CONTESTING AND RECONSTITUTING CONSERVATION IN SPACE, TIME AND LAW

Examining and reimagining the evolving relationships between Indigenous Peoples, their territories and mainstream conservation, with a focus on protected and conserved areas

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Critical analysis submitted to the faculty at the University of East Anglia in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the School of International Development.

I declare that I have written the critical analysis by myself and that the work has not be submitted for any other degree or professional qualification. I confirm that the work submitted is my own.

Word count: 23,855.

I have come here to tell you that it is the order of the Administration that you move out of Game Reserve No. 2. The reason for this order is that you are destroying the game. You may go into the Police Zone and seek work on the farms South of Windhoek, or elsewhere. You must take your women and children with you, also your stock... You will have to be out of the Game Reserve the 1st May, 1954. If you are still in the Game Reserve on that day you will be arrested and will be put in gaol. You will be regarded as trespassers... None of you will be allowed to return to Game Reserve No. 2 from Ovamboland... If you have something to say I will listen but I wish to tell you that there is no appeal against this order. The only Bushmen who will be allowed to continue to live in the Game Reserve are those in the employ of the Game Wardens. Convey what you have heard to your absent friends and relatives.

H. Eedes, Native Commissioner of Ovamboland, Namibia, to the Hai||om people of Etosha
1954

Conservation programmes must respect our rights to the use and ownership of the territories and resources we depend on. No programmes to conserve biodiversity should be promoted on our territories without our free, prior and informed consent as expressed through our indigenous organisations.

Article 42, International Alliance Charter
2002

... injustices to indigenous Peoples have been and continue to be caused in the name of conservation of nature and natural resources...

IUCN Resolution No. 4.052, Implementing UNDRIP
2008

We hope that through our articulation of Indigenous Protected and Conserved Areas, we can contribute to a more hopeful vision of the future—a future where Indigenous Peoples decide what conservation and protection means to them and to the lands and waters and are given the space to lead its implementation in their territories.

Eli Enns and Danika Littlechild
Indigenous Circle of Experts, Co-Chairs (Canada)
2018

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ABSTRACT

This critical analysis engages with eight papers, produced between 2010-2021, covering four areas of research, namely: community protocols, rights-based approaches to protected areas, other effective area-based conservation measures (OECMs), and equitable and effective area-based conservation and the post-2020 Global Biodiversity Framework. At the heart of the work is a form of research and activism rooted in local experiences, problematised by legal-political ecology, and informed by the literature. It first articulates the theoretical framework, referred to as 'legal-political ecology', which augments political ecology with jurisprudence, legal pluralism, Critical Legal Studies and legal geography. It then sets out the methodology and methods, which are transdisciplinary, include a strong focus on knowledge co-production at the local and international levels, and are designed to generate transformative outcomes. The critical engagement with the four areas of work focuses on the papers' legal-political framing, contribution to knowledge and impact. I argue that the research has contributed to scholarship on legal empowerment by advancing work on 'research protocols' to develop the more expansive concept of 'community protocols'. It has contributed to the collective understanding of which conservation-related actors have obligations under international law, what those standards are, and exposed deficiencies in the forms of access to justice available to Indigenous Peoples. The research on OECMs and the post-2020 Global Biodiversity Framework has advanced practical means by which to recognise conservation outcomes occurring outside protected areas and promoted a novel reading of Convention on Biological Diversity (CBD) Decision 14/8. The impacts include 'community protocols' being used by Indigenous Peoples to affirm their responsibilities and assert their rights, as well as being defined by the CBD and referenced in the Nagoya Protocol. The research has also generated impact through the development of the international definition and criteria for OECMs, which has resulted in over 650 sites being identified as OECMs, covering c. 1.6 million square kilometres of marine and terrestrial areas.

PREFACE

It's a cold day in Geneva in early-2008. Delegates from around the world sit in a cavernous hall. Everyone is facing a dais, on which two men sit in an elevated position above the participants. They provide an update on the international process towards developing an international protocol on access and benefit sharing relating to genetic resources and associated traditional knowledge.

"We have received general inputs to the working document over a number of years and have drawn on these ideas and presented you with a 'co-chairs' text'. Please focus your comments on a specific section and propose text-based changes."

Various Party delegates take the floor to speak: Canada, Bolivia, Fiji on behalf of a number of Pacific nations, and Uganda on behalf of the African Group.

A spokesperson for the International Indigenous Forum on Biodiversity is then invited to make an intervention. She speaks passionately, rejecting the entire document, arguing that it is based on a dualist understanding of people and nature and a Western understanding of 'knowledge' as something that can be owned and sold. She explains that Indigenous Peoples are guardians of their unique traditional knowledge and that they consider themselves to be custodians for future generations of …

She is cut off.

A co-chair inquires as to which section of the document she is referring.

Everyone in the room knows this is a facetious question. But in the formal UN process, a necessary part of the dance.

The speaker responds: "The comments relate to the document's very foundation."

The co-chair reminds delegates to focus on specific sections and invites the next speaker.

This was my first experience of seeing a world view simultaneously delegitimised, excluded and silenced. A boundary had been drawn within a larger debate that said: arguments about things in this space matter, views that extend beyond it do not. As Arundhati Roy puts it, "There's really no such thing as the 'voiceless'. There are only the deliberately silenced, or the preferably unheard."

They say that the victors get to write history. True. But they also determine to a large extent what happens in the present and therefore also shape the future. This has certainly been the case for biodiversity law, policy and practice. My interest in understanding the related dynamics and dimensions has only intensified as I have worked on conservation, sustainable use and human rights in Southern and Eastern Africa, India and Malaysia, as well as at the international level. During this time I have found 'thinking through writing' to be an extremely useful means by which to draw upon my work, process findings with colleagues and promote the resultant ideas.

This document can therefore be described as a meta-analysis of the trajectory of my scholarship and activism, read though eight single-focus pieces of work. The process has proven to be extremely useful as a guided, critical reflection on a significant phase of my professional life. I have been supported by my supervisors, Adrian Martin and Iokiñe Rodríguez Fernandes, for the first time to fully articulate what I mean by 'legal-political ecology' (theoretical framework) and to explore the linkages between the ways in which I engage with people, places and ideas in the world (methods) and the changes I hope to achieve (impact). Beyond the framework of a PhD, I have become a proponent of the idea that such processes should be more widely available to people at key moments in their working lives; if so, we would likely be more actualised individuals and attuned professionals. The *Redstone Statement*, includes the following statement:

> *We must assure the well-being of both humanity and nature. This requires a unification of diverse people who are open to ideas; people who are wise, clear, and profoundly human; and people who can transcend the self-imposed limits of their minds, reaching deep into their conscience and spirit for solutions.*

This critical analysis, while part of a degree and framed within an academic setting, presents fifteen years of work towards bringing this ethic into being within my own life and the spirit of the law.

As ever with a writing project, the deep engagement with the issues also leads to a sense of peace and closure when it is finished. I now find myself with a clear, crisp mind, ready for the next phase of work on equitable and effective conservation.

Harry Jonas
Donggongon, Sabah, Malaysia
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ACKNOWLEDGEMENTS

Undertaking my PhD at the University of East Anglia has provided me the opportunity to analyse the last fifteen years of my work – viewed within the broader and longer-term trends in human rights and biodiversity law, policy, practice and critique – and to reflect deeply on the core insights developed during each phase. (These phases feel to me like musical 'movements' as they have built through the decade.) I am supremely grateful to my supervisors, Adrian Martin and Iokiñe Rodríguez Fernandes, both based at the School of International Development and leaders in the Global Environmental Justice Research Group.

This being a retrospective of over a decade of living and working alongside a host of people who are important to me, and with a sense of ritual, I am taking the opportunity to invoke their good names.

Anthony Bennett introduced me to the vivid, tumultuous world of politics. This led me to Georgetown University, where I studied under professor Jeffry Burnam and Bill Butler and worked alongside Bill Snape Jr. at Defenders of Wildlife; all three of whom contributed to me wanting to become an environmental lawyer. Jake Werksman, Farhana Yamin and Philippe Sands QC, at the Foundation for International Environmental Law and Development, helped guide my way into not-for-profit international law. Colin McCall, Steven Gray, Tom Wigley and Emily Sarker (mostly) kept me on the straight and narrow through law school and articles towards becoming an environmental lawyer. Elisa Morgera grabbed my hand and led me to the Earth Negotiations Bulletin, providing me my first insights into the *real politic* of international environmental law. Fiona Darroch gave me the opportunity to combine law and activism. I'll always reflect on these chance encounters and how important they were to me at those all-formative stages of life.

I celebrate the time spent with Sanjay Kabir Bavikatte, Johanna von Braun, Gino Cocchiaro, Lesle Jansen and colleagues at Natural Justice over a number of highly expansive years as we learnt from Indigenous Peoples in Southern Africa and India, shaping our ideas about biocultural diversity, ABS and community protocols. These included living with Anna and Sussa in Upington and being welcomed by the broader Festus family (including Reuben, Oom Paul, Sister Sakes, Mimie, and Baba) and community leaders such as Dawid Kruiper, Katriena Eesoo, Petrus Vaalboi and Anneta Bok. The South African days also shine though with conversations with Roger Chennells and the unstinting support of Carly Tanur, Francien van Eck and our first board members, Adele Wildschut and Hennie van Vuuren.

I'm lucky to have worked with some extremely inspiring people and in some beautiful, albeit challenged, places on earth. I am grateful for the robust conversations and ideas generated with Jael Eli Makagon (Conservation Standards and the Living Convention), Mama Rosie, Rodney Sibuye, Ilse Köhler-Rollefson, Hanwant Singh Rathore, Andreas Drews and Suhel Al-Janabi (community protocols), Grazia Borrini-Feyerabend, Eli Enns, Ashish Kothari, Fred Nelson (ICCAs and OECMs), and Kathy MacKinnon, Trevor Sandwith and highly supportive WCPA colleagues in the development of guidance and ongoing work on OECMs. Along the way, I have benefitted greatly from guidance about international processes provided by Alejandro Argumedo, Joji Cariño, Chrissy Grant, Christine von Weizsäcker and Victoria Tauli-Corpuz, among others. A special thanks to Emma Lee, who celebrated, chided and chivvied me through this process.

Here in Sabah, I've had the privilege to see from inception the growth and blossoming of Forever Sabah, a social movement that illustrates the transformative potential of locally-grounded, critical pedagogy and sustained, collaborative forms of activism. To Cynthia Ong and Ken Wilson, the Lasimbang family (including Anne Jannie, Yoggie and Linggit, Mamamoi, Jennifer and Banie), and colleagues such as Neville Yapp, Noel Seanundu and Winnie Jimis, I and grateful for welcoming me and Holly with open hands and hearts. As instructed, we strove to 'play our top cards'. To Agnes Lee Agama, I'm grateful for the fateful invitation in 2010 and all subsequent guidance. I also feel greatly privileged to have met the late Lucy Bulan in Bario and to have worked with Prof. Ramy Bulan and Prof. Poline Bala.

Ma, you are a brilliant, fiercely supportive and through your life have taught me about love and loyalty. You introduced me to Rawlsian justice when I was five (one cuts, one chooses), so – as I've joked – for all this I blame the parents. Our walks in the bluebell woods were the catalyst for my work on OECMs, and to you I dedicate that idea.

Pa, you introduced me to the black mirror trick to see new perspectives and look for the larger trends beyond life's daily static. I've drawn from that and adopted an artist eye to the law, allowing myself to bring abstract ideas, negative shapes, colours and emotions to my work as a jurist.

Django, the songlines are layers in our lives. Both of us understood quite intrinsically and independently that we needed at least two things after school – to reintegrate some part of us that still lingered in the Ligurian hills and to journey inwards by pushing outward boundaries. *Toujours en avançe, mon frere*.

Holly, how fortunate that our respective journeys of leaving and learning led us directly to Askham on the 3rd of August 2007, then hand-in-hand to Sabah, Sadri and Sarnia. This critical analysis is our story, one made possible by your love and inspiration. Janet, Gary, Derek and Bianca, your faith in our vision gives us flight.

At a professional level, I dedicate this work to the global movement for social and environmental justice and the organisations with whom I've worked towards these ends – Natural Justice, LEAP, Forever Sabah and the FS Institute, the ICCA Consortium and the World Commission on Protected Areas.

At a personal level, I dedicate this to my grandparents – Wendy and Phillip Jonas and Joan and Charles Tyrrell, my niece and nephew – Ayuni and Geo, and godsons – Giacomo, Santiago and Magnus. To our good friend Ghanimat Azhdari – you are forever missed.

We walk in the long shadows of our ancestors, but we make our own paths.

I.

INTRODUCTION, THEORETICAL FRAMEWORK, METHODOLOGY AND METHODS

1. Introduction

January 2022 marks fifteen years since I co-founded Natural Justice, an organisation of lawyers advocating for social and environmental justice. Since then I have worked alongside Indigenous Peoples in South Africa, Kenya, India and Malaysia, listening to their descriptions of their hopes, aspirations and the issues they face, and to their prescriptions for transformative change. Drawing on those experiences, I have engaged in research aimed at understanding the drivers and effects of social-ecological injustices, working at the nexus of power, law and ecology.[1] Over time, I developed an approach to my activism that aspires towards emancipatory and transformative impacts at the personal, community and national-to-international levels through the application of a form of reflexive action-research I refer to as 'transformative legal-political ecology'; '*transformative*' due to the interlinked nature of the participatory methods and intended effects of the research, and '*legal - political*' because I integrate concepts from political ecology and other more 'legal' theoretical frameworks, including legal pluralism and legal geography, to understand and challenge power dynamics within social ecological systems. At this juncture in my working life and cycle of international biodiversity policy (below), this critical analysis provides me an opportunity to set out my theoretical framework and research methods, and to analyse and sharpen them. It also enables me to evaluate the impacts and validity of my publications and related activism in the context of my work with Indigenous Peoples' on community protocols, protected areas, other effective area-based conservation measures, and the post-2020 Global Biodiversity Framework. Doing so is providing me the opportunity to define the trajectory of the next decade of my work, become a more mindful and strategic lawyer, activist and researcher, and extend my social and environmental impacts.

1.1 Aims and objectives

As we close one CBD Strategic Plan (CBD, 2010a) and work towards the post-2020 Global Biodiversity Framework (CBD, 2021), the aims of this critical analysis are to evaluate a decade of research (2010-2021) and generate critical feedback in an academic setting. The objectives include the critical elaboration of the theoretical framework, methodology and methods that generated my publications. While these deepened over a decade of research, my writing seldom references the theoretical framework, methodology or methods from which the work has emerged; this critical analysis redresses that. I also present the contribution to knowledge and impact of eight publications, consider the validity of the methods, and consider the reasons for which some publications were more impactful than others.

1.2 Introduction to the publications

This critical analysis engages with four areas of work undertaken between 2010 and 2021.[2] The publications emerged from work I undertook with communities including from among the Khomani

[1] Power is "not an institution and not a structure, neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategic situation in a particular society". Foucault, quoted in Hvalkof S., 2006. 'Process of the Victims: Political Ecology in the Peruvian Amazon', pages 195-232, in Biersack, A. and Greenberg J., 2006, page 197.

[2] **Appendix I** provides full references and further information about the submitted publications. **Appendix II** sets out a list of my other relevant publications under the same four categories.

San and Kukula traditional health practitioners (South Africa), Samburu pastoralists (Kenya), Raika camel herders (India) and, to a lesser extent, with Dusun and Sungai Peoples (Malaysia), as well as at the national and international levels between 2010 and 2021. The publications are fully described in **Annex I**, and include:

- Chapter 4 on community protocols: Jonas et al., 2010.[3]
- Chapter 5 on rights-based approaches to protected areas: Jonas et al., 2014a, 2014b, 2016.[4]
- Chapter 6 on other effective area-based conservation measures: Jonas et al., 2014, 2017, 2018.[5]
- Chapter 7 on equitable and effective area-based conservation and the post-2020 Global Biodiversity Framework: Jonas et al., 2021.[6]

For each area of work, set out in **Chapters 4-7**, I first situate the work within the law, policy and literature and engage with the issues from a legal-political ecology perspective. I then set out the publication strategy and analyse the contribution to knowledge and impact. **Annex II** contains further information about each publication, including its abstract, methods and findings. **Chapter 8** focuses on the validity of the research, the overall contribution to knowledge, my reflections of the work and what it means for my next phase of work.

1.3 Indigenous Peoples, local communities and peasants

This critical analysis focuses on Indigenous Peoples, of which there are at least 476 million individuals worldwide (World Bank, 2020). The source of Indigenous Peoples' rights, as set out by José R. Martínez Cobo in 1986, then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, is their respective pre-colonial connection to the lands and waters of their ancestors and the critical importance of this living connection for their identities and contemporary

[3] Jonas H.D., Shrumm H., and Bavikatte K., 2010. ABS and Biocultural Community Protocols. *Asia Biotechnology and Development Review*, 12:3.

[4] **1)** Jonas, H.D., Makagon J., and Roe D., 2014a. *Which international standards apply to conservation initiatives?* IIED Discussion Paper. IIED, London. **2)** Jonas, H.D., Makagon, J. and Roe, D., 2014a. *Human Rights Standards for Conservation: An Analysis of Responsibilities, Rights and Redress for Just Conservation*. London: IIED. **3)** Jonas, H.D., J. Makagon, J., and Roe, D., 2016. *Conservation Standards: From Rights to Responsibilities*. London: IIED.

[5] **1)** Jonas, H.D., Barbuto, V., Jonas, H.C., Kothari, A., Nelson, F., 2014. 'New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-based Conservation Measures.' *PARKS,* 20.2. Gland: IUCN. **2)** Jonas, H.D., Enns, E., Jonas, H.C., Lee, E., Tobon, C., Nelson, F., and Sander Wright, K., 2017. Will OECMs Increase Recognition and Support for ICCAs? *PARKS, 23.2*. Gland: IUCN. **3)** Jonas, H.D., MacKinnon, K., Dudley, N., Hockings, H., Jessen., S., Laffoley, D., MacKinnon, D., Matallana-Tobon, C., Sandwith, T., Waithaka, J., Woodley, S., 2018. Other Effective Area-based Conservation Measures: From Aichi Target 11 to the Post-2020 Biodiversity Framework. *PARKS* 24 Special Issue. Gland: IUCN.

[6] Jonas, H.D., Ahmadia, G.N., Bingham, H.C., Briggs, J., Butchart, S.H.M., Cariño, J., Chassot, O., Chaudhary, S., Darling, E., DeGemmis, A., Dudley, N., Fa, J.E., Fitzsimons, J., Garnett, S., Geldmann, J., Golden Kroner, R., Gurney, G.G., Harrington, A.R., Himes-Cornell, A., Hockings, M., Jonas, H.C, Jupiter, S., Kingston, N., Lee, E., Lieberman, S., Mangubhai, S., Marnewick, D., Matallana-Tobón, C.L., Maxwell, S.E., Nelson, F., Parrish, J., Ranaivoson, R., Rao, M., Santamaría, M., Venter, O., Visconti, P., Waithaka, J., Walker Painemilla, K., Watson, J.E.M., von Weizsäcker, C., 2021. Equitable and effective area-based conservation: Towards the conserved areas paradigm. *PARKS* 27:1. IUCN: Gland.

ways of life.[7] **Box 1** provides an overview of the characteristics that give rise to a set of *collective* rights (UNDRIP, 2007).

Box 1: Characteristics of 'Indigenous Peoples' (Martínez Cobo, 1986: 379)

Indigenous communities, Peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as Peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Local communities (CBD, 2011) and peasants (UN Declaration on the Rights of Peasants, 2018) have also faced a wide range of past and ongoing injustices, including in the context of conservation initiatives. Yet the rights of Indigenous Peoples, local communities and peasants have different international legal foundations (Jonas and Godio, 2020). One cannot refer to Indigenous Peoples, local communities and peasants as a collective group – especially in a legal context – without oversimplifying a range of complex historical and legal distinctions (Inuit Circumpolar Council, 2020). Because of this fact, and due to the relatively short word count of this critical analysis, I do not engage with the important experiences of local communities or peasants.

[7] I refer to Indigenous Peoples' 'lands and territories', 'territories and areas' and 'territories of life' interchangeably.

2. Theoretical framework: Legal-political ecology

Our lands and territories are at the core of our existence – we are the land and the land is us.
Kari-Oka 2 Declaration (2012: 4)

… indigenous knowledge is a rich social resource for any justice related attempt to bring about social change.
Paulo Freire and Antonio Faundez (1989: 46)

Law is not innocent. The law does not simply arbitrate between equally placed actors … Law is more than a set of arcane and abstract formulae, meaningful only to lawyers. Law shapes how we understand who we are, how we relate to others, and how we think about and navigate our relations to social and political life.
Nicholas Blomley (*pers comm*)

This chapter provides a review of critical concepts drawn from a range of theoretical fields that I collectively refer to as 'legal-political ecology'. It first provides a brief overview of the core political ecology-related concepts that inform my work. I then explain how a political ecology framing is extended by integrating more 'legal' theoretical fields, particularly legal pluralism and legal geography, and to a lesser extent in my work, jurisprudence and Critical Legal Studies. These concepts have enabled me to unpack and critique the linkages between political and economic power, legal systems and social-cultural-ecological systems operating at multiple scales and in specific places. In doing so, I have been better placed to understand Indigenous Peoples' critiques and demands, and been provided the tools and language with which to interrogate local-to-global dynamics from a justice perspective. While I used legal-political ecology as the theoretical basis for my research, publications and activism, I had not formally set it out. This chapter enables me, for the first time, to elaborate and engage critically with 'legal-political ecology', which I subsequently draw upon in **Chapters 4-7** to frame the research. I conclude this chapter with my theoretical contribution.

2.1 Introduction

Indigenous Peoples' statements, declarations and protocols provide a body of clear insight into the linkages between social injustice and ecological degradation (IPBES, 2019) and provide prescriptions for change, including by inviting others to draw from their ontologies, epistemologies and ways of life as a foundation for personal, community and global transformations. When I began working alongside San communities in the South African Kalahari, I heard first-hand statements about the nature of solidarity within their own communities[8] and in relation to other Indigenous Peoples, as well as about their biocentric and reciprocal relationships with their territories, ancestors and future generations, embodied within and informed by their culture, knowledge, practices and institutions. Since then, my research has enabled me to witness community members in India and Malaysia express their relationships with their territories and wider cultural and ecological systems in terms of their '*responsibilities for'*, not – in the first instance – their 'rights to'. Through my engagement with

[8] Below I speak to the more granular and conflictual intra- and inter-community dynamics that are also present in every human society and are exacerbated by power asymmetries and influenced by laws.

Indigenous Peoples' declarations and protocols, I have read – in their words – about the multiple levels of injustices and harms suffered due to the imposition of colonial and neo-colonial forms of exploitation and imposed 'development' (Declaration of Solidarity from the International Conference on Indigenous Peoples' Rights, Alternatives and Solutions to the Climate Crisis, 2010: 1) as well as about their scepticism of mainstream conservation[9] (A Statement of Custodians of Sacred Natural Sites and Territories, 2008: 3). To respect Indigenous Peoples' voice and agency, **Annex III** provides a selection of statements from Indigenous Peoples' declarations and protocols that elaborate these issues. As a lawyer working to support Indigenous Peoples' movements in common law jurisdictions and at the international level, I found political ecology to be a useful theoretical field to begin to understand and describe power dynamics in social-ecological systems.

2.2 Political ecology

Political ecology is a multi-disciplinary, theoretical framework that helps us challenge localised, ahistorical and apolitical ecologies. It constitutes a constantly evolving body of work, representing the convergence of a long history of critical thought from across a range of disciplines. These include green materialism, common property theory, peasant studies, feminist development studies, postcolonial and subaltern studies, science and deconstruction, and critical environmental history (Robbins, 2011). The integrative impulse has led to 'political ecology' becoming an overarching term for a range of critical concepts. This section describes five approaches and concepts that I have used most extensively in my work, namely: applying an overtly political, normative frame; being explicit about my own assumptions, as well as politicising, denaturalising and historicising phenomena – particularly legislative and judicial systems; being attentive to scales and networks; thinking critically about territorialisation and governmentality; and problematizing the notion of 'marginalisation', i.e. by investigating diverse forms of Indigenous Peoples' agency. Political ecology also promotes the problematisation of a number of key concepts that appear frequently in calls by activists and in the literature, including 'environmental justice', 'equity' and 'participation'.

First, despite their diversity, political ecologists agree on at least one thing - their rejection of apolitical understandings of social-ecological systems. Challenging cultural and economic determinism, political ecologists argue that the relationships between nature, humans (as a species within nature), non-human nature, and broader ecological processes are inherently political and influenced by relations of power. Political ecologists suggest that because all social-ecological systems are contingent on power relations operating at multiple scales, any form of ecology – even avowedly apolitical ecologies – are necessarily political. In this context, political ecology is not *more* political than other approaches to social-ecological systems, but more "explicit about its normative goal and more outspoken about assumptions from which its research is conducted" (Robbins, 2011: 16). Second, political ecologists use this insight to challenge and denaturalise the existence of structures and states of being – such as relating to race, class and gender – presented as being 'natural' by determinists (Biersack and Greenberg, 2006). Furthermore, historicising social-ecological relations enables us to explore how

[9] 'Mainstream conservation' is used here to refer to a range of approaches to conservation, including protected areas, that are referenced in multilateral environmental agreements and their decisions, are funded and promoted by international bodies and organisations, and are widely implemented at the (sub-national) levels. This now includes, to some extent, protected areas governed by Indigenous Peoples, local communities and private actors.

past events and power dynamics have generated present conditions and have produced – and will reproduce – context specific and justice-laden social-ecologies (Braun, 2002). These two concepts are also drawn upon by Indigenous legal scholars who use them to "denaturalise western thought" and "critically historicize" Eurocentric, colonial understanding of the past as a means to co-develop "alternative intellectual context capable of enhancing core values such as parity, freedom, justice, and human rights" (Henderson, 2002: 4); discussed more fully below.

Third, political ecologists are aware that the creation and condition of any local space is contingent on wider social, political, economic and ecological dynamics and forces. We are urged to study the 'politics of place' (Rappaport, 1969) as well as to explore relevant forces and processes across national, regional and international scales and networks (Perreault et al., 2015). These ideas have led to a reconceptualization of place, challenging me to expand my understanding of local relations to the "grounded site of local-global articulation and interaction" (Biersack, 2006: 16). Place is therefore both locational and relational. Fourth, and linked to this idea, political ecologists understand 'territorialisation' as a technology of power that occurs when governing bodies develop rules and procedures that establish access, ownership and exclusion of natural resources. As such, contending classes and groups compete to change rules that define and govern access to resources (Greenberg, 2006). Scholars who have focused on governance (Peet et al., 2010), biopower and governmentality (Foucault, 1977, 1980, 2007) and environmentality (Agrawal, 2005) engage with complementary conceptions of this dynamic, including in the context of 'green governance' (Weston and Bollier, 2013), property and natural resources (Doolittle, 2011), and climate change (Bumpus and Liverman, 2011).

Fifth, political ecologists explore questions of power, expressed as social status, as it relates to natural resource governance, management and use. They suggest that access to and control of resources are inextricably linked to the positioning of people by ethnicity, race, class and gender. At the same time, groups deemed marginalized by earlier development studies, and their concomitant essentialised portrayals, have shown great adeptness as agents of change when their experiences are engaged with more closely. Scott (1985) highlights the subtle nature of rural political agency, and Brosius (2006) explores community-based approaches to resisting and engaging external power dynamics and structures to illustrate how Indigenous Peoples exercise agency by integrating social movements and innovative engagement with political and legal spaces – a major influence on my work on community protocols. This agency is also evident within the commons movement's contribution to political ecology, whereby Ostrom and colleagues (1999) mount a compelling challenge to the contention that privatization of resources will address the perceived 'tragedy of the commons' (Hardin, 1968). Berkes (1999) managed to effect a similar paradigm shift in relation to Indigenous epistemology through his work on traditional ecological knowledge and resource management.

These scholars, among others, encouraged me to adopt an explicitly political approach to my research and activism – including being self-aware of my own positionality and politics, to be ever-present to the historical context and multiple scales of power operating within a social-ecological system, and to engage directly with Indigenous individuals to hear first-hand *their* stories, strategies of resistance and modes of engagement with external systems and actors. Equally, the scholarship urges caution about the unproblematic use of concepts such as 'environmental justice', 'equity' and 'participation'. For example, Álvarez and Coolsaet (2018: 2) argue that 'environmental justice' is often defined in Western

terms and transposed to the Global South in ways that are either ineffective, inappropriate, or (re)produce injustices – constituting a "coloniality of justice". Similarly, political ecologists challenge the universal applicability of Western conceptions of 'justice' and 'equity' (Schlosberg, 2007; Martin et al., 2016; Watson, 2017), 'inclusive conservation' (Matulis and Moyer, 2016) and 'participation' (Cooke and Kothari, 2001), and urge the reconceptualization of justice from radical, decolonial perspectives and emerging communities in the Global South (Rodríguez and Inturias, 2018), as well as from within historically marginalised communities in the Global North (Pulido and De Lara, 2018). Much of this literature urges "making (and taking) space for a range of dissenting voices to engage with the process on their own terms" (Matulis and Moyer, 2016: 5) to enable "affirmative encounters and intercultural dialogue" Álvarez and Coolsaet (2018: 15-16) as means to transform conflicts and co-construct "otherness" (Rodríguez and Inturias, 2018). The making and taking of space is a significant concept that informs my work on community protocols and OECMs.

