact with government decision makers, NGOs are “indirectly influencing the behavior of States in the international system.”²⁴⁹ Their growing influence raises several fundamental questions about their international human rights responsibilities,²⁵⁰ including the following by a commentator:

*Many civil society representatives claim to speak for the public at large, but neither the positions nor the actions of these actors emanate from that public. Decisions are taken by a small number of persons who may or may not be elected based on standards that are benchmarks for liberal, representative democracies. The general public—and often not even the membership of civil society organizations—usually has no possibility to hold the leadership of civil society groups accountable for their action or inaction. Also, it might not care either.”*²⁵¹

This question is particularly relevant in the context of conservation. The conservation of nature is either a part of or the full extent of the missions of many NGOs. While conservation is a broad concept encompassing myriad approaches, it often involves designating an area of land to be conserved and imposing rules regulating human activity on that land. The manner in which IUCN has defined conservation reflects this approach: conservation is “the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.”²⁵² Demarcating land for conservation initiatives raises special concerns because very often it involves imposing new rules on people who are already residing on the land, or, in the most extreme cases, removing (referred to as ‘relocating’) them entirely. When non-governmental organizations are involved in this process, the question of what standards they are expected to abide by becomes especially acute.

Human Rights Responsibilities of NGOs

NGOs have been credited with bringing human rights to the forefront of the modern international legal system.²⁵³ This has led to the creation of an environment that places “an increased reliance on NGOs for the

purpose of fact-finding, investigating and reporting human rights violations.”²⁵⁴ One issue upon which NGOs have understandably focused is the human rights obligations of businesses.²⁵⁵ NGOs were consulted during the formation of the Guiding Principles, and have recognized their utility while at the same time calling for additional steps to be taken.²⁵⁶

Whatever the shortcomings of the Guiding Principles might be, one of their most crucial aspects is that the human rights responsibilities of businesses are grounded in societal expectations arising from human rights enumerated in the IBHR and other relevant instruments.²⁵⁷ Thus, the Guiding Principles are particularly useful for answering the challenges posed by a formalistic view of international law, a view that sees non-state actors as lacking international legal personality, and thus the ability to bear rights and duties under the international legal system.²⁵⁸ Under the approach of the Guiding Principles, whether an entity is a subject of international law is not relevant, because the basis of human rights responsibilities flows not from formal legal sources, but rather from an entity’s social license to operate.²⁵⁹

The applicability of human rights responsibilities to entities on the basis of societal expectations is particularly relevant in the context of NGOs. NGOs – which have been referred to as “the conscience of the world” – rely perhaps more than any other entity upon their social license for operational legitimacy.²⁶⁰ As advocates for human rights, environmental protection, and other causes on behalf of the public, NGOs cultivate and are subject to even higher societal expectations than businesses. One study found that NGOs “are more trusted than business, government or the media.”²⁶¹ NGOs that either target corporations for the social and environmental harm to which they are connected or collaborate with corporations on behalf of the common good are assumed to represent the public good “against the power-driven interests of the state and the profit-driven interests of the economy.”²⁶² The International Non-Governmental Organizations’ Accountability Charter (Box 11) has been developed by a number of major international NGOs who acknowledge that their legitimacy is contingent on trust, accountability and transparency. Thus, the same basis on which human rights responsibilities of business has been defined – i.e. the social license – also applies to NGOs, and this implies comparable obligations.

Furthermore, the Guiding Principles are grounded in recognition of the “role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.”²⁶³ NGOs are also specialized organs of society performing specialized functions, and with regard to the Guiding Principles they share several other similarities with businesses.²⁶⁴

BOX 11: THE INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS' ACCOUNTABILITY CHARTER

The International Non-Governmental Organizations' Accountability Charter (2005) is "an initiative of international NGOs demonstrating their commitment to transparency, accountability and effectiveness." The rationale for the Charter is to ensure international NGOs "remain legitimate and ... preserve the trust in the sector [by strengthening] their accountability towards all stakeholders."

The Charter defines principles towards which the Members report annually. The Charter defines standards in all areas of NGOs' work, such as governance, programme effectiveness, and fundraising. After signing up to these standards on becoming a Member, the NGOs report annually towards their commitments using a specifically designed reporting tool. An independent review panel assesses the reports to ensure the credibility of the reporting. The reports as well as the feedback from the panel are published on the Charter website. This Charter and associated standards and processes are intended to trigger greater transparency and accountability and spur improved effectiveness.

They are established pursuant to national law, and through their actions are capable of profoundly affecting human rights. Although NGOs do not typically have shareholders, unlike businesses, NGOs report to their donors, funders and members, and owe a duty of care to society at large.

In addition, some NGOs have themselves committed to respecting human rights. As noted above, the CIHR developed several principles to guide their conservation work.²⁶⁵ These include the fundamental commitment to respect human rights and to ensure that they do not contribute to infringements of human rights while pursuing their mission. Additionally, there is a proactive commitment to support and promote the protection and realization of human rights within the scope of conservation programmes. More specifically, the participating conservation organizations have pledged to protect the vulnerable by making special efforts to avoid harm to them "and to support the protection and fulfillment of their rights within the scope of our conservation programmes." Furthermore, the CIHR directly references Indigenous peoples and local communities in the context of governance, stating that the organizations commit to supporting "the improvement of governance systems that can secure the rights of indigenous peoples and local communities in the context of our work on conservation and sustainable natural resource use, including elements such as legal, policy and institutional frameworks, and procedures for equitable participation and accountability."²⁶⁶

This latter commitment is particularly important in light of the heightened social license with which NGOs operate. The Guiding Principles specify that "the responsibility of business enterprises to respect human rights refers to internationally recognized human rights ..."²⁶⁷ These are "at a minimum," those set forth in the IBHR and the ILO Declaration on Fundamental Principles and Rights at Work.²⁶⁸ With regard to NGOs, however, given the social license with which they operate, the minimum internationally recognized human rights should include

not only those identified in the Guiding Principles, but also ILO 169, the UN Declaration, and other instruments enumerating these rights.

When conducting conservation activities then, NGOs should, at a minimum, respect human rights.²⁶⁹ They should avoid causing or contributing to adverse human rights impacts through their own activities, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, even if they have not contributed to those impacts.²⁷⁰ Most importantly, this means that NGOs should refrain from engaging in or supporting conservation initiatives which have the effect of dispossessing Indigenous peoples and local communities of their lands, territories or resources.²⁷¹ Any conservation activities which are planned to be undertaken should, at the outset, include affected Indigenous peoples and local communities as meaningful participants in such plans, and respect their right to free, prior and informed consent.

