In conservation law, policy, and practice, there are many challenges and barriers to the recognition and realization of a diversity of rights. Some of the mechanisms put in place to conserve biodiversity may in fact undermine the rights of Indigenous peoples and local communities (Morel), including those related to Indigenous peoples’ and community conserved areas in Nepal (Stevens) and Mexico (Martin et al.), access and benefit sharing (McDermott and Wilson) and marine protected areas (Gardner and Morales) in Canada, and protected areas (Madzwamuse), traditional knowledge (Crawhall), and natural resource governance (Nelson) in Africa. Against a backdrop of legal, political, economic, and social-cultural limitations and risks, the transition from the theory, law, and policy to the practice of rights-based approaches is no small feat. Even where de jure recognition exists, the de facto realization of rights requires significant political will, financial, technical, and human resources, and a genuine commitment to power-sharing that is, in practice, rare. It is clear that rights-based approaches to conservation are not a panacea. In some cases, they may even contravene other efforts to secure local livelihoods and conservation objectives if situations are viewed only from a rights-based perspective. However, within every challenge lies an opportunity, and duty-bearers and rights-holders must continue to engage in constructive dialogue to understand and seek innovative synergies to mutual responsibilities and benefits.
CONSERVATION AND INDIGENOUS PEOPLES’ RIGHTS: MUST ONE NECESSARILYCOME
AT THE EXPENSE OF THE OTHER?

Cynthia Morel

Abstract

This article explores the compatibility of the United Nations Convention on Biological Diversity (CBD) with the protection of Indigenous peoples’ rights. While the CBD has yet to fully address existing gaps of protection that adversely affect Indigenous peoples, there are emerging standards under the African Commission on Human and Peoples’ Rights (ACHPR) that help strike a new balance between the realization of Indigenous peoples’ rights and the conservation of biodiversity as mutually reinforcing objectives. The standards in question are largely drawn from the recent landmark ruling of ‘The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, adopted by the African Union in February, 2010. This case, which entrenches many of the underlying principles of the United Nations Declaration on the Rights of Indigenous Peoples, constitutes the first Indigenous land rights case to be successfully adjudicated before the ACHPR.

The concept of setting aside land for recreation and the conservation of natural species can be traced back to Mesopotamia in the first millennium B.C. Until very recently, the creation of conservation areas has been characterized by a top-down approach, leading to the dispossession of countless Indigenous peoples. The consequent denial of access to resources vital to Indigenous peoples’ welfare and survival has resulted in a long history of marginalization, poverty, and disease that violates their most fundamental human rights. In Africa alone, it has been estimated that the creation of protected areas has expropriated communities from approximately 1 million square kilometers of forest, pastures, and farmlands.

The Indigenous Endorois community has been living on the banks of Lake Bogoria in the heart of Kenya’s Rift Valley since time immemorial. In 1973, the community was forcibly evicted for the creation of a wildlife sanctuary called the Lake Bogoria Game reserve. The failure to consult the Endorois, to involve them in the management and benefit-sharing of the reserve, or to compensate them with adequate grazing land to sustain their livestock rapidly forced them into abject poverty from which they have yet to recover. In the decades following their eviction, members of the community faced arrest for allegedly ‘trespassing’ on the reserve for religious or medicinal purposes. Consequently, as in the case of many other Indigenous peoples, the severed ties with their ancestral land not only threatened their health and socio-economic well-being, but also their spiritual and cultural survival and their ability to contribute to the conservation and sustainable use of the area’s biodiversity.

1 The author’s conclusions expressed in this paper are hers alone and should not be attributed to the Minority Rights Group International, the organization for which she worked as co-counsel for the Endorois case, or to the Open Society Justice Initiative, her current employer. The author thanks Viktoria Nagorna for her research assistance towards this paper.
3 Traditional Indigenous territories encompass up to 22 percent of the world’s land surface and they coincide with areas that hold 80 percent of the planet’s biodiversity. See Sobrevila, C., 2008. The Role of Indigenous People in Biodiversity Conservation: The Natural but Often Forgotten Partners. World Bank: Washington, D.C., page 5.
Against this backdrop, the recent landmark ruling of The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, formally adopted by the African Union on February 2, 2010, is the culmination of nearly 40 years of struggle. It constitutes the first African Commission on Human and Peoples’ Rights (AChPR) ruling to recognize that those maintaining a traditional way of life dependent on ancestral land are Indigenous in the African context and that adequate protection must be afforded accordingly. In this light, the Commission called for the recognition of the Endorois’ ownership over their ancestral land and its restitution. It also called for the protection of the community’s natural resources and its right to development. This present article will highlight the key findings of the decision and assess the scope of its impact in the context of conservation and the management of biodiversity.5

**INDIGENOUS PEOPLES’ RIGHTS TO FORMAL RECOGNITION**

The formal recognition of Indigenous peoples in accordance with existing provisions in international human rights law is arguably the first step to the realization of their fundamental rights. In the recent Endorois ruling, the ACHPR expressly underscored the importance of formally recognizing Indigenous peoples precisely as such.6 In doing so, it pointed to the violation of Indigenous peoples’ collective property rights as “a natural consequence of the lack of recognition of their juridical personality”.7 The Commission ensured this recognition by tackling the distinction between ‘indigeneity’ and ‘indigenousness’, which had proven to be contentious among African States in the lead-up to the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly. It drew on both the ACHPR’s Working Group on Indigenous Populations/Communities’ 2005 report8 and the ACHPR’s Advisory Opinion on UNDRIP to clarify that, while all original inhabitants of the continent correspond to the categorization of ‘indigeneity’, ‘indigenousness’ is more narrowly defined according to the following criteria: (a) the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness; (c) self-identification as a distinct collectivity, as well as recognition by other groups; and (d) an experience of subjugation, marginalization, dispossession, exclusion, or discrimination.9 The Commission also accepted that Indigenous cultures, like all others, are dynamic. Accordingly, it rejected the Kenyan Government objections that the inclusion of certain members of the Endorois community into mainstream society had affected the wider group’s cultural distinctiveness as Indigenous peoples.10

The Commission thus set a legal precedent through the Endorois decision for the formal recognition of Indigenous peoples as such. This development stands in sharp contrast to the recognition ascribed under the United Nations Convention on Biological Diversity (CBD), which is generally considered to be the most important international agreement designed both to protect the world’s biodiversity and to ensure that the use of it is sustainable.11 The CBD expressly refers to “indigenous and local communities” rather than “Indigenous peoples”. Far from mere semantics, the latter term carries with it an extensive body of international law that is invaluable

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7 Endorois case, paragraph 192.


9 Endorois case, paragraph 150, citing the WGIP report, 2005, page 93.

10 Endorois case, paragraphs 161-162.

11 The United Nations CBD, which was adopted in 1992 and entered into force in 1993, has the following principal objectives: to conserve biological diversity; to encourage the sustainable use of biological resources; and to ensure the fair and equitable sharing of benefits derived from such use.
to the effective protection of Indigenous peoples, whereas the former term does not.\textsuperscript{12} The CBD further limits its scope to “indigenous and local communities embodying traditional lifestyles”.\textsuperscript{13} This narrow recognition has been vociferously challenged by Indigenous lobby groups in view of the implication that Article 8(j) only applies to Indigenous peoples “who are fossilized in cultural time-wars and living in a never-changing present” and excludes those who have adapted their lifestyles to reflect the contemporary and continuing colonial situations in which they find themselves.\textsuperscript{14}

In failing to appropriately recognize Indigenous peoples, the CBD in turn neglects to acknowledge them as stakeholders and rights-holders integral to the implementation of its three aims. While the Preamble of the CBD recognizes the close and traditional dependence of indigenous and local communities embodying traditional lifestyles on biological resources, as well as the contribution that their traditional knowledge can make to both the conservation and sustainable use of biodiversity, the Convention itself constrains their involvement to that of potential beneficiaries, rather than as veritable stakeholders. This is partly rooted in the Convention’s over-arching emphasis on the State’s “sovereign rights to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”, as stipulated by Article 3.\textsuperscript{15} It is equally rooted in the further recognition under Article 15(1) of the so-called “sovereign rights” of States over “their” natural resources, with the authority to determine access to genetic resources resting with the national governments and being subject to national legislation.\textsuperscript{16}

The down-casting of Indigenous peoples as passive beneficiaries, rather than legitimate stakeholders, is further illustrated by the wording of the provisions of the CBD that notably underscore the “desirability” of sharing equitable benefits with them rather than an express obligation to do so. It is also evidenced by the extent to which the exercise of consultation with Indigenous peoples is subject to caveats that ultimately eclipse the right to free, prior and informed consent.\textsuperscript{17}

These factors arguably illustrate that the shortcomings of the CBD to effectively protect Indigenous peoples’ rights largely lie in its failure to recognize their identity as Indigenous peoples. The CBD thus fails to adhere to the rights-based approach to which Indigenous peoples are entitled under international law. In doing so, the CBD ignores the inalienable rights that Indigenous peoples have over their ancestral lands and resources since prior to the creation of these States, as well as the corresponding sovereignty that they retain as a result.\textsuperscript{18} Taking concrete steps towards the formal recognition of

\begin{itemize}
  \item By limiting its scope to ‘indigenous and local communities embodying traditional lifestyles’, the CBD arguably fails to effectively protect Indigenous peoples’ rights.
\end{itemize}


\textsuperscript{13} This language can be found in Preambular paragraph 12 and in Article 8(j) of the CBD.

\textsuperscript{14} See International Alliance of the Indigenous Peoples of the Tropical Forests, 1996, Section 2(2).

\textsuperscript{15} Emphasis added. Also see Preambular paragraph 4: “Reaffirming that States have sovereign rights over their own biological resources”; Article 4: “Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party: (a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.”; Article 9(a): “Each Contracting Party shall … Adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components”; Article 9(b): “Each Contracting Party shall … Establish and maintain facilities for ex-situ conservation of and research on plants, animals and micro-organisms, preferably in the country of origin of genetic resources”; and Article 14(2): “The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.”

\textsuperscript{16} Similar wording is found in Article 8: “Each Contracting Party shall, as far as possible and as appropriate: (j) 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” (emphasis added).

\textsuperscript{17} Preambular paragraph 12 of the CBD: “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components” (emphasis added). Also see Article 8(j) of the CBD.

\textsuperscript{18} Critics to this effect include the Barcelona-based Genetics Resources Action International (GRAIN), which maintains that the sovereignty principle does not adequately take into account the rightful place of Indigenous peoples – in essence, the constituency acknowledged to have played a crucial role in sustaining and nurturing the world’s biodiversity resources. Additional perspectives are outlined in Bengwayan, M., 2003. \textit{Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia}. Minority Rights Group International: UK, pages 13-14.
Indigenous peoples as intended under international law would dramatically shift the scope and application of the CBD away from a State-centric instrument towards one in which the rights and benefits that Indigenous peoples are entitled to are fully protected in the context of the conservation and sustainable use of biodiversity.\(^{19}\)

**INDIGENOUS PEOPLES’ RIGHTS TO LAND**

For the first time since the adoption of the African Charter nearly thirty years ago, the Endorois case has established that those maintaining a traditional way of life dependent on ancestral land are Indigenous in the African context, and thus require adequate protection.\(^{20}\)

Given Indigenous peoples’ long history of dispossession throughout the colonial and post-colonial period, the African Commission swiftly determined that the Endorois property claims could be examined despite their lack of formal title. In this respect, it drew on the principle adopted by the Inter-American Court of Human Rights that “possession” of the land should suffice for Indigenous communities lacking real title to obtain official recognition of that property.\(^{21}\) The Commission further added that, while traditional possession entitled Indigenous peoples to demand official recognition and registration of property title, members of Indigenous communities who had unwillingly left their traditional lands or lost possession thereof maintain property rights thereto, even though they lack legal title.\(^{22}\) Moreover, the Commission stressed that for members of Indigenous communities who had unwillingly lost possession of their lands, when those lands had been lawfully transferred to innocent third parties, they remained entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, it was held that possession does not constitute a requisite condition for the existence of Indigenous land restitution rights.\(^{23}\)

In accordance with the above, the Commission found that Kenya’s obligations towards the Endorois community required both compensation and restitution of ancestral land. In doing so, it specified that this meant restoring the ownership of the land to the community, rather than limiting its compliance to rights of access. The Commission based its reasoning on the fact that:

> [I]f international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.\(^{24}\)

The Commission clearly established that restitution of Indigenous peoples’ ancestral lands further required demarcation of the land in consultation with the Endorois and neighbouring communities, with a view to then granting legal title.\(^{25}\) The restitution of the actual ancestral land itself was also said to be obligatory unless factually impossible. In the particular case of the Endorois, the Commission stressed that the community’s ancestral knowledge of Lake Bogoria’s ecosystems made their guardianship of the reserve not only desirable, but ideal for its preservation. The fact that no other community had settled on the land and that the land had not been spoliated further facilitated full restitution.