Yet as a lawyer reading the work of political ecologists, and notwithstanding this group's deep engagement with a wide range of manifestations of power and governance in social-ecological systems (Rappaport, 1969; Scott, 1985, Ostrom, 1999; Brosius, 2006), I find that political ecology does not acutely enough engage with a range of law-related questions and issues, including the relationship between state laws and non-state normative frameworks, and with the way in which law and space interrelate to produce 'places' that embody and promote power-related and justice-laden social-ecological relations. A more nuanced understanding of the relationships between power, law, space and social-ecological systems, and more rigorous engagement with the inner dimensions of law and normative systems *across scales and over time*, deepens the interrogation of the local-to-global dynamics prevalent across my research.

2.3 Towards a more 'legal' political ecology

Law is not synonymous with power, but it is both a manifestation and technology of cultural, political and economic power operating within and between multiple scales (Wily, 2011). Who makes, implements and adjudicates laws, and what is considered by states to be 'law' or a 'legal system', is contingent on political power. Dominant actors use laws and legal systems to bolster their positions, and undermine others, which in turn fosters a range of related dynamics and outcomes, including the concentration of economic resources, social marginalisation and ecological degradation.

Jurisprudence provided me my first critical engagement with the inner dimensions of 'law', 'rights' and 'justice'. The insights that emerge at the intersection of legal positivism and natural law theory provided me with valuable insights into the question of 'what is law?' and 'who makes law?' Grounded in analytical jurisprudence, legal positivists argue that any law that emerges from the 'correct procedures', as defined within any formal system of governance, is a *bona fide* law (Hart, 1961). Emphasising law's basis in authority, positivists aim to clarify our understanding of the concept of law without offering normative guidance of how we ought to behave or what institutions should be supported as just and right (Simmons, 2008).[10] Natural law theorists reject the positivist approach.

[10] John Austin, one of positivisms early thinkers, sums up this position in the following way: "a law, which actually exists, is a law, though we happen to dislike it" (quoted in Bix, 2009: 34).

Emphasizing the law's roots in justice and the common good, they argue that questions about what law is and what law should be are inextricably linked (Finnis, 1980).[11]

Legal positivists and natural lawyers also engage with the nature of rights (Bix, 2009). Questions include: are rights to be understood as purely legal constructs or do they have moral foundations; what kinds of rights exist; and which entities can have rights, such as unborn children in the context of generational equity (Westra, 2006), corporations (Bakan, 2005), or species (Stone, 1972)? Following their approach to the nature of law, positivists argue that a legal right is one recognized in law, and that its foundation is the law that provides for it. Natural law theorists acknowledge this position but broaden the categories of rights to include moral rights that are derived from deeper or more diffuse sources, determinable by reason. Moreover, the natural law school argues that even where a governing authority does not legislate for rights considered universal or inalienable, those rights nevertheless exists and can be claimed by the 'person' (individual/corporate), collective or non-human bearing that right.

The dimensions of law that are illuminated by the positivist and natural law positions extend beyond political ecologists' engagement with these issues, and enabled me to begin to think critically about state claims of legal sovereignty to all people and biodiversity within their borders, Indigenous Peoples' counterclaims about the validity of their own laws vis-à-vis state and international law, and about whether the rights they are 'afforded' at the (sub-)national and international levels are sufficient or just. Yet, as my research engaged spaces in which state laws intersected with Indigenous Peoples' laws and related normative frameworks, recourse to a more nuanced legal scholarship was required, namely legal pluralism (**Section 2.4**) and legal geography (**Section 2.5**), the latter of which includes engagement with the contributions made by Critical Legal Studies scholars. 'Legal-political ecology' has become my overarching description of the framework that encapsulates these theoretical fields and related critical concepts. The following sections demonstrate how a *legal*-political framework provides insights about the complexity of the themes important to Indigenous Peoples and sets out the theoretical anchoring and contributions within the literature.[12]

2.4 Legal pluralism

While it has been argued that the areas of research undertaken within legal pluralism[13] are so diverse that one cannot consider it to be a unified field (Moore, 2001, 2014),[14] I have drawn selectively upon

[11] Natural law arguments have filtered into the public consciousness, leading to the maxim that an 'unjust law is not law' and that contradictions between enacted law and natural law represent "an act of violence rather than a law" (Bix, 2009: 71).

[12] This review of the literature loosely follows the chronological development of the field (from legal anthropology to global legal pluralism), but does not purport to provide a comprehensive overview; the focus being on concepts I have used to inform my research. For more comprehensive chronologies see: Moore, 2014.

[13] Benda-Beckmann and Turner (2018) explain that the legal sociologist Gurvitch first used legal pluralism to denote co-existing legal orders in 1935, and the Belgian lawyer Vanderlinden first used the term in an analytical sense in 1971.

[14] For example, Moore argues that: "'pluralism' can refer to: (1) the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them; (2) the internal diversity of state administration, the multiple directions in which its official sub-parts struggle and compete for

research that engages at the nexus of plural legal and normative systems to inform my work.[15] I begin with an analysis of the literature as it engages with the normative validity, cultural linkages and jurisgenerativity of Indigenous Peoples laws and broader normative systems (**Section 2.4.1**). I then explore the ramifications of these insights for the relationship between Indigenous Peoples', state and international laws and policies (**Section 2.4.2**), including as advanced by global legal pluralism (**Section 2.4.3**).

2.4.1 Indigenous Peoples' laws: normative validity, cultural linkages and jurisgenerativity

Just as the denial of Indigenous Peoples' legal systems was a core strategy of colonial conquest and subjugation, so achieving respect for and revitalising Indigenous Peoples' legal systems is central to the future of their own cultures and the broader health of our planet (Williams, 1991; Borrows, 2005; Mills, 2016; Watson, 2017, 2018; Napoleon, 2019**)**. Article 5 of the UNDRIP (2007) affirms that: "Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." As Indigenous Peoples act upon this and advocate in diverse forums and across multiple scales for their right to self-determination, plural approaches to understanding, describing and promoting social and legal diversity become important (Coyle, 2020).

Many Indigenous Peoples' declarations and protocols present strong biocultural statements about the reflexive relationships between their respective and unique: ancestral territories, larger landscapes and seascapes, and planetary systems; cultures, spirituality and traditional knowledge; and laws, institutions and practices (Statement of Custodians of Sacred Natural Sites and Territories, 2008; Universal Declaration of Rights of Mother Earth, 2010; Kari-Oka 2 Declaration, 2012). Indigenous Peoples' territories are not merely fungible places to live (Bavikatte, 2014), they are part of the respective Indigenous People's identity, just as the territories' identities are given expression through interaction with a specific community or people (Ulu Papar Community Protocol, 2012). Connecting them to their territories, traditional ecological knowledge and their legal systems are often invoked as the means by which Indigenous Peoples have maintained a respectful relationship with natural, cultural and spiritual dimensions within and beyond their territories (Indigenous Peoples International Declaration on Self-Determination and Sustainable Development, 2012), constituting a form of "relational connection" (Watson, 2018: 119).

Anthropologists' interest in Indigenous Peoples' social-ecological relationships and the role of culture, spirituality, law and normative orders in their societies led them to lay the foundation for legal pluralism, generally through thick description studies of particular groups in the Global South (see for

legal authority; (3) the ways in which the state itself competes with other states in larger arenas (the EU, for one instance), and with the world beyond that; (4) the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields which generate their own (non-legal) obligatory norms to which they can induce or coerce compliance; (5) the ways in which law may depend on the collaboration of non-state social fields for its implementation; and so on." (Moore, 2001)

[15] Berman (2020: 4) provides a clear summation of why I am compelled to engage with legal pluralism: "Legal pluralism simply is the reality underlying the work of any scholar or policymaker who seeks to address the contestation among norm-generating communities, the interaction of legal authorities, or the ways in which norms seep across territorial borders and are used, transformed, or contested locally".

example Gluckman, 1955a, 1955b). Despite the foundational importance of this work, much of the early scholarship by anthropologists has subsequently been critiqued for: being undertaken predominantly by western academics whose biases and framing tended to distort or misrepresent their subjects (Bohanna, 1965; Moore 2001; Benda-Beckmann and Turner, 2018); not engaging enough with and/or not being critical enough of the impact of colonial laws on pre-existing legal systems (Moore, 2001); privileging state legal systems, i.e., conforming to 'weak pluralism' (Griffiths, 1986); focusing on describing laws without being attentive to the "active dimension" of law (Webber, 2006: 169), including law's dynamic production and change (Santos, 1987); artificially separating Indigenous Peoples' culture and law (Henderson, 2002); and subjecting Indigenous Peoples to Western, universalist legal concepts and frameworks (Martin at al., 2013; Vermeylen, 2019). As per Anishinaabe scholar, Aaron Mills (Waabishki Ma'iingan) (2016: 852), "Without having begun to internalize our lifeworld, one has no hope of understanding our law." The resulting injustices are being addressed (Melissaris, 2004), the framing revised, and the scholarship being undertaken by people from within their own communities, including most promisingly through the work of Indigenous scholars such as Mills, as well as Irene Watson (Tanganekald, Meintangk and Boandik), Christine Black (Kombumerri and Munaljahlai), Robert A. Williams Jr. (Lumbee), Māmari Stephens (Te Arawa), Val Napoleon (Cree, Dunne-Za and Gitksan), John Borrows (Anishinaabe/Ojib-way), and James (*Sákéj*) Youngblood Henderson (Chickasaw/Cheyenne).[16] These Indigenous lawyers' critiques and contributions, as well as other scholars referenced below, provides insights into at least three facets of Indigenous Peoples' claims that inform my work, namely: a) the validity of their laws, b) the distinct epistemological foundations of those normative frameworks, and c) the non-linearity of the evolution of laws.

First, the work to describe non-state legal and normative systems, that had been actively denied and suppressed under colonial regimes (Williams, 1991, 1994; Henderson, 2002**;** Borrows, 2005; Watson, 2016, 2018), provides empirical evidence of their normative validity and highlights the wide diversity of epistemological bases of distinct Indigenous Peoples' legal systems. While the nature of law – as culture, domination, problem solver or other (Moore, 2001) – is an area of disagreement within the literature and will vary between societies and over time, the studies make visible normative systems that have been and continue to be undervalued, marginalised and actively suppressed (Borrows, 2005). Tamanaha (2000), draws on this insight to argue that both Santos (1987) and Teubner (1997) offer essentialised understandings of law that hinders the role of legal pluralism to enhance our ability to understand legal phenomena. Rather than offering a vision of law as a particular phenomenon that can be captured in a single concept or a "formulaic description" (312), he advocates for 'strong' legal pluralism based on the understanding that law is "whatever people identify and treat through their social practices as 'law' (or recht, or droit, and so on)" (Tamanaha, 2000: 313). His approach, which is based on conventionalism and related to phenomenology, and which I follow, underscores the subjectivity of the experience of law and "involves the coexistence of more than one manifestation of a single basic phenomenon" (315).[17] As per my interest in moving beyond the polarised approach to this question, as engaged with in classical jurisprudence, Tamanaha's approach enables us to ask "*who*

[16] The engagement by Indigenous scholars, among others, has evolved 'post-colonial studies' towards 'settler colonial studies' and beyond to more Indigenous-centred studies (Carey and Silverstein, 2020).

[17] This concept is also aligned with Fitzpatrick's notion of 'integral plurality', whereby state law is integrally constituted in relation to a plurality of social forms. Using this framing, as opposed to a state-centric one, "opens up radical possibilities for the study and the politics of law" (emphasis added, 1984: 115).

(which group in society, which social practices) identifies *what* as 'customary law,' *why*, and under *which* circumstances?" (2000: 318, original emphasis). This understanding of law also appears in Cover's work (1983) on *nomos* – the normative field in which humans exist. As set out below, Indigenous scholars help further shift the focus of investigation to *how* Indigenous laws can be revitalised, respected, shared and used for local-to-global purposes (Borrows, 2005, 2016; Napoleon and Friedman, 2014; Mills, 2016; Watson, 2018; Napoleon, 2019), which is a question that catalyses much of my research.

Second, the work also underscores that law is a "cultural force" and cannot be appreciated separately from the respective group's values and social structures (Watson, 2018; Coyle, 2020: 807).[18] Moreover, despite their high level of diversity (Friedman and Napoleon, 2016; Gover, 2020), Indigenous Peoples' laws reflect and shape local worldviews and relationships with territories, non-human Nature and other communities in ways that are often materially distinct from a Western, Cartesian approach to Nature, property (Watson, 2018) and conflict resolution (Borrows, 2005). In particular, this manifests itself in the many declarations and protocols in which Indigenous Peoples express the *responsibilities* they feel towards the Earth and their territories and the reciprocal nature of the relationship, as contrasted with proprietary, extractive and expendable uses of natural resources (Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project, 1995). The responsibility expressed towards territories is also often extended to ancestral heritage and future generations (Kari-Oka 2 Declaration, 2012; see also **Annex III**).

Following from this, the work of legal anthropology and legal pluralists obligates us to be more explicit about societies' differing philosophical foundations, related ontologies and epistemologies and their expression of rights and responsibilities in law (Griffiths, 1986; Benda-Beckmann and Benda-Beckmann, 2006; Berman, 2006). For example, Coyle and Morrow (2004) and Watson (2018) illuminate the evolution of the concept of 'property' in Western thought, explaining that this approach to property is neither historically nor conceptually inevitable. In political ecology's terms, they denaturalize and provincialize Western notions of property, illustrating its imaginary nature. Their work highlights how Western notions of 'property' emerged from Roman law classifications and related systems of agrarian capitalism. Emergent property rights came to be viewed as constituting legal relationships between individuals structured by posited rules rather than being underpinned by intrinsic values. Within this idea of property, particular natural resources became objects of individual ownership. Escobar (1996) uses similar framing to explore the historical production of Nature. Colonialism's denial of Indigenous Peoples' world views and legal systems led, among other things, to forms of 'epistemicide' (Santos, 2015). These insights usefully augment political ecology's consideration of the production – and construction and destruction – of property and Nature. In this light, laws regulating property and Nature can be seen as "inextricably linked with [multiple and diverse] conceptions of human nature and society, of psychology and history, action and obligation" (Buckle, 1991). Thus any discussion about rights relating to property or Nature necessitates a deeper engagement with differing conceptions of the social, political and moral nature of these concepts and

[18] Gover (2020: 861) sets out that across Canada, New Zealand and Australia are nearly nine hundred "recognized" Indigenous nations holding legal personality and acting on behalf of their members in dealings with the state and third parties. Accordingly, "any generalizations about Indigenous law need to be understood against the backdrop of Indigenous diversity".

the concomitant legal foundations for any claims.[19] Indigenous scholars make an important addition to this line of though, arguing that while and appreciation for a society's culture can assist with understanding its laws, the reverse is also true: engaging with a society's laws provides a means by which to engage with its values (Mills, 2016). These concepts are further engaged by legal geography scholars (below) and informed my work on community protocols, discussed in **Chapter 4**.

Third, Legal pluralism also challenges assertions that law evolves in a linear fashion, from 'primitive law' towards the kind of legal frameworks developed by European states. Indigenous Peoples, supported by legal pluralist scholarship, assert that their legal and institutional frameworks are not 'backward' and do not need to be 'developed' (Watson, 2014; Benda-Beckmann and Turner, 2018). This argument also reveals that even when a colonial power or state asserts its monopoly over the making and adjudication of law, particular groups' legal consciousness is selective and they can subject themselves to non-state normative frameworks irrespective of whether the non-state systems are given the status of 'law' by dominant groups (Benda-Beckmann and Turner, 2018). In this regard, legal pluralism adds an important legal dimension to the ideas presented by political ecologists about Indigenous Peoples' agency through diverse forms of engagement and resistance. As jurisgenerative communities – i.e., active participants in the creation and interpretation of laws (Cover, 1983; Carpenter and Riley, 2014; Gover, 2020) – Indigenous Peoples have law-creating capacities and their own forms of legal consciousness that are based on their respective world views and remain in a dynamic relationship with their cultural-spiritual understanding of themselves and their territories (Borrows, 2005, 2016; Napoleon and Friedman; 2014, Mills, 2016; Watson, 2018; Napoleon, 2019).

Drawing on the above three points, strong legal pluralism becomes a "sensitizing concept" (Benda Beckmann and Turner, 2018: 264) and means by which to enable the problematisation of statist understandings of law and agency in situations in which there are multiple legal orders, including state and non-state systems.[20] This invites further engagement with the position of the state vis-à-vis Indigenous Peoples.

2.4.2 Decentering the state, interlegality, state legitimacy and the universality of international law

The above insights about the normative validity, cultural linkages and jurisgenerative nature of Indigenous Peoples' and their laws provokes critical engagement with: a) the orthodox understanding of the central or apex position of state laws vis-à-vis other legal and normative orders, b) their

[19] Brosius (2006) recounts a story that helps to illuminate some of the differences in this regard between one Indigenous group and the predominant Western approaches. The Penan people of Sarawak (Malaysia) were – and still are – threatened by state-sanctioned logging in their traditional territories. The Penan headman explained to Brosius what he would say to the manager of the local timber company when he met him: "On that ridge over there is a hole in a tree where my father collected honey from *nyiwan* [a kind of bee]. It is still there. Where are the marks made by your father?" (298). On another occasion, a man asked of the loggers: "If this is your land, why do you always ask us the names of the rivers? Do you know the names of places? You and your people are always asking – what is the name of this river, what is the name of that river? If you don't know these, you don't belong here" (310-311). Notwithstanding the illuminating nature of Brosius's story, scholars also caution against essentialising Indigenous peoples relations to nature or elements of their lives such as 'traditional knowledge' (Vermeylen, 2010).

[20] In Canada, for example, this would include shifting the perspective from bi-juridicalism (English common law and French civil law) and to multi-juridicalism (Borrows, 2005).

relationship between each other, and as a consequence c) the legitimacy of states as they relate to Indigenous Peoples within their borders.

First, all of the above has the effect of countering universal theories of law and justice (Benda-Beckmann and Turner, 2018); problematising concepts such as 'equality', participation' and 'inclusive conservation' (Cooke and Kothari, 2001; Martin et al., 2016; Matulis and Moyer, 2016; Álvarez and Coolsaet, 2018; Pulido and De Lara, 2018; Rodríguez and Inturias, 2018; also as described in **Section 2.2**), deconstructing hierarchical understandings of legal orders (Coyle, 2020), and decentering the authority of the state – moving it into a plural position. It presents a direct challenge to monism, legal centrism and "canonical positivists" (Gover, 2020: 860) who assert that only state laws can be called 'law' and that other normative orders are necessarily lesser forms of law or not law at all (Benda-Beckmann and Turner, 2018; Michaels, 2009). It also highlights how the adoption of a plural approach enables investigations to move beyond the *prima facie* important, but ultimately limited, classical jurisprudential arguments, set out above (**Section 2.3**).[21] This led to personal reflection and the evolution of my position on the relationship between normative orders.

The issues raised respectively by Moore (1973) and Griffiths (1986) uncovered my own bias about the relationship between state and non-state legal and normative systems. Notwithstanding Moore's significant contribution to the field, Griffiths criticises Moore's concept of a 'semiautonomous social field' on the basis that it privileged state law and therefore discounted the normative value of 'other' social fields. Similarly, Tamanaha (2000: 313) makes a case for a strong plurality of non-hierarchical orders:

> *What law is and what law does cannot be captured in any single concept, or by any single definition. Law is whatever we attach the label law to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law and customary law on the general level, and an almost infinite variety on the specific level.*

It revealed to me my initial position on the relationship between state and non-state normative systems was 'liberal' (Berman, 2020) and conformed to 'weak' pluralism; i.e., that I conceptualised a hierarchical system dominated by state laws and institutions (as per Moore, 1973). Just as Griffiths had described it, my initial legal centralism was a "major obstacle to the development of a descriptive theory of law" (1986, 3). This was also an erroneous starting point because, in the context of Indigenous Peoples, settler state law is necessarily the more recently introduced system of law (Borrows, 2005; Watson, 2018). This insight helped reveal this bias, but also to reject the binary framing presented by Griffiths, and broaden my perspective to engage with both positions, especially in the context of Indigenous Peoples' legal and normative systems vis-à-vis settler states' laws and institutions. This position recognises power asymmetries and state dominance within the legal orders, while also adopting a strong legal pluralism perspective that fully values the normative validity of other frameworks. This insight helps to ensure that the starting point of my research has been Indigenous Peoples' normative systems, which is followed by exploring how national and international laws support or undermine them, including from a justice perspective; *from their systems out and bottom*

[21] Berman goes further, referring to these arguments as "fruitless" (2008: 1178).

up, as opposed to state-first and top-down. This leads to the consideration of relations between legal orders.

Second, Santos (1987) draws on this insight about the multiplicity of overlapping legal and normative orders to develop the notion of 'interlegality', which refers to the simultaneous existence and porous, dynamic relations *between* normative orders.[22] From this it follows that all authority is relative and contestable (Twining, 2012; Berman, 2020). Yet while interlegality promotes consideration of interactions between normative orders, it does not necessarily mean those relations will be characterised by conflict or competition between the systems (Twining, 2012). Other scholars have developed this concept to explore the coercive and persuasive impacts of laws and the norms they embody on Indigenous Peoples, including in relation to notions of property and individualism (Comaroff and Comaroff, 2001; Watson, 2018). This tendency, when adopted by politically motivated state entities, also highlights the "pathology aspects of the law" (Twining 2012: 123), law's "jurispathic" tendencies (Cover, 1983: 40), and potential for 'juriscide' (Watson, 2016), epistemic violence' (Rodríguez and Inturias, 2018) and 'epistemicide' (Santos, 2015). The related concept of 'provisionality' – relating to the dynamic and ever-changing nature of legal systems (Gover, 2020) – encouraged me to think further about how to design frameworks that promote open dialogue between diverse stakeholders. The emphasis on describing and conceptualising interactions, as well as creating legal spaces for change, informed my research on community protocols at the nexus of Indigenous Peoples' laws, state legal systems and international law (see **Chapter 4**).

Third, a question that arises as a corollary of this insight, presented by a range of Indigenous legal scholars (Borrows, 2005, 2016; Napoleon and Friedman; 2014, Mills, 2016; Watson, 2018; Napoleon, 2019), and others such as Coyle (2020), is whether states in which Indigenous Peoples live can justify their supposed supremacy over Indigenous Peoples' laws, especially in cases when those states were established by force and not consent. I.e., how legitimate are states that deny the legal systems of Indigenous Peoples within its borders? This question becomes more complex at the international level when this potential injustice is magnified through bodies and multilateral environmental agreements of the United *Nations*, with some Indigenous scholars critiquing state sovereignty and international law as having been constituted through colonial processes (Anghie, 2007).[23] Moreover, with regard to the nature of international law itself, Indigenous scholars and others have critiqued the supposed universality of international law and the framing of Indigenous Peoples' rights (Carpenter and Riley, 2014). Human rights are critiqued for being Eurocentric yet framed in ways that are conceived to be universally applicable, and therefore responsible for further undermining Indigenous Peoples' rights

[22] "*Legal pluralism* is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather a conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our action, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life. We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by an intersection of different legal orders, that is, *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism and that is why it is the second key concept of a postmodern conception of law." Santos, 1987: 297-298. Original emphasis.

[23] Perhaps a 'Plural *Peoples*' was one possible historical trajectory, but instead a 'United Nations' was founded, denying Indigenous Peoples representation at the international level. Perhaps a global organisation of Plural Peoples is still a possible future outcome.

to self-determination (Pulitano, 2012; Champagne, 2013). Moreover, Indigenous advocates – such as those involved in the CBD's International Indigenous Forum on Biodiversity – face pressures to conform to pre-determined, anthropocentric, Cartesian frameworks and procedures, as a technology of hegemonic coloniality (Carpenter and Riley, 2014; Vermeylen, 2019). Sometimes, as reflected in the preface of this critical analysis, they are temporarily repressed, excluded or silenced through the jurispathic tendencies within those spaces. This leads Watson (2018: 30) to ask: "is it possible to reconstruct international law so that it is liberated from its colonial origins?" I believe it is, and this aspiration directly informs my work on community protocols, OECMs (**Chapter 6**) and equitable and effective conservation (**Chapter 7**).

With a new appreciation of the critiques of state legitimacy and the universalism of international law, and through my community-based research and work at the international level, plural approaches – which at first seemed like a set of radical propositions – became increasingly axiomatic and the ramifications for justice at the local-to-global levels added urgency to my work. The logical corollary of these arguments is a call for a "disturbance from the south in the western ontologies and epistemologies around environmental justice", including those embedded in international law (Vermeylen, 2019), discussed next.

Fourth, while noting the asymmetrical power relations between state and non-state systems (Barzilai, 2008), the influence and impact of one legal or normative system on another is not a one-way dynamic flowing from the state. Indigenous activists, in particular, are acutely aware of this and are leveraging the rise in global engagement with biodiversity and climate change concerns to promote their interests through reference to their worldviews and legal systems. For example, the authors of the *Indigenous Peoples International Declaration on Self-Determination and Sustainable Development* (2012: Article 3) state the following: "We respectfully offer our cultural world views as an important foundation to collectively renew our relationships with each other and Mother Earth and to ensure *Buen Vivir* – living well proceeds with integrity." This approach is supported by Indigenous lawyers, such as Henderson (2002) and Watson (2016, 2018), who argue that Indigenous worldviews and laws are critical to thriving communities and a healthy planet.

Despite suffering centuries of injustice, Indigenous Peoples remain proud of their cultures and law, and extend an invitation to those willing to learn from their experiences, descriptions of the issues and prescriptions for change. They are also aligning with and informing a tradition of Indigenous decolonial theory by affirming the existence and asserting the relevance of their diverse, alternative Indigenous ontologies and epistemologies (Quijano, 2000; Escobar, 2007; Mignolo, 2012; Rodrígues and Iturias, 2018; Vermeylen, 2019). By expanding spaces for their realities to be reflected, they are enhancing their ability to challenge outsiders' narratives about what constitutes 'environmental justice' within and between their communities. This includes: a) problematising the focus on community-level justice over individual experiences and intra-community relations, particularly those impacted by intersectional forms of injustice, including relating to gender (Napoleon, 2019), and b) engaging with the important distinctions between distributive justice and representative or recognition-related forms of (in)justice (Martin et al., 2013). It has also led to critical engagement with the notion that Indigenous Peoples' laws are inherently 'spiritual', including through the application of critical pedagogy from non-Indigenous intellectual perspectives (Napoleon, 2019). These spaces and related processes are considered necessary to enable Indigenous Peoples' laws to be engaged

with rigorously, understood and to evolve where necessary (Napoleon, 2019). In this regard, Indigenous advocates have been highly strategic and increasingly effective in new and emerging global spaces, particularly those related to human rights, climate change and biodiversity. They are also making gains within academia, as evidenced by the University of Victoria Faculty of Law's Indigenous Law Research Unit (Canada).[24]

2.4.3 Global legal pluralism

Scholars attuned to legal pluralism have also turned their attention to the relationships beyond national jurisdictions (Teubner, 1997). They witnessed the globalisation of production chains and trade as well as the deterritorialization of our relations and the establishment of international and transnational bodies and standards (Snyder, 1999). This led them to theorise about the relations between local-to-global legal and normative systems, moving beyond conceptions of "sovereigntist territorialism" (Berman, 2020: 6). My work engages with and aims to support the struggles of Indigenous Peoples, including those who have identified international and transnational forums as spaces of struggle deemed worthy of engagement and advocacy towards their collective rights and responsibilities. As a result, global legal pluralism – whether it is a unitary concept or itself plural (possibly a "pluralism of pluralisms" – Michaels, 2009: 5) – has played an important part in my thinking, especially relating to my work on community protocols.

Berman (2020) identifies descriptive and normative forms of global legal pluralism. First, descriptive legal pluralism augments the theoretical concepts related to scales provided by political ecology to extend our understanding of the multiple interactions and contestation occurring between interest groups operating from local-to-global levels (Michaels, 2020). In this vein, global legal pluralism moves beyond the focus of sociolegal scholarship on questions of legitimacy to engage empirical questions of efficacy and more complex accounts of institutionalized collective action; i.e., whether and how Indigenous Peoples are engaging effectively in global spaces. It enables a complex description of the interaction of these diverse legal and normative systems, investigation of how interest groups are engaging in different legal and quasi-legal spaces to promote their interests, and the overall effects of the interactions of these systems of particular groups' legal consciousness (Berman, 2020). At the same time, this scholarship highlights how otherwise established legal pluralist understanding of these dynamics is altered under conditions of globalization. These insights help to further decentralise the state by illustrating how Indigenous Peoples are able to bypass national bodies and processes to advocate at international meetings of the UN climate and biodiversity conventions – among others, promote their interests within transnational non-state-centred bodies – including industry roundtables such as the Roundtable on Sustainable Palm Oil, and seek redress at regional human rights courts. This is also a good example of how the field is developing to accept that legal pluralism is not contingent on state power being diminished (Benda-Beckmann and Turner, 2018); i.e., it is not necessarily a zero sum game between state and Indigenous Peoples' laws. As per Benda-Beckmann and Turner (2018: 268), the resulting paradox is that "the acceptance of global legal pluralism has resuscitated the significance of the state in its present fragmented and dependent guise in complex plural legal assemblages".

[24] https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php

Second, normative global legal pluralism proposes a set of relations within hybrid legal spaces for transforming conflict while promoting the co-development of jurisgenerative outcomes. As Berman (2020: 1) argues, global legal pluralism informs communities seeking "to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically". In this regard, it aspires to "alter the way the law is conceived" (Moore, 2001: 111), and positions "law as a forum for dialogue across difference" (Berman, 2020: 2) and as a "bridge in normative space that connects the world-that-is with the worlds-that-might-be" (Cover, 1992: 176).