Additionally, the proscription to avoid causing adverse human rights impacts applies not only to activities directly undertaken by NGOs, but also to impacts that are directly linked to their operations by their relationships with other entities.²⁷² There is no question that such situations can involve great complexity, but complicating factors should not prevent appropriate actions to address human rights impacts. Considerations to determine appropriate actions in such situations include the NGO's leverage over the entity concerned, the importance of the relationship, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.²⁷³ Leverage should be exercised to prevent or mitigate adverse impacts, and if it is lacking it may be increased by, for example, "offering capacity-building or other incentives to the related entity, or collaborating with other actors."²⁷⁴ If leverage cannot be increased, the NGO should consider ending the relationship, although the human rights impact of such a decision should also be taken into account.²⁷⁵

Conclusion

5

Unjust conservation is a well-documented reality that has been occurring since the first protected area was designated in 1872. Since then, similarly designed and implemented conservation initiatives have led to documented violations of the rights of Indigenous peoples and local communities in many parts of the world. Much has changed in international law since the late 19th century. These changes include a substantial increase in the number of states that make up the international community, increased participation by non-state actors in international processes, and a new international discourse focused on human rights. Partly as a result of these changes, increased attention is being paid to conservation initiatives and the impacts they have on human rights.

Despite the increased recognition of the impacts of conservation initiatives on people and livelihoods, addressing this issue remains a contemporary problem. Decisions by international institutions such as the CBD, resolutions made by IUCN, and voluntary guidelines developed by conservation organizations may have led to a 'new paradigm' for protected areas at the international level, but not yet achieved a transformation at the institutional and local levels.

Four main types of actors are involved in the bulk of conservation activities around the world: state agencies; international organizations such as the UN and its specialized agencies and international financial institutions; a range of business interests; and conservation (or conservation funding) NGOs.

With regard to states, who are unquestionably subjects of international law, the substance of the standards that apply to them in the context of conservation are, at the very least, the human rights obligations set forth in the instruments and standards to which they agree. In addition to the treaties in the International Bill of Human Rights, this includes the UN Declaration on the Rights of Indigenous Peoples, which – while not a formally binding treaty – reflects customary principles of international law and international consensus on the rights of indigenous peoples. When undertaking or engaging in conservation-related activities, states should ensure that the rights of affected peoples to self-determination, land and natural resources, cultural integrity and full and effective participation in decision-making – among others – are upheld. As part of their positive human rights obligations, states should also ensure that private parties, such as businesses and NGOs, do not violate human rights, and – if such violations occur – states should provide an effective remedy.

International organizations are also recognized as being subjects of international law, and as being bound by customary human rights law. They should not be used as a vehicle to infringe upon human rights where their individual state members are bound to abide by human

rights obligations. Thus, international organizations should ensure that they do not support conservation activities that violate human rights, and should be proactive in preventing activities that infringe upon the human rights of Indigenous peoples and local communities.

The third and fourth major categories of conservation-related stakeholders are businesses and non-governmental organizations.²⁷⁶ While businesses have been recognized as subjects of international law in certain respects, such as in the context of bilateral investment treaties, there is an ongoing debate as to whether businesses can be considered subjects of international law in the context of bearing human rights duties. The debate regarding the 'subjectivity' of NGOs is even more fundamental because, among other things, few if any international instruments are geared toward their rights and duties at the international level. Thus, at this stage it is not possible to say that businesses or NGOs have the same human rights obligations as states or international organizations. With regard to businesses, John Ruggie avoided the 'subject' dilemma by basing the application of the Guiding Principles to businesses on their social license to operate rather than their status as subjects of international law. NGOs also operate under a social license, and this license is often considered more socially- and environmentally-specific than that of businesses. As a result, the Guiding Principles can be extended to regulate the behavior of NGOs. In this context, businesses and NGOs are required to avoid causing or supporting the violation of any internationally agreed human rights impacts through conservation initiatives.

Overall, the body of international law is clear. Conservation initiatives – whoever they are developed, funded and/or implemented by – should not cause or support the violation of human rights. While this body of law is currently derived from a wide variety of sources, some common standards can be identified. Collating these standards will clarify to stakeholders working in the context of Aichi Biodiversity Target 11 what is expected of them in terms of respecting and upholding human rights in the places where they operate. Clearly articulating those standards is addressed in Technical Paper 2 of this series.

Notes

- 1 <http://naturaljustice.org/library/our-publications/legal-research-resources>
- 2 <https://community.iucn.org/cihr/Pages/default.aspx>
- 3 Indigenous and Tribal Peoples and local communities are referred to throughout this document either in the long form, as “Indigenous peoples and local communities” or as “peoples and communities.”
- 4 The analysis in this sub-section is drawn from Jonas H. D., H. C. Jonas and S. Subramanian, 2013. *The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia*. UNU-IAS and Natural Justice: Yokohama and Cape Town.
- 5 IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980).
- 6 www.cbd.int.
- 7 For a recent commentary, see: Jonas H. D. and S. Lucas, 2013. *Legal Aspects of the Aichi Biodiversity Target 11: A Scoping Paper*. International Development Law Organization: Rome.
- 8 Emphasis added.
- 9 Borrini-Feyerabend, G., N. Dudley, T. Jaeger, B. Lassen, N. Pathak Broome, A. Phillips and T. Sandwith (2013). *Governance of Protected Areas: From understanding to action*. Best Practice Protected Area Guidelines Series No. 20, Gland, Switzerland: IUCN. p. 5. See also Nik Lopoukhine and Bráulio Ferreira de Souza Dias, “Editorial: What does Target 11 really mean?” [2012] 18(1) PARKS 5, 5: “There is a tacit agreement between the institutions that the two definitions are equivalent”.
- 10 See Borrini-Feyerabend et al., page 44.
- 11 See for example: Borrini-Feyerabend, G., N. Dudley, T. Jaeger, B. Lassen, N. Pathak Broome, A. Phillips and T. Sandwith (2013). *Governance of Protected Areas: From understanding to action*. Best Practice Protected Area Guidelines Series No. 20, Gland, Switzerland: IUCN.
- 12 Summary and Results of a Canadian Council on Ecological Areas, *Interpreting Aichi Biodiversity Target 11 in the Canadian Context: Towards Consensus on “Other Effective Area-based Conservation Measures”*. 2013. Borrini-Feyerabend, G. and R. Hill, “Governance of nature”, in Worboys et al (eds.), *Governance and Management of Protected Areas*, draft manuscript, 2014. Jonas H. D., V. Barbuto., H.C. Jonas, A. Kothari, and F. Nelson, forthcoming in 2014. ‘Space to Place New Steps of Change: Looking beyond protected areas to consider other effective area-based conservation measures. PARKS.
- 13 Adams W. and M. Mulligan. *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era*. Earthscan: London, 2003.
- 14 Mark David Spence, 1999. *Dispossessing the Wilderness: Indian Removal and the Making of the National Park* Oxford University Press.
- 15 This infers that the projects were funded without due regard for any negative impacts of the project.
- 16 See Mac Chapin, *A Challenge to Conservationists*, World Watch, 2004. This article provides a very good picture of the state of affairs in 2004.
- 17 See Mac Chapin, *A Challenge to Conservationists*, World Watch, 2004.
- 18 Colchester M., forthcoming. ‘Indigenous Peoples and Protected Areas: towards reconciliation?’ in a forthcoming book to be published by UNESCO and IWGIA. Importantly, there is an increasing recognition the contribution of Indigenous peoples and local communities to the conservation and sustainable use of biodiversity occurring on their territories and areas, which is referenced in the final section of the paper.
- 19 The CBD continues to use the term “indigenous and local communities” to refer to Indigenous peoples and local communities.
- 20 Policy on Social Equity in Conservation and Sustainable Use of Natural Resources: https://cmsdata.iucn.org/downloads/sp_equity_policy.pdf The six areas are: 1. Social Diversity and Equity; 2. Gender and Equity; 3. Tenure and Participatory Management; 4. Indigenous and Traditional Peoples; 5. Security and Equity; 6. Poverty.