\(^{21}\) Endorois case, paragraph 190, citing the case of The Mayagna Awas Tingni v. Nicaragua, Inter-American Court of Human Rights, 2001, paragraph 151. The Commission also quoted Doğan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paragraphs 138-139.

\(^{22}\) Endorois case, paragraph 209.

\(^{23}\) Endorois case, paragraph 209.

\(^{24}\) Endorois case, paragraph 204 (emphasis added), citing Articles 8(2)(b), 10, 25, 26, and 27 of UNDRIP.

\(^{25}\) Endorois case, paragraph 206.
Finally, the Commission held that the threat posed to the Endorois’ cultural survival and way of life as a result of the continued dispossession and alienation from their ancestral land rendered that very dispossession disproportionate under international law. In a similar vein, it dismissed the Kenyan Government’s position that the alleged lack of clarity governing the Endorois land tenure system presented an insurmountable obstacle to the State. The Commission instead stressed that in the event of any lack of clarity, the State had a duty to consult with the members of the community and seek clarifications from them in order to comply with the State’s obligations under the Charter. Kenya was thus called upon to recognize the right to property of members of the Endorois community within the framework of a communal property system and to establish the mechanisms necessary to give domestic legal effect to such a right recognized in the Charter and international law.

**Indigenous Peoples’ Rights to Natural Resources**

The *Endorois* case focused primarily on the State’s obligations of compensation and restitution of ancestral land following the community’s forced eviction for the creation of the wildlife reserve in 1973. However, separate attention was also dedicated to the community’s rights to the natural resources located on this land, including consideration of the community’s rights of ownership of rubies that were recently discovered through prospective mining. In the early stages of litigation, the African Commission issued provisional measures halting the prospective mining efforts on two grounds. The first was reasoned on the basis that the mining had been initiated without consultation or consent of the Endorois community; the second resulted from the fact that the mining activity polluted the only remaining water source accessible to its members.

Beyond the provisional measures themselves, the Commission refrained from explicitly granting ownership of rubies located on the Endorois ancestral land to the community. However, it did recognize that the cultural and economic survival of Indigenous peoples generally depended on their access and use of the natural resources in their territory. It further held that limitations on the prerogative of the State would most likely apply when the extraction of one natural resource affected the use and enjoyment of other resources that are necessary for the survival of an Indigenous community. In doing so, it emphasized the findings of Erica Daes, former Special Rapporteur on Indigenous Peoples and Their Relationship to Land, which underscored that:

> Limitations, if any, on the right to indigenous peoples to their land and natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.

This position fills a rather sizeable gap of protection left by Article 15(1) of the CBD, which strictly limits recognition of natural resources to the “sovereign rights” of States alone and bestows upon them the sole authority to determine access to genetic resources, “subject to national legislation.”

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26 *Endorois* case, paragraph 231-238.
27 *Endorois* case, paragraph 195.
28 *Endorois* case, paragraph 196.
29 *Endorois* case, paragraph 260.
30 *Endorois* case, paragraph 264.
32 Article 15(1), CBD: “Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”
In addition, Indigenous peoples’ full and effective ownership of their ancestral land dramatically strengthens their ability to restrict arbitrary extraction of genetic and biological resources located on their territories. As formal owners of their ancestral lands, when recognized as such, Indigenous peoples gain legal standing as legitimate stakeholders to any activity concerning their land.\textsuperscript{33} While this renders it obligatory for States and private entities to consult with Indigenous peoples and to seek their free, prior and informed consent, it follows that any infringement leading to the spoliation or unlawful extraction of resources from that land becomes subject to compensation. In this regard, the Endorois case and other relevant developments under international law pertaining to Indigenous rights are poised to fundamentally challenge provisions such as Article 14(2) of the CBD, which absolves State Parties from providing any restoration or compensation for damage to biological diversity, where liabilities solely constitute an ‘internal matter’.\textsuperscript{34}

The Commission’s strong emphasis on limitations needing to flow from the most urgent and compelling interests of the State suggests that the threshold upheld by the African Commission is significantly higher than the unilateral and arbitrary discretion afforded to State Parties under the CBD. Moreover, the fact that the African Commission expressly frames the extraction of natural resources in terms of its potential violation of non-derogable rights such as the right to life further accentuates the narrow and binding limitations that it aims to impose upon States in circumstances affecting Indigenous peoples. Negotiations undertaken under the ambit of the CBD should take note of such developments or, in failing to do so, risk being out of step with both international law and the basic needs and rights of Indigenous peoples.

\textbf{Conservation and Indigenous Peoples’ Right to Development}

The right to development was formally acknowledged as an “inalienable” human right with the adoption of the Declaration on the Right to Development by the United Nations General Assembly in 1986.\textsuperscript{35} The Declaration on the Right to Development recognizes all rights and freedoms as “indivisible and interdependent”\textsuperscript{36} and explicitly refers to the failure to observe civil, political, economic, social, and cultural rights as an obstacle to development.\textsuperscript{37} Development has been defined in the Preamble as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”\textsuperscript{38}

The African Charter on Human and Peoples’ Rights, through Article 22, stands as the only normative instrument that renders the right to development justiciable. The Endorois decision represents the first piece of jurisprudence to apply the normative scope of the right in practice. The inherent value of the Endorois decision in this particular respect stems from the fact that conservation efforts to date have been largely understood in opposition to Indigenous peoples’ rights. At best, the protection of wildlife and biodiversity continues to result in planned resettlement, though most instances appear to

33 See, for example, Secretariat of the Convention on Biological Diversity, 2004. Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. CBD Guidelines Series: Montreal.
34 The Inter-American Court of Human Rights has developed extensive relevant case law to this point. See, for example, the Inter-American Court of Human Rights cases of \textit{The Mayagna Awas Tingni v. Nicaragua} (2001); \textit{Molwuana v Suriname} (2005); and the case of \textit{Sanbeyamaska Indigenous Community v. Paraguay} (2006), among others.
35 Article 1 states: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” Declaration on the Right to Development, GA res. 41/128, annex, 41 UN GAOR Supp. (No. 53), at 186, UN Doc. A/41/53, (1986).
36 Declaration on the Right to Development, Article 6(2).
37 Declaration on the Right to Development, Article 6(3).
be characterized by instances of forced evictions that severely threaten Indigenous peoples’ socio-economic and cultural survival. This largely reflects the experience of the Endorois community, whose forced eviction from the banks of Lake Bogoria to arid land – leading to the loss of the majority of their livestock – dramatically undermined virtually all aspects of the community’s well-being, ranging from lack of food security to the inability to afford school fees through the bartering of its animals. In its assessment of these facts, the African Commission’s findings serve to fill the notable normative gap of protection resulting from the disproportionately State-centric provisions under the CBD.

The African Commission’s jurisprudence on the right to development through the Endorois case clearly establishes that development has to be equitable, non-discriminatory, participatory, accountable, and transparent. Whatever the nature of the development in question, the Commission’s ruling is equally emphatic on the requirement that it contributes to the empowerment of communities. In this regard, it held that both the choices and the capabilities of the Endorois had to improve in order for their right to development to be realized.

Securing formal commitments in relation to benefit-sharing from normative instruments constitutes a vital step in ensuring that Indigenous peoples’ choices and capabilities are improved upon. Furthermore, the Commission has made clear that their empowerment depends on more than becoming simple recipients of dividends. In this respect, much of the Commission’s ruling in relation to choice hinged on the quality of consultation processes – in other words, the extent to which consultation processes sought to obtain the community’s free, prior, and informed consent in accordance with their customs and traditions. It was also held that the legitimacy of the consultation further depended on the extent to which Indigenous peoples could effectively help shape the outcome. In this regard, decisions presented as faits accomplis have been summarily rejected by the Commission.

The Endorois case thus once again emphasized under this facet the obligation upon States to treat Indigenous peoples as active stakeholders rather than passive beneficiaries. As such, it has established the right to development as not only a right of outcome, but also a right of process.

**CONCLUSION**

The Endorois ruling is groundbreaking in several respects. It recognizes the concept of indigenousness in the African context, including the dynamic nature of these societies, rather than confining recognition to those ‘embodying traditional lifestyles’. It also establishes land rights flowing from this recognition as the basis for full restoration of ownership, rather than mere access to land and resources managed and relied upon by Indigenous peoples since time immemorial. This, in turn, firmly repositions Indigenous peoples as active stakeholders in any decisions affecting their land and resources, rather than as passive beneficiaries. In this respect, the Commission’s findings not only serve to strengthen the use of rights-based approaches in general terms, but the precedent is also poised to equally broaden the use of rights-based approaches in the specific context of the conservation and sustainable use of biodiversity.

The Endorois decision thus offers a new framework through which biodiversity conservation initiatives can be negotiated
with Indigenous peoples as stakeholders and rights-holders in a manner that increases their choices and capabilities, rather than in one that leaves them dispossessed and further marginalized. This is a framework that also increases the possibility of greater trust to be established between Indigenous peoples and the private sector, creating the potential for science and ancestral knowledge to come together more effectively to increase sustainability and optimal management of the world’s most fragile and complex ecosystems. This requires renewed efforts to ensure that Indigenous rights and normative standards on biodiversity be conceptualized as mutually reinforcing interests and that new practices be negotiated accordingly. It does not need to be a case of one being championed at the expense of the other.

Nevertheless, the extent to which UNDRIP or the principles upheld in the Endorois decision are incorporated into further developments associated with the CBD remains to be seen. In Africa, at the very least, the Endorois ruling constitutes a formal interpretation of the African Charter – a normative instrument that is binding upon all but one State of the continent. As a landmark case, it therefore serves as a formal warning to all other State Parties to the CBD of their obligations under the Charter if similar fact patterns were to emerge under their respective jurisdictions. However, this warning must not be misconstrued as a threat. Instead, as highlighted above, it should be welcomed by States as a blueprint and an opportunity for the emergence of new frameworks that allow for mutually beneficial outcomes for both conservation and Indigenous peoples’ rights.

Cynthia Morel (cmorel@justiceinitiative.org) served as founding legal officer and then senior legal advisor to Minority Rights Group International’s strategic litigation programme from 2002-2008, where she spearheaded landmark cases before the African Commission on Human and Peoples’ Rights and the European Court of Human Rights. In these capacities, she served as co-counsel for the Endorois case cited herein. She has since joined the Open Society Justice Initiative.

Morocco stands as the sole African country not to be party to the African Charter on Human and Peoples’ Rights.