Global legal pluralism's focus on space connects with the arguments made by Indigenous scholars that one of the core effects of colonialism was to close Indigenous spaces, in physical, cultural and legal realms, and that therefore there is a need to reclaim, revitalise and/or create new spaces for Indigenous laws, which then opens further space for the existence and flourishing of Indigenous worldviews and self-defined justice (Henderson, 2002; Borrows, 2005; Watson, 2005, 2012, 2018; Mills, 2016; Napoleon and Friedman, 2016). These illuminating ideas highlight the central tenet that future coexistence is not constituted by one system being replaced by another, necessarily, but by integration of concepts and laws through respectful engagement within spaces and mechanism that are collectively perceived as *legitimate* (Henderson, 2002). Coyle (2020: 831-832) draws on global legal pluralism to set out a non-exhaustive list of principles relevant for Indigenous Peoples that any related mechanisms should embody, including (quoting directly):

- *They should recognize the continuing jurisgenerative nature of Indigenous societies;*
- *In those fields where the application of Indigenous legal norms is formally recognized, care should be taken to acknowledge the distinctive sources of Indigenous law, Indigenous processes for addressing competing interpretive claims about that law, and Indigenous methods of legal reasoning;*
- *In specifying the legal fields in which Indigenous norms will be recognized, the mechanisms should address Indigenous ways of characterizing the issues involved, particularly in the areas of governance categories and the nature and significance of relationships within the community, and between the community and others;*
- *Within those fields, recognition mechanisms should be attentive to the reality that Indigenous legal norms may be implicit, or focused on the use of appropriate processes to interpret the law or resolve a dispute (where indigenous peoples wish to develop written codes, some will undoubtedly seek to focus on generalized legal and normative values, rather than technical rules of conduct);*
- *Processes that are established to address conflicts between state law and Indigenous law should reflect the diversity of the parties' norms;*
- *The process itself should not privilege Western values; and*
- *Any process or institution that is tasked with interpreting Indigenous legal norms should be implemented by a body whose cultural diversity and expertise gives it the legitimacy and competence to interpret Indigenous norms.*

These are important principles. They are set out in full because, in our own way, colleagues and I attempted to develop a form of legal empowerment and related tool – the biocultural community

protocol – that embodies pluralist ideals and values, and promotes value-laden processes, to enable "space for indigenous legal traditions" (Newman, 2020: 833) and rebalance relationships between particular Indigenous Peoples and other actors, operating from the local-to-global levels (Jonas et al., 2010). We sought to generate a hybrid space where "normative systems and communities overlap" (Vermeylen, 2013: 200), and to enable the co-development of 'living law' growing out of fragmented legal discourses and from the social peripheries (Teubner (1997). This was balanced by the appreciation that colleagues and I had for the complexities and associated challenges that states face with the full recognition of Indigenous Peoples' laws, including in relation to state-building policies, increased power of local groups, conflict of laws, and dispute resolution (Tamanaha, 2015). In this context, the primary emphasis on processes, as opposed to regulations, has great appeal, because as summarised by Berman (2007: 1164): "although people may never reach agreements on norms, they may at least acquiesce in procedural mechanisms, institutions, or practices that take hybridity seriously, rather than ignoring it through assertions of territorially based power or dissolving it through universalist imperatives". As a result, I draw on Coyle's framework to reflect upon my work on community protocols (**Chapter 4**).

Notwithstanding contributions of legal pluralism, there are arguments that its framing is overly theoretical and lacks an empirical enough engagement with political power (Tamanaha, 2000; Barzilai, 2008). Legal geographers make important contributions that help to address these shortcomings.

2.5 Legal geography

Legal geography is a theoretical field that investigates the "conjoined and co-constituted" nature of law and space (Braverman et al, 2014: 1) and analyses power relations as they relate to spatial justice (Delaney, 2016). A significant step forward towards the integration of law and geography was taken by Santos (1987), who linked cartography to representations and truth in law. He is considered to have "exploded conventional conceptions about the 'where' of law and, in doing so, questioned the definition of law itself" (Braverman, 2014: 3). The Critical Legal Studies (CLS) movement, peaking in the 1990s, contributed to the intensification of legal geography's critical, normative tendencies and suspicion of power (Blomley and Bakan, 1992; Blomley 1994b; Mitchell, 1997; Delaney, 1998; Kedar, 2003). CLS's concern with power asymmetries, as observed through social, economic and political relations, was further evolved by legal geographers to demonstrate how laws and legal institutions configure social space – such as protected areas – and reproduce unequal social and economic hierarchies in places and over time that have justice-related implications (Forest, 2000; Delaney, 2015). Like CLS, legal geography is interdisciplinary – perhaps even trans/post-disciplinary – challenging formalist and functionalist views of law though its interrogation of power (Palacio-Rodriguez, 2020). This section engages briefly with CLS, as a theoretical antecedent to legal geography, before engaging in a critical analysis of legal geography as it relates to my research.

2.5.1 Critical Legal Studies

If legal plural theorists focus on the epistemological differences and power relations that exist between legal system, CLS theorists explore a series of context-specific contradictions within the common law tradition (Tushnet, 1990). The diverse thinkers associated with CLS engage with the biases within legal doctrines (Carter, 1985), court rooms (Kelman, 1981) and law schools (Kennedy,

1982), with a focus on crosscutting themes such as race - through critical race theory (Bell, 1976) and gender - through feminist legal criticism (MacKinnon, 1987; Menkel-Meadow, 1988).

Collectively, they illustrate how the creation, enforcement, adjudication and teaching of law is not value neutral – challenging claims of legal objectivism and formalism (Finnis, 1985), and instead are formed by socio-economic affiliations (Kairys, 1983), hierarchies and corresponding politically-laden processes that favour dominant classes of society while marginalising and 'othering' groups and ideas beyond their class (Kelman, 1987). Their work, like political ecology, was intended to deconstruct and describe political dimensions of the law previously ignored and, in doing so, enable challenges to the legitimacy of legal systems and their supposedly impartial outcomes, constituting a form of radical rejection of existing orders that are referred to in the literature as 'trashing' (Kelman, 1984) or 'guerrilla warfare' (Binder, 1987). This enabled further work that highlights the indeterminacy and ambiguity of rules intended to generate a particular outcome when applied to a set of facts (Kress, 1989). Their work is of relevance to critical lawyers, such as myself, focusing on dimensions of power and justice operating within defined social-ecological systems and across scales.

If international and national laws and legal institutions contain hierarchies, biases and ambiguities, and do not necessarily describe the natural and social order of things derived by objective rationality, then it is likely that conservation law, policy, practice and enforcement contains similarly challengeable foundations. In which case, by exploring and describing those political biases and embedded power relations, we open space for diverse voices and the revelation of a range of new possibilities. My reading of CLS scholars emboldened my scholar*ly* activism and fuelled my critical engagement with the processes that led to the development of conservation of law and policy scepticism of 'conservation experts'' purported apoliticality. It also my provoked a growing impatience for change, discussed in **Annex IV**. I subsequently extended my reading to engage with the work of a growing group of scholars who integrated the insights provided by CLS and critical geography to develop the theoretical field of legal geography.

2.5.2 Legal geography and the nature of place

Legal geographers augment legal pluralism and political ecology as their work relates to my research in at least five ways. First, legal geography draws on and extends the insights provided by strong legal pluralism to illustrate how law and spaces are entwined and how places are actively transformed through legal processes, in the most part, to confirm to dominant actors' interests. Such processes are shown to marginalise or extinguish customary laws and Indigenous Peoples' understandings of the same physical geographies (Benda-Beckmann and Benda-Beckmann 2013) and alter the legal nature of the actors interacting in and around those spaces (Benda-Beckmann and Benda-Beckmann 2019), including causing displacement (Kedar, 2006).

Second, they add to legal pluralism's investigation of multiple, possibly conflicting and/or stacked legal systems (Roquas, 2002), based on disparate foundations of validity, power and authority (Benda-Beckmann and Benda-Beckmann, 2014), to explore the way in which those systems 'produce' places, establish boundaries, and dictate who is subsequently either permitted within those places or actively

excluded.[25] In this context, legal geographers illustrate that laws often have a spatial frame of reference and that places are therefore inscribed with legal meaning (Blomley, 1994b; Braverman, 2014), which impact actors' conceptions of authority, obligation, justice and rights (Blomley et al., 2001).

Third, legal geographers augment political ecologists' engagement with counter-hegemonic movements (Andrews and McCarthy, 2014). For example, they examine the dynamic role of civil society in resisting the state and private sector's neoliberal governance project (Perreault, 2008) to examine how actors are shaped by *and shape* spaces constrained by legal and institutional frameworks, and find legal or extra-legal means of negotiating for their interests (Borgias, 2018). The recent literature shows a 'justice turn' (Gillespie, 2020), which places a strong emphasis on the search for openings for legislative reform and legal claims.

Fourth, like the scholars associated with descriptive forms of legal pluralism, some scholars demonstrate a strong commitment to applied legal geography. Scholars have shown commitment to explore multi-scale interactions through in-depth qualitative research and the resultant papers engage deeply with particular places and judicial processes (Soja, 2013), including power dynamics within and projected by "Courts of the Conquerors" (Chief Justice Marshall, US Supreme Court, quoted in Kedar, 2003: 401). For example, Koschade and Peters (2006) illustrate how the procedural rules governing the kinds of evidence and forms of standing admissible to the Ontario Environmental Review Tribunal (Canada) negatively impacted the Ardoch Algonquin First Nation and Allies (AAFNA) from effective participation in river governance-related legal proceedings and access to justice. The epistemological basis of the AAFNA's holistic understanding of the community's place in the wider environment, their traditional ecological knowledge and their assertion of responsibility to their territory – as opposed to rights over resources – were considered incompatible with the procedures and standards applied by the Tribunal. The limitations of the Tribunal's administrative rules, forged by and subsequently reflecting Euro-Canadian understandings of 'rights' and 'ecosystems', resulted in the legal invisibilising of the AAFNA's belonging, role and knowledge of a physical geography.

Fifth, legal geographers also historicize legal spaces to illustrate the evolution of and evolving relationships between laws, space and power (Valverde, 2014). As noted by Guy Debord, "To reflect upon history is also, inextricably, to reflect upon power" and therefore also law (quoted in Agarwal, 2005: 1). Just as Graham (2010) shows how laws 'de-physicalises' places by abstracting the lived connection between people and places across 'lawscapes', so Wily (2011) illustrates how law can be weaponised[26] by colonial and post-colonial administrations to effect administrative expropriation and deny large numbers of Africans title over traditional lands. Wily highlights the ability of the law to make legal what might otherwise consider to be unjust. Colonial governments, in many countries across the African continent, became owners of most of the land while ordinary people became, as per colonial laws, 'permissive occupants'. Wiley explains (2011: 752):

[25] Bartel (2017) coined the term, a 'plegal', to refer to the place-based interrelations between laws and geographies.
[26] This is also referred to as "lawfare" (Braverman et al., 2014: 14).

while clearly not the driver of dispossession, the law is the culpable hand-maiden or enabler of policies which foster capitalist transformation through conventional dispossessory routes, and in the case of Africa, in conditions where governments are hardly impersonal arbiters.

Power, law and space – underscore legal geographers – are operating simultaneously, and have been for a long time. Legal geography helps to make visible these technologies of power that are otherwise obscured, actively concealed and/or legitimised through conventional spatial imaginaries and technocratic professional discourse (Kedar, 2006; Braverman, 2012; Delaney, 2015). In this way, legal geographers challenge the "unwitting reification" and apolitical understanding of space (Valverde, 2014: 53).

Drawing on a broad body of legal geography scholarship, Delaney (2017) notes that the field has its own geography and favoured themes. The scholarship initially focused on Northern subjects and within common law jurisdictions (Delaney, 2015, 2016, 2017), and with a marked lack of engagement with environmental issues (Andrews and McCarthy, 2014). More recently, the work is diversifying its focus and geography (Braverman et al., 2014; Delaney, 2017), and to subjects specifically relevant to this critical analysis – such as justice (Raustiala, 2004), international law (Pearson, 2008; Mahmud, 2010), rights of nature (Burdon, 2010), and protected areas (Gillespie, 2020). My research on protected and conserved areas and within local-to-international legal spaces contributes to this new wave of South-based and multi-scalar legal geography. Moreover, legal geography's demonstration of "how unjust geographies are made and potentially un-made" Delaney (2015: 2) informed my work as a scholar*ly* activist (see **Annex IV**) to aspire towards transformative change. This approach influenced my research and activism on area-based conservation and helped me to move beyond a focus on 'rights-based approaches to protected areas' (**Chapter 5**) to develop a new kind of conservation designation, namely 'other effective area-based conservation measures' (**Chapter 6**).

2.6 Theoretical contribution

'Legal-political ecology' is an overarching term for a set of interrelated (not necessarily integrated) concepts that, in my experience, are required to engage critically with the issues on which I work and to co-produce research that is relevant to and grounded within local realities. Applying a legal-political frame, begins by requiring me to be explicit about my own positionality and assumptions. It subsequently entails and enables:

- An explicitly political, normative approach to my research;
- Politicising, denaturalising and historicising phenomena, particularly supposedly 'value neutral' legislative and judicial spaces, systems and experts;
- Being attentive to scales and networks from the (intra- and inter-)local to national, regional, international and global scales;
- Thinking critically about the interrelationships between laws and spaces (that interrelate to create places and lawscapes), including though territorialisation and governmentality;
- Problematising and critiquing key concepts such as 'environmental justice', 'equity' and 'participation' as well as 'law' and 'rights';
- Appreciating the cultural bases, jurisgenerativity and normative validity of Indigenous Peoples' legal and normative systems despite mainstream contestation of their existence or

value (i.e., deep legal pluralism, but not one that denies the importance and power of state laws and institutions);

- Challenging state centrism, the validity of the concomitant undervaluation, marginalisation and active suppression of Indigenous Peoples' laws and normative systems, and the universality of international law, operating from the local-to-global levels; and
- Problematizing the notion of 'marginalisation', i.e., by investigating diverse forms of Indigenous Peoples' agency.

Taken together, a legal-political framework legitimises, provides theoretical anchoring and contributes to the claims made by Indigenous Peoples in their declarations and protocols. In turn, Indigenous scholars' work and Indigenous Peoples' declarations and protocols add a normative centring to the literature and thereby ground and inform legal-political ecology as a theoretical framework. My theoretical contribution, in the first instance, is not *to* political ecology, jurisprudence, legal pluralism, CLS and/or legal geography, *per se*, but is to having made the connection between these diverse concepts. In a modest way, it has also contributed to legal geography by describing the local-to-international relationships between law and space in the context of area-based conservation, and is part of the shift towards South-based and multi-scalar legal geography. My research underscores the need to use these insights to reclaim, revitalise and/or create spaces for Indigenous Peoples' laws and normative systems to be expressed, operate and evolve naturally, and to interact with other systems, on their own terms, and subject to rights-based safeguards. As demonstrated in the next chapter, when legal-political ecology is *applied* at the local-to-international levels in ways that are participatory, the framework has the potential to have transformative and emancipatory impacts.

3. Methodology, methods and intended impacts

The success of an intervention depends on the interior condition of the intervener.
Bill O'Brien

We call this merger of indigenous and critical methodologies 'critical indigenous pedagogy' (CIP). It understands that all inquiry is both political and moral. It uses methods critically, for explicit social justice purposes. It values the transformative power of indigenous, subjugated knowledges. It values the pedagogical practices that produce these knowledges, and it seeks forms of praxis and inquiry that are emancipatory and empowering.
Norman Denzin, Yvonna Lincoln and Linda Tuhiwai Smith (2008: 2)

Unlike many other dissertations, the methodology and methods that were applied to the research set out in this critical analysis were not pre-defined. Instead, they evolved organically in response to the issues with which I engaged in the course of my work; i.e., they are Indigenous-informed and arose from my scholar*ly* activism as an environmental lawyer (see **Annex IV** for a description of these two concepts). This section therefore sets out a retrospective understanding of my methodology and methods, re-storying the approaches adopted, applied and reflected upon (Wayne et al., 2014). I then explain how 'participatory legal-political ecology' relates to the emancipatory and transformative impacts that I have aspired to catalyse through my work.

3.1 Methodology

While I did not use these terms at the time, my methodological approach is transdisciplinary (Lang et al., 2012) and includes a strong focus on knowledge co-production (Norström et al., 2020) at the local and international level. First, at the local level, my methodology is based on principles of participatory learning and action research (Chambers, 1983, 2008; Mikkelsen, 1995; Mukherjee, 2002; Bozalek, 2011) and includes aspects of longer term ('life-long') action learning (Zuber-Skerritt & Teare, 2013), traditional action research (Lewin, 1946, 1948, 1951; McNiff, 2013; Stringer, 2013), and participatory action research (Freire, 1972; Fals Borda and Rahman, 1991; Fals Borda, 1998; Koch and Kralik, 2006; Hunter et al., 2013; Reason and Bradbury, 2013). It also contains elements of transcendental phenomenology, as I strive to make a concerted effort to be self-aware about my own preconceived worldview (Plummer, 1983; Stanley and Wise, 1993; Kaplan and Davidoff, 2014) and not to intrude on the essential aspects of participants' accounts (Moustakas, 1994). Second, at the international level, I applied doctrinal legal research methodology (Hutchinson and Duncan, 2012), with multi-sited ethnographies (Marcus, 1995) applied to understand the dynamics operating within and between international legal fora and a diversity of actors including international organisations, non-governmental organisation (NGO) representatives and Indigenous Peoples' organisations.

I had not read Linda Tuhiwai Smith's *Decolonising Methodologies* (1999) or *Handbook of Critical and Indigenous Methodologies* (Denzin et al., 2008) until the writing of this analysis, but their work on critical Indigenous pedagogy, quoted above, resonates with the principles and values that guided my approach. This includes remaining suspicious of processes that purport to be participatory or based on principles of co-production of knowledge – such as being context-based, pluralistic, goal-oriented,

and interactive (Norström et al., 2020) – yet which are "manipulative" (Cooke and Kothari, 2001: 1) and driven by externally dictated objectives and/or facilitated in ways that centralises power in the hands of a core group; often external actors and/or the project coordinators. Understanding that co-production of knowledge is a spectrum, I worked to deepen my approach to ensure processes remain as genuinely locally-initiated and facilitated as possible (see for example, Shrumm and Jonas, 2012a, 2012b). As a result of the above, my approach has been qualitative, my methodology's ontology is relativist and the epistemology both etic – as a British person working in other countries, reflecting on cultural similarities and shared values, and emic – paying respect to cultural differences and local individuals descriptions of their endemic value systems.

3.2 Methods

My research methods have been driven by wanting to understand, engage and find solutions to real-world problems at the local-to-international levels. Between 2008-2012, I worked with members of the Khomani San (Northern Cape, South Africa), Sepedi and Tsonga 'Kukula traditional health practitioners' (Mumalanga, South Africa), Samburu pastoralists (Samburu, Kenya), Raika camel herders (Rajasthan, India) to support them to conserve and promote their natural resources and traditional knowledge, including by developing community protocols. In a lesser capacity, I supported processes with Dusun communities in Ulu Papar and Sungai communities in the Lower-Kinabatangan Segama Wetlands Ramsar Site (Sabah, Malaysia). Methods used include 'participatory advocacy' (Jovanovic, 2007, Kahn, 2011; Rodino-Colocino, 2011) and included participatory mapping and photography, group development of timelines, participatory theatre, semi-structured interviews, future scenarios and legal empowerment (Shrumm and Jonas, 2012a, 2012b).

At the heart of this work was a form of research and activism rooted in local experiences, problematised by legal-political ecology, and informed by the literature. Influenced by work by Paolo Freire (1972), and other critical pedagogists (Hope and Timmel, 1984), colleagues at Natural Justice and Forever Sabah and I strove to ensure the communities with whom we worked retained their positions at the centre of the respective processes, positioning ourselves as facilitators to further their reflection, and using diverse methods (**Figure 1**). To capture the local processes, I used note-taking and photography. We analysed the outputs by having focused discussions between the researchers as well as facilitating follow-on community meetings and workshops to enable the communities to collectively elaborate conclusions.

I augmented the local research with descriptive, analytical, quantitative and applied legal research (Banakar and Travers, 2005), with which I engaged national and international law, and with multi-sited ethnography, semi-structured interviews and participant observation to understand dynamics within international fora such as meetings of the CBD and IUCN. From 2012-2016, I used legal research to develop the *Conservation Standards* (Jonas et al., 2014a, 2014b, 2016). My initial work on OECMs (Jonas et al., 2014) was informed by my earlier work on community protocols but generated through legal research and interviews.

Figure 1: Discussion with a community near Sadri, Rajasthan (India) to discuss grazing rights in the Kumbhalghar Wildlife Sanctuary. © Harry Jonas, 2011.

Once I became co-chair of the IUCN WCPA Task Force on OECMs, this reverted again to methods more related to participatory learning and action research as I engaged with a wide variety of individuals involved in area-based conservation and actively involved them in conceptualising and developing guidance on OECMs. Facilitation of a range of workshops has included sessions intended to disrupt existing patterns of behaviour among members of the group, such as asking conservation professionals to express their *feelings* about OECMs (Jonas and Mackinnon, 2016a) as well as supporting participants to develop priorities, run sessions and co-develop outputs with only minimal inputs from facilitators (Jonas and MacKinnon 2016b, 2017; Jonas and Sandwith, 2019. See **Figure 2**).

Figure 2: Images from a meeting of the Task Force on OECMs (Germany, June 2019) at which the participants self-facilitated sessions and led on output development, including the draft 'OECM site-level assessment methodology'. © Harry Jonas, 2019.

I used multi-sited legal ethnographies (Starr and Goodale, 2002), semi-structured interviews and participant observation to understand power and processes within the mainstream conservation community. For example, individuals within the WCPA are diverse yet can be characterised by a shared professional culture and operate according to embedded social relationships and power structures.[27] Understanding their internal working and international role vis-à-vis the CBD, for example, has been a critical factor in the impact of my research on OECMs. Brosius (1999) and Braverman (2014) add credence to this approach, arguing that environmental law is an especially relevant field in which to conduct such studies, including the imperative of studying 'up' (Nader, 1972) to communities within international law and policy-related processes and urging researchers to avoid a limited focus on members of Indigenous Peoples and local communities who form the mainstay of traditional ethnographies. To this I added legal research and literature reviews, for example, to understand the history and trajectory of mainstream conservation and its effects upon Indigenous Peoples.

All of the above now contributes to the latest phase of writing about Indigenous Peoples and the post-2020 Global Biodiversity Framework. A summary of the methods used per category of work is set out in **Table 1**.

Table 1: Summary of scale-specific methods per area of work.

Area of work	Scale	Methodology	Methods
Community protocols (2008-2012)	Community level - with the Khomani San and Kukula (South Africa), Samburu (Kenya), Raika (India), and Dusun (Malaysia)	Participatory learning and action research.	Participatory advocacy, participatory mapping and photography, group development of timelines, participatory theatre, semi-structured interviews, evaluating future scenarios, legal empowerment. NB, I co-facilitated the work in South Africa, Kenya and India. The work in Malaysia was led by others.
	International level	Legal research and multi-sited ethnographies.	Descriptive, analytical and applied legal research, semi-structured interviews, participant observation and literature reviews.
Conservation Standards and the Living Convention (2012-2016)	Community level	I did not undertake new local level research, but the ideas that informed the work were drawn from the research undertaken from 2008-2012 (above).	As above.
	International level	Legal research.	Descriptive, analytical and applied legal research and systematic literature review.
OECMs (2014-2020)	Community level – existing research as	Participatory learning and action research. I drew on the research	The work included participatory mapping, timelines and

[27] As part of the system I am studying and working to reform, I too have become the subject other people's work – namely three PhD candidates who have interviewed me about my role as a co-chair of the IUCN WCPA Task Force on OECMs. At first I was an outsider to mainstream conservation. I am increasingly an insider. This transition is not necessarily good or bad, but must be made explicit and reflected upon.

	well as with Sungai communities in the Lower-Kinabatangan Segama Wetlands Ramsar Site (Malaysia)	undertaken between 2008-2012 as well as new research in Malaysia from 2014-2017.	photography. NB, unlike the community work undertaken from 2008-2012, I was not leading this work. The experience was nevertheless highly instructive.
	International level	Legal research, multi-sited ethnographies and participatory learning and action research.	Descriptive, analytical and applied legal research, semi-structured interviews, participant observation and literature reviews.
Indigenous Peoples and the post-2020 Global Biodiversity Framework (2018-2020)	Local	I did not undertaken new local level research, but I drew on my previous work (above).	As above.
	International level	Legal research.	Descriptive, analytical and applied legal research and literature reviews.

There are two final concepts that have been present within my work, namely humanisation and optimism. To engage with people and places in the twenty-first century often requires us to acknowledge that grievous social and ecological harms have been perpetrated. Humanising processes can be a first step to enable the collective actualisation of more harmonious futures (Cynthia Ong, pers. comm., 2018). Optimism is the logical corollary.

A possible downside of my transdisciplinary approach relates to the danger of 'slurring' (Baker et al., 1992), whereby rigour can be diluted through the mixing and inexact application of methodologies and methods. Another potential difference between the present approach and more formal research is the question of independence. The long-term and fully-embedded nature of the action research, operating at multiple scales, has provided insights into a diversity of people's lives and places in deeply personal ways; experiences and connections for which I am grateful. This has enabled increasingly frank engagement but carries the potential to lead to the development of group bias (Brewer, 1979). To address this concern, the trustworthiness of the methodology and methods (Lincoln and Guba, 1985) have been continually tested through the feedback loop integral to participatory learning and action research. As discussed the next section, the production of papers and this critical analysis are further examples of my commitment to ongoing reflexivity.

3.3 Developing an increasingly reflexive activism through writing and publishing

As I began to work with Indigenous Peoples in 2006, I found there to be a clear feedback loop between the evolution of my theoretical framework and methods. For example, personal breakthroughs in my conceptual framework enabled me to co-develop with participants and colleagues more locally-appropriate, participatory methods, and vice versa. Consequently, I began to think of the integration of my theoretical framework, methodology and methods as 'participatory legal-political ecology' (**Figure 3**).

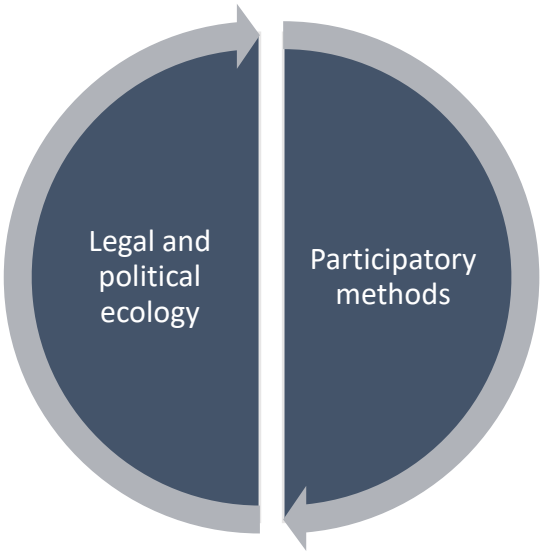

Figure 3: My early work demonstrated to me the positive feedback loop between my theoretical framework and my participatory methods.

As I applied participatory legal-political ecology within my work in South Africa, Kenya and India, (2006-2012), I began to produce publications as an integral part of my activism. Writing about my work enabled me to engage rigorously with the literature and to challenge my own assumption. I found that the writing of a paper required me to step back from my day-to-day local work and international advocacy to reflect, read and analyse the literature as well as work intensively to order and present my ideas (as a form of praxis). I found this cyclical process to be beneficial for critiquing my work and sharpening my approach to future research and advocacy. Furthermore, active dissemination of papers and publishing of papers in journals read by practitioners was deployed to quickly communicate current thinking and seed debate (particularly, Jonas et al., 2014, 2017, 2018; Jonas and MacKinnon 2016a, 2016b, 2017; Jonas and Sandwith, 2019; Jonas and Jonas, 2019).

Figure 4: My theoretical framework, methodology and methods form part of a broader process intended to improve the quality of my research, advocacy skills and strategic focus.

Figure 4 illustrates how I used publications as a *means* by which to articulate ideas that emerged from my research and local-to-global advocacy and, in turn, use them to generate feedback and to contribute to personal and group reflections about next steps. Notably, Figure 4 expresses a reflexive cycle focused on critiquing my work and improving my research, advocacy skills and strategic focus, *not* in the first instance on generating impact – which I discuss in the next section. Beyond this cycle, each paper had a specific strategy that informed its writing and publication, which I set out per paper in **Chapters 4-7**.

3.4 From participatory to transformative: three levels of emancipatory and transformative impact

I applied 'participatory legal-political ecology' to catalyse impacts at three levels. The first is personal – the inner dimension (Grenni et al., 2020). Before I could offer anything to the world, I had to 'unlearn' the certitude of my schooling and reconstitute aspects of my essentialised identity (Aedo et al., 2019). I realised I needed to embrace new ways to see and be in the world.[28] I drew upon the ideas and experiences generated through the application of participatory legal-political ecology to challenge and subsequently transform my own ontology and epistemology. In retrospect, this openness to change signifies an acknowledgement that to be a changemaker[29] I also had to be open to personal transformation and embrace my own conceptual evolution, which in turn were catalysed by the things I was aiming to change. Put another way, to engage with power relations within social-ecological systems using participatory legal-political ecology was *to be transformed* by what I subsequently witnessed and understood about myself and the world.[30]

The second level of impact I worked towards is within and between communities and vis-à-vis external actors. I applied participatory legal-political ecology to support the emancipation of individuals with whom I worked, to enable them to more keenly critique and challenge the power relations and systems in which they were situated. Co-developing 'community protocols', as an emancipatory and transformative form of legal empowerment, is an example of this work (**Chapter 4**).