- 21 The Durban Accord: <http://cmsdata.iucn.org/downloads/durbanaccorden.pdf>. Moreover, recent findings indicate that policies safeguarding local populations' sustainable use of the forest reserves were not only effective, but on average, even more so than strictly protected areas that focused exclusively on conservation. The findings further indicated that most effective of all were indigenous areas, which were estimated to reduce deforestation by approximately 16 percentage points over the period of 2000-2008. See World Bank, 'New Study Finds Indigenous Areas Highly Effective at Reducing Tropical Deforestation' (16 August 2011). The study compared indigenous areas with strictly protected areas, such as national parks. The report is available at: <<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022722>> accessed 2 February 2014.
- 22 CBD's Programme of Work on Protected Areas: <http://www.cbd.int/protected/overview/default.shtml>
- 23 Greiber, Thomas (Ed.) 2009. Conservation with Justice. A Rights-based Approach. IUCN, Gland, Switzerland. Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.) 2009 Rights-based approaches: Exploring issues and opportunities for conservation. CIFOR and IUCN. Bogor, Indonesia.
- 24 IUCN 2013-2016 Programme: https://cmsdata.iucn.org/downloads/iucn_programme_2013_2016.pdf
- 25 <ftp://ftp.fao.org/docrep/fao/010/a1404e/a1404e00.pdf>
- 26 <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>
- 27 Organizations include IUCN, Birdlife International, Conservation International, Fauna & Flora International, The Nature Conservancy, Wetlands International, Wildlife Conservation Society, and WWF.
- 28 Conservation Initiative on Human Rights, Program of Work (July 2010 – June 2013), available at https://community.iucn.org/cihr/Documents/CIHR_Program_of_Work2.pdf (last accessed 8 May 2014).
- 29 Jonas H. D., J. E. Makagon, and H. Shrumm, 2013. The Living Convention: A Compendium of Internationally Recognized Rights that Support the Integrity and Resilience of Indigenous Peoples' and Local Communities' Territories and other Social-ecological Systems. Natural Justice: South Africa and Malaysia. Second edition.
- 30 Springer J. and J. Campese, 2011. Conservation and Human Rights: Key Issues and Concepts (Scoping Paper for the Conservation Initiative on Human Rights), 2011, at p. 20. The authors note the following human rights related issues that can arise in conservation: participation in decision-making; free, prior and informed consent; tenure security, especially conflicts between customary and statutory tenure; cultural rights and bio-cultural diversity; sustainable development and equitable benefit-sharing; displacement and restrictions on resource access; law enforcement.
- 31 <http://www.forestpeoples.org/topics/african-human-rights-system/publication/2013/letter-unesco-reiterating-concerns-over-designat>
- 32 <http://www.survivalinternational.org/news/9253>
- 33 <http://www.justconservation.org/the-tanzanian-government-insists-on-grabbing-maasai-land-in-loliondo>
- 34 <http://www.forestpeoples.org/topics/rights-land-natural-resources/news/2012/01/karen-people-forcibly-expelled-kaeng-krachan-natio>
- 35 <http://www.forestpeoples.org/topics/rights-land-natural-resources/news/2011/07/guest-article-nishnawbe-aski-nation-canada-exprop>
- 36 <http://www.forestpeoples.org/topics/rights-land-natural-resources/news/2012/09/shipibo-communities-peruvian-amazon-reject-impleme>
- 37 James Crawford, Brownlie's Principles of Public International Law, 8th ed., Oxford University Press: Oxford, 2012, at 7s.
- 38 Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119. Article 38(d) clarifies that the fourth category is intended to serve as a "subsidiary means for the determination of rules of law." Hugh Thirlway, The Sources of International Law, in International Law, 3d Edn, Malcom Evans, ed, Oxford University Press: Oxford, 2010, at 95.
- 39 Harlan Cohen, Finding International Law: Rethinking the Doctrine of Sources, 93 Iowa Law Review 65, 77 (2007).
- 40 James Crawford, Brownlie's Principles of Public International Law, 8th ed., Oxford University Press: Oxford, 2012, at 30.
- 41 The phrase translates to "that which has been agreed to must be respected." Hugh Thirlway, The Sources of International Law, in International Law, 3d Edn, Malcom Evans, ed, Oxford University Press: Oxford, 2010, at 95.

- 42 Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331. The binding nature of international law is discussed further in the next section.
- 43 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, 26-33.
- 44 *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).
- 45 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, 35.
- 46 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, 37.
- 47 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, 43.
- 48 See Glen Anderson, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects*, 41 *Denv. J. Int'l L. & Pol'y* 345, 372 (2013).
- 49 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 *A.J.I.L.* 757, 758 (2011).
- 50 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, 42.
- 51 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 4.
- 52 See R.R. Baxter, *International Law in "Her Infinite Variety,"* 29 *International and Comparative Law Quarterly* 549, 549 (1980) (distinguishing soft law norms from "from the 'hard' law consisting of treaty rules which States expect will be carried out and complied with").
- 53 Gregory Shaffer and Mark Pollack, *Hard and Soft Law*, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Jeffrey Dunoff and Mark Pollack, eds.), Cambridge University Press: Cambridge, 2013, at 198.
- 54 However, some positivists argue that the very concept of soft law should be abandoned because "as soon as soft law comes to be applied, it becomes indistinguishable from hard law." See Klabbers, J. (1996). *The Redundancy of Soft Law*. *Nordic Journal of International Law*, 65(167), at 179.
- 55 Gregory Shaffer and Mark Pollack, *Hard and Soft Law*, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Jeffrey Dunoff and Mark Pollack, eds.), Cambridge University Press: Cambridge, 2013, at 198.
- 56 Shaffer, G., & Pollack, M. (2010). *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, *Minnesota Law Review*, 94(706), at 713.
- 57 Shaffer, G., & Pollack, M. (2010). *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, *Minnesota Law Review*, 94(706), at 717.
- 58 Abbott, K., & Snidal, D. (2000). *Hard and Soft Law in International Governance*. *International Organization*, 54(3), at 421.
- 59 Gregory Shaffer and Mark Pollack, *Hard and Soft Law*, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Jeffrey Dunoff and Mark Pollack, eds.), Cambridge University Press: Cambridge, 2013, at 200.
- 60 Abbott, K., & Snidal, D. (2000). *Hard and Soft Law in International Governance*. *International Organization*, 54(3), at 421.
- 61 See for example: Gupta, J. and Sanchez, N., 2012. *Global Green Governance: embedding the Green Economy in a Global Green and Equitable Rule of Law Polity*. *RECIEL* 21 (1), 2012.
- 62 C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *International and Comparative Law Quarterly* 850, 851 (1989) ("Where a treaty provides only for the gradual acquiring of standards or for general goals and programmed action it is itself soft 'for what is apparently a treaty may be devoid of legal content.'")
- 63 See Daniel Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?* 5 *Journal of International Economic Law* 647, 648 (2002).
- 64 Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 *Minnesota Law Review* 706, 717-18 (2010).
- 65 Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 *Minnesota Law Review* 706, 719 (2010).