IMPLEMENTING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND INTERNATIONAL HUMAN RIGHTS LAW THROUGH THE RECOGNITION OF ICCAs

Stan Stevens

Abstract

Appropriate recognition and respect for Indigenous Peoples’ Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs) are critical components of the International Union for Conservation of Nature’s new protected area paradigm policies and contribute significantly to implementing the Convention on Biological Diversity’s Articles 8(j) and 10(c) and Programme of Work on Protected Areas. ICCAs are also supported by and embody many internationally-affirmed human rights. As such, the appropriate and rights-based legal recognition of ICCAs should become an important means of ‘best practice’ implementation of the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as an important remedy and redress for violations of human rights associated with the establishment and governance of protected areas in Indigenous peoples’ territories. An analysis of Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park and World Heritage Site illustrates the need for increased and appropriate recognition of ICCAs as a prerequisite to the realization of these rights.
In recent years, the discourse on protected areas has been revolutionized by greater appreciation for the conservation contributions of Indigenous peoples and local communities on their traditional territories and collective lands. Recognition of Indigenous Peoples’ Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAcs) is central to the current protected area policies and best practice standards of both the International Union for Conservation of Nature (IUCN) and the United Nations (UN) Convention on Biological Diversity (CBD). IUCN characterizes ICCAcs as territories and areas that “are voluntarily conserved by indigenous peoples and local communities through customary law or other effective means.” Both the Members of IUCN and the Parties to the CBD have endorsed ICCAcs as protected areas and urged states to give them legal and other recognition and support. ICCAcs embody diverse forms of conservation based on Indigenous peoples’ and local communities’ cultures, self-governance, and self-determination. They vary enormously in their age, size, goals, and institutional arrangements, ranging from the collective care and protection of sacred natural sites and species to the community governance of forest, grassland, and marine commons, and from small sacred groves to Indigenous peoples’ conservation stewardship of entire territories (Indigenous Conservation Territories) through their customary knowledge, values, institutional arrangements, and practices. ICCAcs can also be recently adopted institutional arrangements and practices that Indigenous peoples and local communities implement through their self-governance and authority for decision-making about the use, development, and conservation of their lands, waters, and natural resources.

IUCN recognizes ICCAcs as one of four protected area governance types (along with governance by states, private governance, and shared governance). ICCAcs are considered appropriate for administering the entire spectrum of protected areas (IUCN protected area management categories I-VI), including national parks and wilderness areas. An IUCN resolution adopted by the IIIrd World Conservation Congress in Bangkok, moreover, linked ICCAcs to rights by calling for “supporting existing ICCAcs, and facilitating new ones, through measures including support to the restitution of traditional and customary rights.” Recent discussions of ICCAcs within IUCN’s Commission on Environmental, Economic and Social Policy further acknowledge that “many have been subsumed within government protected areas without acknowledgment of their pre-existence as independently-governed ICCAcs” and recommend that “ICCAcs that have been incorporated into official protected area systems without the free, prior and informed consent of the concerned communities should be recognized as ICCAcs and provided respect and support.”

ICCAcs are recognized and supported by many provisions of international human rights and environmental law and policy.


5 Dudley, 2008.

6 See WCPA, 2003c, which noted the link between ICCAcs and rights with reference to the then draft UNDRIP; IUCN, 2004a. On ICCAcs and protected area governance types, see Pathak et al., 2004; Borrini-Feyerabend, 2010; Dudley, 2008.

ICCAs are also supported by multiple provisions of the CBD and its Programme of Work on Protected Areas (PoWPA). ICCAs are an important means for the realization of the CBD’s Article 8(j), which requires states 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” and Article 10(c), which requires states to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”. The PoWPA, which was adopted by the Parties to the CBD in 2004, specifically calls on state parties to “facilitate the legal recognition and effective management of indigenous and local community conserved areas” (Activity 2.1.3). Support for recognition of ICCAs within the PoWPA is grounded in overall policy on protected area “governance, participation, equity, and benefit sharing”, which emphasizes Indigenous peoples’ participation in accordance with recognition of their rights.

Recognition of ICCAs by IUCN is grounded in a long history of affirmation of the rights of Indigenous peoples with regard to protected areas. As early as 1975, IUCN advised states to “devise means by which indigenous people may bring their lands into conservation areas without relinquishing their ownership, use, or tenure rights.” In 1994, IUCN began recommending compliance with the principles of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) and the then draft UN Declaration on the Rights of Indigenous Peoples (UNDPRIP). Two years later, IUCN reaffirmed this position by recommending that its members (which include most of the world’s states and major non-governmental conservation organizations) adopt policies based on principles such as “recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas” and the rights of Indigenous peoples “to participate effectively in the management of the protected areas established on their lands and territories.”

IUCN’s strong affirmation of Indigenous rights and the rights of local communities has made ICCAs a core component of IUCN’s “new protected area paradigm.” The new paradigm maintains, inter alia, that rights recognition and rights-based conservation must be integral to the establishment, governance, and management of all protected areas, with advocates

8 Convention on Biological Diversity, 1992. The PoWPA makes further reference to Article 8(j) in recommending “the establishment of protected areas that benefit indigenous and local communities, including by respecting, preserving, and maintaining their traditional knowledge in accordance with Article 8(j) and related provisions” (Activity 1.1.7). ICCAs also have now been identified by the CBD as key means of implementing Article 10(c). In 2009, the Executive Secretary of the CBD noted that customary use, sui generis systems of resource use regulation, Indigenous knowledge, customary law, local beliefs and cosmologies, and the effective participation by Indigenous peoples in the management of natural resources are closely linked (paragraphs 6, 7, 8, 9, 16, 31, and 32), recommended local control as an effective means of realizing this (paragraph 16(a)), called for “supporting Indigenous and local communities to exercise their customary practices and laws” and to “represent themselves through their own institutions (paragraph 14(b)),” identified protected areas as a particular site of challenges to Indigenous peoples’ natural resource management in accordance with their knowledge and customary practices (paragraphs 15 and 18), and recommended recognition of ICCAs (paragraph 13(b)). The Executive Secretary observed that “one mechanism for promoting and strengthening access to biological resources for the purposes of customary use . . . is to document and recognize the existence of ICCAs, and to support local communities in their stewardship of these areas” (paragraph 13(b)). CBD Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 2009. Advice on How Article 10(c) can be Further Advanced and Implemented as a Priority: Note by the Executive Secretary, Sixth meeting, Montreal, November 2-6, 2009, Item 7 of the provisional agenda, UNEP/CBD/WG8J/add.1 12 June 2009.

9 CBD PoWPA, Activity 2.1.3. Two other PoWPA-suggested activities also advocate recognition and promotion of ICCAs. Activity 2.1.2 recommends that states do so through “legal and/or policy, financial, and community mechanisms,” while Activity 2.2.4 calls for promotion of an “enabling environment” for Indigenous peoples and local communities “to establish and manage protected areas, including community conserved . . . protected areas.” COP9 Decision IX/18, paragraph 19 encourages “taking into account indigenous and local communities’ own management systems and customary use” in protected area conservation and development activities and benefit sharing. The revised CBD Programme of Work on Inland Water Biological Diversity also provides support for ICCAs by calling on states in paragraph 9(c) “to support indigenous and local communities to re-establish, develop and implement traditional approaches and/or adaptive management approaches to conserve and sustain the use of the biological diversity of inland water ecosystems.” COP7 CBD 2004, Decision VII/4, Biological diversity of inland water ecosystems, Annex: Programme of Work on Inland Water Biological Diversity; paragraph 9(c). Last accessed July 23, 2010, at: http://www.cbd.int/decision/ cop/7/cbd-41774.

10 PoWPA, Element 2. Also, Goal 2.2 is “to enhance and secure involvement of indigenous and local communities and relevant stakeholders” in protected area governance and management with a target of “full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities . . . in the management of existing, and the establishment and management of new, protected areas.” Participation by Indigenous peoples is also highlighted in Activities 2.1.3 and 2.1.5.


The affirmation of the rights of Indigenous peoples and local communities is a core component of IUCN’s new protected area paradigm.

Similarly, the Parties to the CBD have endorsed core new paradigm policy and recommendations by highlighting governance issues and rights recognition in 2004 in Decision VII/28 of the 7th Conference of the Parties (COP) and in the associated PoWPA. Paragraph 22 of Decision VII/28 “[r]ecalls the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of and, full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.” After setting a 2008 target for implementation, PoWPA Activity 2.2.2 further emphasizes that Indigenous peoples should be involved “with respect for their rights … at all levels of protected areas planning, establishment, governance and management.” The Parties to the CBD reiterated these commitments at the 9th COP in Bonn, Germany, in 2008 and urged states to give special attention to implementation of PoWPA Element 2. IUCN had urged that COP 9 do so, observing that implementation of Element 2 “is crucial and yet is among the least effectively advanced.” A 2010 report from the Executive Secretary of the CBD agreed that implementation of Element 2, Goals 2.1 and 2.2 “was limited and way behind in achieving the targets.” Greater attention to legal recognition of rights, implementation of Element 2, and appropriate recognition and support of ICCAs are also emphasized in the 2010 in-depth review of the PoWPA developed by the CBD’s Subsidiary Body on Scientific, Technical and Technological Advice and the recommendations adopted by its 14th meeting in Nairobi, Kenya in May 2010.

These IUCN and CBD policies in part represent a response to Indigenous peoples’ calls for their rights to be recognized and respected in protected areas. ICCAs are an important means of meeting the call, expressed in the Indigenous Peoples Declaration to the World Parks Congress in Durban, for protected areas to “recognize the cultural integrity of Indigenous Peoples and ensure the integration of traditional collective management systems as a basis for the management of protected areas.”

This article discusses how ICCAs, including those over which state-governed protected areas have been superimposed, are supported by an extensive set of human rights. Thus far, unsuccessful efforts to promote the legal or other appropriate recognition of Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park and World Heritage Site illustrate the difficulties of honoring human rights in protected areas even in a country such as Nepal, which has avowed often highlighting ICCAs as a key example of a new paradigm approach.

References:
17 COP7 CBD, Decision VII/28, paragraph 22.
18 PoWPA, Activity 2.2.2. The PoWPA does not clarify what is meant by the rights of Indigenous peoples, an omission which could be corrected in its 2010 review and revision by specific reference to UNDRIP. The COP9 Decision IX/18 on Protected Areas took a step in this direction in its preamble by “Recognizing the need to promote full and effective participation of indigenous and local communities in the implementation of the programme of work on protected areas at all levels; also noting the United Nations Declaration on the Rights of Indigenous Peoples.”
19 COP9 Decision IX/18 Protected Areas, paragraph 4(c).
strong support for the rights of Indigenous peoples by voting in favor of UNDRIP and becoming the first country in Asia to ratify ILO 169. The recognition and support of ICCAs must be considered to be an important – indeed, necessary – means of upholding UNDRIP, ILO 169, and international human rights treaties through the implementation of current protected area policies of IUCN and the CBD and its PoWPA. The failure of states or conservation non-governmental organizations (NGOs) to recognize and respect ICCAs arguably constitutes a violation of multiple human rights and a failure to meet international protected area standards. In many countries, however, achieving appropriate and effective recognition of ICCAs involves challenging entrenched political, social, economic, and conservation relationships and interests.

The appropriate and effective recognition of ICCAs involves navigating complex political, social, economic, and conservation interests.

**INDIGENOUS RIGHTS AND ICCAS**

The rights of Indigenous peoples are affirmed by UNDRIP, ILO 169, international human rights treaties, and interpretations of those treaties by bodies and experts mandated to monitor states’ compliance with them. UNDRIP, unlike ILO 169, is not a legally binding treaty, yet it nonetheless has “normative weight that is grounded in the international human rights system.” James Anaya, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (the UN Special Rapporteur), advises that for signatory states, “at all times and at all levels, Government actors should be cognizant of UNDRIP when addressing indigenous peoples’ concerns, and further, should interpret ILO 169 in light of it.”

In addition to the rights identified in UNDRIP and ILO 169, Indigenous peoples are entitled to, without discrimination, all individual and collective human rights identified in international human rights instruments, including the right of peoples to self-determination. That these rights are held by Indigenous peoples has been affirmed through interpretation of UN treaties and other international law by UN Charter-based bodies such as the UN Human Rights Council, UN treaty bodies charged with monitoring the implementation of core human rights treaties, international and national human rights commissions, and international and national courts. For example, the UN Human Rights Council has devoted considerable attention to Indigenous peoples, including appointing UN Special Rapporteurs and establishing the Expert Mechanism on the Rights of Indigenous Peoples. In 1994, the UN Human Rights Committee (the predecessor of the UN Human Rights Council), referencing the cultural rights of members of minorities affirmed in Article 27 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), noted that this article applies to Indigenous peoples, including their right to a “way of life associated with the use of land resources.” The Committee charged with monitoring the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) has noted that “the situation of indigenous peoples has always been a matter of close attention and concern” and that “the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention” (paragraph 1). The CERD has called on states to “recognize and respect” Indigenous peoples’ “distinct culture, history, language and way of life” (paragraph 4(a)), to “ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs” (paragraph 4(e)), “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources” (paragraph 5), and “where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories” (paragraph 5).