Change in law, policy, institutional arrangements and practice at the national and international levels relating to human rights and mainstream conservation is the third form of transformation that I have worked to promote. This has been attempted by applying participatory legal-political ecology to conservation law and policy to produce the *Conservation Standards* (**Chapter 5**), ideas about 'other effective area-based conservation measures' (**Chapter 6**), and influencing the development of the

[28] Santos (2017: 258) states that: "For more than 40 years I have been teaching at universities where we have often spent too much time training incompetent conformists. It is now time for us to train competent rebels". Perhaps I intrinsically felt like the product of the former process and realised I needed to work towards equipping myself with the characteristics of the latter.

[29] Ashoka uses the term 'changemaker' in relation to people who work towards a range of types of local-to global change. I became an Ashoka Fellow in 2012 for my contribution to Natural Justice's work on community protocols.

[30] We are intentional beings, and we must be disciplined enough to intend our own openness or receptivity, else we impose ourselves in a way that elicits a presumption, a closing down, a boredom, a conservatism and fundamentalism, a laziness. A delicate activism, what- ever else it does, intends its own openness and receptivity as much as it does its desire for change. It seeks to change the world through being open to being changed by the world. (Smith, 2010, quoted in Kaplan and Davidoff, 2014: 30).

post-2020 Global Biodiversity Framework (**Chapter 7**) as a means to catalyse systemic change within international conservation law, policy and practice, with differing rates of success.

Through the writing of this critical analysis I have problematised this approach. Adding to it the four dimensions of conflict transformation (Lederach, 2015)[31] helps to illustrate the fact that the four dimensions are relevant to each of the levels I have aspired to impact through my activism and research (**Table 2**).

Table 2: Lederach's four dimensions of conflict transformation mapped against the two levels of intended impact of my activism and research.

Levels of intended impact	Types of conflict transformation	Description
Indigenous Peoples – at the local level	Personal	Increase creativity, critical reflexivity and agency.
	Relational	Deepen authentic communication and related strategies and actions to address conflict.
	Structural	Understand and address root causes and social conditions that give rise to violent and other harmful expressions of conflict. Promote nonviolent mechanisms that reduce adversarial confrontation and that minimize and ultimately eliminate violence.
	Cultural	Identify and build upon resources and mechanisms within a cultural setting for constructively responding to and handling conflict.
National and international law, policy and practice – with a focus on individuals, structures and processes related to UN and governmental agencies, funders and mainstream conservation NGOs	Personal	Increase creativity, critical reflexivity and agency, particularly in relation to changing attitudes and approaches to Indigenous Peoples and justice.
	Relational	Minimize poorly functioning communication and maximize understanding. Bring out and work with fears and hopes related to emotions and interdependence in the relationship.
	Structural	Foster the development of structures to meet basic human needs (substantive justice) and to maximize participation of people in decisions that affect their lives (procedural justice).
	Cultural	Identify, understand and address the cultural patterns that contribute to the rise of expressions of conflict.

In conclusion to **Part I** of this critical analysis, it is now clear to me that I have been reaching for a comprehensive approach to my activism as a lawyer working for locally-defined justice in the context of social-ecological systems, which I now refer to as *transformative* legal-political ecology. **Figure 5** illustrates the most up to date expression of this approach, by illustrating as building blocks: 1) my theoretical framework, 2) methodologies and methods, 3) strategies and actions, and 4) intended impacts. The articulation of this framework in this critical analysis is enabling me to critique the strategies applied to each area of work more rigorously than ever before and represents an important advancement in the way I analyse my past research and conceptualise and plan my present and future work.

[31] Lederach's work draws on Ken Wilber's Integral Theory and the four quadrants of change framework (Wilber, 2000).

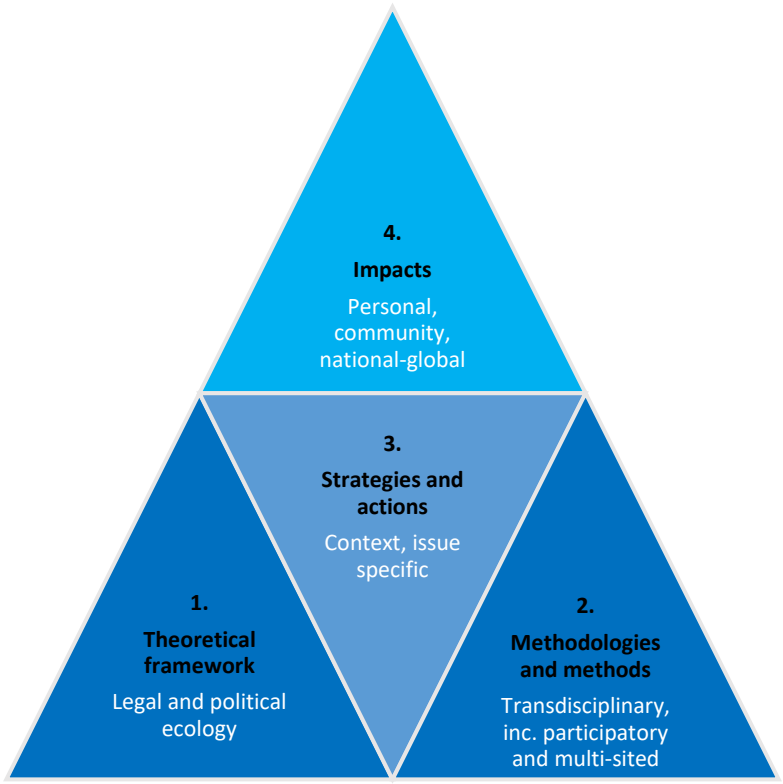

Figure 5: Transformative legal-political ecology is effected through the dynamic relationships between my 1) theoretical framework, 2) methodologies and methods, 3) strategies and actions, and 4) intended impacts.

II.

CRITICAL ANALYSIS OF THE PUBLICATIONS

4. Community protocols

This is our community protocol. It is an articulation of the integral role of our breeds in Samburu culture and their importance to the world. It seeks to establish the significance of our way of life and the value of our indigenous breeds, and that as the keepers of important livestock populations we have a right to maintain our way of life. It clarifies for others on what terms we will permit activities to be undertaken on our land or regarding our breeds and traditional knowledge.

Samburu Community Protocol (2009: 1)

This section analyses a paper entitled 'ABS and Biocultural Community Protocols' (Jonas et al., 2010).[32] The paper represents an example of my examination of the relationship between Indigenous Peoples, their natural resources, associated traditional knowledge, and legal frameworks relating to access and benefit sharing (ABS), with a focus on legal empowerment and community protocols, from across a range of publications that colleagues and I produced between 2008 and 2014.[33]

4.1 Situating the work within the law, policy and literature

Despite the great diversity that exists between Indigenous Peoples around the world, there is a discernible consensus across their myriad statements, declarations and protocols about the interconnected nature of their worldviews, territories and natural resources, forms of spirituality and culture, and their institutions, customary laws and traditional knowledge (as set out in **Section 2.1**). While many aspects of Indigenous Peoples' lives were either discredited or suppressed from encounters with colonial actors onwards, researchers in the twentieth century became increasingly interested in their traditional ecological knowledge (Berkes, 1999), particularly relating to the properties and uses of genetic resources. An understanding of traditional uses of genetic resources can greatly speed up the discovery phase of new products in the fields of medicine, biotechnology and pharmacology, as well as for aquaculture, agriculture and products relevant for industrial processes. The trend of researchers accessing Indigenous Peoples' traditional knowledge without full disclosure of the purposes of their work and a lack of sharing of profits generated by the resultant products led to claims of 'biopiracy' (Shiva, 2007). Parties to the CBD – whose aims are to promote *in-situ* conservation and sustainable use of biodiversity and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources (CBD, Article 2) – agreed on the need to address this injustice. That international process would culminate in 2010 with the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (CBD, 2010b).

[32] Jonas H.D., Shrumm H., and Bavikatte K., 2010. ABS and Biocultural Community Protocols. *Asia Biotechnology and Development Review*, 12:3. Further information on this publication, including the abstract, methods and findings, is provided in **Annex I**. Related, authored publications are set out in **Annex II**.

[33] With regard to my use of 'I' and 'we', much of my work on community protocols was conducted intensively with a small number of the original members of Natural Justice. I use 'we' when the ideas and work emerged from the group, and 'I' when I refer specifically to something I did or wrote. I use the same formulation in **Chapters 5-7** vis-à-vis my co-authors in that work.

In parallel to these developments, the San – a collective term for a number of linguistically distinct groups living in the Kalahari and beyond – had claimed that they had been the victim of biopiracy relating to their traditional knowledge of the *Hoodia* plant. An ABS agreement was subsequently reached between the South African San Council and the Council for Scientific and Industrial Research in 2003 (Wynberg 2004; Vermeylen 2007, 2008; Bavikatte and Jonas, 2009).

At the time of writing of the paper, the literature on ABS fell into at least three main camps. A number of scholars argued against the commercialisation of traditional knowledge on the basis that ABS, among other things, constituted a form of neo-colonial expansion into Indigenous Peoples' lives (Shiva, 2007). Another group was producing technical analyses of how the future ABS architecture might work, with a focus on issues such as international (Sampath, 2005) and domestic institutional arrangements (Crouch et al., 2008), and the implications for issues such as conservation (Rosendal, 2006) and biological control (Cock et al., 2010).[34] A third group, in which my colleagues and I were most interested, were producing papers based on experience and/or research on examples of ABS, most notably the *Hoodia* case (Wynberg, 2004; Vermeylen, 2007, 2008, 2010; Wynberg et al., 2009).[35] At the international level, the nuances expressed within the literature was often lost, with competing sides depicting the *Hoodia* case, and ABS more generally, as either a victory for Indigenous Peoples or an unfolding travesty of justice.

4.2 Applying a legal-political ecology frame

During my work on community protocols, I drew largely on political ecology and legal pluralism, less on concepts from legal geography. In particular, because this was the first work I was undertaking with Indigenous Peoples, I drew upon political ecology scholarship – first and foremost – to be explicit about my own positionality and assumptions, while striving neither to essentialize community members nor assume any level of homogeneity or unity (Vermeylen, 2013). A legal-political ecology frame, supported us to engage with access and benefit sharing law in ways that extended far beyond a narrow intellectual property understanding of the issues. Colleagues and I attempted to understand the multifaceted levels of injustice operating in the Kalahari, as well as in Mpumalanga (South Africa), Samburu District (Kenya), Rajasthan (India), and Sabah (Malaysia), by exploring the power dynamics we witnessed through critical engagement with the social, political *and legal* history of each respective place. For the San, for example, this meant engaging with the broader history of Southern Africa and the evolving relationships between the San, other groups in the region – including white farmers and Herero cattle livestock keepers, and Apartheid and post-Apartheid governments. It also usefully shifted our *prima facie* focus on local legal issues to *also* include analyses of the relationships between law, power and intra- and inter-community dynamics operating at and between the local, national, regional (across the Kalahari and between South Africa, Namibia and Botswana), and international levels. We came to understand law as a conduit of power – or 'vector' in Bennett's terminology (2016) – which operated at local-to-global levels and which produced and reproduced inequalities.

[34] Some of this work, influential with African stakeholders, emerged from the ABS Capacity Development Initiative: www.abs-initiative.info/

[35] A fourth group of relevant researchers did not engage with ABS but their work is relevant to understanding the *Hoodia* case because of their engagement with San communities across the Kalahari, particularly focusing on the San's dual status as hunter gatherers and as a highly marginalised underclass (Suzman, 2001; Sullivan, 2001; Lee, 2003; Sylvain, 2003).

Applying a strong form of legal pluralism to our work with the respective Indigenous Peoples, enabled a critical engagement with multiple, overlapping and contested legal and normative systems. It brought to the fore the *prima facie* divergent epistemological foundations between the respective Indigenous Peoples' with whom we worked and the more mainstream, Western conceptions of traditional knowledge/intellectual property. We were also positioned to witness how national and international laws privileged and legitimised the latter, while delegitimizing Indigenous Peoples' conceptions of traditional knowledge and related laws. It also emboldened our focus on engaging with communities' customary legal and normative systems. In particular, this revealed 'legal empowerment' as being more than helping communities to understand and engage with state and international systems, to become instead a process of facilitation to support them to draw deeply on their own systems and to explore how state and international law supports or undermines those values, systems and institutions. Regarding the San access and benefit sharing discussions, legal pluralism also focused our attention on the twin processes of internal marginalization within San communities and the conceptual restrictions placed on those that assumed leadership positions due to the framing of the deal and post-deal governance framework (Vermeylen, 2013).

This theoretical framing enabled us to interrogate the local-to-global dynamics and to understand Indigenous Peoples' need to claim or create spaces for respectful intercultural encounters that could generate emancipatory relationships and transformative outcomes.[36] This led to the co-development of 'community protocols' as an endogenous and community-led process of organisation and tool for engaging external actors.

4.3 Publication strategy

The paper was to be published immediately following the adoption of the Nagoya Protocol, when it was expected that there would be an increase in bioprospecting on Indigenous Peoples' territories. Our intention was twofold: first, to draw on our experiences of working with San community members and use a legal-political ecology perspective to add insight to the normative arguments concerning the San *Hoodia* case; and second, to present community protocols as a practical means by which Indigenous Peoples could assert their right to free, prior and informed consent (FPIC) over any further ABS processes, or other issues that may arise. We published in a UNEP and UNESCO-edited Special Issue of the *Asia Biotechnology Development Review* to increase its visibility.

4.4 Contribution to knowledge and impact

Reflecting on the methods and findings (**Annex I**), the paper's contribution to knowledge relates to the way in which community protocols attempt to advance the concept of 'research protocols' to bring into being a type of hybrid legal space that embodies the principles set out by Coyle (2020), quoted in **Section 2.4.3**. Reviewing that list, it closely resembles the principles we developed in 2012

[36] "Such encounters should not be viewed as valueless relativism aimed at achieving agreement or compromise—an undiscriminating grey zone with all perspectives equally viable, and as a result, equally uncompelling. Instead, these encounters are among valued worldviews, ideologies and identities of Indigenous Peoples and others seeking to achieve a sustainable, dynamic and respectful relationship with other powers and peoples." Henderson 2002: 51.

that should be upheld by processes that develop community protocols or in which they are used, see **Box 2**.

Box 2: Guiding principles for the development of community protocols (Shrumm and Jonas, 2012a: 21)

The development of a bona fide biocultural community protocol (or other community-based instrument for engaging external actors) ...

... is a community endeavor that:
- Is endogenous
- Is empowering
- Is based on communities' values and procedures, while including the fullest and most effective participation of community members
- Promotes intra- and inter community dialogue, and intergenerational discussions
- Fosters consideration of the interlinkages between social, economic and spiritual wellbeing
- Explores the diversity of knowledge and skills in the community
- Draws on the communities' own resources and resilience
- Further develops community collaboration on useful methodologies

... and focuses on and integrates:
- The values and customs relating to their collective biocultural heritage
- Current strengths, challenges and future plans
- Their rights at the international and national levels that support their ways of life and their corresponding duties
- Messages to specific agencies about how they intend ...

... to produce a protocol that is:
- Value laden
- Presented in a form that is most appropriate for the community while effectively communicating their key points to the relevant authorities / bodies ...

... towards:
- Establishing the community's/ies' rights and duties relating to their stewardship of their collective biocultural heritage
- Respect for and realization of procedural and substantive rights and responsibilities
- Increasing their agency
- Improving access to information, participation and/or justice
- Improving dialogue with other communities or outside agencies
- Further developing flexibility and adaptability
- Promoting local social, environmental and economic equity ...

... and where outsiders assist a community with any aspects of developing or engaging the community through a protocol, they should engage the community with:
- Honesty
- Integrity
- Transparency
- Respect
- Social and cultural sensitivity to local processes and timeframes.

Community protocols represent a real-life contribution to legal pluralist thought about the importance of "space for indigenous legal traditions" (Newman, 2020: 833), "a forum for dialogue across difference" (Berman, 2020), "spaces for resistance" and represent the creation of "hybrid spaces where normative systems and communities overlap and clash" (Vermeylen, 2013: 200, 187). Our work responds to Berman's call (2020: 2) "to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically" and to act as "bridge in normative space that connects the world-that-is with the worlds-that-might-be" (Cover, 1992: 176).

Figure 6: Clockwise from the top: A Samburu herder (Samburu District, Kenya), Gamnaram Raika, Raika camel herder (Rajasthan, India), Mimi and Anna Festus, Khomani San (Upington, South Africa). © Harry Jonas. Photos used with consent.

Our work on community protocols led to four levels of impacts. First, at the local level, the approach has been adopted by a number of Indigenous groups and local communities around the world to

protect and affirm a range of their rights and responsibilities, including in Brazil, Colombia, Malaysia, Namibia, Peru and South Africa (Swiderska, 2012).[37] In relation to Lederach's four dimensions of conflict transformation (2015), this includes emancipatory effects at the personal and relational levels – through the processes of developing the community protocols, and impact at structural and cultural levels, including through the use of the community protocols to engage outsiders.

Second, at the international level, the term 'community protocols' was referenced in the Nagoya Protocol (CBD, 2010b) and subsequently defined in the Mo' otz Kuxtal Voluntary Guidelines (CBD, 2016).[38] The internationally-agreed definition clearly illustrates the issues for which colleagues and I advocated for at the CBD. The ABS Clearing House now acts as a repository of community protocols[39] and communities and practitioners are learning from other communities' protocols. For example the Samburu protocol has been viewed over 2,000 times.[40] This illustrates the fact that the work has led to cultural and structural changes in ABS law and practice, and perhaps personal and relational changes in the way ABS is now conducted, though I have not researched this latter suggestion. Third, academics and practitioners are engaging actively with and further evolving community protocols in law, policy and practice.[41]

Fourth, the work had an enduring personal impact on my thinking about law and social-ecological systems. The following paragraph in the paper highlights a dynamic that was revealed to me through the research:

[37] www.naturaljustice.org/community-protocols

[38] Definition of 'community protocols' from the Mo' otz Kuxtal Voluntary Guidelines (2016): *Community protocols* is a term that covers a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards. Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders to better understand the community's values and customary laws. Community protocols provide communities an opportunity to focus on their development aspirations vis-a-vis their rights and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders. By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors. (Original emphasis)

[39] https://absch.cbd.int/search/referenceRecords?schema=communityProtocol

[40] https://www.yumpu.com/en/document/view/13131292/the-samburu-community-protocol-natural-justice

[41] Practitioners and scholars have engaged with community protocols in the following contexts: pastoralists (Köhler-Rollefson, 2010; Köhler-Rollefson et al., 2012), farming communities (Franco et al., 2011), the Potato Park in Peru (Argumedo, 2012), traditional healers in South Africa (Sibuye et al., 2012), defending territories in Colombia and Malaysia (Piedrahita and Mosquera, 2012; John et al., 2012), forest monitoring in Cameroon (Lewis and Nkuintchua, 2012), sacred groves and gold mines (Yangmaadome et al., 2012; Yangmaadome and Banuoku, 2012), ethical biotrade (Oliva et al., 2012); biodiversity and culture (Swiderska et al., 2012), stakeholder and power analysis (Brouwer et al., 2012), environmental sustainability (Jukic and Collings, 2013), managing the commons (Tsioumani, 2013), prior and informed consent in Brazil (Castro and Ramos, 2016), resistance to exclusion in global environmental governance (Delgado, 2016), community-based co-design projects in Namibia (Kapuire et al., 2017), efforts to combat marginalisation by the Embera people of Colombia (Nemogá et al., 2018), equity and benefit sharing (Parks, 2018, 2020); recognition of customary laws and institutions in domestic ABS legislation (Arjjumend, 2018), the bio-commons (Girard, 2018), traditional knowledge and genetic resources (Suvanto, 2020), and genomic data (Hudson et al, 2020).

> *The implementation of such laws compounds these challenges by requiring communities to engage with disparate stakeholders according to a variety of disconnected regulatory frameworks, many of which may conflict with their customary laws and traditional governance structures. Communities thus face a stark choice to either spurn these inherently limited frameworks (something which is a virtual impossibility, considering the ubiquitous nature of State law) or engage with them at the potential expense of becoming complicit in the disaggregation of their otherwise holistic ways of life and governance systems. If the latter is chosen, the resultant challenge is for communities to draw upon and further develop appropriate means to effectively engage with State and international legal-policy frameworks, specifically in ways that accord with their biocultural heritage, support their integrated systems of ecosystem management, are commensurate with their customary laws, and recognize traditional forms of governance. In the absence of such approaches, the very act of using rights can be disempowering and disenfranchising*. (Jonas et al., 2010: 59-60)[42]

I re-engaged these issues during the development of the *Conservation Standards*, which is analysed in the next chapter.

[42] This insight also inspired my work on the Living Convention (first published in 2012, now: Jonas 2020; Jonas and Godio, 2020) and led to the commissioning of the living/legal landscape image, reproduced in **Annex V**.

5. Rights-based approaches to protected areas

... injustices to indigenous Peoples have been and continue to be caused in the name of conservation of nature and natural resources...

IUCN Resolution No. 4.052, Implementing UNDRIP (2008)

This section analyses three conservation-related, international human rights-focused publications, namely: *Which International Standards Apply to Conservation Initiatives?* (Jonas et al. 2014a), *Human Rights Standards for Conservation: An Analysis of Responsibilities, Rights and Redress for Just Conservation* (Jonas et al., 2014b) and *Conservation Standards: From Rights to Responsibilities* (Jonas et al., 2016).[43] The publications were developed as part of a collaborative international law research partnership between Natural Justice and IIED, which aimed to address protected area-related injustices.

5.1 Situating the work within the law, policy and literature

In 2009, a number of the world's largest conservation organisations formed the Conservation Initiative on Human Rights (CIHR). In their own words: "We employ more than 22,300 people around the world, who work every day to improve human well-being and environmental sustainability. The scale of our potential impact on the conservation community is enormous, and this was one of the main drivers behind the formation of the CIHR".[44] Yet despite the Initiative's resources and potential, the members had by 2012 managed only to agree collectively to "respect human rights, promote human rights within conservation programmes, protect the vulnerable and encourage good governance". Each organisation was subsequently responsible for developing internal policies towards these ends, which were neither publicly available nor included mechanisms for external review or redress. While I was not able to determine the level of commitment of each member to the principles, including the internal policies and reforms required to ensure them across their operations, I considered there to be an opportunity to produce change-oriented research. I sensed that the situation highlighted a need for research that, on the one hand, provided specificity about Indigenous Peoples' international rights in the context of conservation initiatives, and on the other, clearly articulated conservation actors' international legal obligations vis-à-vis Indigenous Peoples.

We framed our work around three areas of focus. First, a body of scholarship emerged from the 1970s onwards that linked Indigenous Peoples' governance of their territories to high levels of biological diversity. They described the positive relationships existing between Indigenous Peoples' understandings of their territories, traditional ecological knowledge and resource use and raised questions about their treatment by mainstream conservation (Chapin, 1992; Posey, 1997; Stevens,

[43] **1)** Jonas, H.D., Makagon J., and Roe D., 2014a. *Which international standards apply to conservation initiatives?* IIED Discussion Paper. IIED, London. **2)** Jonas, H.D., Makagon, J. and Roe, D., 2014a. *Human Rights Standards for Conservation: An Analysis of Responsibilities, Rights and Redress for Just Conservation*. London: IIED. **3)** Jonas, H.D., J. Makagon, J., and Roe, D., 2016. *Conservation Standards: From Rights to Responsibilities*. London: IIED. Further information on these publications, including the abstracts, methods and findings, is provided in **Annex I**. Related, authored publications are set out in **Annex II**.

[44] www.thecihr.org

1997). These arguments were bolstered by work that documented the increasingly high levels of exclusion Indigenous Peoples were experiencing from their territories (Dasmann, 1976; Colchester, 2000; Stevens, 2014) as well as other associated human rights abuses and challenges posed by the imposition of state-governed protected areas (Alcorn, 1993; Stevens, 1997). This was nuanced by two other kinds of studies. The first suggested that the notion of 'pristine nature' and 'wilderness' was mistakenly applied to many places colonised by European nations; the areas in fact having been actively managed and altered by Indigenous Peoples (Gomez-Pompa and Kaus, 1992; Blackburn and Anderson, 1993). The second cautioned against ahistorical understandings of Indigenous Peoples' cultures, denying dynamic cultural shifts that in some cases have led to the adoption of less ecologically sustainable lifestyles - often the result of external forces (Alcorn, 1991; Soulé, 1995).

Second, Indigenous Peoples' movements drew on this literature to inform ongoing global debates, including relating to the development of the UN Convention on Biological Diversity, agreed in 1992.[45] By 1994, IUCN had updated its *Guidelines for Protected Areas Management Categories* to include recognition of Indigenous Peoples within any category of protected area, on the condition they did not undermine the relevant area's management goals. A range of activists began promoting 'community conserved areas'[46] at the turn of the millennium (Kothari, Pathak and Vania, 2000; Bennagen et al. 2001; Borrini et al., 2004; Kothari, 2006;), which in turn helped further evolve IUCN's guidance on the management of protected areas. The concept of four governance types for protected areas (government, private, Indigenous Peoples and local communities, and shared) was further developed and published as IUCN guidelines (Borrini-Feyerabend et al. 2013).

Third, building on the above developments, and following the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007, a range of socio-legal researchers approached the issues with a greater emphasis on human rights law or through an equity and justice perspective, with a focus on developing tools and mechanism to address the issues. 'Rights-based approaches to conservation' had begun to receive increased focus (Johnson and Forsyth, 2002; Uvin, 2007; Campese et al., 2009; Greiber et al., 2009; Moore, 2013) and at the time we began our research, the Forest Peoples Programme developed the Whakatane Mechanism, which is an alternative dispute settlement mechanism tailored to protected area-related conflicts (Freudenthal, 2012).

5.2 Applying a legal-political ecology frame

Political ecology urged me to study the power relations within the conservation movement, revealing highly asymmetrical relationships between, on the one hand, states, major funders and large NGOs, and on the other, Indigenous Peoples and local communities and their allies. Legal geography influenced my area-based conservation-related research by highlighting the intertwined and

[45] Two sections of the CBD are notable for explicitly addressing Indigenous Peoples. Article 8(j) calls on Parties, among other things, 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". Article 10(c) calls on Parties to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

[46] The term then evolved to become 'Indigenous and community conserved areas' – abbreviate to ICCAs'. The preferred term is now 'Territories and areas conserved by Indigenous Peoples and local communities' or 'territories of life'.

reciprocal relationships between conservation law and policy, enforcement and case law, institutional arrangements and geographical units, such as space and place (Gillespie, 2020), including as they relate to socially-constructed concepts such as nature-as-culture, landscapes and property, and enclosing commons though the privatization of property (Braverman, 2009).

Protected areas, including related laws, policies and practices, are an ideal concept to investigate through a legal geography lens. Through legal designation, protected areas become controlled and regulated places. The social-ecological relations in those places – especially if they are designated as state governed and exclusionary protected areas – will likely be altered. The law becomes localised *into* the landscape or seascape through social-ecological relations and leads to enduring future legacies. Delaney (2010: 59, original emphasis) helps to elaborate the idea that places are laden with legal meaning by describing them as *nomic settings*, that "*confer* significance *onto* actions, events, relationships and situations" that, as described above, constitute a 'nomoscape' or 'lawscape'. A protected area, therefore, is not more or less produced (and re-produced) than any other place within a landscape or seascape, but it is designated through particular kinds of law and generate specific types of relations with implications for justice. To address injustices within these places, one needs first to engage with the law-people-place dynamics over time, which legal geography enables. This led me to investigate the legal-political history of protected areas to better understand the development and evolution of the concept and to explore the local-level ramifications of the framing. **Annex VI** sets out my understanding of that history, which I had started to develop during the writing of the *Conservation Standards*-related work, and which also has relevance for my work on OECMs. It became clear that there were differences between the concept of a protected area – that is contingent on an area being dedicated to the conservation of biodiversity (Dudley, 2008), and the broader stewardship ethic that informs the governance and management of Indigenous Peoples' territories and areas.

In this context, Gillespie (2020, 24) – a legal geographer focusing on protected areas – issues a direct challenge:

> *[W]e need to put the people being regulated back into this protected area picture; we must not abstract people/place connections in crafting regulatory solutions in our pursuit of habitat/species conservation. To do so invites conflict, lack of compliance and regulatory failure. Best-practice requires that we understand people/place connections before we enact any measures to protect or exclude, and in doing so we are performing a legal geography analysis. … While the focus on anthropology, sociology, economics and political dimensions are important, we should not overlook the law-social-enviro dimensions of the protected area policy arena.*

My *Conservation Standards*-related work (and on OECMs, below) responds to this call, as well as to the promotion of engagement with places occurring beyond the urban and Global Northwest, discussed in **Chapter 2** (Braverman, 2014; Delaney 2017). I engage with the way protected areas are produced around the world – and subsequently represented as polygons – through the translocation and localization of laws that are based on Western imaginaries. My work also challenges the common understanding of protected areas as landscapes, seascapes, ecosystems and species, reframing them as representations (Blomley, 1998) that in many contexts have been established through processes where "space gets produced, invoked, pulverized, marked, and differentiated through practical and

discursive forms of legal violence" (Blomley, 2003: 135). Legal geography has enabled me to see protected areas as places produced through geographies of power (Blomley, 1994b) that become laden with 'meaning' – over-coded with legal signifiers – that has been produced by law. It has supported my investigating of how protected area law privileges or marginalizes actors, and affects their inter-relations over time, in and between particular places (Delaney, 2015).

I took the view that the rigorous application of a human rights framework to the establishment, governance and management of any protected area should negate any negative forms of territorialization and impacts on Indigenous Peoples. In legal geography terms, while the establishment by law of a protected area has the potential to produce and reproduce power asymmetries and injustices, the proper application of a rights framework, as a safeguard mechanism, has the potential to alter the nature of the relationships within and around the protected areas in ways that generate positive justice outcomes for all rights holders and stakeholders.