- 66 See Ian Johnstone, Law-Making Through the Operational Activities of International Organizations, 40 *George Washington International Law Review* 87,88 (2008) (describing a pattern “in which so-called ‘soft law’ crystallizes into hard law”); Gregory C. Shaffer & Mark A. Pollack, Hard Versus Soft Law in International Security, 52 *B.C. L. Rev* 1147, 1156-1157 (2011) (noting that “soft law may develop over time and harden into hard law, just as customary international law has been codified and progressively developed in treaty law”).
- 67 Aida Torres Perez, The Internationalization of Lawmaking Processes: Constraining or Empowering the Executive?, 14 *Tulsa J. Comp. & Int'l L.* 1, 4 (2006).
- 68 *Mayagna (Sumo) Indigenous Cmty. of Awas Tingi v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).
- 69 *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, P 82 (Nov. 28, 2007).
- 70 Most legal scholars have accepted as a working definition of Indigenous peoples the description set forth by José Martínez Cobo, Special Rapporteur of the UN Sub-commission on Prevention of Discrimination and Protection of Minorities. Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia (2001), 74. According to Martínez Cobo:
- 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.*
- José Martínez Cobo, Study of the Problem of Discrimination Against Indigenous Populations: Final Report, E/CN4/Sub.2/1983/21/Add 8 (30 September 1983), para.. 379.
- 71 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 15.
- 72 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 17.
- 73 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 18. We recognize that other interpretations of the prevailing international legal theory during that time do exist. See Stephen Allen, Limits of the International Legal Project, in *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Stephen Allen & Alexandra Xanthaki, eds), Hart Publishing: Oxford (2011), 241 (noting that “while early international law may have accepted that indigenous peoples possessed certain natural rights, it rendered these rights highly contingent and practically meaningless”).
- 74 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 26. See also Robert Miller, *The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States: The International Law of Colonialism: A Comparative Analysis*, 15 *Lewis & Clark L. Rev.* 847, 851 (2011) (discussing the Discovery Doctrine at length).
- 75 “Terra nullius defines lands that are not possessed by any person or nation, or which are occupied and possessed by non-Europeans but not being used in a fashion that European legal systems approved.” Robert Miller & Jacinta Ruru, *An Indigenous Lens Into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 *W.Va. L. Rev.* 849, 855 (2009).
- 76 Under the auspices of the CBD, for example, the International Indigenous Forum on Biodiversity (IIFB) has the right to participate as observers. Notwithstanding this point, the IIFB has achieved important gains in the process of drafting CBD decisions and subsidiary instruments.
- 77 James Anaya, *Indigenous Peoples in International Law*, Oxford University Press: New York (2004), 50-53.
- 78 *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, 1650 UNTS 383 (1989) (Convention No 169). For a discussion of the precursor to this instrument, ILO 107, see Hurst Hannum, *New Developments in Indigenous Rights*, 28 *Virginia Journal of International Law* 649, 653 (2011). The shift in focus between these two instruments is yet another example of the evolution in international law toward recognition of the rights of Indigenous peoples and local communities.

- 79 Alexandra Xanthaki, Indigenous rights in international law over the last 10 years and future developments, 10 *Melb J Int'l L* 27, 29 (2009) (discussing a 1999 decision by the South Australian Supreme Court); *The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001) (referring, in concurring opinion of Judge Garcia Ramirez, to relevant provisions of Convention No. 169 in case involving Nicaragua, despite the fact that Nicaragua has not ratified it).
- 80 James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *University of Hawaii Law Review* 983, 998 (2013). While not all scholars accept this viewpoint, they acknowledge that the bulk of international literature is not so restrictive as to assume that UN General Assembly resolutions have no impact on customary law. See Emmanuel Voyiakiss, *Voting in the General Assembly as Evidence of Customary International Law?*, in *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Stephen Allen & Alexandra Xanthaki, eds), Hart Publishing: Oxford (2011), 222.
- 81 Claire Charters, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, (Claire Charters & Rodolfo Stavenhagen eds.) Transaction Publishers: New Jersey (2009), 282.
- 82 Michael Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 *Cornell Int'l L.J.* 439, 448 (2010).
- 83 Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 *Melb J Int'l L* 439, 465 (2008).
- 84 James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *University of Hawaii Law Review* 983, 999 (2013).
- 85 Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 *Vand. J. Transnat'l L.* 1141, 1176 (2008).
- 86 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct).
- 87 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct), para. 132.
- 88 See Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Stephen Allen & Alexandra Xanthaki, eds), Hart Publishing: Oxford (2011), 38 (stating that the UN Declaration is a normative instrument of the UN that memorializes the rights of Indigenous peoples as previously set out in several international instruments).
- 89 See ILO Convention No. 169 Articles 6, 8, 14.
- 90 See, e.g., Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article of the Covenant*, CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008).
- 91 Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. HRI/GEN/1/Rev.9, 51st Sess., Vol. 2, 285-86 (1997).
- 92 James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *University of Hawaii Law Review* 983, 1000 (2013).
- 93 Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 *Int'l & Comp LQ* 957, 982 (2009).
- 94 UN Development Group, *Guidelines on Indigenous Peoples' Issues* (1 February 2008).
- 95 UNDG Guidelines at p. 10.
- 96 31 *I.L.M.* 849 (1992).
- 97 UN-REDD Programme, *About REDD+*, available at <http://www.un-redd.org/aboutredd/tabid/102614/default.aspx> ("REDD+' goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.").
- 98 CoP to the UNFCCC Dec. 1/CP.16, *The Cancun Agreements*, 16th Sess., Nov. 29-Dec. 10, 2010, U.N. Doc. FCCC/CP/2010/7/Add.1, P 76 (Dec. 11, 2010), Appendix I, para.2.
- 99 James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *University of Hawaii Law Review* 983, 1011 (2013).
- 100 I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172*, par. 79. This definition is in conformity with the provisions of Article 1.1(a) of the ILO Convention 169.