Four broad sets of rights affirmed in UNDRIP and ILO 169 are particularly pertinent to recognition and respect for ICCAs: rights to self-determination and autonomy; rights to ownership, control, management, and use of land and natural resources; the right to development; and rights to education, culture, and participation. The world’s highest mountain is called Chomolungma by the Sherpa and Tibetan peoples who live at its foot. For them, it is a sacred peak and the dwelling of the goddess Miyolangsangma. The Nepal government’s official name for the mountain and for the national park ignores the Sherpa name and instead adopts a Nepalese name for it that was coined in the twentieth century and was first used by the government in the late 1950s. The People’s Republic of China uses the Tibetan and Sherpa name, rendered in pinyin as Qomolangma.

24 The world’s highest mountain is called Chomolungma by the Sherpa and Tibetan peoples who live at its foot. For them, it is a sacred peak and the dwelling of the goddess Miyolangsangma. The Nepal government’s official name for the mountain and for the national park ignores the Sherpa name and instead adopts a Nepalese name for it that was coined in the twentieth century and was first used by the government in the late 1950s. The People’s Republic of China uses the Tibetan and Sherpa name, rendered in pinyin as Qomolangma.


29 CERD, 1997, paragraphs 3.2, 4(a), d, and e, and 5.
resources; rights to culture, including cultural integrity and participation in the cultural life of the community; and rights to self-governance and participation in decision-making. Recent interpretations of the UNDRIP by James Anaya, the current UN Special Rapporteur, and his earlier work on Indigenous rights illustrate how ICCAs are supported by such rights identified in UNDRIP and thus how legal recognition of ICCAs can be an important means of implementing it.

**Rights to Self-Determination and Autonomy**

ICCAs are a foundational aspect of self-determination for Indigenous peoples as expressions of their self-governance, decision-making, and autonomy and as means of maintaining their cultures, livelihoods, and identities. The right to self-determination is violated when Indigenous peoples are prevented from maintaining their ICCAs. This infringement of self-determination is common when state-declared protected areas have been superimposed on ICCAs, collective tenure and customary law have not been recognized, Indigenous peoples’ lands have been nationalized or privatized, or states or NGOs have imposed new local institutions of governance and conservation on Indigenous peoples without their free, prior and informed consent. Rectifying such situations through recognition and respect for ICCAs can be a key remedy and means of realizing the right to self-determination.

Self-determination is a fundamental right of all peoples. The securing of this right is one reason that the global Indigenous peoples movement has so strongly maintained that Indigenous peoples are not minorities, ethnic groups, or people, but rather are peoples with the right of peoples to self-determination. As affirmed in foundational human rights instruments such as the UN Charter, the ICESCR, and the International Covenant on Civil and Political Rights (ICCPR), the right of peoples to self-determination has rich political, economic, social, and cultural dimensions that affirm the rights of peoples to decision-making authority over their lives, territories, and futures. Self-determination also has an important “territorial aspect” of supporting Indigenous peoples’ autonomy within the territories that they occupy or use. This encompasses not only current land use, but also “ancestral or traditional use that continues to have significance in the contemporary life of the community, including within cultural and religious domains.”

Article 3 of UNDRIP declares that “Indigenous peoples have the right to self-determination. By virtue of that right they … freely pursue their economic, social and cultural development.” Furthermore, Article 4 affirms that Indigenous peoples have the right to autonomy or self-government, which includes the rights to maintain and develop their own distinct decision-making, political, legal, economic, social, and cultural institutions (Articles 5, 18, and 20). ICCAs are distinct institutions in all of these senses. As culturally appropriate institutional structures through which Indigenous peoples realize their autonomy over their lands and lives, ICCAs are the means through which Indigenous peoples exercise authority over how community members and associations interact with nature, use natural resources through collectively managed practices, maintain care and respect for sacred places, and exercise self-governance. ICCAs therefore exemplify the “autonomy over particular subjects of local or internal concern”, which Anaya maintains should “extend to matters throughout their respective territories in ways commensurate with the exercise of their rights to political participation, cultural integrity, and social and economic development.”

**Rights to Ownership, Control, Management, and Use of Land and Natural Resources**

ICCAs are expressions and means of Indigenous peoples’ ownership, control, and management of territory and natural resources. These rights over territory, land, and natural resources critically support ICCAs and distinguish ICCA-managed land and resources from land use under state-conferred, conditional access privileges.

Article 26.2). States are required to “give legal recognition and protection to these lands, territories and resources”, which “shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned” (UNDHRIP, Article 26.3). Affirmation of these rights thus requires recognition of pre-existing Indigenous traditional title to lands and waters that have been annexed by the state and nationalized, including lands and waters for which ownership or custodianship is held collectively. Indigenous peoples also have the right to redress – including by restitution – for territory, land, and natural resources “confiscated, taken, occupied, used, or damaged without their free, prior and informed consent” (UNDHRIP, Article 28), a provision which is relevant to many protected areas. International and national law that attests to rights to property gives further support to ICCAs by affirming both collective and individual tenure rights. Recognition of Indigenous peoples’ collective ownership and management of territory is necessary to avoid discrimination against their customary means of owning property, ensuring cultural integrity, and pursuing self-determination. Article 14(1) of ILO 169 recognizes Indigenous peoples’ collective ownership of land and the importance of this for their culture and their spiritual relationship with their lands and territories, and affirms “a combination of possessory, use, and management rights.”

Many ICCAs benefit from de jure ownership of communal lands, territories, and resources. Others are maintained without state legal recognition of Indigenous peoples’ collective land tenure or territorial control. In such conditions, ICCAs may be weakened or at risk. Conversely, restoration of title to nationalized lands or affirmation of rights to use and manage lands and natural resources may strengthen or rejuvenate ICCAs that have been destroyed or weakened by loss of tenure or of legal authority for self-governance and land management. Indigenous peoples and proponents of rights-based conservation often maintain that recognition of tenure rights (both land and marine) can be critical for maintaining effective ICCAs. Recognition of tenure rights alone, however, may not be sufficient to ensure full recognition and respect for ICCAs or full and effective realization of Indigenous peoples’ rights.

**Rights to Culture: Community, Participation, and Cultural Integrity**

Rights to culture are fundamentally linked to ICCAs. ICCAs are supported by the right to participate in community cultural practices, by the collective rights of communities to their cultural integrity, and by the rights of peoples to rejuvenate their culture, institutions, and practices. ICCAs are cultural expressions par excellence. The governance and management of lands, waters, natural resources, and cultural sites (including sacred places) through ICCAs constitutes a community cultural practice that is often strongly associated with their values, spirituality, heritage, and cultural identities.

Rights to cultural integrity are affirmed in multiple articles of UNDRIP (of which Articles 5, 8, 11, 12, 15, 25, 31, and 34 are particularly relevant to ICCAs). Articles 15 and 11, which state that Indigenous peoples “have the right to the dignity and diversity of their cultures, traditions, histories and aspirations” and “the right to practice and revitalize their...
cultural traditions and customs”, recognize rights that are relevant to ICCA recognition and respect. Indigenous peoples’ governance of sacred sites, moreover, is specifically recognized in Article 12 of UNDRIP, which affirms “the right to maintain, protect, and have access in privacy to their religious and cultural sites.” These rights to the expression, enjoyment, and revitalization of culture and customs are also relevant to community governance of land and natural resources based on customary law and institutions.

The right to practice culture as part of a community is recognized in Article 27 of the ICCPR, which the UN Human Rights Committee has interpreted as affirming the rights of persons who belong to “ethnic, linguistic or religious minorities … in community with other members of their group, to enjoy their own culture, [and] to profess and practice their own religion.” Although Article 27 is a right conferred upon individuals, its realization requires recognition of collective practices of culture and depends upon the ability of the community to maintain its culture, language, and religion.

Cultural rights under Article 27 of the ICCPR also extend to Indigenous peoples’ economic and social activities. For example, in applying Article 27 in the case of Ominayak, Chief of the Lubicon Lake Band v. Canada, the UN Human Rights Committee found in 1990 that Canada had violated the rights of the Lubicon Lake Band of Cree Indians to economic and social activities that are important to their identity as a community and to their subsistence. The UN Human Rights Committee subsequently reiterated that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.” The way of life associated with the use of natural resources arguably encompasses not only the specific practices through which resources are used, but also the community’s cultural shaping of that use through ICCAs, which integrate knowledge, values, and norms through culturally-grounded institutional arrangements. The strong bonds between ICCAs, natural resource use, and livelihood customs make ICCAs an important aspect of Indigenous peoples’ collective culture, community solidarity, and identity.

**RIGHT TO SELF-GOVERNANCE AND PARTICIPATION IN DECISION-MAKING**

ICCAs are pre-eminent institutions of self-governance. They are critical to Indigenous peoples’ governance of their livelihood practices, natural resource use, economic development, and conservation practices. Lack of recognition of ICCAs, including their forced replacement by standardized, state-designed local institutions and institutional arrangements, strongly interferes with Indigenous peoples’ rights to self-governance and decision-making.

Rights to self-governance and to participation in decisions made about lands, natural resources, and development are recognized in UNDRIP (Articles 18, 20, 34, and 35) and ILO 169 (Articles 7, 8, and 9). These are entwined with rights to self-determination and cultural rights because of the right to self-governance through freely-adopted institutions and arrangements, including customary ones. According to UNDRIP Articles 5, 18, 20.1, and 34, Indigenous peoples have the rights to maintain, strengthen, and develop their own distinct decision-making, political, legal, economic, social, and cultural systems and institutions and “to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and, in the cases where they exist, juridical systems or customs.” The right of Indigenous peoples to participate in decision-making clearly refers not only to consultation, but also to participation within the context of the right to self-governance through their own decision-making institutions.

41 UNHRC, 1994, paragraph 1. The right to participate in cultural activities and the right of members of minority groups to participate in the cultural life of their community are also recognized in the Universal Declaration on Human Rights (Article 5.vi) and in the International Covenant on Economic, Social and Cultural Rights (Article 15).
42 UNHRC, 1994, paragraph 6.2.
44 UNHRC, 1994, paragraph 7.
45 This is now noted by the Executive Secretary of the CBD, in conjunction with CBD Article 10(c), who observed that “customary use should be recognized as a form of traditional, local management. As such, customary use and the effective participation of indigenous and local communities in the management of resources form two sides of the same coin.” CBD Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 2009, paragraph 16.
These rights cannot be affirmed while denying recognition and respect to Indigenous peoples’ ICCAs or by legally recognizing only standardized, ‘blue-print’ institutions designed by state agencies or conservation NGOs as ICCAs. In this way, any violation of rights to self-governance and to participation in decision-making also violates rights to culture, rights to self-determination and autonomy, and rights to the ownership, control, and management of territories, lands and waters, and natural resources. Such deep and widespread violation of rights is a common experience of Indigenous peoples whose lands and waters have been declared state-owned and -governed protected areas and whose ICCAs have not been accorded any legal standing. Such peoples include many Indigenous peoples in Nepal, among them, the Sherpa people of the Mount Everest region.