5.3 Publication strategy

The intention of the publications was to change the behaviour of UN agencies, international conservation NGOs and funders in relation to their support for or implementation of conservation initiatives. In my interactions with a number of individuals associated with the CIHR, they had argued that it was not possible to develop an easily accessible resource to guide respect for the relevant standards because of, among other things, whether international law is relevant to non-state actors, which laws might apply, and whether any international redress mechanisms can be used to solve conservation conflicts. Based on these inputs, we set out to inform the debate by conducting international legal research to answer the following three foundational questions:

- To which conservation actors do international standards apply? (Makagon et al., 2014)
- Which international standards apply to conservation initiatives? (Jonas et al., 2014a)
- Which redress mechanisms are available to Indigenous Peoples and communities affected by conservation initiatives? (Makagon, 2014).

We drew on these publications to produce a policy brief to catalyse discussion among key stakeholders entitled *Human Rights Standards for Conservation: An Analysis of Responsibilities, Rights and Redress for Just Conservation* (Jonas et al., 2014b). As we wrote at the time:

> *It is hoped that this work will inject fresh energy into the ongoing debate about how best to tackle conservation injustice. In doing so, it aims to provide a firm foundation on which to build a collaborative effort towards ensuring that countries achieve the targets set out in the UN Strategic Plan for Biodiversity 2011-2020 while also upholding internationally agreed human rights standards.* (Jonas et al., 2014b: 6)

We presented the research outputs at CBD COP 12 and the World Parks Congress in 2014. We then produced further research to develop *Conservation Standards: From Rights to Responsibilities* (Jonas et al., 2016), which we presented at CBD COP 13 and the World Conservation Congress in 2016.[47]

[47] The full set of publications are available online on IIED's project page (www.iied.org/human-rights-standards-for-conservation-rights-responsibilities-redress).

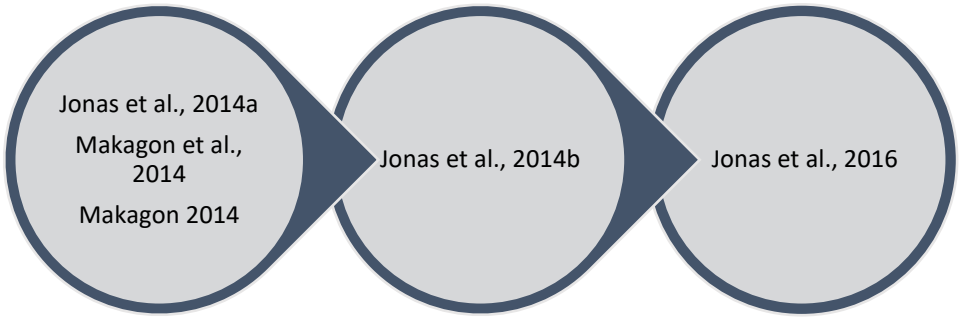

Figure 7: The publications were developed to produce a foundational body of research to inform the global debate about the international legal standards applicable to conservation initiatives.

5.4 Contribution to knowledge and impact

The application of a legal-political ecology frame led to a rights-based piece of legal research intended to change behaviour among conservation actors. It contributed to the collective understanding of which conservation-related actors have obligations under international law, what those standards are, and exposed deficiencies in the forms of access to justice available to Indigenous Peoples.[48] These contributions to knowledge are especially relevant at this time. During the final stages of writing this critical analysis, the report of the Independent Panel of Experts who reviewed allegations regarding human rights violations in the context of WWF-related conservation work was published (WWF, 2020). The report underscores that WWF has responsibilities under the *Guiding Principles on Business and Human Rights (*Ruggie Principles), as we had argued in 2014 and 2016. In response to the allegations of human rights abuses and the report, WWF has published an *Environmental and Social Safeguards Framework* (2019), and committed to establishing an integrated complaint system and an independent monitoring and review function through a new Ombudsperson Office; ideas broadly aligned with our recommendations. Moreover, the work is having academic and practitioner-level impact[49] and is being actively engaged with in the context of the development of IUCN's natural resource governance framework assessment guide (Campese, 2016).

[48] See **Annex I** for the methods and findings, **Annex VII** for the categories of rights that can be negatively affected by conservation initiatives, and **Annex VIII** for the international instruments with human rights implications in a conservation context.

[49] Practitioners and academics are engaging with the *Conservation Standards* in range of contexts, including: equity and protected areas (Schreckenberg et al., 2016), forest biodiversity and Indigenous Peoples' right to food (Sylvester et al., 2016), corporate responsibility in Greenland's energy future (Wilson, 2016), the proposed development of a code of conduct for marine conservation (Bennett et al., 2017), environmental justice research as it relates to social feedbacks in ecosystem service trade-offs (Dawson et al., 2017), Indigenous Peoples and ICCAs in international biodiversity law and conservation policy (Jonas, 2017 [*not me*]; Witter and Satterfield, 2019), integrating biodiversity offsets within circular economy policy in China (Ali et al., 2018); priorities for protected areas research (Dudley et al., 2018), approaches to engaging students in debates about environmental justice (Kopnina, 2018); governance principles for community-centred conservation in the post-2020 global biodiversity framework (Armitage et al., 2020), and the roles of ethnobotany and ethnoecology in Indigenous Peoples' land rights (McCune and Cuerrier, 2020).

In terms of the direct impact, measured by the uptake of the *Standards* and the consequent reduction in conservation-related injustices, the work was not immediately successful. The reason for this emerges from drawing on **Table 2** (**Section 3.4**). Colleagues and I focused my energies on *structural* change at the international level. I thought that the principal reason members of the CIHR had not taken more collective action was due to the technical nature of the international legal issues involved and that by producing legal research that clarified the issues, engagement and action would follow. Yet despite working with colleagues within the CIHR as well as from IIED and the Forest Peoples Programme to advocate for engagement with the *Conservation Standards* for over a year after publication, no progress was made.[50] It is clear with hindsight that to achieve the outcome we wanted to effect, a much deeper and more encompassing process was required that also engaged the personal, relational and cultural dimensions of conflict transformation at the local-to-international levels (Lederach, 2015). We were suggesting a series of structural solutions (the *Standards* and a roundtable) when the core of the issue was a lack of institutional interest *to respond* to the issues, including organisational reluctance to engage in the relational processes necessary to institute genuinely reconciliatory processes with Indigenous Peoples. This analysis attests to the contribution of applying the four dimensions of conflict transformation as a means by which to plan and subsequently critique strategies and actions. It also further underscores the power asymmetry that exists between highly capitalised conservation organisations and others calling for their reform.

The work also had a personal impact. I realised that achieving conservation justice in the context of protected areas required a set of conditions that, for the reasons set out, were not yet present among the mainstream conservation actors. Moreover, with regard to the legal-political history of protected areas, set out in **Annex VI**, I realised that a 'rights-based approach to protected areas' was not the same as the broader concept and agenda of 'conservation justice'. Reflecting on this, I began to wonder whether that there might be a more systemic change possible that would reduce area-based conservation-related injustices and increase the appropriate recognition and support for the conservation contributions of Indigenous Peoples. The next chapter addresses the work that emerged from this insight, namely: 'other effective area-based conservation measures'.

[50] **Appendix IX** sets out a concept note that I co-developed with colleagues from FPP, IUCN, WWF and WCS, but which was never actioned.

6. Other effective area-based conservation measures

One of the problems with the definition [of a protected area] as it stands is that it tries to encapsulate a whole philosophy and approach to conservation and development into a single short sentence.

Nigel Dudley, 2007

The term 'other effective area-based conservation measures' (OECMs) first appeared in international law within Target 11 of the CBD's Strategic Plan for Biodiversity (CBD, 2010a). This chapter engages with three related papers.[51] In chronological order, the first sets out the findings of a body of research that engages with the question of whether developing a definition and criteria for the term 'OECMs' might enable the more appropriate recognition of the contributions to conservation by Indigenous Peoples and other rightsholders and stakeholders (Jonas et al., 2014). Colleagues and I then deepened our research focus to ask whether OECMs would increase recognition and support for Indigenous Peoples' territories of life (Jonas et al., 2017). The third paper (Jonas et al., 2018) sets out the research outcomes of a two-year, IUCN World Commission on Protected Areas (WCPA) facilitated process, which I co-chaired with Kathy MacKinnon, and which informed final deliberations of what would become CBD Decision 14/8 on protected areas and OECMs, agreed at COP 14 in November 2018.

6.1 Situating the work within law, policy and the literature

At the time delegates at CBD COP 10 adopted the 10-year Strategic Plan for Biodiversity in 2010 (CBD, 2010a), conservation law, policy and practice was facing a series of internal contradictions. On the one hand, protected areas law and policy was becoming increasingly attentive to the rights of Indigenous Peoples. The outcome documents of the Vth IUCN World Parks Congress, the Durban Accord and Action Plan, celebrate the emergence of "a new paradigm for protected areas" (IUCN, 2003a: 1) and set out a range of measures explicitly related to Indigenous Peoples.[52] In addition, the Congress issued a five-page message to the CBD that acknowledged the need for a new paradigm for protected areas and called upon the CBD COP to consider adopting a programme of work on protected areas that responds to the needs identified at the Congress. This has been directly credited with the development and adoption by CBD Parties of the Programme of Work on Protected Areas (PoWPA) at CBD COP 7 (2004). Element 2 of PoWPA, on 'Governance, Participation, Equity and Benefit Sharing' drew on Durban's outcomes and invites parties, among other things, to recognise and promote the

[51] **1)** Jonas, H.D., Barbuto, V., Jonas, H.C., Kothari, A., Nelson, F., 2014. 'New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-based Conservation Measures.' *PARKS,* 20.2. Gland: IUCN. **2)** Jonas, H.D., Enns, E., Jonas, H.C., Lee, E., Tobon, C., Nelson, F., and Sander Wright, K., 2017. Will OECMs Increase Recognition and Support for ICCAs? *PARKS, 23.2*. Gland: IUCN. **3)** Jonas, H.D., MacKinnon, K., Dudley, N., Hockings, H., Jessen., S., Laffoley, D., MacKinnon, D., Matallana-Tobon, C., Sandwith, T., Waithaka, J., Woodley, S., 2018. Other Effective Area-based Conservation Measures: From Aichi Target 11 to the Post-2020 Biodiversity Framework. *PARKS* 24 Special Issue. Gland: IUCN. Further information on these publications, including the abstracts, methods and findings, is provided in **Annex I**. Related, authored publications are set out in **Annex II**.

[52] These include: recognition of protected area governance by Indigenous Peoples and local communities, respect for traditional knowledge and contributions to conservation globally, and respect for human rights and indigenous Peoples' rights – including the right of restitution (IUCN 2003a, b).

procedural and substantive rights of Indigenous Peoples, including recognition of their governance of protected areas (CBD, 2004).

On the other, and despite this progress in international law and policy, Indigenous Peoples continued to suffer a wide range of injustices. Indigenous Peoples' territories and their custodians faced threats from multiple sources, including: the influence of traditional systems of mainstream economies, languages, education and health care systems, media and religions (International Work Group for Indigenous Affairs, 2017); imposed forms of 'development' such as industrial agriculture, extractive industries and physical infrastructure in both terrestrial (Coalition Against Land Grabbing, 2015) and marine contexts (Bennett et al., 2015); and armed conflicts and establishment of illegal crops due to a growing demand for drugs (IDMC, 2017). In many instances, laws – such as those related to weak tenure rights, judicial processes and related institutions – continued to facilitate and protect the interests of more powerful groups over Indigenous Peoples (Minority Rights Group, 2012; Rights and Resources Initiative, 2012). Associated violence against environmental and human rights defenders, including 304 reported murders in 2019, is occurring at an alarming rate (Front Line Defenders, 2020), see **Figure 8**.

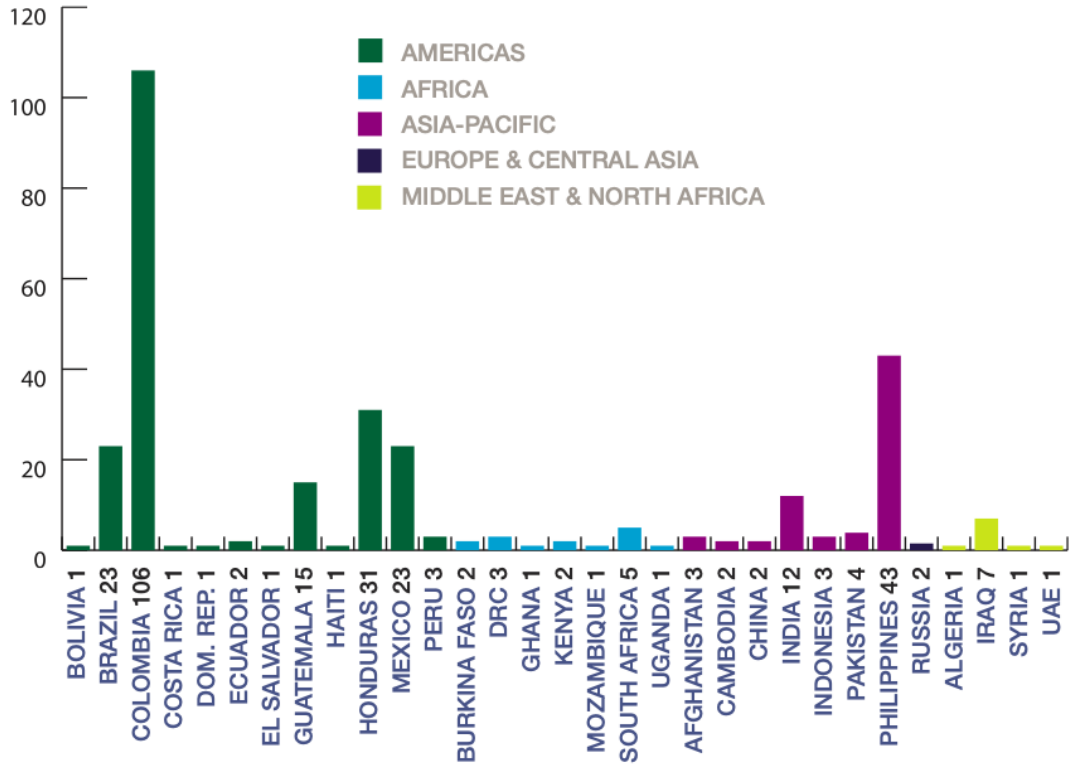

Figure 8: Front Line Defenders reported 304 people were killed in 2019 defending human rights and campaigning for environmental issues (Front Line Defenders, 2019)

Despite the promise of the new paradigm for protected areas and the increasing acceptance of the importance of territories and areas conserved by Indigenous Peoples and local communities (ICCAs/territories of life) and the increase in the number of protected areas to 245,133 protected areas in the world – covering 15.2 per cent and 7.4 per cent of the Earth's land and ocean surface

respectively (UNEP-WCMC and IUCN, 2019)[53] – only 0.5 per cent are governed by Indigenous Peoples and local communities (**Figure 9**; UNEP-WCMC and IUCN, 2019). Moreover, Indigenous Peoples' continued to face displacement from their traditional territories as a result of exclusionary forms of conservation (Indian Law Resource Centre and IUCN, 2015; Tauli-Corpuz, 2016), referred to as "conservation refugees" (Dowie, 2011). This conflict, created by competing ideologies about how to conserve nature, has been referred to by Mander and Tauli-Corpuz (2005) as the "paradigm wars".

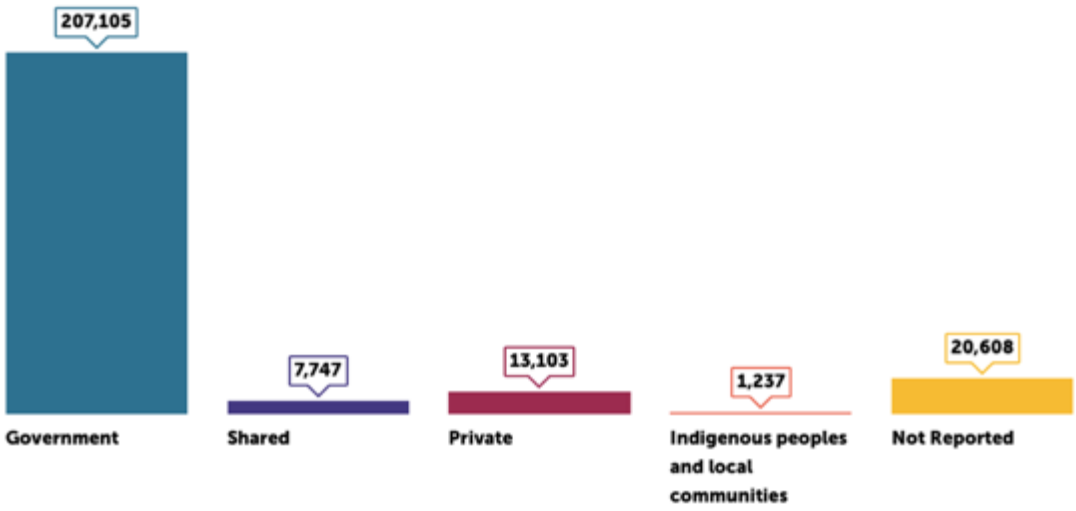

Figure 9: Number of protected areas reported in the World Database on Protected Areas under each IUCN governance type. UNEP-WCMC and IUCN, 2019.

In parallel to the above developments, a range of researchers approached the issues through a focus on human rights law and equity and justice perspective, and with a view to developing tools and mechanism able to address 'fortress conservation' (Brockington, 2002) and decolonise conservation (Adams & Mulligan, 2004). Researchers employed empirical, locally-grounded methodologies to develop insights into the impacts of protected areas on Indigenous Peoples (Chapin, 2004; Brockington and Igoe, 2006; Agarwal and Redford, 2009; Almudi and Berkes, 2010), which was furthered by a focus on multiple dimensions of equity and justice in and around protected areas (Sikor et al., 2014). Studies focused on how notion of justice often form the foundation of different conservation interventions, even unjust ones (Whiteman, 2009; Redpath et al., 2013). They also explored the different dimensions of injustice, such as relating to the inability to access resources (Martin et al., 2013), from a lack of recognition (Martin et al., 2015), through misrepresentative narratives that cast the injured party as a wrongdoer (Rodríguez et al., 2013; Martin et al., 2016), and in the context of attempts to promote just ends, such as the redistribution of wildlife-sector revenues (Schroeder, 2008). Such studies often engage terrestrial social-ecological system, but research has also been undertaken in the marine context under the label of 'ocean grabbing' or 'blue grabbing' (Benjaminsen, 2012; Bennett et al., 2015). This work contributes, among other things, to furthering consideration of the multiple dimensions of equity, also referred to as 'conservation justice' (Martin, 2017), namely recognition, procedure and distribution (McDermott, 2013; Franks et al., 2016; Schreckenberg, 2016; Dawson et al., 2017; Martin, 2017; Franks et al., 2018).[54]

[53] This amounts to 20,455,273 km^2 of land and 26,925,028 km^2 of the marine areas.

[54] This led to the production of a social assessment toolkit (Franks et al., 2018) and inclusion in CBD Decision 14/8 (2018) of voluntary guidance on governance equity for protected and conserved areas.

In this context, as well as drawing on the literature referenced in **Chapter 5**, in 2013 I started to consider whether a term in international law, as yet undefined, might help to address the continuing injustices suffered by Indigenous Peoples in the context of mainstream conservation, namely: 'other effective area-based conservation measures' (Jonas and Lucas, 2013).

6.2 Applying a legal-political ecology frame

As stated in **Chapter 5**, the application of a legal-political frame to rights-based approaches to protected areas led to the realisation that engaging with 'conservation justice' required work that extended beyond a focus on protected areas. In this context, and in addition to the critical concepts within political ecology (described in **Chapter 2 and 5**), I engaged intensively with legal geography to understand the law, politics and practice of protected *and conserved* areas. First, in legal geography terms, protected areas are "never simply a natural space, a feature of the natural environment" but a "place where we establish our own human organization of space and time" (Jackson, 1984: 156). In this way, conservation zonation constitutes a translocation of ideas and leads to a "double territorialization – of landscape and of mind" (Bluwstein and Lund, 2018: 453), whereby the creation of place is reinforced by the legal localisation of "conceptual frames that legitimize space as natural" (Adams, 2019: 8) and produce endemic forms of jurisdiction (Ford, 2001). Heeding Gillespie's call to "not overlook the law-social-enviro dimensions of the protected area policy arena" (2020, 24), and drawing on political ecology's emphasis on power, my research questioned the naturalness of protected area law and policy.

		Biodiversity-related objective		
		1 *In-situ* conservation - primary objective	**2** Use and conservation	**3** No biodiversity-related objective
Biodiversity-related outcomes (i.e., conservation effectiveness)	**a** *In-situ* conservation	**PA**	Secondary conservation	Ancillary conservation
	b Minor degradation	**PA** Possibly requiring improved management effectiveness	Sustainable use	Sustainable use
	c Major degradation	**PA** requiring improved management effectiveness	Unsustainable use	Unsustainable use

Table 3: The relationship between biodiversity related objectives and outcomes highlighting the important omission by protected areas law of areas that are not dedicated to the conservation of biodiversity but nevertheless achieve long-term conservation outcomes.

Second, legal geography scholarship urged me to engage with social-ecological spaces beyond protected areas, including those governed by Indigenous Peoples, with a focus on allying with these groups to search for openings for legislative reform and legal claims (Gillespie, 2020). Third, and with

these two concept in mind, I continued my work on a legal-political history of protected areas and explored the related laws' and policies' conceptual and political biases and embedded power relations (**Annex VI**). This work revealed the fact that while protected areas were promoted as encompassing the totality of area-based conservation, they did not account for a range of 'conserved areas' that are not dedicated to the conservation of biodiversity but nevertheless achieve long-term conservation outcomes, either through secondary or ancillary forms of conservation (shown in yellow in **Table 3**).

My subsequent work, presented in the three papers engaged with below, enabled me to make visible the technologies of power that are otherwise obscured and to question the "unwitting reification" of protected areas (Valverde, 2014: 53). Taken together, they helped to create space for the recognition of diverse forms of equitable and effective conservation through a novel conservation designation: 'other effective area-based conservation measures'.

6.3 Publication strategy

The first publication (Jonas et al., 2014) was intended to spur debate among a targeted group within the WCPA, with the aim of initiating a Task Force to develop guidance on OECMs. The second publication (Jonas et al., 2017) aimed to highlight to conservation policy makers and practitioners the issues emerging at the nexus of Indigenous Peoples' territories and OECMs and to influence the work of the Task Force on OECMs. The third publication (Jonas et al., 2018) aimed to bring the findings of two years of participatory research conducted through the IUCN-WCPA Task Force on OECMs (IUCN-WCPA, 2018) to the attention of the international community and influence the negotiations of what would become CBD Decision 14/8 (2018). I therefore decided to publish the first two in *PARKS*, as it is open access, published by the WCPA, and is intended to be read by policy makers and practitioners instead of being academic-focused. The third publication appeared in an open access Special Issue of *PARKS* on OECMs[55] which was published strategically in advance of and distributed in hard copy at the twenty-second meeting of the CBD's Subsidiary Body on Science, Technological and Technical Advice (SBSTTA 22), being the last intersessional CBD meeting held before COP 14 (November 2018) at which Parties agreed the definition and criteria for an OECM.

6.4 Contribution to knowledge and impact

My work on OECMs advances legal-political ecology through my engagement with landscapes and seascapes in the Global South and the legal-political relationships between local, national and international levels; i.e., towards a global legal geography of conservation. It enabled me to see 'beyond protected areas' (the title of my first paper on OECMs) to theorise about a new kind of conservation designation that might be more attuned to local social-ecological relations and justice considerations, and less likely to constitute a form of "legal violence" (Blomley, 2003: 135) or create 'jurispathic' outcomes (Cover, 1983).

The contribution to knowledge of the first paper (Jonas et al., 2014) was to clearly identify an existing term in international law that had the potential to be defined in ways that might provide more appropriate recognition of Indigenous Peoples' stewardship of lands and waters. This helped to

[55] I guest edited the Special Issue, which contains eight other papers: http://parksjournal.com/list-of-papers/

integrate and advance the arguments being put forward by the proponents of Indigenous Peoples' rights and their contributions to the *in-situ* conservation of biodiversity and those challenging the newly developed IUCN definition of a protected areas (Dudley, 2008) for being too narrowly conceived (Govan and Jupiter, 2013). We drew on the analysis to offer the following substantive and procedural conclusions:

> *This paper suggests that the incorporation of the term 'other effective area-based conservation measures' within the CBD's Aichi Biodiversity Targets provides a critical opportunity for more appropriate and greater recognition and support of a diversity of effective conservation occurring outside protected areas around the world. For this to happen, key questions need to be addressed around the definition and practicalities of OECMs and how they can be appropriately represented within formal conservation targets and policies. One possible means to do so is through a participatory process, coordinated by an IUCN Task Force. Such a process could generate an important discussion, provide official guidance to IUCN members and state parties to the CBD, and, most importantly, lead to greater and more appropriate recognition and support for OECMs.* (124)

The second paper (Jonas et al., 2017) makes a contribution to knowledge as it was the first publication to explore whether and under which conditions the OECMs framework – which was still under development at that time – might increase recognition and support for Indigenous Peoples' territories of life. We highlighted the fact that the future OECM framework will not be a panacea for conservation justice, but marks an important, further inflection point in the growing inclusivity of mainstream conservation. We argued that if OECM-related processes are managed according to a set of criteria, there may be positive outcomes, including even forms of 'restorative ecology', whereby recognising and supporting individual Indigenous Peoples' areas and territories as OECMs catalyses a healing and transformative process for all parties involved (Jonas et al., 207: 70). We also envisaged a range of approaches that would result in negative outcomes:

> *Under [unfavourable] conditions such as these, the governance authorities of ICCAs may at best be disinterested in engaging with the framework. At worst, OECMs may be used – whether inadvertently or not – to further undermine the social- ecological integrity of ICCAs.* (71)

The third paper (Jonas et al., 2018), sets out two years of research undertaken under the auspices of the IUCN WCPA Task Force on OECMs (Jonas and MacKinnon 2016a; 2016b; 2017). It contributes, for the first time in the literature, a definition of an OECM and explains the conceptual distinction between and OECM and a protected area. It also makes a broader contribution to the Indigenous Peoples' movement by clearly linking the framework to rights, stating that the framework "… will also require all rights- and stakeholders – including Indigenous Peoples and local communities – to be centrally involved in the development and implementation of (sub-)national OECM-related laws, policies, procedures and institutional arrangements" (13).

While I have not been able to yet measure the local-level social-ecological impact of my work, the work has clearly made an impact at least five levels. First, the first publication led to the formation of the Task Force, and that body enabled the development of guidance and subsequently the development of international law on OECMs through a relatively inclusive process. Decision 14/8

directly references the rights of Indigenous Peoples, which we promoted (Jonas et al, 2017[56]), and is closely based on the technical advice we submitted (Jonas et al., 2018[57]). We are building on that with the development of guidelines (IUCN-WCPA, 2019) and related methodologies (Jonas and Marnewick, forthcoming). Second, the work of the Task Force promoted communication and understanding across a range of groups (including between Indigenous individuals and non-Indigenous conservationists, and across sectors) and our facilitation enabled groupwork on hopes and fears about OECMs and the quality of new relationships that could be made possible by the framework. Third, Indigenous individuals and conservation professionals working at the international level have grappled with the concept and some have evolved in their positions on the issues – most notably members of the latter group.[58]

[56] The paper cannot be credited with the level to which Indigenous Peoples were referenced in Decision 14/8, but it likely contributed to that outcome. For example, its reference to the 2016 report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples on the theme 'indigenous Peoples and conservation' (Tauli-Corpuz, 2016) and its call for states to respect Indigenous knowledge systems and the right to free, prior and informed consent contributed to those issues being included in the advice presented by the IUCN Task Force to the CBD Secretariat. In turn, the Secretariat's first draft contained these provisions, which ended up remaining in the final version. The final text states:

1) Encourages Parties and invites other Governments, relevant organizations, in collaboration with indigenous Peoples and local communities, to apply the scientific and technical advice on other effective area-based conservation measures contained in annex III, also taking into account, where appropriate, the **2016 report of the United Nations Special Rapporteur on the rights of indigenous Peoples** on the theme 'indigenous Peoples and conservation' …

2) Recognition of other effective area-based conservation measures in areas within the territories of indigenous Peoples and local communities should be on the basis of **self-identification and with their free, prior and informed consent**, as appropriate, and consistent with national policies, regulations and circumstances, and applicable international obligations.

3) The best available scientific information, and **indigenous and local knowledge**, should be used in line with international obligations and frameworks, … (CBD Decision 14/8, emphasis added). Considering the centrality of such provisions, it is likely that related formulation would have been included despite our work, but our contribution ensured that the International Indigenous Forum on Biodiversity did not have to negotiate for the inclusion, because they were referenced from the first draft of Decision 14/8 presented at SBSTTA-22.

[57] The impact of the Task Force's advice to the CBD Secretariat (IUCN-WCPA, 2018) and set out in our paper (2018) is marked. The definition and criteria we proposed were included in the draft decision and remained almost unchanged in the final decision. The intention of our paper was to make the Task Force's proposals easily accessible and, through the other papers in the Special Issue (Mwamidi et al., 2018; Waithaka and Njoroge, 2018; Gray et al., 2018; Hiltz et al., 2018; Eghenter, 2018; Utomo and Walsh, 2018; Matallana-Tobón et al., 2018), we aimed to introduce CBD delegates and practitioners to the technicalities and possible local-level applications of the definition and criteria of an OECM. For example, the following sets out the Task Force's definition and the definition that was finally adopted in Decision 14/8:

IUCN WCPA: A geographically defined space, not recognised as a protected area, which is governed and managed over the long-term in ways that deliver the effective in-situ conservation of biodiversity, with associated ecosystem services and cultural and spiritual values. (Jonas et al., 2018)

CBD: A geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio–economic, and other locally relevant values. (CBD, 2018)

[58] For example, in the first meeting of the Task Force, it was suggested that protected areas were necessarily at the apex of a conservation hierarchy. By the end of the three-day meeting, it was accepted that if an OECM is correctly identified, the conservation outcomes would be at least as good, if not better, than many protected areas (Jonas and MacKinnon, 2016a).