- 101 *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*.
- 102 CBD Article 8(j). Emphasis added. At the tenth CBD Conference of the Parties, the 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>.
- 103 33 I.L.M. 1328 (2004), Article 3(a). Local communities are referenced in several other instances throughout the UNCCD.
- 104 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.
- 105 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.
- 106 UNEP/CBD/WG8J/7/8/Add.1, page 12.
- 107 CBD COP Decision XI/14.
- 108 UNEP/CBD/AHEG/LCR/1/2, page 2.
- 109 UNEP/CBD/WG8J/7/8/Add.1, page 12.
- 110 Lennox C., 2012. “Natural resource development and the rights of minorities and indigenous people,” in B Walker (eds), *State of the World's Minorities and Indigenous Peoples 2012: Focus on land rights and natural resources*, Minority Rights Group International.
- 111 UNEP/CBD/AHEG/LCR/1/2, page 2.
- 112 The African Commission on Human and Peoples' Rights (ACHPR) and its related Working Group on Indigenous Populations/Communities has spent considerable time and energy clarifying the distinction between indigenous and aboriginality in the African context. In this regard, it has noted that while everyone in Africa (bar those of European and Asian descent) are 'aboriginal' to the continent, the concept of indigeneness related to a particular way of life that required additional forms of protection. See the ACHPR's *Advisory Opinion on Indigenous Peoples (2007)* and the African Commission's *Working Group on Indigenous Peoples 2005 report*, pp. 87-93.
- 113 General Comment 23 on Minorities (Article 27, ICCPR).
- 114 Art. 4(2), UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.
- 115 C Lennox, “Natural resource development and the rights of minorities and indigenous people,” in B Walker (eds), *State of the World's Minorities and Indigenous Peoples 2012: Focus on land rights and natural resources*, Minority Rights Group International, 2012, p. 18.
- 116 *Ibid.*, p. 18.
- 117 E/2011/43-E/C.19/2011/14.
- 118 Decision X/43, paragraph 21.
- 119 Notably, the opposition to using the term “indigenous peoples and local communities” comes from a small number of countries. For more on this issue, see: Submission to the CBD pursuant to a request (SCBD/SEL/OJ/JS/dm/81183), developed by Natural Justice and Forest Peoples Programme, and signed by 71 CBOs and NGOs.
- 120 Russel Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?* 7 *Harv Hum Rts J* 33, 44 (1994).
- 121 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 648.
- 122 See Report of the Working Group on Indigenous Populations on its eleventh session, E/CN.4/Sub.2/1993/29 (23 August 1993) at para. 67-68.
- 123 Russel Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?* 7 *Harv Hum Rts J* 33, 43-44 (1994).
- 124 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 635.

- 125 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 5.
- 126 Because the focus of this work is on those conservation entities who generally control decision-making with regard to conservation, the list below does not include peoples, communities or individuals, who are of course crucial to conservation - per se – are seldom accused of human rights violations in this context.
- 127 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 634 (noting that the events of World War II “led to a programme of increased protection of human rights and fundamental freedoms at the international level”).
- 128 David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 *Virginia Journal of International Law* 936, 937(2004).
- 129 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 642.
- 130 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 of 21 March 2011 (Guiding Principles). The Guiding Principles are discussed in more detail below.
- 131 Viviana Waisman, *Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard*, 33 *Hastings Int'l & Comp. L. Rev.* 385, 406 (2010).
- 132 See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) (referring to this duty in the context of the American Convention on Human rights); *Guiding Principles No. 1*; Viviana Waisman, *Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard*, 33 *Hastings Int'l & Comp. L. Rev.* 385, 406 (2010) (“State responsibility exists not only when the State directly commits a human rights violation, but also when the State fails to protect those under their jurisdiction from such violations.”).
- 133 International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission, Fifty-third session, UN Doc. A/56/10 (2001), (hereinafter “ILC Draft Articles on Responsibility of States”), Article 11, Commentary para. 2.
- 134 Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 *Harv. Hum. Rts. J.* 125, 151 (1994).
- 135 For guidelines on states' extraterritorial human rights obligations, see *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights*, available at [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23) (last accessed 19 May 2014).
- 136 See *Guiding Principles No. 10*, discussing this duty in the context of businesses.
- 137 Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 *Harv. Hum. Rts. J.* 125, 151 (1994).
- 138 See *Guiding Principles para. 25*, Commentary.
- 139 See *Guiding Principles No. 1* (noting that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties” and that “This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”). See also Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 *Colum. Human Rights L. Rev.* 81, 94 n. 30 (“Nevertheless, by the clear language of two international human rights treaties, the state's responsibility to prevent or remedy human rights violations encompasses abuses by state officials and private individuals alike.”).
- 140 993 UNTS 3 (1966).
- 141 999 UNTS 171 (1966).
- 142 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 636.
- 143 See *Core International Instruments*, UN Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited February 20, 2014).