**RECOGNIZING SHERPA ICCAS IN SAGARMATHA (CHOMOLUNGMA/MOUNT EVEREST) NATIONAL PARK**

Sherpa efforts to gain recognition and respect for their ICCAs within the Sagarmatha (Chomolungma/Mount Everest) National Park (SNP) and World Heritage Site, Nepal, highlight how underlying political, bureaucratic, economic, and social relationships can pose enormous challenges to ICCA recognition, even in states that are signatory to major international human rights and Indigenous rights treaties. The Sherpa people are one of at least 59 Indigenous peoples in Nepal, where Indigenous peoples collectively constitute at least 37% of the total population. For two centuries, Indigenous peoples have been severely politically, socially, and economically marginalized and discriminated against in Nepal by the dominant ethnic elite. They continue to be subjected to entrenched discriminatory attitudes, institutions, and practices that violate fundamental human rights, despite Nepal’s 2007 ratification of ILO 169 – the first country in Asia to do so – and vote in the UN General Assembly in favor of UNDRIP. Rights violations continue in Nepal, even though ILO 169 and other human rights treaties have exceptional legal weight under the terms of the Nepal Treaty Act of 1990, whereby “as a duly ratified treaty, ILO 169 prevails in the case of conflicting national legislation within the domestic sphere.” There is considerable concern about the lack of implementation of ILO 169 due to the failure of many realms of national law, policy, and practice to affirm its provisions. According to Indigenous rights advocates in Nepal, this reflects continued social and political domination of Indigenous peoples by the non-Indigenous ethnic elite, as well as ethnocentrism, racism, paternalism, corruption, and vested political and bureaucratic interests. The UN Special Rapporteur’s 2009 country report on Nepal notes specific charges by Indigenous peoples of rights violations in and around national parks due to the policies and practices of the Department of National Parks and Wildlife Conservation.

Most of Nepal’s national parks and other protected areas have been established in the customary territories of Indigenous peoples and without their consent. While Indigenous peoples and local communities continue to inhabit the mountain protected areas (with one exception), resident Indigenous peoples were evicted from the lowland protected areas. Indigenous peoples’ enclave settlements within national parks, including the Sherpa settlements in the SNP, are

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47 Indigenous peoples’ organizations in Nepal charge that past censuses have significantly under-enumerated Indigenous peoples. A number of peoples who are not yet recognized as Indigenous, moreover, are seeking legal recognition.


49 Anaya, 2009.

50 Such conditions in Nepal and other countries raise questions about whether rights-grounded recognition and promotion of ICCAs – or rights-based conservation more generally – can be meaningfully implemented, regardless of pertinent international obligations, constitutional provisions, and national law. Nepalese and other Indigenous leaders are skeptical that ICCAs can be appropriately and effectively recognized and supported in the absence of rights recognition and the development and implementation of new national law and revised protected area policies, regulations, and plans.

51 Anaya, 2009.

considered to be part of national park buffer zones in which Indigenous peoples are permitted to continue some of their customary livelihood activities in their customary territories. Other customary practices are banned. Many peoples continue to maintain their customary ICCAs, including those that protect sacred places and species that maintain customary governance and management of the use of community forests, grazing lands, rivers, lakes, and other livelihood commons. They maintain these customary, culture-based ICCAs despite the nationalization of their collective lands, the lack of legal recognition of the authority of their ICCAs, and the imposition by the Nepal government of new, nationally-standardized institutions of local governance and natural resource management such as state-recognized community forests and buffer zone institutions.

Human rights recognition has not been a fundamental consideration in the establishment, governance, and management of Nepal’s protected areas. Allegations of human rights violations by park officials and staff (including evictions, unlawful violence, and lack of due process) have been documented in several of the national parks and wildlife reserves and found to be credible by the UN Special Rapporteur.53 Besides these rights violations, the suppression of ICCAs and denial of their legal recognition can also be considered to be in violation of multiple cultural, social, and political rights affirmed by the ICESCR, ICCPR, CERD, and ILO 169, all of which Nepal is signatory to, and UNDRIP, which Nepal voted in favor of adopting in the UN General Assembly.

Nepal’s Indigenous peoples and local communities maintain thousands, possibly tens of thousands, of ICCAs.54 The most internationally-renowned of these are the Sherpa ICCAs of Khumbu, a customary Sherpa territory that encompasses the area that is now the SNP and SNP Buffer Zone.55 Sherpas consider Khumbu to be one of a small number of sacred, hidden Himalayan valleys known as beyul (hidden valleys) in the Sherpa and Tibetan languages. These places, which are believed to have been consecrated by Padmasambhava 1 200 years ago, are considered to be places of extraordinary sanctity by the Sherpa and other Tibetan Buddhists.56 For generations, the Sherpa have expressed their responsibility to care for the Khumbu beyul, including responsibility for its conservation stewardship. As part of this commitment, the Sherpa seek to protect all life within the region, effectively making all of Khumbu a wildlife sanctuary ICCA. There are also many local and regional ICCAs maintained by individual villages and by groups of settlements, including protected

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54 Stevens, S., 2008b. “Nepal [ICCA relevant legislation]”. Last accessed on Sept. 3, 2010, at: http://www.iccaforum.org/index.php?option=com_content&view=article&id=84&Itemid=100. There is not yet any enumeration in Nepal of sacred natural sites or of systems of community management of commons through customary institutions, though there are a vast number of both. Moreover, Nepal currently legally recognizes communities as having management or co-management authority (but not ownership) of 15 000 community forests. These are situated in Nepal’s national forest and are overseen (and influenced) by the Ministry of Forests and Soil Conservation’s Department of Forests.

55 The Sherpa live in many other customary territories in northeastern Nepal. Khumbu is considered to be the first Himalayan region that Sherpa ancestors settled after migrating from eastern Tibet (see Stevens, 1993). On the international renown of Sherpa ICCAs, see, for example, Borrini-Feyerabend, 2008; Borrini-Feyerabend, 2010; Stevens, 2009.

56 Padmasambhava, revered by the Sherpa and Tibetan peoples as Guru Rinpoche (precious teacher), was crucial in the adoption of Buddhism in the 8th century in the Himalaya and Tibet and was a founder of the Nyingma tradition that is followed by the Sherpa. Padmasambhava consecrated a number of sacred valleys in diverse parts of the Himalaya and Tibet and passed on directions for reaching them to his followers. Instructions for reaching Beyul Khumbu are found in 14th-century texts. According to Sherpa oral traditions, Guru Rinpoche visited Khumbu, converted local mountain spirits to Buddhism, and made it a beyul prior to his work in Tibet. See Stevens, 2008a.
sacred forests, mountains, and lakes, red panda habitat protection areas, a sanctuary which protects ground-nesting birds, rotational grazing management systems, community forests where tree felling for timber and deadwood gathering for fuel are restricted or banned, and a region-wide firewood collection management system that has reduced firewood use by 75% since 2002.\textsuperscript{57} While some of these ICCAs have been created over the past 8 years, others have been maintained for generations and even centuries.\textsuperscript{58}

Sherpa leaders consider these ICCAs to play a major role in conservation in the SNP. None, however, are legally recognized. They are not mentioned in the 2007-2012 SNP Management Plan, the SNP draft regulations developed by the Department of National Parks and Wildlife Conservation in 2007-2008, or other policies, plans, regulations, or written agreements related to the park.\textsuperscript{59} Although some SNP wardens have informally respected or supported some ICCAs (and not others), these ICCAs’ lack of legal status has made them vulnerable to neglect and interference by the SNP. The national park’s wardens have often ignored them, supported only selected aspects of them, or authorized Sherpa use of their customary institutional arrangements only for enforcing national park regulations (not village regulations); they have also often been unaware that Khumbu is a beyul or that the Sherpa conserve sacred places, community forests, and rangeland areas.\textsuperscript{60} Wardens have also undermined and overruled ICCAs by authorizing international conservation NGOs’ introduction of new institutions and by authorizing the park’s army detachment, police, and hotel developers to fell trees in strictly protected sacred forests and community forests. In one 2008 instance, the SNP warden reprimanded a Sherpa leader and ordered him to apologize for Sherpa efforts to halt logging by the park’s army protection unit, which had violated forest management regulations and procedures.\textsuperscript{61}

Sherpa leaders are concerned about the weakening of their ICCAs’ conservation effectiveness because of lack of respect for them by the SNP and conservation NGOs, natural resource use pressures associated with international tourism development, livelihood and lifestyle changes, and the assimilation of young Sherpas into national ‘Nepalese’ society.\textsuperscript{62} They believe that without effective ICCAs, the Sherpa cannot maintain their responsibility to care for Khumbu as a beyul. They fear that sacred sites such as forests and lakes will be desecrated, community forests and rangelands will be misused, customary and new livelihood practices will be jeopardized by environmental degradation, and their distinctiveness as a people will be diminished by loss of local knowledge, spiritual beliefs and practices, and community institutions. The loss of ICCAs thus threatens not only conservation, but also identity, community cohesion, self-governance, culture, livelihoods, and development.

In an effort to increase awareness and support for their ICCAs, Sherpa leaders have taken several steps in recent years, including forming a new Sherpa NGO to support ICCAs and other aspects of Sherpa culture through community and youth education programmes and events, preparing to document and map their ICCAs to propose them as the basis for

\textsuperscript{57} Stevens, 2008a.

\textsuperscript{58} The firewood collection management system, bird sanctuary, and red panda habitat protection areas are new. The red panda habitat protection areas are ICCAs catalyzed by World Wildlife Fund Nepal initiatives; the others are Sherpa innovations. See Stevens, 2008a.


\textsuperscript{61} Sherpa leaders did not apologize. Ultimately, the commander of the army unit admitted that his troops had made a mistake and Sherpa leaders complied with his request that they not make a further issue of the matter.

\textsuperscript{62} Sherpa society is not homogeneous. Although the Khumbu Sherpas strongly share many values, beliefs, and practices, there is significant differentiation in wealth, lifestyle aspirations, conservation commitment, and views on appropriate ‘development’. As a result, there is notable regional variation in land use and resource management, including in the maintenance of customary ICCAs.
management zones within the SNP, and seeking national and international recognition and support. Sherpa leaders also contributed strongly to the formation of the Nepal ICCA Network, established on June 6, 2010. The Sherpa are founding members of the network and a Sherpa leader was elected to be the first coordinator of the organization.

One Sherpa action, however, sparked a national controversy when it was misinterpreted by the SNP warden and the Director-General of the Department of National Parks and Wildlife Conservation and misrepresented in the national press. On May 25, 2008, after discussing Khumbu ICCAs, Sherpa leaders from nearly all of the enclave settlements within the SNP personally endorsed an informal statement affirming Sherpa commitment to their responsibility to care for and conserve Khumbu as a beyul and to maintain their ICCAs. They announced that they considered all of Khumbu to be an ICCA as well as a national park and national park buffer zone. They hoped that this would increase Nepalese national park officials’ awareness and appreciation of their ICCAs, prompt them to take steps to acknowledge ICCAs, and improve coordination between them and SNP management. Instead, they were accused by the SNP warden of acting illegally, subjected to an investigation by the Director-General of the Department of National Parks and Wildlife Conservation, and threatened by the SNP warden with retribution against Sherpa community members unless they withdrew their ‘declaration’ and apologized. Under enormous pressure from the Department, Sherpa leaders ‘withdrew’ their informal ICCA self-declaration. They refused, however, to apologize. Instead, 18 leaders of regional Sherpa NGOs sent a letter to the Director-General of the Department informing him that if he persisted in misrepresenting their actions and questioning their patriotism in the national press, they would be compelled to mount a campaign of demonstrations and strikes to educate the public about the situation. Negative press coverage subsequently ceased and the controversy died out without further actions against Sherpa leaders, but also without any dialogue about changing SNP policies or practices. Sherpa leaders nonetheless continue to seek ICCA recognition. When the prime minister of Nepal visited Khumbu on December 4, 2009, a Sherpa leader presented him with a petition that included a request to recognize Sherpa ICCAs. So far, there has been no answer.

The Sherpa experience with attempting to gain recognition and respect for their ICCAs highlights how far Nepal has yet to go in honouring human and Indigenous peoples’ rights in its national parks. The problem is arguably not the government officials’ lack of awareness of Nepal’s international obligations to honor Indigenous rights or of IUCN and CBD policies supporting rights-based conservation and ICCAs. Many other factors may play a role, including lack of appropriate training, administrative capacity, and financial resources, the unstable national political situation,

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63 Sherpa leaders discussed their ICCAs and ICCA recognition issues at national and South Asia regional meetings on ICCAs and on protected area governance in 2008, 2009, and 2010. At these and other meetings, they have met with past and present co-chairs of TILCEPA, the IUCN inter-commission group concerned with Indigenous peoples, equity, and protected areas (TILCEPA was originally the Theme on Indigenous and Local Communities, Equity, and Protected Areas and now is the Theme/Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas). They were also invited participants at IUCN’s IVth World Conservation Congress in Barcelona in October, 2008, where they spoke at a TILCEPA-organized side-event on ICCAs.