Fourth, there are now over 650 sites that have been identified as OECM, covering over 1.6 million square kilometres of marine and terrestrial areas (UNEP-WCMC and IUCN, 2021). Fifth, my contribution to OECMs – both through the publications and the work of the Task Force – is leading to active engagement by academics and practitioners with the law, policy and practice of OECMs. A growing literature engages with OECMs at the global level,[59] in the context of a range of specific groups and geographies,[60] in relation to marine areas and fisheries,[61] and in relation to the post-2020 Global Biodiversity Framework.[62] OECMs are also being explored in the context of the three dimensions of equity (McDermott, 2013; Franks et al., 2016; Schreckenberg, 2016; Dawson et al., 2017; Martin, 2017; Franks et al., 2018) and the Site-level Assessment of Governance and Equity tool (IIED, 2019) in relation to work in the Andakí Municipal Natural Park in Colombia (Echeverri et al., 2021). The Special Issue of *PARKS* on OECMs, that I guest edited, has been engaged with widely, being *PARKS*'s most accessed journal.[63] **Figure 10** provides a quantitative analysis of the annual increase in papers on OECMs.

[59] Namely: protected and conserved areas (Borrini-Feyerabend et al., 2014; Borrini-Feyerabend and Hill, 2015); freshwater conservation (Juffe-Bignoli et al., 2016); privately protected areas (Mitchell, 2018); mainstreaming biodiversity and the Sustainable Development Goals (SDGs) (Rees, 2018); key biodiversity areas (Donald et al., 2019); progress towards achieving Aichi Biodiversity Target 11 globally (Watson et al., 2016; Gannon et al., 2017, 2019), and relating to Aichi Target 11 in the megadiverse countries (Bacon et al., 2019).

[60] The literature also features papers located within specific geographies or that focus on particular groups, including relating to: conservation networks in the Republic of Korea (Hong, 2017); large scale conservation initiatives in the United Kingdom (Shwartz et al., 2017), Canadian biosphere reserves (Shore and Potter, 2018); the Daasanach pastoral community in East Africa (Mwamidi et al., 2018); conservancies in Kenya (Waithaka and Njoroge, 2018); area-based conservation in Ontario Canada (Gray et al., 2018); Disko Fan Conservation Area in Canadian waters (Hiltz et al., 2018); Dayak Kenyah of North Kalimantan, Indonesia (Eghenter, 2018); the 'Hutan Harapan' ecosystem restoration concession in Sumatra, Indonesia (Utomo and Walsh, 2018); and complementary conservation strategies in Colombia (Matallana-Tobón et al., 2018).

[61] A number of papers focus on OECMs in the marine context, including: marine issues generally (Laffoley et al., 2017); marine capture fisheries (Auster et al., 2015; Garcia et al., 2019; Rice, 2019; Petza 2019); marine biodiversity and the SDG (Diz et al., 2018), marine spatial planning in the Adriatic and Mediterranean seas (Shabtay et al., 2019), in Canadian waters (Schram, et al. 2019) and including concerns about ecological standards being upheld (Lemieux et al., 2019); surf-break protection (Monteferri, 2019; Scheske, 2019); locally-managed marine areas and blue carbon (Moraes, 2019); and marine archaeological sites in Portuguese waters (Farquhar and Santos, 2019).

[62] Papers include: those that foreground OECMs (Dudley et al., 2018; Dudley and Stolton, 2020) or contains sections that focus on OECMs in various contexts, including: the conservation effectiveness of territories of Indigenous Peoples (Garnett et al., 2018); the importance of Indigenous Peoples' lands for the conservation of intact forest landscapes (Fa et al., 2020) and for terrestrial vertebrates (O'Bryan at al., 2020); and in relation to indicators for measuring area-based conservation effectiveness (Geldmann et al., 2021) and the post-2020 Global Biodiversity Framework (Maxwell et al., 2020).

[63] The Special Issue has been downloaded 9,915 times (Marc Hockings, Editor of *PARKS,* pers. comm., 18 October 2020).

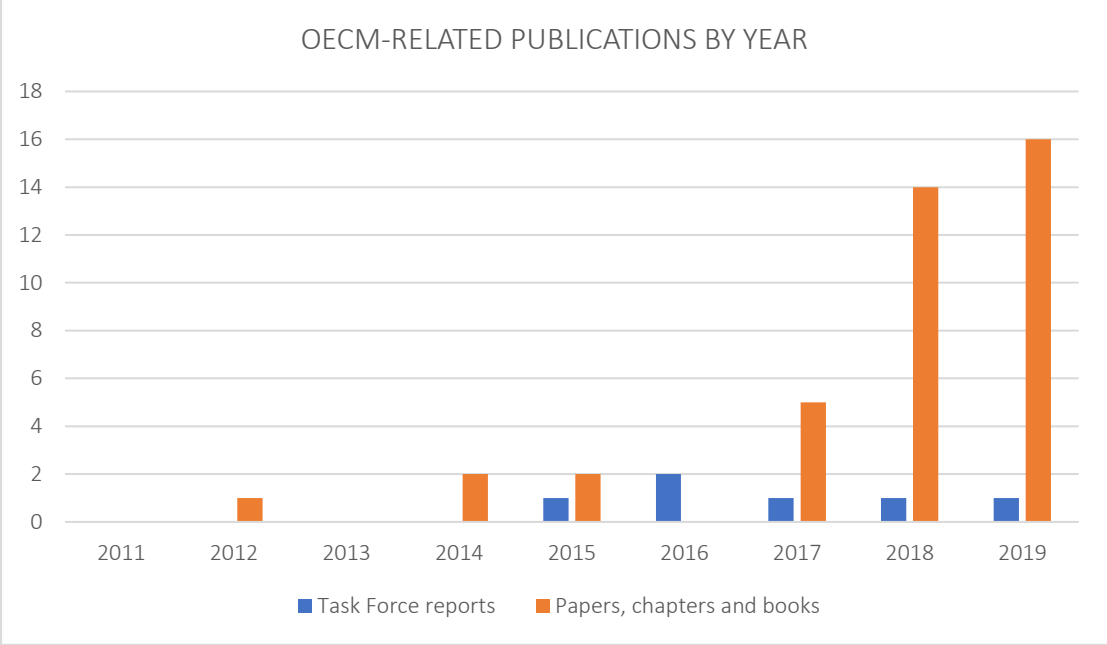

Figure 10: Increase in peer reviewed publications on OECMs since 2011. The IUCN-WCPA Task Force on OECMs' reports includes an initial concept paper (2015), four workshop reports (2016, 2017 and 2019) and the submission to the final report to the CBD Secretariat (2018). (Google Scholar, 2020).

Notwithstanding these points, the concerns about OECMs vis-à-vis Indigenous Peoples centres on the valid concern that, however robust the concept, the framework will be used by states and other powerful interests to further undermine, territorialise and expropriate their territories. Joji Cariño (Forest Peoples Programme) has argued that while the advent of OECMs is an important acknowledgement that areas outside protected areas that deliver conservation should be valued at the international level, she would prefer for Indigenous Peoples territories to be valued in their own right (pers. comm. 2019). The argument is important and must be taken seriously in all future work on OECMs. The development of OECMs as a concept included Indigenous Peoples and people working closely with Indigenous Peoples but was not Indigenous-led. As a proactive means of guarding against human rights abuses perpetrated through the imposition of OECMs on Indigenous Peoples territories, it is important for financial support to be made available to enable Indigenous Peoples – as culturally distinct, context-specific groups – to fully evaluate the pros and cons of engaging with OECMs, on their own terms, and to have their evolving positions on the issues to be fully respected.

Returning to the work's contribution, our work underscores that 'conservation justice' is more than an agenda aimed at ensuring 'a rights-based approach to protected areas'. In doing so, it further increases the space for other activists and researchers to engage the issues and develop progressive approaches to equitable and effective conservation; to recognise the conservation contributions of Indigenous Peoples within or beyond the context of protected areas, OECMs, territories of life and new, yet undefined concepts and frameworks. My final area of work engages this agenda in the context of the post-2020 Global Biodiversity Framework.

7. Equitable and effective area-based conservation and the Global Biodiversity Framework

Ensure that at least 30 per cent globally of land areas and of sea areas, especially areas of particular importance for biodiversity and its contributions to people, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.

Target 3, First draft of the post-2020 Global Biodiversity Framework (2021)

Since 2018, I have contributed to research about Indigenous Peoples and conservation (Garnett et al., 2018; Fa et al., 2020; Maxwell et al., 2020; O'Bryan et al., 2020; Alves-Pinto, 2021; Guerney et al., 2021; Marnewick et al., 2021; Estradivari et al., in press) and the impacts of COVID-19 on protected and conserved areas (Hockings et al, 2020). This section evaluates a paper that draws on much of that thinking, as well as CBD Decision 14/8, to make a case for a turn in conservation law and policy towards equitable and effective area-based conservation (Jonas et al., 2021).[64] The paper was written through collaboration between a diverse group of 40 authors, including Indigenous leaders and scholars, practitioners and activists, natural and social scientists – marine and terrestrial, reporting experts and international lawyers.

7.1 Situating the work within the law, policy and literature

Initially planned for 2020, now moved to 2022 due to COVID-19, the world will agree at CBD COP 15 a post-2020 Global Biodiversity Framework (CBD, 2020). This has put an emphasis on the production of papers that attempt to influence the development of the framework. A debate has developed over the latter half of this decade between competing camps which has implications for the future trajectory of area-based conservation. The first group is advocating for a 'half earth' or 'nature needs half' approach (Locke, 2014; Wilson, 2016; Cafaro et al., 2017; Dinerstein et al., 2017, 2019). They argue that humans should set aside at least half of the planet in which to allow nature to regenerate and flourish. The critique of this approach, by those concerned by possible negative social impacts (Schleicher, 2019) and/or promoting a 'whole earth' approach (Büscher et al., 2017; Büsher and Fletcher, 2020), is that the former concept is founded on a dualist approach to human-nature relations and would exacerbate the human rights and practical challenges associated with exclusionary protected areas. The competing proposals are generating further thought about the merits of biocultural, biocentric or anthropocentric approaches as they relate to the future of conservation

[64] Jonas, H.D., Ahmadia, G.N., Bingham, H.C., Briggs, J., Butchart, S.H.M., Cariño, J., Chassot, O., Chaudhary, S., Darling, E., DeGemmis, A., Dudley, N., Fa, J.E., Fitzsimons, J., Garnett, S., Geldmann, J., Golden Kroner, R., Gurney, G.G., Harrington, A.R., Himes-Cornell, A., Hockings, M., Jonas, H.C, Jupiter, S., Kingston, N., Lee, E., Lieberman, S., Mangubhai, S., Marnewick, D., Matallana-Tobón, C.L., Maxwell, S.E., Nelson, F., Parrish, J., Ranaivoson, R., Rao, M., Santamaría, M., Venter, O., Visconti, P., Waithaka, J., Walker Painemilla, K., Watson, J.E.M., von Weizsäcker, C., 2021. Equitable and effective area-based conservation: Towards the conserved areas paradigm. *PARKS* 27:1. IUCN: Gland. Further information on this publications, including the abstract, methods and findings, is provided in **Annex I**. Related, authored publications are set out in **Annex II**.

(Kopnina et al., 2018).[65] Others engaging with the issues include a focus on conservation outcomes (Visconti et al., 2019) – with specific arguments rebutted by a group associated with the WCPA (Woodley et al., 2019), three conditions for biodiversity conservation and sustainable use (Locke et al., 2019), governance principles for community-centred conservation (Armitage et al., 2020), and a number of paper that make sets of specific proposals for the future framework (Dinerstein et al., 2019; Williams et al., 2020). Papers falling within this category have been referred to as 'Aichi+', i.e. essentially focusing on implementing the current elements of Aichi Target 11 for a further 10 years to ensure all its qualitative elements, not just the percentage of coverage targets, are achieved by 2030 (Bhola et al., 2020).

7.2 Applying a legal-political ecology frame

The paper is based on much of the legal-political analysis undertaken in the papers described in **Chapters 4-6**. It is founded on a critical approach to international law, that acknowledges the way in which UN processes have historically been used to deny Indigenous Peoples' standing within the process of developing international law and, as a result and in varying degrees, not fully enough engaged with their views. It is a novel application of legal-political ecology, because colleagues and I used the framework for the first time as a means by which to interpret international law; specifically, CBD Decision 14/8 on protected areas and OECMs.

One way to understand Annex III of Decision 14/8, entitled 'Scientific and technical advice on OECMs', is that it relates only to OECMs. Colleagues and I engaged with the Annex using a more legal-political frame to ask whether this is the only way to read Decision 14/8. Through initial conversations with Christine von Weizsäcker (European Network for Ecological Reflection and Action), I realised that there is a broader reading of the Annex, which has implications for CBD policy on equitable and effective area-based conservation. In this context, the paper attempts to influence the way in which Target 3 of the Global Biodiversity Framework will include these considerations and is subsequently interpreted, including a focus on addressing power inequalities between Indigenous Peoples and other conservation actors.

7.3 Publication strategy

The aim for the paper was to intervene in the debate about the post-2020 Global Biodiversity Framework and inform the academic and policy-level discussions in the run-up to COP 15. I was particularly interested in contributing to work that underscores the importance of Indigenous Peoples' rights and their contribution to biodiversity conservation as well as to add emerging thinking about equity and effectiveness as they relate to protected areas and OECMs. This publication is also different from the first three bodies of work as it is not promoting a practical approach to an issue. Unlike my publications on community protocols, rights-based approaches to protected areas and OECMs, that were intended to generate specific behavioural and structural changes, the work is focused on

[65] Some interesting and nuanced work is emerging that is less polemic than some of the initial work on this, including relating to lessons learnt from Natura 2000 (Campagnaro, 2019) and using distributive justice models (Wienhues, 2018).

generating and disseminating novel analysis and related ideas. To reach policymakers and practitioners, we published the paper in *PARKS*.

7.4 Contribution to knowledge and impact

The paper is the first analysis of CBD Decision 14/8, which is surprising as the decision is the most expansive engagement by the Parties to the CBD with area-based conservation since the Programme of Work on Protected Areas (2004). Our paper makes a contribution at two levels. First, our paper contributes to knowledge about this important piece of international law by presenting an analysis of the operative part of the decision and four annexes. It advances a novel way of looking at Annex III, by making the argument that the CBD's criteria for 'other effective area-based conservation measures', by default, also provides criteria for 'effective area-based conservation measures'. Based on this breakthrough, we argue that the criteria for 'effective area-based conservation measures' can be applied to OECMs *and protected areas*, as well as other types of conserved area not included in those two categories, subject to the respective governance authority's FPIC. Second, our work demonstrates the further emergence of a new paradigm of conservation, which can be described as the 'conserved areas paradigm', and places a clear emphasis on a diversity of equitable and effective forms of area-based conservation. This crosscutting focus on 'effective area-based conservation measures' has important ramifications for how we measure success against the future Target 3 of the Global Biodiversity Framework including in relation to both protected areas and OECMs.

Whether the paper impacts the development of the post-2020 Global Biodiversity Framework is to be seen, but it is helping to make the case that the implementation of Target 3 in relation to OECMs *and protected areas* must be equitable and lead to effective conservation outcomes. In doing so, it further underscores that Indigenous Peoples have and continue to make a major contribution to the conservation of myriad ecosystems and species and that inclusive and rights- and respect-based approaches to engaging with Indigenous Peoples is both a justice imperative and central to the future of life on planet Earth.

III.

CONCLUSIONS

8. Conclusions

A delicate activism is truly radical in that it is aware of itself, and understands that its way of seeing is the change it wants to see.

Alan Kaplan and Sue Davidoff, 2014

8.1 Validity

Qualitative research can be assessed against its descriptive, interpretive, theoretical and evaluative validity, as well as its generalizability (Maxwell, 1992). I draw on this framework to consider my work from three perspectives: were colleagues and I researching the right questions based on local realities and needs, did we use the appropriate methods, and did we well enough validate our findings with the people with whom we collaborated? As has become clear from this critical analysis, my most locally-grounded research emerged from the work on community protocols (**Chapter 4**). In this case, our engagement was led in a significant way by the communities with whom we worked and the community-based organisations that worked with them. Nevertheless, in hindsight, it is clear that our methods were developed intuitively, and might have been more rigorously developed and applied had we, for example, collaborated with the right kind of practitioners and academics. At the same time, the flexibility of being able to respond to local realities as opposed to limited by having adopted one or other methodology and set of methods enabled innovation. Our local work on community protocols was validated by the communities by each respective community had the final say about their protocols. Nevertheless, our broader findings, as expressed in the paper on the issues (Jonas et al., 2010) was not referred to community members for feedback.

The findings that emerged from the research relating to the *Conservation Standards* (**Chapter 5**), Indigenous Peoples' contributions to conservation and the post-2020 Global Biodiversity Framework (**Chapter 7**) were based on legal and data analysis as well as literature reviews. Both areas of research were based on the identification of research gaps, conformed to the relevant standards for legal and data analysis, and were peer reviewed prior to publication; the first two internally within IIED (Jonas et al., 2014a, 2014b, 2016), and the third (Jonas et al., 2021) through the broad authorship and further peer review processes associated with publication. Beyond this, the *Conservation Standards* work was perhaps too narrowly based on a liberal notion of justice and within the frame of what we thought was feasible, and might therefore have been too conservative, instead of being more open to Indigenous or intercultural approaches to justice, legal pluralism and inter-species dignity (Santos, 2017). This is especially evident in the context of the suggestion to establish a roundtable or council that can be considered to be a reproduction of existing approaches to natural resource management in the forestry, fishery and palm oil sectors.

The research on OECMs (**Chapter 6**) was a also a direct response to a gap in knowledge that was validated by the IUCN and the people involved in the Task Force meetings, who agreed with the need to develop technical advice on the issues (IUCN, 2012b). As per my research on community protocols, the methods applied broadly conformed to participatory action research and were developed and adapted to the unfolding process, not wholly pre-determined and applied inflexibly. This enabled us to be innovative but may have led to methodological 'slurring' (Baker et al., 1992). I made up for this by ensuring that our findings were validated by members of the Task Force, which had at that time

over 120 members. Our technical advice was then negotiated by Parties to the CBD and the International Indigenous Forum on Biodiversity, among others, before being agreed (CBD, 2018). This critical analysis has enhanced my understanding of methodologies, methods and validation, which will benefit my future research.

8.2 Contribution to knowledge and academic impact

My work on ABS and community protocols (Jonas et al., 2010) contributed to understanding the complex dynamics relating to external actors accessing Indigenous Peoples' genetic resources and/or associated traditional knowledge. It furthered a more nuanced framing of whether ABS is 'good' or 'bad' by focusing on the local-level conditions and the influence of power relations across scales. It also contributed to scholarship on legal empowerment by advancing work on research protocols to propose 'community protocols'. The *Conservation Standards*-related work (Jonas et al., 2014a, 2014b, 2016) contributed to the collective understanding of who has obligations under international law, what those standards are, and highlighted deficiencies in the means by which Indigenous Peoples can access justice. The argument we promoted, that conservation NGOs are bound by the Ruggie Principles on business and human rights, has been echoed in later, influential documents (WWF, 2020).

My research on OECMs (Jonas et al., 2014, 2017, 2018) generated innovative thinking about how to conceptualise conservation occurring 'beyond protected areas'. The work on equitable and effective area-based conservation (Jonas et al., 2021) contributes a novel way of reading CBD Decision 14/8. It suggests that, by default, Parties to the CBD have elaborated criteria for 'effective area-based conservation measures', which are applicable to OECMs as well as protected areas, among others. In my view, this work is generating the most significant contribution to knowledge, in itself, and is also catalysing a growing body of scholarship due to the number of researchers now engaging the issues.

While the impact I aim to achieve through these and other co-authored papers extends beyond the academy, there has been a notable increase in the level by which they are being referenced in other peer-reviewed papers (**Figure 11**).

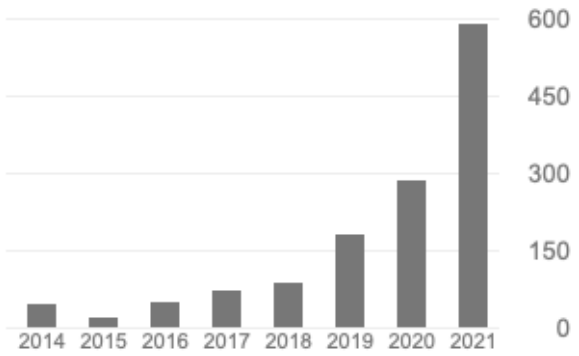

Figure 11: Citations of my work between 2014-2021. Source: Google Scholar, 2021.[66]

[66] Harry D. Jonas: https://scholar.google.com/citations?hl=en&user=R_39cHgAAAAJ

8.3 Reflections and emerging futures

This critical analysis has provided me the opportunity to analyse my research – including its changing nature – and, in doing so, become more reflexive and aware of the intended impacts and unintended consequences of my thoughts and actions (Kaplan and Davidoff, 2014). I conclude this work with four observations. First, much of my work is about using the law and rights to revitalise and/or create legal and physical spaces for Indigenous Peoples to flourish. My work on community protocols focused on establishing the conditions for mutually respectful exchanges to occur between Indigenous peoples and other actors. Similarly, OECMs is a framework that attempts to open and secure legal space for forms of conservation that are not protected areas – reclaiming space that had been closed where protected areas had become the singular, official approach to area-based conservation. While conservation's history reflects the larger trends in colonialization, progressive approaches to conservation also illustrate how decolonisation can occur in wider society. My work contributes to this agenda, and illustrates that part of any process of transformation must include creating and respecting spaces for Indigenous ontologies, epistemologies, legal systems and practices.

Second, it is clear that in 2010 I was engaged closely with particular Indigenous Peoples and my outputs were generated through local, participatory methods. This stands in contrast to my latest work on the post-2020 global biodiversity framework, which focuses on data and policy analysis. I lament this change. My most meaningful work and impact, important conceptual breakthroughs and personal transformations were catalysed through engagement at the community level. This critical analysis has brought this evolution to my attention and I will continue to reflect on this realisation.

Third, this critical analysis has also helped me realise that while I have used participatory legal-political ecology as the basis for my work, this critical analysis presents its first comprehensive written exposition and exploration. It is clear to me that if I want to contribute to the linkages between political ecology and more 'legal' theories, I must express this in a more public form – in one or more articles, papers or in a multi-media format. Equally, if I am interested in promoting transformative legal-political ecology as a useful approach for use by scholarly activists, similar kinds of communication is required. Between these two, there are interesting questions to which I can contribute, relating to the reflexive nexus of activism and scholarship (Blomley, 1994b; Maxey, 1999; Castree, 2000; Fuller et al., 2004; Wisner, 2015). I believe I have ideas to offer and plan to work towards these ends in the coming decade. Fourth, the work undertaken in **Chapter 3** to refine my approach to impact by engaging with conflict transformation (Lederach, 2015; Rodríguez, and Inturias, 2018) has been useful and helped me to better understand why some of my work has been more impactful at various levels than others.

As I close this critical analysis, I am developing a scientific paper about the first 650 sites that have been identified as OECMs and plan to write a book on OECMs, whose working title is: 'Nature Stewardship Beyond Protected areas: Other effective area-based conservation measures and the transformation of conservation'. This critical analysis has increased my reflexivity and self-critical epistemological awareness (Cooke and Kothari, 2001), and is making an immediate impact on that work and my ideas about future research directions. It is already benefiting my critical thinking,

contribution to knowledge and, I hope, my future impact as we move from the “new paradigm for protected areas” (Phillips, 2003) to a conserved areas paradigm (Jonas et al., 2021).

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ANNEX I: Annotated list of publications submitted as part of this critical analysis

Total Words: 64,813 excluding footnotes, endnotes, annexes and bios.

This annex presents the publications submitted as part of this critical analysis, chronologically within each of the four thematic sections addressed in Chapters 4-7. Their up to date citations can be found on my Google Scholar profile.

1. Community protocols

This publication is a good example of my writing between 2008-2014 about Indigenous Peoples and the interrelationship between international, national and customary law as it related to their traditional knowledge, and by extension, all aspects of their lives. This period was the time during which we co-developed 'community protocols' as a legal empowerment methodology. This work led to 'community protocols' being included in the Nagoya Protocol and subsequently defined by the CBD.

1.1 Jonas H.D., Shrumm H., and Bavikatte K., 2010. ABS and Biocultural Community Protocols. *Asia Biotechnology and Development Review*, 12:3.[67] (Link)

Abstract: The adoption of Nagoya Protocol was a landmark event in the history of Convention on Biological Diversity. This article examines the promises and potentials of the Protocol for indigenous Peoples and local communities in light of previous experiences in Access and Benefit Sharing (ABS). It points out the pitfalls within the Access and Benefit Sharing framework. Community protocols that are community-led instruments can help communities in engaging with Access and Benefit Sharing and can be useful to communities in legal empowerment. This can transform ABS from ABS- to ABS+.

Methods: To investigate the issues and contribute to the field, we employed two different kinds of methods. First, at the local level, colleagues and I began to conduct participatory research and advocacy with the Khomani San in relation to their *Hoodia*-related traditional knowledge in 2007. In 2008 I moved to live in Upington (Northern Cape, South Africa) which is home to a number of Khomani San. From 2009, colleagues and I worked with Sepedi and Tsonga 'Kukula' traditional healers in the Kruger to Canyons Biosphere Reserve (Mumalanga, South Africa) for over two years, Samburu pastoralists (Samburu county, Kenya) for over one year, Raika communities in Rajasthan (India) for two years, and in 2010 I began working with Dusun communities in Sabah, (Malaysia) for over an 18 month period, all in the context of supporting their development of community protocols.

In the case of all communities, our research was intended to support their local processes. The meetings were often chaired by members of the respective community's leadership, jointly facilitated by local NGOs, my colleagues and me. We worked collectively to develop community protocols, with the processes lasting between six months to two years. Towards those ends, colleagues and I engaged with each community through the use of a range of methods relating to participatory advocacy,

[67] I led the writing of this paper, based on three years of working closely with Shrumm and Bavikatte on the issues.

including qualitative dialogue, community institutions sketch maps, community decision-making calendars, historical timelines, trend line analyses, community visioning, assessing community capacities, assessing key opportunities and threats, and community wellbeing impact assessment worksheet (Shrumm and Jonas, 2012a, 2012b). These were aimed at supporting diverse voices in the community to be heard, including a focus on women, youth and the elderly. We augmented this with semi-structured interviews and conversations in more informal settings, such as over meals and when traveling together. Living in Upington for over two years also enabled me to develop relationships with members of the community and to discuss with them sensitive inter- and intra-community issues in unfiltered ways. To this, we added participatory forms of legal empowerment, which for us meant always starting from the community perspective and customary laws, and working outwards towards national and international laws; i.e., beginning with customary laws instead of an alienating organogram of acronym-laden international laws. I took notes during the meetings and I used photography to document the processes. I co-developed the outputs by engaging in focused, small-group discussions among the facilitators coupled with facilitating series of community meetings or workshops to enable the communities to elaborate the emergent ideas; i.e., the meetings were not one-off events.

The evidence generated by our research enabled us to gain insights into the respective communities' lives, aspirations and challenges. The work with the Khomani San community members helped me to see first-hand a number of specific, negative impacts the supposed positive *Hoodia* benefit sharing agreement was having on the community, particularly in terms of intra-San group and inter-Khomani San community relations. The research with the Kukula traditional health practitioners, Samburu and Raika communities deepened my understanding about how the issues affecting the San also arose in other Indigenous groups in disparate parts of the world (albeit in context-specific ways).[68] As set out in Chapter 3, it is only by restudying my work that I can characterise our participatory advocacy as 'research'.

Second, at the international level, I engaged in legal research to analyse the laws and institutional processes relevant to the negotiation of the Nagoya Protocol. Colleagues and I realised early on in our work, in 2007, that textbooks can only convey so much about how international law and policy is developed. We engaged in multi-sited ethnographies at UN meetings, augmented by semi-structured interviews and participant observation, including of the co-chairs of the Working Group on ABS, delegates and NGOs, as well as when working with members of the International Indigenous Forum on Biodiversity. Unlike our work with communities, this research was not a 'participatory' approach, but observational and intended to gain an understanding from the relevant actors. Nevertheless, we were actively engaged in the agendas at those events and did not remain detached observers.

Findings: The paper sets out three findings. First, access and benefit sharing puts Indigenous Peoples under a number of stressors and can result in fractured communities and degraded landscapes and seascapes. Second, community protocols are one means by which Indigenous Peoples can address these negative tendencies and assert their rights and affirm their responsibilities in a more holistic

[68] It is important to note that during this time I engaged with individuals from these communities as people who had reached out to Natural Justice to work alongside them and I never thought of them as 'research subjects'.

way to their particular cultures, resources and knowledge. Third, the Nagoya Protocol affirms a number of important rights relating to Indigenous Peoples, genetic resources and associated traditional knowledge. Because of the word limit of this critical analysis, this section analyses the first two findings and their relationship to the contribution to knowledge made by the paper.