- 144 These treaties are, respectively, the International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec 1965 (CERD); Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec 1979 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec 1984 (CAT); Convention on the Rights of the Child, 20 Nov 1989 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec 1990 (ICMW); Convention on the Rights of Persons with Disabilities, 13 Dec 2006 (CRPD); and International Convention for the Protection of All Persons from Enforced Disappearance, 20 Dec 2006 (CPED).
- 145 See Universal Human Rights Instruments, UN Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> (last visited March 11, 2014).
- 146 John Knox, Horizontal Human Rights Law, 102 *American Journal of International Law* 1, 11 (2007). Several of the regional conventions are legally binding and have clear enforcement mechanisms.
- 147 ICCPR Articles 6, 7, 9.
- 148 CESC Articles 12, 13, 15,
- 149 See *The Role of the State in Implementing the UN Guiding Principles on Human Rights and Business with Special Consideration of Poland*, 31 *Polish Y.B. Int'l L.* 349, 365 [YEAR].
- 150 International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, Fifty-third session, UN Doc. A/56/10 (2001), at 84 (hereinafter "ILC Draft Articles on Responsibility of States").
- 151 The term "organ" is defined as "all of the individual or collective entities which make up the organization of the State and act on its behalf." ILC Draft Articles on Responsibility of States at 84. As the Human Rights Committee has stated in regard to the CCPR, "all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party." General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Hum. Rts. Comm., CCPR/C/21/Rev.1/Add. 13, 26 May 2004.
- 152 Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *Ga. J. Intl Comp. L.* 287, 340 (1995).
- 153 Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, *Australian Year Book of International Law* 82, 98 (1992).
- 154 It should be noted that "the conceptual underpinnings for indigenous peoples' right to free prior informed consent ("FPIC") lie in the right to property, on one hand, and rights to self-determination and culture, on the other." Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 *Sustainable Development Law Policy* 16, 16 (2004).
- 155 Crystal Fortwangler, 2003. *The Winding Road. Incorporating Social Justice and Human Rights into Protected Area Policies*. In: *Contested Nature. Promoting International Biodiversity Conservation with Social Justice in the Twenty-first Century* (eds. S.R. Brechin et al.). State University of New York Press, New York, p.26 (noting that the IBHR supports the rights of indigenous peoples "to self-determination, to secure subsistence, and to take part in public affairs").
- 156 The UN Declaration Article 3 incorporates common article 1 of the CESC and the CCPR. The UN Human Rights Committee did conclude that CCPR Article 1 applies to aboriginal rights, noting "The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant." *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, Apr. 7, 1999, U.N. Doc. CCPR/C/79/Add.105, P8 (1999).
- 157 James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *Ariz. J. Int'l & Comp. Law* 13, 16 (2004).
- 158 See UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: *Indigenous Peoples*, U.N. Doc. CERD/C/51/misc 13/Rev 4, at P3 (1997) [hereinafter CERD General Recommendation on Indigenous Peoples] (calling on states to provide compensation where indigenous peoples have been deprived of their lands, and to ensure that no decisions are taken in regard to indigenous peoples without their informed consent).

- 159 James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *Ariz. J. Int'l & Comp. Law* 13, 52 (2004).
- 160 See *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4, at 39 (1986) (Jose R. Martinez Cobo, special rapporteur).
- 161 James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *Ariz. J. Int'l & Comp. Law* 13, 37 (2004).
- 162 See *Case of the Ogoni People v. Nigeria*, African Commission on Human and Peoples Rights, Communication 155/96, the Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, para. 57 (2001). (“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties ...”).
- 163 See World Wildlife Fund, *Amazon Region Protected Areas Programme*, available at http://wwf.panda.org/what_we_do/where_we_work/amazon/vision_amazon/models/amazon_protected_areas/financing/arpa/ (last visited 14 March 2014), stating that “A project steering committee composed of public sector and civil society representatives, including WWF, oversees project implementation”).
- 164 Vienna Convention Article 2(1)(i).
- 165 A/CN.4L.778, 20 May 2011.
- 166 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press: Oxford, 2012, at 636.
- 167 See Clive Archer, *International Organizations* (3d ed.), Rutledge: London, 2001 at 2, 33 (defining international organizations as a form of institution that has “its own formal structure of a continuous nature established by an agreement such as a treaty or constituent document”). We recognize that the definition employed in this paper is broad, and that further analysis would be required to determine the precise duties of particular international organizations.
- 168 See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, 1996, at 80 (discussing the Reparations case at length).
- 169 “Capacity” to bring an international legal claim is another term of art that is closely related to the concepts of subjectivity and legal personality. See Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples*, Antwerp : Intersentia, 2001, at 33 (stating that “[a]n entity can only have rights and duties when it has the capacity to possess rights and duties”) (emphasis in original).
- 170 *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, (1949) ICJ Reports 174, at 175.
- 171 *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, (1949) ICJ Reports 174, at 178.
- 172 *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, (1949) ICJ Reports 174, at 179. This conclusion is important because it demonstrates international legal personality is not a homogenous classification, and that an entity need not be a state, nor possess the same characteristics of a state, in order to be a subject of international law.
- 173 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 57.
- 174 Margaret Karns and Karen Mingst, *International Organizations: The Politics and Process of Global Governance*, Lynne Rienner Publishers: Boulder, 2004, 419.
- 175 Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 *Minn. J. Global Trade* 153, 154 (1997).
- 176 UN Charter Article 1.
- 177 See Margaret Karns and Karen Mingst, *International Organizations: The Politics and Process of Global Governance*, Lynne Rienner Publishers: Boulder, 2004, 426.
- 178 J H Lebovic & E Voeten, *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators*, 46 *Journal of Peace Research* 79, 83 (2009).
- 179 The IFC’s lending guidelines support the “responsibility of businesses to respect human rights, independently of the state duties to respect, protect, and fulfill human rights.” IFC Policy on Environmental and Social Sustainability (2012), para. 12.
- 180 World Bank Operational Policy OP 4.10.

- 181 Ralph Steinhardt, *The New Lex Mercatoria*, in *Non-State Actors and Human Rights* (Philip Alston, ed.), Oxford University Press: Oxford (2005), 207.
- 182 African Development Bank Group, *Integrated Safeguards System: Policy Statement and Operational Safeguards*, *Safeguards and Sustainability Series* (1:1) (2013), at 1.
- 183 Inter-American Development Bank, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development*, Part I.
- 184 Conferences of the Parties (COPs) to multilateral environmental agreements are likely not considered to be international organizations in the traditional sense. However, they share similar key characteristics that make the analysis here applicable to their activities. Robin Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 *American Journal of International Law* 623, 655 (2000) (stating that “In spite of not being established as formal IGOs, the institutions of MEAs should be considered to possess international legal personality and the capacity to act on the external plane, particularly in relation to the conclusion of agreements in the form of treaties with other subjects of international law”).
- 185 Convention on Biological Diversity, “Protected Areas – an overview”, available at <http://www.cbd.int/protected/overview/default.shtml> (last visited 12 March 2014).
- 186 IUCN, “Global Protected Areas Programme”, available at http://www.iucn.org/about/work/programmes/gpap_home/pas_gpap/ (last visited 12 March 2014).
- 187 The World Bank, “Projects and Operations, Amazon Region Protected Areas (GEF)”, available at <http://www.worldbank.org/projects/P058503/amazon-region-protected-areas-gef?lang=en> (last visited 12 March 2014).
- 188 The “plus” in this term refers to “the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries” FCCC/CP/2007/6/Add.1* (14 March 2008) (Bali Action Plan), para. 1(b)(iii).
- 189 FCPF, *About Us*, available at <http://www.forestcarbonpartnership.org/fcpf> (last visited 7 May 2014).
- 190 Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 *Vand. J. Transnat'l L.* 905, 934 n. 142 (2009).
- 191 Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 *Am U Int'l L Rev* 527, 566 (2014).
- 192 Philip Alston, *Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food*, 30 *How. L.J.* 473, 479 (1987) (emphasis added).
- 193 Philip Alston, *Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food*, 30 *How. L.J.* 473, 479-80 (1987).
- 194 International Law Commission, *Draft Articles on the Responsibility of International Organizations*, Report of the International Law Commission, Sixty-third session, UN Doc. A/66/10 (2011), Articles 41, 42 and commentary. See also Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 68 (2006) (stating that “An interim conclusion could be that international organizations have a duty to protect the customary international human rights of everyone in their control to the extent that their functions allow them to fulfil such a duty. Such responsibility includes not only the duty to respect human rights (the negative obligations) but also the duty to protect human rights (the positive obligations).”).
- 195 “The concept of self-determination derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality.” James Anaya, *Indigenous Peoples in International Law*, Oxford University Press (2004), at 96.
- 196 Like the other entities discussed in this paper, businesses are also capable of being defined in different ways. In general, however, the term business is used to describe a commercial enterprise carried on for profit. See *Black's Law Dictionary* (9th ed. 2009). A “corporation” on the other hand has a specific legal meaning: “An entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely” *Black's Law Dictionary* (9th ed. 2009). For purposes of this discussion, the terms business and corporation will be used interchangeably unless otherwise noted.
- 197 Peter Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 *Vanderbilt Journal of Transnational Law* 1101, 1103 (2013).
- 198 Adam McBeth, *International Economic Actors and Human Rights*, Routledge: New York (2010), 72.