64 Officials of the Department of National Parks and Wildlife Conservation and the Ministry of Forests and Soil Conservation (the former’s parent ministry) have attended workshops, briefings, and dialogues on protected area policies that have included presentations on ICCAs and associated IUCN and CBD standards.
ICCAs as Remedies and as Best Practice Implementation of UNDRIP and Human Rights Treaties

ICCAs embody cultural, social, economic, and political expressions that are protected by a remarkably broad set of individual and collective rights. Appropriate and effective ICCA recognition and support should thus be considered to be best practice for implementing UNDRIP, ILO 169, and other international human rights instruments. ICCA recognition and support also constitute a key means of implementing principles of good governance and rights recognition advocated by the CBD and IUCN in their protected area policies. Failure to recognize ICCAs constitutes failure to recognize many of the fundamental freedoms and human rights of Indigenous peoples. Inappropriate recognition of ICCAs – in essence, recognition without full accord with Indigenous peoples’ rights and without their full and effective participation in developing standards and procedures – similarly threatens Indigenous peoples’ self-determination, identities, cultural integrity, social cohesion, livelihoods, self-governance, and ownership, control, and use of their territory, lands, and natural resources.

Despite being party or signatory to all of the major international human rights instruments, Nepal has a long way to go before honouring these obligations in practice.

The implementation of international human rights treaties, however, requires not only responding to allegations of rights violations, but also recommending remedies and promoting practices that honour rights and strengthen rights recognition. Rectifying injustices that have harmed or continue to threaten Indigenous peoples’ cultures, livelihoods, and freedoms requires affirmative remedies in support of cultural integrity, self-governance, ownership and management of land and natural resources, and self-determination. ILO 169 requires governments to take such affirmative action to protect the rights of Indigenous peoples. Accordingly, the UN Special Rapporteur has been directed by the UN Human Rights Council to “examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous peoples,” to identify and promote best practice, and to “formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people.” Recognition of existing ICCAs and restoration or revitalization of suppressed ICCAs should be viewed as such a best practice and remedy that powerfully promotes the affirmation and restitution of Indigenous peoples’ rights, including their control and management of their lands and territories in accordance with their legal recognition.


65 Sherpa leaders complain that these continuing conflicts over culture, conservation, and rights reflect many SNP wardens’ and Department of National Parks and Wildlife Conservation officials’ determination to maintain autocratic governance, ethnocentrism, paternalism, ignorance of Sherpa conservation contributions, disrespect for Sherpa culture and rights, bias towards scientific, techno-managerial ‘expert’ planning and decision-making, belief in exclusionary protected area models that emphasize strict nature protection, and the mistaken assumption that ‘local people’ are inevitably a threat to protected area goals.

66 The question of how ICCAs can be appropriately recognized and promoted has generated considerable discussion among Indigenous peoples and in international conservation circles. There is great concern that states will seek to establish criteria and procedures for ICCA recognition that will undermine Indigenous peoples’ authority and culture, in effect destroying existing ICCAs and violating the rights of Indigenous peoples (see, for example, Borrini-Feyerabend, 2010). The CBD PoWPA calls for promotion through “legal and/or policy, financial and community mechanisms” (Activity 2.1.2) and calls for states “to establish policies and institutional mechanisms with full participation of indigenous and local communities” and “in a manner consistent with . . . the knowledge, innovations and practices of indigenous and local communities” (Activity 2.1.3). Besides legal recognition of ICCAs per se in national law or constitutional provisions, ICCAs can be appropriately recognized with the participation and consent of Indigenous peoples through other means such as their inclusion in protected area management plans, policies, and regulations and through inclusion in memoranda of understanding between state officials and Indigenous peoples. The recommendations adopted by SBSTTA14 in Nairobi in May, 2010, advise Parties to the CBD that appropriate recognition and support of ICCAs can include “formal acknowledgement, inclusion in listings or databases, legal recognition of community rights to land and/or resources, as appropriate, or incorporation of ICCAs into official protected area systems with the approval and involvement of indigenous and local communities”. SBSTTA, 2010a and 2010b, paragraph 27(c). For further recommendations, see Borrini-Feyerabend, 2010.


cultural integrity, self-governance, and self-determination. ICCA recognition can particularly be a key remedy and means of redress for discrimination and rights violations caused by the superimposition of state protected areas over ICCAs and the latter’s consequent neglect or suppression. In this respect, ICCA recognition could be endorsed and advocated by the UN Special Rapporteur and other international monitors as a best practice for protected areas established in the territories of Indigenous peoples, as well as an important remedy and redress in cases in which human rights have been violated by the marginalization or destruction of ICCAs as a result of protected area establishment, governance, and management.

The strong entwinement of culture, rights, and conservation commitment in ICCAs should make upholding and strengthening them a major focus of future efforts by Indigenous peoples, international conservation organizations, human rights organizations, UN treaty monitoring bodies and experts, and national and international courts in order to strengthen recognition of human rights and promote rights-based conservation and development. The suppression of ICCAs or lack of recognition and support for them are issues of particular importance for action by the Special Rapporteur, in accordance with his statement to the VIIIth Session of the UN Permanent Forum on Indigenous Issues that he “may take action where the situation is representative of, or connected to, a broader pattern of human rights violations against indigenous peoples.” It may be appropriate for the Special Rapporteur to carry out a thematic study of the impacts of protected areas on Indigenous communities and, in coordination with the UN Permanent Forum on Indigenous Issues and the UN Human Rights Commission’s Expert Mechanism on the Rights of Indigenous Peoples, to take note of the status of ICCAs as a key indicator of rights recognition or violation, as a key remedy and redress for injustices, and as a best practice for future implementation of UNDRIP and rights-based conservation.

Stan Stevens (sstevens@geo.umass.edu) is Senior Lecturer in Geography in the Department of Geosciences, University of Massachusetts, Amherst. Focusing on cultural ecology and political ecology, he has worked with Sherpa communities and leaders in the Mt. Everest region of Nepal for nearly 30 years. He is a volunteer member of the WCPA, CEESP, TILCEPA, and TGER and a member of the ICCA Consortium steering committee.

The failure to recognize ICCAs constitutes the failure to recognize many of Indigenous peoples’ fundamental rights and freedoms.

NEGOTIATING THE WEB OF LAW AND POLICY: COMMUNITY DESIGNATION OF INDIGENOUS AND COMMUNITY CONSERVED AREAS IN MEXICO

Gary Martin, Carlos del Campo, Claudia Camacho, Guadelupe Espinoza Sauceda, and Xóchitl Zolneta Juan

Abstract

International recognition of Indigenous and Community Conserved Areas (ICCAs) is leading a resurgence of interest in various modes of community conservation. One prominent concern is the suitability of international agreements and national laws concerning the legal status of ICCAs and how they translate into practice at a local scale. Since 1996, Mexican environmental law and policy have enabled the voluntary designation of community conserved areas; in 2008, a new official category of Voluntary Conserved Areas was established. The response of communities to these opportunities has been cautiously enthusiastic and creative, leading to broad experimentation with multiple avenues of designating both ancient and new community conserved areas, some of which are internationally acknowledged as ICCAs. Within Mexico, Indigenous and mestizo communities of Oaxaca are particularly active in establishing ICCAs, more than doubling the protected area coverage in the state from 2003 to 2009. Deeper examination of specific ICCAs in Oaxaca reveals a complex reality in which international agreements, national laws, and local customs provide an enabling context with an impressive past and an uncertain future. In addition to documenting legislation that enables and legitimizes community conservation initiatives, it is essential to understand the broader web of laws and policies that affects the security of land and resource tenure.

The emergence of the concept of Indigenous and Community Conserved Areas (ICCAs) has brought community conservation back into focus worldwide. At the Vth World Parks Congress – held in Durban, South Africa, in 2003 – conservationists embraced a new vision of protected areas governance that explicitly acknowledges the historical and contemporary role of Indigenous peoples and local communities. The Convention on Biological Diversity (CBD) Programme of Work on Protected Areas, initially adopted in 2004 at the 7th CBD Conference of the Parties (COP 7) in Kuala Lumpur and further developed in COP 8 and COP 9, reaffirmed this commitment to governance, including recognition of the importance of equity and Indigenous peoples’ rights in conservation. The International Union for Conservation of Nature (IUCN) added its support in the 2004 and 2008 World Conservation Congresses, incorporating ICCAs in its protected area matrix as a distinct governance category.

1 The community-based organization CORENCHI provided free, prior and informed consent for inclusion of its case study in this paper. Further insights were gained from an ongoing capacity building programme in the CORENCHI communities, coordinated by the Global Diversity Foundation with support from the UK Darwin Initiative and the UK DEFRA Sustainable Development Dialogues programme. The United Nations Development Programme Global Environment Facility Small Grants Programme funded the inventory of Oaxacan ICCAs as part of a grant for recognition and support to Indigenous and Community Conserved Areas (ICCAs) in northern Mesoamerica. A fellowship at the Rachel Carson Center, a joint initiative of Ludwig-Maximilians-University Munich and the Deutsches Museum, allowed G. Martin to complete the manuscript.

2 IUCN-Commission on Environmental, Economic and Social Policy (CEESP), 2008a. Recognizing and supporting Indigenous and community conservation – ideas and experiences from the grassroots, Briefing Note 9.

3 Target 2.2 of the 2004 CBD Programme of Work on Protected Areas calls for the “full and effective participation … of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas.” Last accessed September 13, 2010, at: http://www.cbd.int/protected/pow/learnmore/intro/?prog=p2.

4 IUCN-CEESP, 2008b. Implementing the CBD Programme of Work on Protected Areas Governance as key for effective and equitable protected area systems. Briefing Note 8.


World Conservation Monitoring Centre (UNEP-WCMC) has initiated a global voluntary registry that documents the growing global recognition of ICCAs.\footnote{Corrigan, C., and A. Granziera, 2010. A Handbook for the Indigenous and Community Conserved Areas Registry. UNEP-WCMC: Cambridge, UK.}

Stimulated in part by this international movement, governments of various countries have enacted laws and devised new policies to recognize and in some cases, certify the ICCAs within their national boundaries. IUCN’s Theme/Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas (TILCEPA) is coordinating an assessment of national laws and policies on recognition of terrestrial, riparian, and marine ICCAs.\footnote{See CENESTA, 2009. “ICCAs and National Legislation: Support or Hindrance?”. Last accessed August 29, 2010, at http://www.iccaforum.org/index.php?option=com_content&view=article&id=84&Itemid=100.} In addition to systematically documenting if ICCAs are integrated in national protected area systems, the survey enquires if there are general policies and laws that otherwise enable community conservation on Indigenous territories or concede rights to natural areas or resources. Assessing the status of ICCAs in Mexico highlights a critical question that is relevant from both a community and a global perspective. Are there national laws and policies that could threaten established ICCAs – as well as land and resource tenure in general – that escape attention in a specific focus only on legislation that enables and legitimizes community conservation initiatives?

**Community Conservation in Mexico**

Mexico has an enabling policy framework for community conservation that is supported by its constitution and by national legislation - including general agrarian, environmental, forestry, and wildlife laws - that governs land and natural resource rights. Under Article 27 of the 1917 Constitution, which was subsequently reformulated in 1992, community ownership of land was re-established after the Mexican revolution. In contrast to most countries, Mexico legitimizes community-based tenure systems that give community members the responsibility to allocate and enforce resource rights within the legally established boundaries of their community.\footnote{Alcorn, J. B., and V. M. Toledo, 1998. “Resilient resource management in Mexico’s forest ecosystems: the contribution of property rights”, pages 216-249 in Berkes, F., and C. Folke (eds), Linking social and ecological systems: Management practices and social mechanisms for building resilience. Cambridge University Press: Cambridge.} Mexican law recognizes two types of community-based collective land and resource ownership: comunidades and ejidos. The comunidades are pre-existing corporate entities in which community members can demonstrate long-standing communal use of land and resources, whereas ejidos are collectives of campesinos ( peasants) granted access to land and resources for which they have no prior legal claim.