Based on the evidence generated by the participatory research, the paper begins by reporting a number of dangers presented by ABS. These include the gap between what is stated in laws and how laws are applied in practice (Cotula and Mayers, 2009), the potentially negative effects of communities needing to redefine themselves vis-à-vis particular types of knowledge, the challenges of developing new institutions to do so, the associated pressures on community members chosen to negotiate agreements and/or manage benefits – which can then lead to elite capture, and managing expectations within the broader community (53-57). We also found that while ABS is intended to promote the three aims of the CBD, in fact the '*Hoodia* boom' occurring at around the time of writing was leading to unsustainable harvesting of *Hoodia* (57). Drawing on the above, we set out the following paradox:

> *The [Hoodia] deal asserted the San's rights to provide prior informed consent for the use of their traditional knowledge, but the nature of the negotiation, the terms of the agreement, and the governance reforms that they have undertaken have, among other things: weakened the San's traditional forms of authority; increased the community's reliance on external expert opinion; led to largely misunderstood and at times corrupt new forms of governance; raised and dashed hopes of new found wealth; exacerbated power and information asymmetries in and across San communities; and initially fostered mistrust between the San and Nama communities. (57)*

The paper also argues for the need to elevate Indigenous Peoples' voices through 'participatory advocacy' (Jovanovic, 2007; Kahn, 2011; Rodino-Colocino, 2011) as opposed to act as interlocutors with external actors and systems. As Sanjay Kabir Bavikatte put it in conversation (2008), our role was to break the dichotomy of Indigenous Peoples being spoken to or spoken for. We drew on research protocols (Oneha and Beckham, 2004; Poff, 2006; Bannister, 2009) to develop the deeper concept of a 'biocultural community protocol' as a community-led instrument that promotes endogenous development (Slee, 1992; Haverkort and Rist, 2007) and participatory advocacy towards the recognition of and support for ways of life that are based on the customary sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies (60-62). While research protocols were often narrowly conceived around resources, knowledge and academic researchers, we drew on our research – as well as the ideas of Eleanor Ostrom (1999) and Fikret Berkes (1999) – to frame community protocols more widely, to encompass and connect all relevant elements of the respective community's lives. The very act of developing and communicating a community protocol represented a rejection of the atomisation of Indigenous Peoples' lives. We drew on the above ideas to argue that their value and integrity lay in the "process that communities undertake to develop them, in what they represent to the community, and in their future uses and impacts" (62). With reference to the *Biocultural Protocol of the Traditional Healers of Bushbuck Ridge* (2009), our findings illustrate how the development of a community protocol integrates legal empowerment (Golub, 2003) with community mobilisation and enables communities to speak about their lives, challenges and aspirations in their own words (63-67). We conclude with a

cautionary note, underscoring that community protocols are not a panacea (67) and might even entrench existing power asymmetries between or within communities, including along gender lines (also spoken to by Köhler-Rollefson et al., 2012).[69]

2. Rights-based approaches to protected areas

These publications illustrate an ongoing and deepening engagement with the law, challenging its framing and attempting to reimagine it to be used practically, particular in the context of protected areas. The Conservation Standards is in many ways a failed project – based on the immediate impact we intended to effect – but the ideas contained in it are coming to the fore (WWF, 2020).

Methods for all three publications: The core research method used to generate the *Conservation Standards*-related publications included the following types of legal analysis:

- Analytical legal research, to develop the key questions, and map and analyse the resources which would inform our research;
- Descriptive legal analysis, used for example to develop a non-exhaustive list of conservation-related injustices occurring around the world;
- Quantitative legal analysis, applied to analyse the increase in reference to 'Indigenous and local communities' in CBD decisions and IUCN resolutions and recommendations; and
- Applied legal research, to ensure that the research outputs were as focused on the practical issues as possible.

Notwithstanding the direct focus on legal research, I would not have been able to develop the conceptual framing of the publications or generate the ideas contained therein if I had not first conducted the local level research undertaken in the context of community protocols, discussed above (2008-2012). It was through previous engagement with a range of participatory research methods with communities in South Africa, Kenya, India and Malaysia that I was able to frame the research to address what I considered to be the core bottlenecks to progress towards conservation justice. These practical insights were augmented through the application of my theoretical framework to the research, with a focus on legal and political ecology's suspicion of hidden power within international legal instruments and, in particular, critical legal studies theorists' willingness to subvert doctrinal approaches to international law and jurisprudence. I also drew inspiration from Indigenous Peoples' courage to assert their rights, versus asking permission to exercise them.

2.1 **Jonas, H.D.**, Makagon J., and Roe D., 2014a. *Which international standards apply to conservation initiatives?* IIED Discussion Paper. IIED, London.[70] (Link)

Abstract: This paper identifies the wide range of international instruments, CBD decisions, and IUCN resolutions and recommendations that contain provisions relevant to upholding the rights of

[69] My only regret, re-reading the work, is that we suggest that the paper provides "an analysis of the Nagoya Protocol from the perspective of Indigenous Peoples and local communities" (50). I would now not use this phrasing, that might suggest we are purporting to speak on communities' behalf. Instead I would set out the theoretical framework and research methods used to generate the findings and present my work as a researcher and activist, albeit as someone who is allied with Indigenous Peoples.

[70] I led the research for this work, and I was provided substantive inputs by Makagon and Roe.

Indigenous Peoples and local communities in a conservation context. Over 30 broad categories of rights are identified. It forms Part II of a series of three papers that aims to serve as a foundation for developing an accessible Guide to Human Rights Standards for Conservation.

Findings: This publication addresses the question: 'which international standards apply to conservation initiatives?' First, we found over 30 categories of rights that can be negatively affected by conservation interventions (12, see **Annex VII**).[71] Second, we argued that because conservation initiatives could infringe such a wide range of rights, the obligations of international organisations, NGOs and funders extended beyond CBD and IUCN decisions, resolutions and references to respecting the substantive and procedural rights of Indigenous Peoples across a wide range of instruments, including but not limited to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (14-17, see **Annex VIII**). Third, and notwithstanding this point, we demonstrated that the stated importance of the rights of Indigenous Peoples was growing within conservation law and policy by setting out the increased reference of 'indigenous and local communities' in CBD decisions and IUCN resolutions and recommendations over time (15-22), as set out in **Tables 1 and 2**.

Annex I, Table 1: Percentage of CBD COP decisions that reference the term 'indigenous and local communities' from COP 7-11 (reproduced from Jonas et al., 2014a: 17)

COP 7 2004	COP 8 2006	COP 9 2008	COP 10 2010	COP 11 2012
48.8	58.8	63.9	66%	72.9

Annex I, Table 2: The percentage of resolutions and recommendations that reference 'indigenous Peoples/local communities' per Conservation Congress from 2000-2012 (reproduced from Jonas et al., 2014a: 22)

WCC 2000 (Amman)	WCC 2004 (Bangkok)	WCC 2008 (Barcelona)	WCC 2012 (Jeju)
6.1	10.2	14.7	21.3

2.2 Jonas, H.D., Makagon, J. and Roe, D., 2014a. *Human Rights Standards for Conservation: An Analysis of Responsibilities, Rights and Redress for Just Conservation*. London: IIED.[72] (Link)

Abstract: This research report presents a synthesis of the relevance of human rights standards to different conservation actors, an assessment of current standards and trends in international law, and an analysis of the various redress mechanisms available when rights are violated. It concludes with a number of options for further elaborating a set of minimum human rights standards to be applied to all conservation initiatives. It is hoped that this work will inject fresh energy into the ongoing debate about how best to tackle conservation injustice.

[71] These include: substantive individual and collective rights (e.g. overarching human rights, Indigenous Peoples' rights, cultural traditions etc.); land, and natural resource rights; and procedural rights (e.g. free prior and informed consent, access to information etc.)

[72] I was the main author of this publication, based on the work that Makagon, Roe and I undertook on the background documents.

Findings: This publication draws on the above publication (Jonas et al., 2014a) and two others (Makagon et al., 2014; Makagon, 2014) to set out three findings. First, while international law in the first instance operates between states, it is also applicable to businesses through the *Guiding Principles on Business and Human Rights* (UN, 2011). By extension, we argued, conservation NGOs' and foundations' social license to operate generates a similar obligation to "respect, protect and fulfil human rights and fundamental freedoms" (UN, 2011: 1; Jonas et al., 2014b: 11-13). Second, we found that the obligations of organisations carrying out and funding conservation initiatives extends to the full spectrum of international law that collectively gives rise to Indigenous Peoples' rights, including but not limited to ILO 169 and UNDRIP. Third, we drew upon the Endorois case (Morel, 2003) to illustrate the range of challenges faced by Indigenous Peoples in the pursuit of justice through redress mechanisms, and – when judgements are given in their favour – to enforce the judgement and/or gain full benefit of remedies. Our research revealed a wide range of possible avenues for redress, including state-based mechanisms, intergovernmental institutions and processes, financial institutions, corporate accountability, alternative dispute resolution and customary redress mechanisms. We found that while each additional mechanism had its merits, they all contained substantive or procedural barriers to their use by Indigenous Peoples with which to challenge injustices generated in the context of conservation initiatives (22-27). Drawing on our main findings, we made the following suggestion:

> *These challenges raise an important question: should a body focused specifically on the just functioning of conservation initiatives be formed? One model for such a mechanism is the roundtable approach that industries such as soy and palm oil have formed to certify their operations and, in the case of palm oil, to settle disputes. A 'Roundtable on Just Conservation' or a 'Conservation Stewardship Council' could serve as a clearinghouse for states, NGOs and funders to ensure that their conservation initiatives comply with human rights standards. The Roundtable or Council could also house a dedicated redress mechanism as a means of ensuring access to justice for complainants and the cost-effective resolutions of cases.* (27)

2.3 Jonas, H.D., J. Makagon, J., and Roe, D., 2016. *Conservation Standards: From Rights to Responsibilities*. London: IIED.[73] (Link)

Abstract: Although conservation interventions aim to protect biological and cultural diversity, they can affect communities in a number of ways. The vast body of international law, norms and standards protecting human rights offers little rights-based, practical guidance for conservation initiatives. Focusing on indigenous Peoples, this paper aims to provide a set of draft conservation standards that outline: how indigenous Peoples' rights are enshrined in international law; how conservation interventions can infringe these rights; which rights conservation actors need to be most aware of — and why; and conservation actors' responsibilities in upholding these rights. The aim of this paper is to encourage discussion and collect feedback. We look forward to continuing to develop these conservation standards.

[73] I conceptualized the research and was the lead author, supported by Makagon and Roe who provided inputs to the draft.

Findings: This publication advances the above work by articulating the minimum conditions conservation interventions are expected to meet, based on the body of international human rights law. The 'conservation standards' (16-26) set out under 14 categories of rights:

- The nature of the right,
- The ways in which the right arises in the context of conservation initiatives; and
- The duties and responsibilities[74] incumbent upon conservation actors to ensure the standards are met and rights are not infringed.

We conclude by requesting feedback from Indigenous Peoples and state and non-state actors on the approach and how it might be advanced.

3. Other effective area-based conservation measures

These three publications illustrate my evolution of leading on OECMs (including substantive and strategic thinking), and the fourth publication is one example, of a number, of publications led by others on OECMs – usually with a sector/biome specific focus - to which I have contributed. The impact includes the CBD and IUCN guidance on OECMs.

3.1 Jonas, H.D., Barbuto, V., Jonas, H.C., Kothari, A., Nelson, F., 2014. 'New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-based Conservation Measures.' *PARKS,* 20.2. Gland: IUCN.[75] (Link)

Abstract: In 2010, the Conference of the Parties to the Convention on Biological Diversity adopted the Aichi Biodiversity Targets as part of the Strategic Plan for Biodiversity 2011-2020. Target 11 calls for 'at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas' to be conserved by way of 'well-connected systems of protected areas and other effective area-based conservation measures'. Yet four years after their adoption, parties to the CBD and other rights- and stakeholders have not received guidance about either what kinds of arrangements do and do not constitute 'other effective area-based conservation measures', or how best to appropriately recognise and support them. The paper argues that without clear guidance on the issue, conservation law and policy will continue to inappropriately and/or inadequately recognise the great diversity of forms of conservation and sustainable use of ecosystems and their constituent elements across landscapes and seascapes, including by Indigenous Peoples and local communities. In this context, and in line with calls from the Convention on Biological Diversity and the IUCN, it proposes the establishment of an IUCN Task Force to further explore the issues with a view to developing clear guidance on 'other effective area-based conservation measures' as a means to effectively and equitably achieve Aichi Biodiversity Target 11.

[74] We deliberately included the term 'responsibilities' in the standards to indicate that both state and non-state conservation actors are covered by the provisions we discuss here (i.e. not just state actors that have 'international obligations').

[75] This makes an important contribution by drawing attention to the lack of guidance and suggested the formation of an IUCN Task Force to address the omission – which has happened and I now co-chair. I conceptualized the research and led the writing.

Methods: A colleague and I conducted legal research to analyse each elements of Aichi Biodiversity Target 11[76] (Jonas and Lucas, 2013). The research led me to focus on the term 'other effective area-based conservation measures', which the research revealed did not have an internationally-agreed definition. IUCN's guidance at that time suggested that any future guidance on OECMs should "clarify that areas that do not, and will never qualify as protected areas, should not be included" (IUCN, 2012a), i.e., that OECMs should be defined to be 'undesignated protected areas'. This finding led me to wonder whether, contrary to IUCN's advice at the time, the term presented an opportunity to provide greater recognition to areas of high biodiversity that *do not* meet the definition of a protected area. Rather than continue to try *only* to improve the social dimension of protected areas, one could develop a parallel designation better suited to Indigenous Peoples, among others.

To test our hypothesis and develop a proposed way forwards, we applied legal-political ecology and analytical and applied legal research to literature and law and policy on protected areas. We denaturalised and historicised 'protected areas' to critique the concept's construction and to understand its emergence and evolution in law, policy and practice (114-117). I also interviewed 15 people and analysed their inputs to deepen the analysis and to generate feedback on our substantive and procedural proposals. The co-authors are all members of the ICCA Consortium and the linkages between OECMs and ICCAs are discussed below.[77]

Findings: Our research of the literature, law, policy and interviews demonstrated that the definition of a protected area requires the area in question to be dedicated to conservation.[78] Govan and Jupiter (2013) argued at the time of writing that this prerequisite excluded a range of locally-managed marine areas from receiving recognition for their conservation contributions. Their paper underscored to me that our findings and tentative conclusions had merit. We argued that many local forms of natural resource management are driven by livelihood interests in the sustainable use of natural resources – including community forests, pastoralists' grazing reserves, and many other areas where conservation is an *outcome* of traditional or locally adaptive resource use institutions, rather than the primary or central *objective* of those management efforts. Our research findings revealed the fact that a site can be assessed by an alternative measure to its dedication to conservation, namely, its *effectiveness at conserving biodiversity* (115). We drew on the analysis to offer the following substantive and procedural conclusions:

> *This paper suggests that the incorporation of the term 'other effective area-based conservation measures' within the CBD's Aichi Biodiversity Targets provides a critical opportunity for more appropriate and greater recognition and support of a diversity of effective conservation occurring outside protected areas around the world. For this to happen, key questions need to be addressed around the definition and practicalities of OECMs and how*

[76] Target 11: By 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of **protected areas and other effective area-based conservation measures**, and integrated into the wider landscape and seascape (emphasis added).

[77] www.iccaconsortium.org

[78] For IUCN, only those areas where the main objective is conserving nature can be considered protected areas; this can include many areas with other goals as well, at the same level, but in the case of conflict, nature conservation will be the priority. (Dudley, 2008: 10)

they can be appropriately represented within formal conservation targets and policies. One possible means to do so is through a participatory process, coordinated by an IUCN Task Force. Such a process could generate an important discussion, provide official guidance to IUCN members and state parties to the CBD, and, most importantly, lead to greater and more appropriate recognition and support for OECMs. (124)

3.2 Jonas, H.D., Enns, E., Jonas, H.C., Lee, E., Tobon, C., Nelson, F., and Sander Wright, K., 2017. Will OECMs Increase Recognition and Support for ICCAs? *PARKS, 23.2*. Gland: IUCN.[79] (Link)

Abstract: This paper reflects on IUCN's ongoing progress to develop technical guidance on 'other effective area-based conservation measures' (OECMs) and begins to explore under what conditions OECMs – as a new form of recognition – might make a positive contribution to territories and areas conserved by Indigenous Peoples and local communities (abbreviated to 'ICCAs'). It argues that while the protected areas framework is a potentially useful means by which to recognise the biodiversity contributions of some ICCAs, it is not universally appropriate. In this context, and subject to important caveats, OECM-related frameworks offer an important opportunity to increase recognition and support for ICCAs. The paper concludes with two practical recommendations: first for the development of supplementary guidance on OECMs and ICCAs; and second, for further discussion by a wide range of interested parties on whether 'OECMs' should be referred to as 'conserved areas'.

Methods: A number of co-authors and I followed up the above publication with a paper that asked whether OECMs will increase recognition and support for Indigenous Peoples' territories. I led a literature review of the history of linkages between Indigenous Peoples and protected areas and we drew on the outputs of a workshop held in early-2017 that focused on OECMs and Indigenous Peoples (Jonas and MacKinnon, 2017). At that workshop we employed a range of methods associated with participatory action learning and research, such as participants developing research priorities, self-facilitating sessions and co-developing outputs.[80] The co-authors are all affiliated with the ICCA Consortium, with two co-authors being Indigenous: Emma Lee, a trawlwulway[81] woman of Tasmania and Eli Enns from the Nuu-chah-nulth nation in Canada. It was also infused by our respective understanding of the way the mainstream conservation law, policy and practice interacts with Indigenous Peoples.

Findings: The findings illustrate that international protected areas law and policy has had a at least two kinds of negative effects on Indigenous Peoples' territories; on the one hand leading to their expropriation and conversion to state-governed protected areas, and on the other, being largely ignored by the conservation community.[82] We argue that the advent of OECMs constitutes part of the

[79] I conceptualized and led the writing of this paper, which will be published as a follow up to the 2014 piece.
[80] The workshop was held in Vancouver (Canada) and invitees included First Nation representatives including from Gitxaała First Nation, Great Bear Initiative and the Council of the Haida Nation.
[81] Tasmanian Aboriginal language is written in italics and capital letters are only used for Peoples' names.
[82] This approach has led to holistic and inextricably linked forms of culture, spirituality, knowledge and practices being presented as "those that contribute to conservation outcomes" (Dudley, 2008) and those that do not. According to this approach, Indigenous Peoples' and local communities' worldviews matter, but only if they accord with what is desired and acceptable within a protected areas framework (Wilk, 1995; Morel, 2010). While this approach may have an inherent logic from a 'conservation' perspective, this binary approach leaves a wealth

systemic changes required within the international conservation framework to address these dynamics. At a foundational level, OECMs present a counterpoint to the foundational misalignment between Indigenous Peoples' and local communities' traditional approaches to territories, land and sea, on the one hand, and Western scientific (often dualist) approaches to conservation, culture and nature on the other. Second, at an instrumental level, they may be a useful means by which to provide an additional layer of recognition to ICCAs that either do not meet the definition of a protected area or do not want to be recognised as such (67). We argue that any potential benefit are highly contingent on a range of conditions. These include: external actors investing in understanding and embracing holistic social-ecological systems; upholding Indigenous Peoples' substantive and procedural rights; and engaging collaboratively to address potential procedural challenges such as respecting Indigenous and knowledge systems in the assessment of a particular site's values (67-70). We conclude by saying that if processes are managed according to these criteria, there may be positive outcomes, including even forms of 'restorative ecology', whereby recognising and supporting individual ICCAs as OECMs catalyses a healing and transformative process for all parties involved (70). We also envisage a range of approaches that would result in negative outcomes:

> *Under [unfavourable] conditions such as these, the governance authorities of ICCAs may at best be disinterested in engaging with the framework. At worst, OECMs may be used – whether inadvertently or not – to further undermine the social- ecological integrity of ICCAs.* (71)

3.3 Jonas, H.D., MacKinnon, K., Dudley, N., Hockings, H., Jessen., S., Laffoley, D., MacKinnon, D., Matallana-Tobon, C., Sandwith, T., Waithaka, J., Woodley, S., 2018. Other Effective Area-based Conservation Measures: From Aichi Target 11 to the Post-2020 Biodiversity Framework. *PARKS* 24 Special Issue. Gland: IUCN.[83] (Link)

Abstract: The IUCN WCPA Task Force on OECMs has worked for over two years to develop technical inputs on OECMs, submitted to the CBD in January 2018. The Task Force suggests that the definition of an OECM and core criteria include the following core concepts: geographically defined, not a protected area, governed and managed, achieve the long-term in situ conservation of biodiversity, and conserve associated ecosystem functions and values. Reporting of OECMs should be facilitated by the creation of a 'World Database on OECMs'.

Methods: By late-2017, the IUCN WCPA Task Force on OECMs had completed its work and had submitted its advice to the CBD Secretariat in January 2018. The co-chairs[84] and a number of related individuals published an editorial in *PARKS* that set out our key findings (Jonas et al., 2018). The paper was based on two years of research undertaken under the auspices of the IUCN WCPA Task Force on OECMs, and which included literature reviews and three workshops based on participatory learning and action research methods, such as engaging participants actively in developing research priorities, facilitating sessions and co-developing outputs with only minimal inputs from facilitators (Jonas and MacKinnon 2016a; 2016b; 2017). In addition, I used multi-sited ethnographies, semi-structured

of Indigenous and local worldviews (including ontologies and ethics) unrecognised, disrespected and marginalised (Indian Law Resource Centre and IUCN, 2015). (Jonas et al., 2017: 66)

[83] I was the lead author, drawing on the work of the IUCN-WCPA Task Force on OECMs. This paper was published in a Special Issue of PARKS that I guest edited.

[84] Kathy MacKinnon and I co-chaired the Task Force from 2016-2019.

interviews and participant observation to understand power and processes within the mainstream conservation community.

Findings: The paper sets out our rationale for the difference between a protected area and an OECM. The distinction that colleagues and I first set out (Jonas et al., 2014) had been developed and crystalised through two years of research to the following:

> *While protected areas must have conservation as the primary objective of management, OECMs are defined by outcomes rather than objectives; i.e. an OECM must deliver the effective in-situ conservation of biodiversity, regardless of the area's management objectives. (10)*

It then sets out the core criteria of an OECM, namely that the area must be: geographically defined, not a protected area, governed and managed, deliver long-term conservation of biodiversity and conserve associated ecosystem services and cultural and spiritual values (11). It highlights a number of benefits that could result from the appropriate recognition of OECMs, including: engaging and supporting new stakeholders and more equitable partnerships in global conservation efforts, highlighting the diversity of contributions to conservation globally; increasing opportunities for enhancing and increasing ecological representation within conservation networks; enabling enhanced recognition and increased protection of areas of high biodiversity significance; improving connectivity across landscapes and seascapes; and contributing to improved management and restoration of areas that could usefully support long-term *in-situ* conservation of biodiversity (13).

We conclude by highlighting the core challenges, which in the context of Indigenous Peoples we suggest "… will also require all rights- and stakeholders – including Indigenous Peoples and local communities – being centrally involved in the development and implementation of (sub-)national OECM-related laws, policies, procedures and institutional arrangements" (13).

4. Equitable and effective area-based conservation and the global biodiversity framework

This paper represents a shift in my writing from presenting solutions to issues (community protocols, the conservation Standards and OECMs) to presenting analysis and novel findings about international law with a view to influencing the development of the global biodiversity framework and its implementation.

4.1 **Jonas, H.D.**, Ahmadia, G.N., Bingham, H.C., Briggs, J., Butchart, S.H.M., Cariño, J., Chassot, O., Chaudhary, S., Darling, E., DeGemmis, A., Dudley, N., Fa, J.E., Fitzsimons, J., Garnett, S., Geldmann, J., Golden Kroner, R., Gurney, G.G., Harrington, A.R., Himes-Cornell, A., Hockings, M., Jonas, H.C, Jupiter, S., Kingston, N., Lee, E., Lieberman, S., Mangubhai, S., Marnewick, D., Matallana-Tobón, C.L., Maxwell, S.E., Nelson, F., Parrish, J., Ranaivoson, R., Rao, M., Santamaría, M., Venter, O., Visconti, P., Waithaka, J., Walker Painemilla, K., Watson, J.E.M., von Weizsäcker, C., 2021. Equitable and effective area-based conservation: Towards the conserved areas paradigm. *PARKS* 27:1. IUCN: Gland. (Link)

Abstract: In 2018, the Parties to the Convention on Biological Diversity (CBD) adopted a decision on protected areas and other effective area-based conservation measures (OECMs). It contains the definition of an OECM and related scientific and technical advice that has broadened the scope of

governance authorities and areas that can be engaged and recognised in global conservation efforts. The voluntary guidance on OECMs and protected areas, also included in the decision, promotes the use of diverse, effective and equitable governance models, the integration of protected areas and OECMs into wider landscapes and seascapes, and mainstreaming of biodiversity conservation across sectors. Taken as a whole, the advice and voluntary guidance provides further clarity about the CBD Parties' understanding of what constitutes equitable and effective area-based conservation measures within and beyond protected areas and provides standardised criteria with which to measure and report areas' attributes and performance. This policy perspective suggests that this CBD decision represents further evidence of the evolution from the 'new paradigm for protected areas' to a broader 'conserved areas paradigm' that embodies good governance, equity and effective conservation outcomes and is inclusive of a diversity of contributions to conservation within and beyond protected areas.

Methods: We undertook at legal analysis of CBD Decision 14/8 on 'protected areas and other effective area-based conservation measures and made a surprising finding. We realised the following: while Parties to the CBD had developed criteria '**other** effective area-based conservation measures' they had also, in effect, developed guidance on 'effective area based conservation measures'. Due to the potentially controversial findings and commentary, I sent the first draft of the paper to a wide range of people. It generated intense interest among a growing number of people who engaged very actively – and sometime combatively – over the course of the writing.

Findings: Since 2010, when the Parties to the CBD incorporated 'OECMs' into Target 11, the lack of a definition and criteria for OECMs hindered progress on this aspect of the Target (Jonas et al., 2014a). Annex III of CBD Decision 14/8 addresses this by setting out four criteria for identifying OECMs, namely:

A. The area is not currently recognised as a protected area;
B. The area is governed and managed;
C. The area achieves sustained and effective contribution to *in situ* conservation of biodiversity; and
D. Associated ecosystem functions and services and cultural, spiritual, socio-economic and other locally relevant values are respected, upheld and supported (CBD, 2018: 12–13).

The definition and criteria for OECMs represents important progress towards promoting more inclusive and diverse approaches to achieve the long-term *in situ* conservation of biodiversity (Jonas et al., 2018; IUCN-WCPA, 2019). But CBD Decision 14/8 also produced an outcome that has yet to be fully appreciated by Parties, rightsholders and stakeholders. Because the criteria and guidance can be disaggregated and understood as individual elements, by defining and setting out criteria for *other* effective area-based conservation measures (Criteria A–D), Parties to the CBD have also in effect provided voluntary guidance about what constitutes *effective area-based conservation measures* (Criteria B–D). As such, while Criterion A is only relevant to OECMs, Criteria B–D can also be applied on a voluntary basis to protected areas.

Importantly, the criteria and guidance do not override the CBD or IUCN definitions of a protected area. Instead, we are able to draw on Decision 14/8 – together with broader guidance on protected areas

and OECMs from the CBD (including the Akwé: Kon Voluntary Guidelines – CBD, 2004b), the IUCN and others – and apply it to areas, flexibly and with regard to their specific social-ecological contexts, so as to measure and evaluate their attributes and performance, identify aspects of governance and management in need of improvement, and celebrate success stories.

The possible application of Criteria B–D on effective area-based conservation measures to *both* OECMs *and* protected areas has several implications for all forms of conservation, including areas that are conserved *de facto* outside of these frameworks. In this context, we explore four key issues – good governance, conservation effectiveness, assessment and reporting – and then discuss some of the implications specifically for non-state actors, namely, Indigenous Peoples and/or local communities, and private landowners.

ANNEX II: Relevant, authored publications not submitted as part of this critical analysis

This annex sets out my additional publications related to the work presented in this critical analysis.

1. Community protocols

Jonas H.D. (ed.), 2014. *Access and Benefit Sharing, Biotrade and Biosphere Reserves*. UNESCO: Paris.

Shrumm H. and **Jonas H.D.**, 2012a. Biocultural Community Protocols: A Toolkit for Community Facilitators. Natural Justice: Cape Town.

Munyi P. and **Jonas H.D.**, 2012b. "Implementing the Nagoya Protocol in Africa: Opportunities and Challenges for African Indigenous Peoples and Local Communities." E. Morgera, M. Buck and E. Tsioumani (eds.), *The Nagoya Protocol in Perspective: Implications for International Law and Implementation Challenges.* Brill/Martinus Nijhoff: Netherlands.

Jonas H.D., K. Bavikatte and H. Shrumm, 2010. "Biocultural Community Protocols and Conservation Pluralism", p102-112 in *Policy Matters* 17, IUCN-CEESP, Malaysia.

Jonas H.D. and H. Shrumm, 2010. 'Biocultural Community Protocols and Conservation Pluralism', in *Policy Matters* 17. IUCN and Natural Justice: Kota Kinabalu.

Jonas H.D., 2010. "Bio-cultural Community Protocols as a Community-based Approach to Ensuring the Local Integrity of Environmental Law and Policy." *CBD Square Brackets.* CBD Alliance: Nagoya.

Jonas H.D., 2010. "No Narrowing of the Definition of Traditional Knowledge" in *ECO*, WGABS8 coverage. CBD Alliance: Cartagena.

A. Persic and **Jonas H.D.**, 2010. "The Bushbuckridge Healers' Path to Justice." *A World of Science*, UNESCO, 8:1.

Jonas H.D., 2010. "REDD Community Protocols: A Community Approach to Ensuring the Local Integrity of REDD." *Stakeholder Forum Outreach*, Special Post-COP15 Issue.

Bavikatte K. and **Jonas H.D.**, (eds.) 2009. *Bio-cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (2009).