- 199 Adam McBeth, *International Economic Actors and Human Rights*, Routledge: New York (2010), 72.
- 200 OECD Guidelines for Multinational Enterprises (2011 ed.), p.19 (OECD Guidelines).
- 201 FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) No. 3.2.
- 202 United Nations Global Compact, Overview of the UN Global Compact, available at <http://www.unglobalcompact.org/AboutTheGC/index.html> (last accessed 13 May 2014).
- 203 For additional discussion on the emergence of such standards, see Elisa Morgera, *Benefit-sharing as a Bridge Between the Environmental and Human Rights Accountability of Multinational Corporations*, Forthcoming in *The Environmental Dimension of Human Rights* (Ben Boer, ed.), Oxford: Oxford University Press, 2014, at 10.
- 204 Equator Principles, About the Equator Principles, available at <http://www.equator-principles.com/index.php/about-ep/about-ep> (last accessed 13 May 2014).
- 205 The Equator Principles: A Financial Industry Benchmark for Determining, Assessing and Managing Social and Environmental Risk in Project Financing (June 2013), 2.
- 206 Roundtable on Sustainable Palm Oil, Principles and Criteria for the Production of Sustainable Palm Oil (2013), at 4.
- 207 Indeed, the increasing developments in this area may reflect increasing recognition on the part of companies that respecting human rights is good business.
- 208 John Knox, The Human Rights Council Endorses "Guiding Principles" for Corporations, 15 ASIL Insights 21, 1 (2011).
- 209 Special Representative to the Secretary-General on Business and Human Rights. *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (2008) (2008 Framework Report).
- 210 Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in *The UN Guiding Principles on Business and Human Rights--Foundations and Implementation* (Radu Mares, ed.), Marinus Nijhof: Boston (2012), 1.
- 211 Karin Buhmann, *Damned if You Do, Damned if You Don't? The Lundbeck Case of Pentobarbital, the Guiding Principles on Business and Human Rights, and Competing Human Rights Responsibilities*, 40 *Journal of Law, Medicine Ethics* 206, 210 (2012).
- 212 See Peter Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 *Vanderbilt Journal of Transnational Law* 1101, 1113 (2013).
- 213 Institute for Human Rights and Business, John Ruggie, Building on a 'landmark year' and thinking ahead, 12 January 2012, available at http://www.ihrb.org/commentary/board/building_on_landmark_year_and_thinking_ahead.html (last accessed 19 May 2014).
- 214 Guiding Principles at p.1.
- 215 Guiding Principles para. 4 commentary. In general, Ruggie carefully avoids the primary/secondary dichotomy, and indeed has stated that because the responsibility of business to respect human rights exists independently of states' duties, "there is no need for the slippery distinction between 'primary' State and 'secondary' corporate obligations - which in any event would invite endless strategic gaming on the ground about who is responsible for what." 2008 Framework Report para. 55.
- 216 2008 Framework Report, para. 24.
- 217 Guiding Principles No. 25.
- 218 Guiding Principles No. 25. "This limitation was controversial, because many human rights advocates have argued that developed states have a duty to protect against foreign abuses committed by corporations domiciled in their territory." John Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, 15 ASIL Insights 21, 3 (2011).
- 219 Guiding Principles No. 3.
- 220 Guiding Principles No. 10.
- 221 Guiding Principles No. 11.
- 222 Guiding Principles No. 11 commentary.
- 223 Guiding Principles No. 11 commentary.
- 224 Guiding Principles No. 12.
- 225 Guiding Principles No. 13.
- 226 Guiding Principles No. 15.

- 227 Guiding Principles No. 18. The commentary to this principle provides that “In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.”
- 228 Guiding Principles No. 13 commentary.
- 229 2008 Framework Report para. 55.
- 230 Guiding Principles No. 29.
- 231 John Knox, *The Human Rights Council Endorses “Guiding Principles” for Corporations*, 15 ASIL Insights 21, 4 (2011).
- 232 *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 2007, para. 44.
- 233 *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 2007, para. 44.
- 234 2008 Framework Report para. 9.
- 235 John Knox, *The Human Rights Council Endorses “Guiding Principles” for Corporations*, 15 ASIL Insights 21, 2 (2011).
- 236 2008 Framework Report para. 54.
- 237 Guiding Principles No. 12 commentary. The reason Ruggie took this approach was a practical one, based on his attempt to navigate between overstating corporations’ legal obligations on the one hand and on the other excusing them from any obligations at all. Although grounding the obligation of businesses to respect human rights in the expectations of society presents disadvantages that scholars have debated at length, doing so was less controversial and ultimately led to widespread acceptance. John Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in Radu Mares, ed., *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2011.
- 238 John Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in Radu Mares, ed., *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, 2011.
- 239 Businesses are also involved in conservation in other ways, such as through conservation easements, biodiversity offsets, and payments for ecosystem services. See Colin Reid, *The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK*, 23 *Journal of Environmental Law* 2 (2011).
- 240 Elisa Morgera, *Benefit-sharing as a Bridge Between the Environmental and Human Rights Accountability of Multinational Corporations*, Forthcoming in *The Environmental Dimension of Human Rights* (Ben Boer, ed.), Oxford: Oxford University Press, 2014, at 19.
- 241 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, UN Doc. A/HRC/12/34, (2009), Section E.
- 242 Pierre-Marie Dupuy and Lisa Vierucci, Introduction, in *NGOs in International Law: Efficiency in Flexibility*, Pierre-Marie Dupuy and Lisa Vierucci eds, Edward Elgar Publishing Limited, Glos (2008) at 12.
- 243 The purpose of this discussion is not to settle the debate over the meaning of the term, but to recognize that a debate exists in order to facilitate a full understanding of the larger issues at play. In general, the acronym NGO as used in this report will refer to the criteria set out above. For a discussion of the equally fraught term “non-state actor,” see Philip Alston, ‘The ‘Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’, in *Non-State Actors and Human Rights*, in Phillip Alston, ed., *Non-State Actors and Human Rights*, Oxford University Press, 2005.
- 244 See Menno Kamminga, ‘The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?’, in Philip Alston, ed., *Non-State Actors and Human Rights*, Oxford University Press, 2005, p. 96.
- 245 See Peter Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 *Vanderbilt Journal of Transnational Law* 1101, 1102 (2013) (“I count myself among those who believe that non-state power is on an inevitable upward trajectory in the wake of material changes in human interaction.”). Notably, NGOs are only one ‘major group’ but the most relevant to conservation initiatives.
- 246 Karsten Nowrot, *Legal consequences of globalization: The status of non-governmental organizations under international law*, 6 *Ind J Global Legal Stud* 2, 579 (1999).