Since 1996, under Article 59 of Mexico’s General Environmental Law\footnote{General Environmental Law (Ley General del Equilibrio Ecológico y la Protección al Ambiente), 1988. Originally decreed January 28, 1988, modified July 2, 2010. Last accessed September 14, 2010, at: http://www.diputados.gob.mx/LeyesBiblio/pdf/148.pdf.} (Ley General del Equilibrio Ecológico y la Protección al Ambiente), communities have been able to set aside land for conservation areas that could be recognized by the National Commission of Natural Protected Areas (Comisión Nacional de Áreas Naturales Protegidas), especially under a programme of certifying comunidad and ejidal reserves that was initiated in 2003. A reform of the General Environmental Law in May, 2008, allowed communities to register community reserves as Voluntary Conserved Areas, a new federal protected area category that also includes private reserves, which henceforth will be incorporated into the National Registry of Protected Areas (Registro Nacional de Áreas Naturales Protegidas) according to Article 74.

Other national laws support the recognition of community conserved areas. For example, since 1997, the Mexican General
Wildlife Law (Ley General de Vida Silvestre) has allowed communities to establish legally recognized wildlife management areas on their lands. Under the Mexican Law on Sustainable Forest Development (Ley General de Desarrollo Forestal Sustentable), which has regulations for the use of temperate and tropical forests, communities are required to establish management plans for species or habitat conservation within forests managed for timber production. The management plans can include provisions for setting aside some forested areas for conservation.

The enabling policy framework for community conservation extends to state law. Oaxaca is one of eight Mexican states – along with Campeche, Chiapas, Estado de Mexico, Nayarit, Quintana Roo, San Luis Potosí, and Veracruz – that have specific laws that address the way Indigenous peoples may engage in the conservation of natural resources, including through the establishment of community conserved areas. Oaxaca’s Indigenous Rights Law (Ley de Derechos de los Pueblos y Comunidades Indígenas del Estado de Oaxaca), through Article 55, vests responsibility in Indigenous communities and peoples for the conservation and protection of natural resources within their territories, including fauna and flora, but excluding sub-soil resources. The state is also mandated to provide recognition, support, and validation for specific conservation initiatives. Article 56 reinforces this approach, noting that Indigenous communities and peoples have an obligation to protect, restore, conserve, sustainably use, and conduct research on natural resources, with state financial and technical support. The creation of protected natural areas is addressed in Article 54, which obliges the state to engage in explicit agreements with community members when they establish community conserved areas (áreas naturales) and other measures to protect their territories.

With legal assistance and support from non-governmental organizations (NGOs), communities have framed their requests for certification by referring not only to the Mexican Constitution, General Environmental Law, and relevant state laws on Indigenous rights, but also to international instruments such as the CBD, especially Articles 8(j) and 10(c). In many communities, the general assembly of community members (assembled) has declared protected areas on communal lands without seeking recognition under national law.

The benefits of national recognition, as set out in Articles 22bis and 45bis of the General Environmental Law, include qualifying for federal programmes that provide financial incentives and certification of sustainably harvested products. Article 77bis confirms these benefits specifically for certified voluntary conserved areas. Although poorly documented, there may be communities that prefer to maintain the autonomy of their conserved areas, particularly because of concerns that certification may limit future options and rights, including the ability to establish new settlements and continue traditional agricultural practices. In addition, there is little motivation to certify sacred natural sites, which fit within the IUCN concept of areas of land or water having special spiritual significance to peoples and communities. They are widely acknowledged in communities, but have no clear national legal status.

14 Article 8(j) encourages Parties to “respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities,” to “promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices,” and to pursue “the equitable sharing of the benefits arising from their utilization”.  
15 Article 10(c) requests that Parties “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.  
16 Article 46 of the General Environmental Law states that no new settlements are allowed in protected areas and Article 101 requires a progressive transformation of shifting cultivation to other forms of agriculture in tropical forested areas.
**Community Conservation in Oaxaca**

Within Mexico, Oaxaca is recognized as a unique state with distinctive patterns of social and political organization and the highest levels of biological and cultural diversity in the country. Oaxaca’s Indigenous peoples and mestizo communities are characterized by relative political autonomy, collective institutions, and tenurial systems that contribute to resilient resource management and the ability to respond to outside conservation and development efforts. It is estimated that more 70% of the state is covered by communal forests and agricultural lands. Five million hectares (ha) of forest, nearly 82% of the total forest cover of the state, are owned and managed by Indigenous and mestizo communities.

The community-based property rights system is supported by the national government, which effectively devolves political power to culturally diverse communities capable of implementing their own conservation programmes.

Drawing on their autonomy and communal ownership of forests, 126 communities established their own conserved areas from 2003 to 2009, a trend which is continuing today. These ICCAs comprise 375,457 ha of communal lands, an area 14.5% greater than the 327,977 ha included in nationally decreed Protected Natural Areas in Oaxaca. Each of the ICCAs has its own history, unique characteristics, and responses to local contexts and external driving forces. One relatively high profile and successful example is the Regional Committee for Chinantla Alta Natural Resources (Comité Regional de Recursos Naturales de la Chinantla or CORENCHI), created by six Chinantec communities of northern Oaxaca in 2004. The Chinantec have a reputation of popular resistance to outside powers that spans more than five hundred years of history, from pre-Hispanic times to modern Mexico. This has arguably contributed to their relative autonomy, maintenance of local language and cultural traits, and conservation of forests, but with the negative consequences of substantial economic and social marginalization.

Building on their social and natural capital, the CORENCHI communities joined together to improve their control over natural resources, strengthen conservation efforts, and obtain more socio-economic benefits from landscape management. The communities are located in the Papaloapan river basin, between 200 and 2,900 meters above sea level. Five belong to the municipality of San Felipe Usila (Santa Cruz Tepeyotlula, San Antonio de El Barrio, Santiago Tlatepusco, San Pedro Tlatepusco, and San Antonio Ánaco). The sixth community, Nopalera del Rosario, is part of the municipality of San Juan Bautista Valle Nacional. The region is famous for its highly diverse tropical cloud and lowland forests, which include thousands of plant species and notable animals such as jaguar, puma, white-tailed deer, toucan, and wild boar.

![Figure 3. The distribution of community conserved areas in Oaxaca, Mexico. © Carlos del Campo](image-url)
The nearly 2,000 residents are engaged in agriculture, agroforestry (including organic shade coffee plantations), fish production, and extraction of non-timber forest products such as the edible palm *tepejilote* (*Chamaedorea tepejilote*) and *pita* fiber (*Aechmea magdalenae*). The subsistence and monetary benefits of these activities are supplemented with remittances from the large number of community members who migrate to the United States and urban areas of Mexico in response to persistent socio-economic marginalization[26].

Community territorial planning started in the community of Santa Cruz Tepetotoluta between 2000 and 2002, with institutional support from two Mexican NGOs, Rural Studies and Consultancy (*Estudios Rurales y Asesoría*) and GeoConservation (*GeoConservación*). Two government programmes, Community Forestry Development (*Programa de Conservación y Manejo Forestal*) and Integrated Ecosystem Management (*Manejo Integrado de Ecosistemas*), funded the efforts. Community Forestry Development is a Mexican programme led by the National Forestry Commission (*Comisión Nacional Forestal*) and funded by the World Bank, which aims to improve natural resource management and conservation and raise income generated by forestry-based comunidades and ejidos. Integrated Ecosystem Management is funded by the United Nations Development Programme Global Environmental Facility and implemented to protect biodiversity and sustain vital ecological functions in different eco-regions of Mexico.

GeoConservation provided the technical expertise to extend territorial planning to the other five communities of CORENCHI, culminating with San Antonio Analco and Nopalera del Rosario in 2006. The World Wide Fund for Nature supported land use studies and management plans. Separately, the Mexican enterprise *Grupo Modelo* (brewers of Corona and other popular beers) provided financial support for the construction of a biological field station in Santa Cruz Tepetotoluta. This external support was in response to local requests, stimulated in part by the intervention of NGOs, for technical and financial assistance from industries that are dependent on the watersheds managed and protected by CORENCHI communities.

The community territorial planning, guided by regular training workshops, led to a proposed revision of community statutes on the use and management of natural resources and the demarcation of different land use zones. These include conservation areas – in which land use changes and hunting are not currently allowed – that protect biodiversity and ecosystems, including the maintenance of forest cover, water capture, and wildlife. The general assembly of community members, an important local governance institution, officially validated the land use categories and statutes.

Certification of community reserves by the National Commission of Natural Protected Areas provided the promise of additional incentives, including greater visibility, financial support, and certification of agricultural and non-timber forest products. The process started in 2004, when four communities (San Antonio del Barrio, Santa Cruz Tepetotoluta, San Pedro Tlatepusco, and Santiago Tlatepusco) achieved certification of a total of over 20,500 ha, valid for 30 years. Nopalera del Rosario obtained certification of its community reserve of nearly 5,000 ha in 2010 and San Antonio Analco is in the process of applying for certification of over 2,050 ha. The total area placed under conservation status by the communities to date surpasses 27,500 ha.

In addition to community territorial planning and certification, the community conservation process was encouraged by the National Forestry Commission’s payment for environmental services scheme, a neoliberal mechanism to finance conservation through the market economy, which was also funded by the World Bank. In 2004, the four communities that first obtained certification of their voluntarily conserved areas submitted 8,189 ha for payment for hydrological environmental services. The National Forestry Commission approved 16,377,208 Mexican pesos (1,453,969 USD at the

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2004 average exchange rate) over a period of five years. In 2007, San Antonio Analco and Nopalera del Rosario submitted a proposal with the other four communities for a second payment for hydrological environmental services of 7,866 ha, which yielded an additional 14,849,658 Mexican pesos (1,360,229 USD at the 2007 average exchange rate).

In this initial phase of the process, CORENCHI achieved a joint strategy among the six communities to conserve common property and demarcate different land use zones within their borders without loss of autonomy. Communal statutes were modified to normalize and regulate common resources access and use, including a ban on hunting and watershed disturbance and restrictions on conversion of forest to other uses. Development of strategic productive projects, aiming to strengthen community economy through sustainable resource management, added financial incentives that augmented payments for environmental services. Following on these measures, the communities are exploring further economic diversification through scientific tourism, added-value marketing of cacao and coffee, and commercialization of selected non-timber forest products. At the same time, community research teams are exploring the potential negative impacts of these market mechanisms, including the disincentives they create for continuing subsistence modes of production that play a positive role in conserving biological and cultural diversity.

With legal advice from national experts in Mexican agrarian and Indigenous law, the communities are continuing to explore the implications of accepting official certification, financial incentives, and other forms of external support for their conservation initiatives. In addition, they are gaining an understanding of the web of national laws and policies that may affect their ability to sustain communal environmental initiatives over the long-term. Agreements and disagreements about the future direction of community conservation are voiced in the general assemblies of community members, as well as in regular meetings of CORENCHI delegates that have been selected by the communities.

Three of the communities have formed teams of local researchers who are becoming proficient in field methods such as participatory mapping and biodiversity inventories, while assisting local authorities to formulate management plans for their ICCAs. The researchers are also evaluating the significant changes in traditional agricultural practices, land use, and resource management implied by certification and the payment for environmental services programme.

**EXTERNAL DRIVING FORCES OF COMMUNITY CONSERVATION**

Apart from collective environmental management and the long-standing community practice of maintaining forested areas with minimal human impact, there are also exogenous forces that drive the community conservation movement in Oaxaca and other parts of Mexico. As seen in the CORENCHI case study, community territorial planning, certification schemes, government development programmes, and payment for environmental services schemes are all supported in various ways by national law and policy.

Community territorial planning (ordenamiento territorial comunitario), a legal requirement for many aspects of land and resource use, including community forestry, has stimulated community conservation by providing local people with recognized processes, detailed maps, and biodiversity surveys that guide collective decisions about the location and size of protected areas. Although the planning has often been conducted by representatives of non-governmental agencies and other external

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Government and NGO certification schemes require explicit delimitation of conservation areas within comunidad and ejido lands. Foremost among these is the recognition of certified community reserves by the National Commission of Natural Protected Areas, within the framework of General Environmental Law regulations concerning natural protected areas. The National Commission of Natural Protected Areas represents this certification as a mechanism for civil society participation in environmental conservation on collective lands. Forty-three of the 126 community conserved areas in Oaxaca have opted for this form of government recognition.

The Mexican government’s recognition of communities’ rights to manage their forests, especially since the onset of ambitious community forestry initiatives in the 1970s, has encouraged local people to embrace opportunities for commercial timber production in community-managed forests. It also eventually led them to set aside forestry management protected areas, including some certified by the Forestry Stewardship Council. The principles and criteria for responsible forest management that form the basis of the Forestry Stewardship Council's certification scheme require the inventory and maintenance of High Conservation Value Forests of outstanding significance or critical importance, the assessment of which is based on ecological and social values.

Following the Mexican debt crisis of 1982 and the federal state’s subsequent progressive withdrawal from rural development, the government established ‘social liberalism’ programmes that combined pro-market economic policies with social concerns. Some of these programmes, coordinated by diverse government agencies and often with support from international institutions, have provided funding and logistical support for the establishment of conservation areas in beneficiary comunidades and ejidos in various states, including Oaxaca. These kinds of programmes, created after the dismantling of previous forms of state intervention, effectively maintain significant central state involvement in rural communities. As noted above, Mexico has developed an elaborate payment for environmental services scheme with the goal of supporting land owners who maintain areas of forest cover by providing them with compensation for avoiding land use change. This programme has been an important source of support for ICCAs in Oaxaca. Fifty-nine (46.8%) of the 126 sites surveyed have benefited from payments, including 45 communities for hydrological services, 10 for biodiversity protection, and four for maintenance of forest cover by providing them with compensation for avoiding land use change.

The recognition and creation of ICCAs in Oaxaca must be grounded within an understanding of how local institutions are impacted by national and international trends and policies.
agroforestry systems\textsuperscript{36}. The aggregate payment to all of these communities has now exceeded 130 million pesos (over 10 million USD) for a total of 78 600 ha (20.9\% of the area of the 126 ICCAs surveyed).

This brief introduction to exogenous driving forces demonstrates the need for a deeper analysis of Mexican national efforts, as well as of trends in international environmentalism, policy, and Indigenous identity politics\textsuperscript{37}, all of which have an impact on the popular initiative of creating new or recognizing existing Indigenous and community conserved areas in Oaxaca and other parts of Mexico. This observation is consistent with calls to extend the assessment of community-based conservation to explore institutional linkages and multiple levels of organization that impact and shape institutions at the local level\textsuperscript{38}.

**INTANGIBLE FACTORS AND CONTINGENCIES**

Mexico’s innovative experimentation with community conservation faces many uncertainties that could affect the viability of this nascent socio-ecological movement. Community motivation to maintain protected areas may be vulnerable to an interlinked set of factors that includes internal cultural dynamics, vagaries in the implementation of government policy, and the impact of global trends such as accelerated resource extraction, climate change, transnational migration, and land privatization.

The ultimate success or failure of community conservation areas depends to a large degree on the internal complexity and quality of interpersonal relations within any single community. In his analysis of the roles and complex interactions of different types of actors associated with community-based conservation and development initiatives, Peter Wilshusen notes some of the unpredictable consequences—such as community use of financial incentives in ways not anticipated by policymakers—that result when informal and formal practices interface\textsuperscript{39}. Nora Haenn calls attention to a ‘layered’ land tenure setting in Mexico in which local, regional, state, and national actors hold different ideals and operate within distinct spheres of power\textsuperscript{40}. Although ethnographic studies of new trends in community conservation practice and process in Oaxaca have yet to appear, there are anecdotal accounts of internal differences over specific local policies such as hunting bans and of deliberations on the appropriateness of requesting and maintaining government certification and payment for environmental services.

The 1992 changes to the Mexico Constitution arguably pose a serious potential threat to land tenure and social organization in comunidades and ejidos\textsuperscript{41}. The most extreme land tenure counter-reform was the amendment of Article 27, which essentially disallowed future claims for redistribution of private land while opening the door to privatizing ejido lands. This is part of a broader neo-liberal trend in Latin America to reverse course on land redistribution and privatize common property landholdings\textsuperscript{42}. A new national Programme for the Certification of Ejido Land Rights and the Titling of Urban House Plots (Programa de Certificación de Derechos Ejidales y Titulación de Solares Urbanos), set up in part to delimit ejido and comunidad lands and divide them into individual parcels, has had limited impact to date in Oaxaca and elsewhere in Mexico. Nevertheless, the modification of Article 27 creates the possibility that community conserved areas could be subdivided into individually titled plots, which could then become commercial real estate for lease or sale in the future.

Another element of policy uncertainty is the application of the 2008 reform of the General Environmental Law. Changes to Articles 55bis and 77bis allow the Ministry of Environment and Natural Resources (Secretaría de Medio Ambiente y Recursos Naturales) to certify Voluntary Conserved Areas, the new official category for community conserved areas, including those voluntarily set aside under the 1996 modification of Article 59 of the General Environmental Law. However, the implications of the 2008 reform for the de jure and de facto management of community conserved areas will remain unclear until the regulations of the law are written and approved. In the meantime, before these crucial legal steps are finalized, various laws and policies, including ones not explicitly environmental, create legal uncertainty and have the potential to undermine community conservation efforts.

\textsuperscript{36} Martin et al., in press.
\textsuperscript{41} Sarukhan and Larson, 2001.
\textsuperscript{42} Haenn, 2006.
the law is open to interpretation. In Oaxaca, the National Commission of Natural Protected Areas has recently attempted to persuade some Indigenous communities to convert their community conserved areas certificates into decrees, enabling their integration into the National System of Protected Areas. There are concerns that this could potentially lead to the conversion of community conserved areas into co-managed areas, a distinct form of governance. Some communities, including the members of CORENCHI, have resisted this initiative.

With the risk of oversimplifying a complex situation, the decision to group private reserves with community conserved areas under the General Environmental Law definition of Voluntary Conserved Areas could be characterized as essentially integrating common property areas of Indigenous communities, especially in southern Mexico, and large areas of the north that are under individual or corporate private title. There are concerns that this further opens the door to privatizing communal property, as no change of conservation status would be needed if community protected areas were divided into individual titled parcels that could be leased and sold as private property. This raises doubts about whether or not what is considered appropriate for private reserves is necessarily appropriate for ICCAs, leaving the onus on the still undecided regulations to adopt a coherent policy.

Laws and policies that are not environmental per se, but that could affect community conservation efforts, create additional uncertainty. Chief among these is Agrarian Law (Ley Agraria)\(^4\). Article 59 explicitly prohibits the assignation of ownership for land parcels in tropical forests. This could be interpreted as limiting land use change in areas that have undergone ecological succession from cultivated parcels to older secondary forest, particularly if the change is registered by Secretaría de la Reforma Agraria (the Land Reform Ministry). There is particular concern about the increasingly vast areas registered under payment for environmental services, as land use change on these parcels is prohibited initially for periods of five to fifteen years and potentially in perpetuity, as well as similar programmes such as those proposed as part of national and international initiatives related to the United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD).

**Mexico is obliged to align national law and policy with international instruments and avoid imposing new governance systems on community conserved areas through uncertain legal frameworks.**

With Article 73 of the Agrarian Law providing a definition of the concept of communal property, Article 74 recognizes the rights of the community’s general assembly to establish, regulate, and protect communal lands, including through their conservation, management, and use. These Articles have been broadly interpreted as supportive of communities’ right to establish conserved areas. However, Article 75 allows communities to transfer land domain to companies or civil societies when there is ‘manifest utility’ for the population. Furthermore, Article 93 allows for the expropriation of comunidad and ejido communal lands as needed for conservation, environmental services, natural resource exploitation, urban development, and tourism, among other purposes.

Even if unintended, applying these provisions in the context of Mexican Federal Tourism Law (Ley Federal de Turismo)\(^4\), for example, has the potential to divest communities of communal property under certain circumstances. If communities enter into relationships with private tourism companies in which land is part of the assets or collateral, they could be forced to fragment and sell lands to pay debts under eventual bankruptcy proceedings. As communities develop ecotourism projects related to their ICCAs, they call attention to scenic areas of international and national interest and could potentially run the risk of losing control over a part of their communal territories through federal expropriation. Although there are not yet any known examples of the expropriation of ICCAs in the interest of national tourism, the important point is that the law, as currently written, creates the possibility of such action.

Among the intangible global trends that should be monitored in coming years, transnational migration figures prominently. Although internal displacement has been a historic factor in the establishment of Indigenous communities in Mexico,
migration is a more recent phenomenon that has arisen with individuals or families seeking off-farm temporary employment in urban centers or in the United States and Canada. This migration trend creates potential threats and opportunities for the governance and management of natural areas that could lead to the weakening or reinforcement of local institutions, depending on the context. Further uncertainty has been generated by a poorly documented impact of the return of migrants to communities during the recent economic crisis.

These intangible factors and contingencies cannot be divorced from developments and discussions of international policy that relate to conservation, human rights, and livelihoods. Mexico, as a signatory of international conventions and declarations ranging from the 1992 Convention on Biological Diversity to the 2007 United Nations Declaration on the Rights of Indigenous Peoples, has a responsibility to align its national policy with international policy instruments and expectations that it will seek common ground between local and federal institutions. This would imply, inter alia, avoiding the imposition of new modes of governance on community conserved areas and generally respecting Articles 8(j) and 10(c) of the CBD.

**The Web of National Law and Policy**

Despite significant developments that empower communities to gain recognition for ICCAs on their own terms, there are numerous areas that need to be resolved to strengthen rights-based approaches to conservation and ensure the positive application of environmental law and policy for Indigenous peoples and local communities in Oaxaca and other parts of Mexico. The 1992 reform of Article 27 of the 1917 constitution has created opportunity for the division and privatization of communal lands, especially through the Certification of Ejido Land Rights Programme, leading to demonstrated changes in resource use and access. There are concerns that efforts to convert ICCAs into collaborative management areas by decree could continue if ambiguities in the 2008 reform of the General Environmental Law are not clarified in associated regulations that are still to be formalized. Provisions for division, expropriation, and sale of communal lands contained in Agrarian Law and other national legislation should be qualified so they do not threaten the integrity of ICCAs by negating supportive provisions under other laws and policies.

As the Mexican experience demonstrates, a narrow focus on the national environmental laws and policies that are supportive of ICCAs may provide an overly positive and unrealistic view of governmental endorsement of community conservation initiatives. If ICCAs are to be sustained, a community perspective – as exemplified by CORENCHI’s assessment of external support for its conservation efforts – needs to take into account broader national legislation and international programmes that may erode not only land and resource tenure, but also the respect for and protection of knowledge, innovations, and practices of Indigenous peoples and local communities, in contravention of obligations under the CBD. This lesson should be applied to the international level as well, ensuring that surveys and summaries of national laws and policies integrate awareness and caveats about the wider web of legislation that provides a critical context for community conservation efforts.

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Gary Martin (gary@globaldiversity.org.uk), PhD, MA, BSc, is the Director of the Global Diversity Foundation, Lecturer in the School of Anthropology and Conservation of the University of Kent, and Fellow of the Rachel Carson Center, Ludwig-Maximilians-University Munich and the Deutsches Museum. Carlos del Campo, MSc, BSc, and Claudia Camacho, MSc, BSc, have been the joint coordinators for the Global Diversity Foundation’s regional programme in Mesoamerica since 2007, working specifically with community conservation in northern Mesoamerica. Guadalupe Espinoza Sauceda, who has a Masters in Rural Development and a Bachelor of Law and Social Sciences, works for the Centre for Orientation and Advice to Indigenous Peoples (Centro de Orientación y Asesoría a los Pueblos Indígenas or COAPI) and the Coa Collective. Xóchitl Zoluetza Juan, who has a Masters in Law and Philosophy and a Bachelor of Law, works as an independent lawyer and collaborates with COAPI.