- 247 Karsten Nowrot, Legal consequences of globalization: The status of non-governmental organizations under international law, 6 *Ind J Global Legal Stud* 2, 591 (1999).
- 248 Karsten Nowrot, Legal consequences of globalization: The status of non-governmental organizations under international law, 6 *Ind J Global Legal Stud* 2, 580 (1999).
- 249 Karsten Nowrot, Legal consequences of globalization: The status of non-governmental organizations under international law, 6 *Ind J Global Legal Stud* 2, 594-95 (1999).
- 250 See Kenneth Anderson, "Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations, 36 *Brooklyn Journal of International Law* 841, 842 (2011).
- 251 Bernauer, T. and Betzold, C., 2012. Civil Society in Global Environmental Governance. *The Journal of Environment & Development*, 2012 21: 62.
- 252 IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980).
- 253 Robert Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *Buff Hum Rts L Rev* 261, 261 (2004).
- 254 Robert Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *Buff Hum Rts L Rev* 261, 263 (2004).
- 255 See e.g. CorA Network for Corporate Accountability, *Position Paper on Business and Human Rights: Expectations of a German Action Plan* (2013), available at http://www.cora-netz.de/wp-content/uploads/2013/06/Position-Paper_Bus+HR_expectations-of-German-action-plan_2013-04.pdf (last visited 14 March 2014).
- 256 See Joint civil society statement *Advancing the global business and human rights agenda: Follow-up to the work of the Special Representative of the Secretary-General (SRSG) on human rights and transnational corporations and other business enterprises* (2011), available at <http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/Joint-civil-society-statement-on-business-and-human-rights-May-2011.pdf> (last visited 14 March 2014).
- 257 Dr. Yael Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 *Cornell Int'l L.J.* 21, 24 (2013) (noting that consensus was reached on corporate accountability for human rights "only on the understanding that any corporate responsibility stems from societal expectations rather than human rights law").
- 258 It is important to note, however, that they are not the only way. As discussed above, we refer to them here because as a practical matter they have been widely accepted at the international level and are likely to drive much of the conversation around human rights obligations of corporations in the years to come.
- 259 However, some have argued that: "companies, according to the widely accepted qualifying criteria, have at least some form of legal personality in public international law. This is not exactly the same type of personality as that of states, but this does not negate its existence." David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *Human Rights Law Review* 447, 480 (2006).
- 260 See Peter Willetts, Introduction, in (Peter Willetts, ed.) *"The Conscience of the World": The Influence of Non-Governmental Organisations in the UN System* 1, 11 (1996).
- 261 Eric Pfanner, *NGOs gain confidence of public*, *New York Times* (January 24, 2005), available at <http://www.nytimes.com/2005/01/23/business/worldbusiness/23iht-brands24.html> (last visited 13 March 2014).
- 262 Dorothea Baur & Guido Palazzo, *The Moral Legitimacy of NGOs as Partners of Corporations*, 21 *Business Ethics Quarterly* 579, 583 (2011).
- 263 *Guiding Principles* p.1.
- 264 See Timothy C. Evered, *Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union*, 3 *Buff. Jour. Int'l L.* 153, 158 (stating that "NGOs active internationally have important similarities with for-profit foreign investors").

- 265 Conservation Initiative on Human Rights, Conservation and Human Rights Framework, available at http://cmsdata.iucn.org/downloads/cihr_framework_feb_2010.pdf (last accessed 8 May 2014). Individual conservation organizations have also developed their own principles along similar lines. See, e.g., World Wildlife Fund, Indigenous Peoples and Conservation: WWF Statement of Principles, available at http://awsassets.panda.org/downloads/183113_wwf_policyrpt_en_f_2.pdf (last visited 14 March 2014), Principle No. 32 (stating that in the context of partnerships with other organizations, WWF will “ensure that such partnerships do not undermine, and if possible serve to actively promote, the basic human rights and customary resource rights of indigenous peoples”).
- 266 Conservation Initiative on Human Rights, Conservation and Human Rights Framework, available at http://cmsdata.iucn.org/downloads/cihr_framework_feb_2010.pdf (last accessed 8 May 2014).
- 267 See Guiding Principles No. 12.
- 268 Guiding Principles No. 12 (emphasis added).
- 269 Additionally, NGOs may be subject to a variety of other standards governing their activities in the conservation context. For example, NGOs that are Partner Agencies of the GEF must meet minimum requirements in order to implement GEF-financed projects. These include a standard on Indigenous peoples, which provides that “Established policies, procedures, and guidelines require the Agency to ensure projects are designed and implemented in such a way that fosters full respect for Indigenous Peoples’ and their members’ dignity, human rights, and cultural uniqueness” GEF, Policy on Agency Minimum Standards on Environmental and Social Safeguards, Minimum Standard 4: Indigenous Peoples, available at http://www.thegef.org/gef/sites/thegef.org/files/Docs/PL.SD_.03.Policy_on_Environmental_and_Social_Safeguards.Update_09_12_2013.pdf (last accessed 8 June 2014).
- 270 See Guiding Principles No. 13.
- 271 UN Declaration Article 8.
- 272 Guiding Principle No. 13 defines “business relationships” broadly “to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”
- 273 Guiding Principles No. 19 Commentary at 22.
- 274 Guiding Principles No. 19 Commentary at 22.
- 275 Guiding Principles No. 19 Commentary at 22.
- 276 Although this term is not generally considered to include large non-profits and funders who support NGO activities, they fit into the formal definition of an ‘NGO’.

This paper analyses the applicability of international human rights law to actors involved in protected area conservation, including States and State agencies, international organizations, businesses and NGOs. It forms Part I of a series of technical reports that will serve as a foundation for developing an accessible *Guide to Human Rights Standards for Conservation*. The authors are particularly keen to receive feedback on the analysis and conclusions presented.

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