Bavikatte K. and **Jonas H.D.**, 2009. "Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective" on the website of the United Nations University Traditional Knowledge Initiative: Darwin.

2. Conservation Standards

Jonas H.D., and Godio J., 2020. *The Living Convention: An Accessible Compendium of the International Rights of Indigenous Peoples, Local Communities and Peasants* (Volume I). 3rd Edition. Natural Justice: South Africa.

Jonas H.D. and D. Roe, 2016. Shifting the Debate about Conservation Justice from Rights to Responsibilities.' Mongabay. (https://news.mongabay.com/2016/08/shifting-the-debate-about-conservation-justice-from-rights-to-responsibilities/)

Jonas H.D. and A. Dilke, 2014. *Which International Standards Apply to Conservation Initiatives?* IIED, London.

Jonas H.D. and D. Roe, 2014. 'And End to Conservation Injustice?' Mongabay. (**exact date**)

Jonas H., H. Jonas and J. Eli Makagon, 2014. "New Steps of Change: Introducing the Living Convention and a Landscape Approach to Legal Empowerment." *Access to Justice*. Columbia Law School: New York.

Jonas H.D. and S. Lucas, 2013. *Legal Aspects of the Aichi Biodiversity Target 11: A Scoping Paper*. International Development Law Organization: Rome.

Jonas H.D., H. C. Jonas and S. Subramanian, 2013. *The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia.* UNU-IAS and Natural Justice: Yokahama and Cape Town.

Jonas H.D., 2012. *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities: An Analysis of International Law, National Legislation, Judgements and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*. Natural Justice and Kalpavriksh: Bangalore and Pune. The study includes 15 national level reports and an analysis of international law.

Jonas, H.D., J. E. Makagon, S. Booker, and H. Shrumm, 2012. *An Analysis of International Law and Jurisprudence as Relating to Territories and Areas Conserved by Indigenous Peoples and Local Communities.* Natural Justice and Kalpavriksh: Bangalore and Pune.

Jonas H.D. and H. Shrumm, 2012. "Recalling Traditional Resource Rights: An Integrated Rights Approach to Biocultural Diversity". Paper prepared for a session at the 13th Congress of the International Society of Ethnobiology entitled: 'Remembering Darrell Posey, Traditional Resource Rights Today'.

Jonas H.D., 2012. "National Level Recognition and Support." Kothari, A. *et al*. *Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities: Global Overview and National Case Studies*. Technical Series no. 64. Secretariat of the Convention on Biological Diversity, ICCA Consortium, Kalpavriksh, and Natural Justice: Montreal, Canada.

Kothari, A., with C. Corrigan, **Jonas H.D.**, A. Neumann and H. Shrumm (eds), 2012. *Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities: Global Overview and National Case Studies*. Technical Series no. 64. Secretariat of the Convention on Biological Diversity, ICCA Consortium, Kalpavriksh, and Natural Justice: Montreal, Canada.

3. OECMs

Estradivari, Agung, M.F., Adhuri, D.S., Ferse, S., Sualia I., Andradi-Brown, D.A., Stuart J. Campbell, S.j., Iqbal, M., **Jonas, H.D.**, Lazuardi, M.E., Nanlohy, H., Pakiding, F., Pusparini, N.K., Hikmah, C. Ramadhana, H.C., Ruchimat, T., Santiadji W.V., Timisela, N., Veverka L., Ahmadia, G., (in press). Marine conservation beyond MPAs: Towards the recognition of other effective area-based conservation measures (OECMs) in Indonesia. Marine policy

Gurney, G., Daring, E., Ahmadia, G., Agostini, V., Ban, N., Blythe, J., Claudet, J., Epstein, G., Estradivari, Himes-Cornell, A., **Jonas H.D.**, Armitage, D., Campbell, S., Cox, C., Friedman, W., Gill, D., Lestari, P., Sangeeta, M., McLeod, E., Muthiga, N., Naggea, J., Ranaivoson, R., Wenger, A., Yulianto, I., Jupiter, S., Biodiversity needs every tool in the box: Use OECMs. *Nature.*

Marnewick, D., Stevens, C.M., Jonas, H., Antrobus-Wuth, R., Wilson, N. and Theron, N., 2021. Assessing the extent and contribution of OECMs in South Africa. *PARKS*, *27*, p.57.

Alves-Pinto, H., Geldmann, J., **Jonas, H.D.**, Maioli, V., Balmford, A., Latawiec, A.E., Crouzeilles, R. and Strassburg, B., 2021. Opportunities and challenges of other effective area-based conservation measures (OECMs) for biodiversity conservation. *Perspectives in Ecology and Conservation*.

IUCN-WCPA, 2019. *Recognising and Reporting Other Effective Area-based Conservation Measures*. Technical Report. IUCN: Gland. (Co-lead author)

Jonas H.D. (ed.), 2018. Special Issue on 'Other Effective Area-based Conservation Measures'. *PARKS* 24. IUCN: Gland.

Laffoley, D., Dudley N., **Jonas H.D.**, MacKinnon D., MacKinnon K., Hockings M. and S. Woodley, 2017. 'An introduction to 'other effective area-based conservation measures' under Aichi Target 11 of the Convention on Biological Diversity: origin, interpretation and some emerging ocean issues.' *Aquatic Conservation* (Suppl.1): 130-137.

Juffe-Bignoli D., Harrison I., Butchart S., Flitcroft, R., Virgilio H., **Jonas H.D.**, Lucasiewicz A., Thieme M., Turak E., Bingham H., Dalton J., Darwall W., Deguignet M., Dudley N., Gardner R., Higgins J., Kumar R., Linke S., Milton G.R., Pittock J., Smith K., and A. van Soesbergen, 2016. 'Achieving Aichi Biodiversity Target 11 to Improve the Performance of Protected Areas and Conserve Freshwater Biodiversity.' Aquatic Conservation. 26 (Suppl. 1): 133–151.

Jonas H. D. and S. Lucas, 2013. *Legal Aspects of the Aichi Biodiversity Target 11: A Scoping Paper*. International Development Law Organization: Rome.

4. Equitable and effective area-based conservation and the post 2020 Global Biodiversity Framework

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ANNEX III: Excerpts from Indigenous Peoples' declarations and statements

The following sections set out a number of excerpts from Indigenous Peoples' declarations and statements under a number of non-exhaustive headings.

Mother Earth, territories, knowledge and responsibility

Universal Declaration of Rights of Mother Earth (2010: Article 1):

> *Mother Earth is a living being. Mother Earth is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings. Each being is defined by its relationships as an integral part of Mother Earth.*

A Statement of Custodians of Sacred Natural Sites and Territories (2008: 2):

> *For many of us, we see Sacred Natural Sites and Territories as living beings. Even the rocks are alive, animated by our beliefs, and should not be disturbed. The rocks and water themselves teach important lessons to our children. At the deepest level we belong to the land and the sea and they give us their secrets and wisdom. They give us the laws and the rules for preserving knowledge. The land gives us unity and brings healing.*

Kari-Oka 2 Declaration (2012: 4):

> *Our lands and territories are at the core of our existence – we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories and they are inextricably linked to our survival and to the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management.*

Ulu Papar Biocultural Community Protocol (2012: 6):

> *Until this day, the Ulu Papar Community have an intimate relationship with our customary lands, the cradle to our way of life and source of our daily livelihood needs, foundation to our identity and history as the original inhabitants of Ulu Papar, the basis for recreation and rejuvenation, harmony and development of our community forever more.*

Indigenous Peoples International Declaration on Self-Determination and Sustainable Development (2012: Article 1):

> *As Indigenous Peoples, our fundamental cultural belief systems and world views based on our sacred relationships to each other and Mother Earth have sustained our Peoples through time. We recognize the contributions and participation of our traditional knowledge holders, indigenous women and youth. Cultures are ways of being and living with nature, underpinning our values, moral and ethical choices and our actions. Indigenous Peoples' abiding survival is supported by our cultures, providing us with social, material, and spiritual strength.*

Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project (1995: 1):

> *Our responsibility as Indigenous Peoples is to insure the continuity of the natural order of all life is maintained for generations to come. We have a responsibility to speak for all life forms*

and to defend the integrity of the natural order. In carrying out these responsibilities we insure that all life in its natural process and diversity continues in a reciprocal relationship with us.

Kari-Oka 2 Declaration (2012: 1):

We reaffirm our responsibility to speak for the protection and enhancement of the well-being of Mother Earth, nature and future generations of our Indigenous Peoples and all humanity and life.

Unjust, unsustainable 'development'

Declaration of Solidarity from the International Conference on Indigenous Peoples' Rights, Alternatives and Solutions to the Climate Crisis (2010: 1):

Indigenous Peoples face serious and urgent problems including the violation of our collective rights as indigenous Peoples, oppression by states, development aggression and plunder of our land and resources by multinational corporations and international financial institutions in collusion with the local elite. Government policies and neglect have led to continuing impoverishment, discrimination and deprivation of our identity. All of these amount to virtual genocide of indigenous Peoples in various parts of the world, resulting in mental trauma, active population transfer, displacement, minoritization and marginalization of indigenous Peoples in our own lands.

The Declaration of Solidarity (2010: 2):

We believe that the root cause of the enormous problems we face today is the neoliberal global capitalist system, which puts profits before people and the planet. Central to this system is the expropriation and control of resources by multinational corporations, and dispossession and marginalization of small producers, workers, peasants, women and indigenous Peoples.

Redstone Statement (2010: 1):

Environmental, social, economic, and political conflicts over natural resources and access rights, climate change concerns, and other significant issues threatening international and local communities did not suddenly erupt on the global landscape. Rather, they are an outcome of the historical process that today affects every area of creation. Spiritual, cultural, social, economic, and political structures and values lost their connections to the communities and now focus exclusively on the individual. The world shifted from the circle of community to the ascendancy of the individual, resulting in a dangerous environmental imbalance with significant spiritual and health consequences.

Khoikhoi Peoples' Rooibos Biocultural Community Protocol (2019: 28):

The Hottentots Code made it illegal for the Khoikhoi to own land and forced them to have a fixed 'place of abode' on either a farm or a mission station. It also stated that if a Khoikhoi wished to move, he had to obtain a pass from his master or from a local official. The Hottentots Code was one in a series of pass laws used to empower the Afrikaner farmers to control the Khoikhoi Peoples' movements. If we were caught without such a pass, we would be arrested. This became the systemised recruitment for the prison system we still find today.

Conservation

A Statement of Custodians of Sacred Natural Sites and Territories (2008: 3):

> *Incorporate in its concepts of nature the spiritual values and principles of traditional cultures. Make efforts to overcome ignorance of many conservationists in relation to the Sacred Natural Sites and Territories of indigenous and local communities. Seek new paradigms for the relationship between humans and the environment, based on the principles of indigenous Peoples and traditional cultures.*

Segovia Declaration of Nomadic and Transhumant Pastoralists (2007: 2):

> *Recognise the crucial role of indigenous knowledge and the capacity of pastoralists and all other nomadic and transhumant communities to conserve biodiversity in full compatibility with pastoral livelihoods, empower mobile communities in the management of existing protected areas, and recognise their customary territories as community conserved areas (CCAs) when so demanded by the concerned mobile Peoples and communities.*

International Alliance Charter (1992: Article 44):

> *Environmental policies and legislation should recognise indigenous territories and systems of natural resource management as effective 'protected areas', and give priority to their legal establishment as indigenous territories.*

Rights and solidarity

The Anchorage Declaration (2009: 3):

> *We call on States to recognize, respect and implement the fundamental human rights of Indigenous Peoples, including the collective rights to traditional ownership, use, access, occupancy and title to traditional lands, air, forests, waters, oceans, sea ice and sacred sites as well as to ensure that the rights affirmed in Treaties are upheld and recognized in land use planning and climate change mitigation strategies.*

The Anchorage Declaration (2009: 4):

> *In order to provide the resources necessary for our collective survival in response to the climate crisis, we declare our communities, waters, air, forests, oceans, sea ice, traditional lands and territories to be "Food Sovereignty Areas," defined and directed by Indigenous Peoples according to customary laws, free from extractive industries, deforestation and chemical-based industrial food production systems (i.e. contaminants, agrofuels, genetically modified organisms).*

Indigenous Peoples International Declaration on Self-Determination and Sustainable Development (2012: Article 3):

> *The greatest wealth is nature's diversity and its associated cultural diversity, both of which are intimately connected and which should be protected in the same way. Indigenous Peoples call upon the world to return to dialogue and harmony with Mother Earth, and to adopt a new paradigm of civilization based on Buen Vivir - Living Well. In the spirit of humanity and our*

collective survival, dignity and well-being, we respectfully offer our cultural world views as an important foundation to collectively renew our relationships with each other and Mother Earth and to ensure Buen Vivir - living well proceeds with integrity.

ANNEX IV: Indigenous-informed research, scholarly activism

1. Indigenous-informed research

Unlike some researchers working with Indigenous Peoples, perhaps, I do not treat the individuals with whom I work – or their territories, knowledge etc. – as the subject of my research. Likewise, my work is not led purely by my own research agenda, but responds to Indigenous Peoples' calls for more just forms of recognition, including by state and non-state conservation agencies. In this light, many Indigenous Peoples' declarations and protocols present their concerns with and calls for the reform of mainstream conservation. First, and broadly put, many Indigenous Peoples' groups do not consider mainstream conservation to be an ally. Many declarations and protocols present mainstream conservation as part of the hegemonic development paradigm and describe it, similar to capitalism, as having a Western-centric epistemology and ontology, including anthropocentrism and dualism, as well being infused with human-centred forms of ecocentrism and capitalistic tendencies (A Statement of Custodians of Sacred Natural Sites and Territories, 2008: 3). Indigenous Peoples call for recognition of their ways of life without being forced into externally defined mainstream conservation paradigms (Segovia Declaration of Nomadic and Transhumant Pastoralists, 2007: 2). The authors of the *International Alliance Charter* (1992: Article 44) make a similar call for recognition of Indigenous Peoples' territories and systems in their own image (thus the use of the term 'protected areas' in inverted commas):

> *Environmental policies and legislation should recognise indigenous territories and systems of natural resource management as effective 'protected areas', and give priority to their legal establishment as indigenous territories.*

The call is clear: any recognition or support for Indigenous Peoples' contributions to the conservation and sustainable use of biodiversity must be based on the right to free, prior and informed consent, must not impose externally-developed priorities, and should be and carried out by their own community members unless they expressly decide otherwise. The methodology and methods that I have applied respond directly to this call and framing and are a function of my scholarly activism. I.e., my methodological approach to my work is Indigenous-informed. It is also driven by my solidary with marginalised groups and a desire to be an active participant in the movement for social and environmental justice.

2. Scholar*ly* activism

My work compels me to engage actively with the questions that arise at the nexus of scholarship and activism and I briefly engage with the literature as a means to explore the tensions that exist in the application of methodology and methods. Because I do not identify myself as being an academic,[85] I

[85] I became politically aware though my undergraduate degree (politics). I chose to become a lawyer because I became to appreciate law as a conduit of power and therefore understood the importance of engaging with and using the law to address power asymmetries, which are often the root cause of injustice. I have continued to engage in transformative forms of research and with scholarship under the broad legal and political ecology banner because it has helped me to gain insights about the dynamics I witness and am a part of in my work.

do not engage with the questions of whether scholars should also be activists 'in here' (i.e., within the academy; Castree, 2000) or 'out there' (see for example: Blomley, 1994a; Maxey, 1999; Loftus, 2015; Fuller and Kitchin, 2004). Instead, I briefly explore the relationship, synergies and contradictions between activism and scholarship, with a focus on how critical concepts can promote impactful activism, and vice versa.

Following the work in the 1980s-1990s by feminist geographers (Fuller and Kitchin, 2004), Loftus (2015: 180) argues that political ecologists – and perhaps other critical fields – are engaged in praxis and dialectical pedagogy, and that "learning from activism can be the most productive, inspiring and progressive way of "doing" political ecology". He suggests that the relationship "can be, perhaps even *should* be, symbiotic, mutually reinforcing, and productive for both the subfield and active interventions in the world" (179). Yet he admits that in his own work he has not found an adequate balance between the activities and has instead focused more on the production of knowledge than in engaging with activists. In this context, he worries that individuals may have to choose between "*either* an impoverished activism *or* an impoverished scholarship" (179, original emphasis). He uses this potential conundrum to set out a framework that moves the analysis beyond this binary, namely: that researchers should be 'attendant' to social and environmental movement, align themselves and their research with them, and produce work that supports the causes(s). In my view, the life and work of Darrell Posey is an example of this form of attendant solidarity.[86]

Wisner extends this thinking by differentiating between 'application', 'advocacy' and 'activism' (Wisner, 2015). First, applied research is the engagement with a specific issue with a view to developing a solution. Second, advocacy relates to the promotion of a particular position, such as of an interest group or a movement. Third, he suggests that the defining feature of activism is an explicit questioning of power relations. My legal-political ecology has taken each of these forms during the development of the submitted work. For example, I undertook activist scholarship to co-develop community protocols, applied research to develop *The Conservation Standards* and develop my proposals relating to OECMs, and my latest research on the global biodiversity framework represents advocacy scholarship. While this framework helps distinguish between different kinds of engaged scholarship, Blomley (1994a: 30) cautions against essentialised understanding of activism, arguing that the activists he has encountered have "complex, and occasionally self-serving, agendas … activism is a field of contradiction and diversity". Maxey (1999) also underscores that while critical approaches to activism (or, 'theory activists') demonstrate enormous liberatory potential, the term 'activist' is actively constructed through a range of discourses, including NGOs, academia, and various kinds of media and the resulting framing is problematic and can result in exclusion. Maxey (1999: 202) 'reclaims' the term and quotes Routledge (1996) who proposes that "occupying a third space of critical engagement enables research to become a personal and reflexive project of resistance. Clearly such a space must be one's own, not one prescribed, ordered, expected, enforced". He concludes by

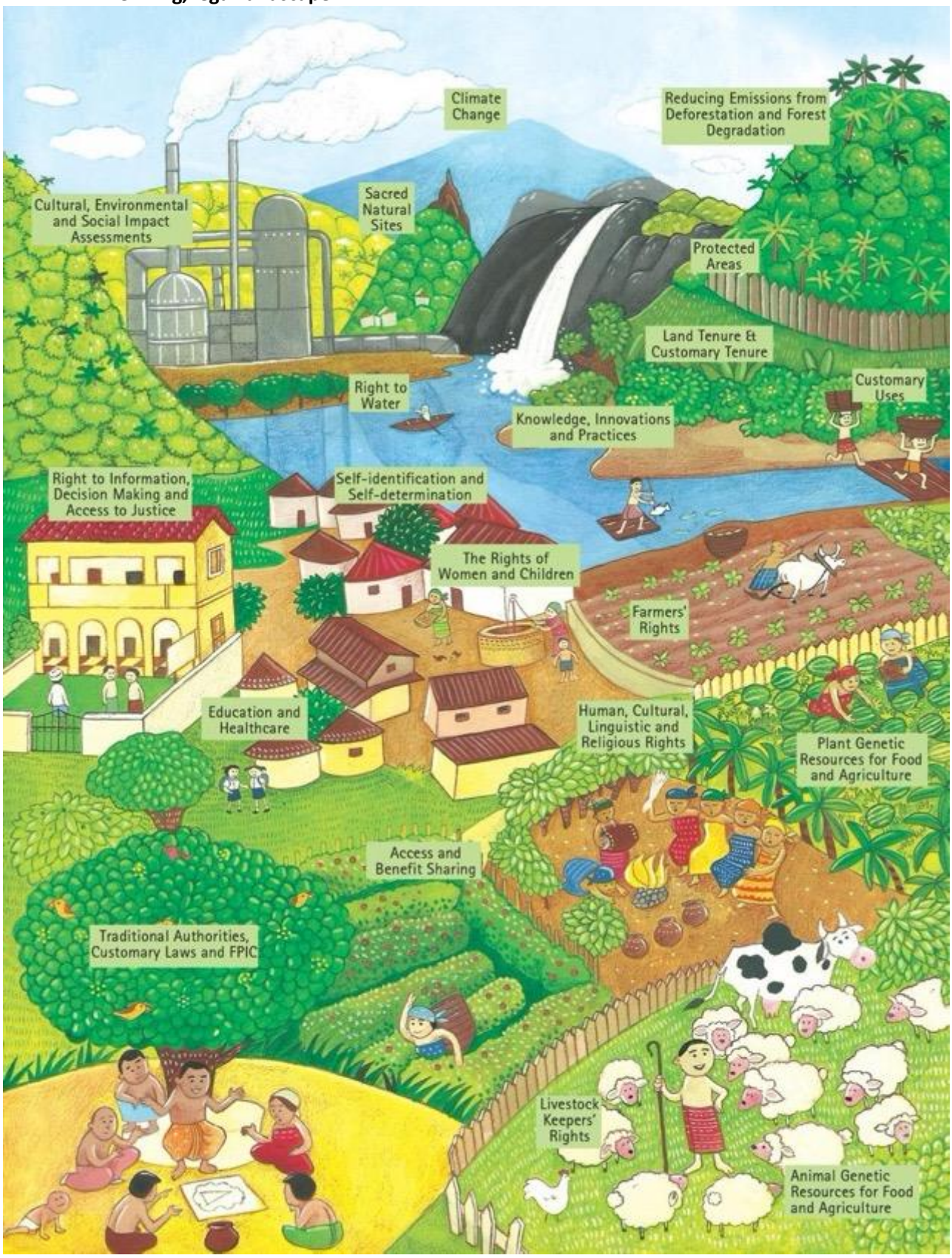
Rather than being faithful to one or other approach, perhaps even developing an identity around being legal-political ecologist', I view these disciplines as offering critical tools that can be used selectively to solve real life issues through critical engagement with legal-spatial processes that produce and reproduce social and environmental inequalities. Through my work, I bridge the divide between theory and practice (as praxis) as an explicit means by which to challenge those processes and outcomes (Fuller and Kitchin, 2004).

[86] I was inspired by Darrell Posey's work, his general approach and his work on 'traditional resource rights', which contributed to my work on *The Living Convention* (Jonas et al, 2020).

making the point that it is important for the individual concerned to “celebrate the value of our contingent, flawed efforts” and that by doing so “we will be far freer to add our next contribution to the conversation” (206). This is a useful idea, but only if the person heeding the advice takes responsibility to ‘do no harm’. Otherwise it become a license to act in ways that feels liberating and may do great harm to a group or a movement’s work. To ensure this, the power-relations within the activist-research process requires reflexivity, reciprocation and representation and the individual should reflect on the effects of their relative positionality within the broader group or movement (Fuller and Kitchin, 2004), all approaches that I have striven to integrate into my work.

In the context of the above analysis, I would consider my approach to be that of a scholar*ly* activist, i.e., first and foremost an activist lawyer who works for social and environmental change, but one who engages with the critical concepts provided by Indigenous-informed legal-political ecology to guide my work. These considerations have informed my methodology and methods, which integrate my approach to research and its integral links to my activism, and collectively constitute a form of participatory legal and political ecology that aspires to generate emancipatory and transformative impacts.

ANNEX V: The living, legal landscape



ANNEX VI: Problematising the 'new paradigm for protected areas' – a legal political history

The first decade of this millennium saw unprecedented reforms to international protected area law and policy. A 'new paradigm for protected areas' was declared at the Vth IUCN World Conservation Congress (IUCN, 2003), Parties to the Convention on Biological Diversity (CBD) agreed a progressive programme of work on protected areas (CBD, 2004), and IUCN adopted a new definition of a protected area, revised management categories and a protected area matrix that includes governance by Indigenous peoples and local communities (Dudley, 2008). To contextualise and critique those reforms, this appendix interrogates the development of the definition of a 'protected area' within IUCN and the CBD. It then contrasts this framing with broader notions of 'conservation' and 'sustainable use' to denaturalise and historicise 'protected areas'.

This interrogation of the 'new paradigm' finds the following paradox: despite the real progress it represents for the relationship between Indigenous Peoples and the protected areas paradigm (at least in law and policy), the reforms remain inherently limited by their self-imposed focus on 'protected areas'. Despite the advances, the 'new paradigm for protected areas' represents only one part of the deeper, broader changes required to reconcile Indigenous Peoples and mainstream conservation. More broadly, this annex aims to underscore the importance of detailed legal analysis that engages the deep structure of area-based conservation law and policy as a means of understanding and subsequently addressing the root causes of protected area-related injustice.

1. Defining and redefining a protected area

This section explores the evolution of the definition of a 'protected area' in two phases: early approaches from 1872 to 1994 and further developments during the 2003-2008 period. It advances two arguments. First, the definitions of a 'protected area' and related guidance on management and governance are outcomes of historically located, politically-laden, technocratic processes and not apolitical and linear eventualities. Second, the high water mark represented by the 'new paradigm for protected areas' was an important step forwards, yet contained conceptual limitations. It argues that despite its progressive elements, the 2008 definition of a protected area and related guidance remains less than fully aligned with Indigenous Peoples' relationships with their territories (Jonas et al., 2014, 2017). Notably, a deeper consideration of the commitments made at the Vth World Parks Congress and time-limited targets in the CBD's programme of work on protected areas that have and have not been realised is critically important (Stevens, 2014; Jonas, 2017) but is not developed here.

1.1 Defining a 'protected area' (1872-1994)

In the beginning there was Yellowstone. The Act of Dedication that established Yellowstone National Park (1872) is noteworthy for a number of reasons. The area was intended to be a "public park or pleasuring ground for the benefit and enjoyment of the people", "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States", and "all persons who shall locate, or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed there from" (US Congress, 1872). The Native American groups who previously inhabited and or used the resources of the area, such as the Shoshone, Bannock, Crow and Nez Perce, were unilaterally dispossessed of and barred from accessing the area (Stevens 1997,

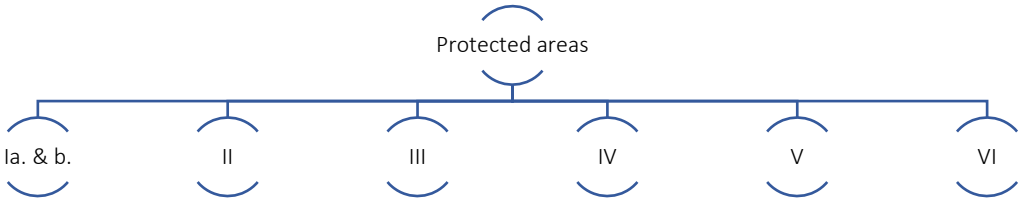
Janetski, 2002). The Yellowstone experience contains a number of the characteristics that set a pattern for state governed national parks in the 20th century, namely: an area is set aside to protect the natural resources and natural beauty, a government agency has powers to exclude certain groups and prohibit access and activities - often Indigenous Peoples or local communities, and tourism remains one of the few permitted activities. The 'Yellowstone model' was exported internationally, which led to a proliferation of locally-adapted approaches, and by mid-century there were at least 140 kinds of terms used to describe different kinds of protected areas, described by Brockman in a paper that informed the first world conference on National Parks in 1962 (Dudley, 2008).

IUCN (then the International Union for the Protection of Nature) was founded in 1948 with the aim of facilitating international cooperation towards the protection of nature. As part of a number of early efforts to categorise the increasingly diverse kinds of protected areas, IUCN moved to define a 'national park' as "a relatively large area where one or several ecosystems are not materially altered by human exploitation and occupation" (quoted in Dudley and Stolton, 2008: 12-13) and to begin a process of developing 'categories' of protected areas, which would include but not be limited to 'national parks'. In 1978, IUCN's Commission on National Parks and Protected Areas (later renamed the 'World Commission on Protected Areas') published a report that proposed ten categories of protected areas based on their management objectives, albeit without defining a 'protected area' (Dudley and Stolton, 2008).

This omission was rectified during the drafting of the Convention on Biological Diversity (1992), in which IUCN was centrally involved, which defines a protected area as "a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives" (Article 2). In 1994, IUCN published a revised list of six protected area categories, also based of their management objectives, and offered its own "equivalent" (Lopoukhine and de Souza Dias, 2012: 5) definition of a protected area:

> *An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.* (IUCN, 1994)

IUCN described their updated guidance as an elaboration of the "universe" of protected areas (IUCN, 1994: 7) consisting of the overarching definition (above) and six categories of areas considered to be compatible with that overall objective (Figure 1). The word 'universe' is telling, and is reflected upon in **Section 3**.

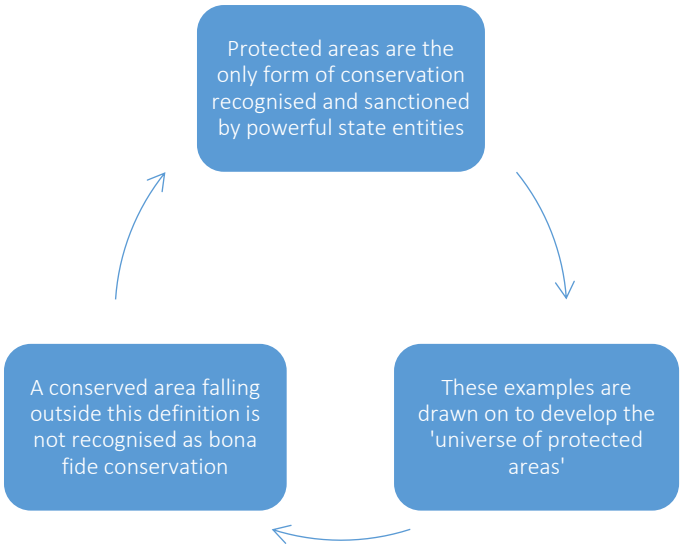


Annex VI, Figure 1: The IUCN 'universe' of protected areas, consisting of six management categories, as set out in the Guidelines for Protected Area Categories (1994).

Three issues are important to note. First, IUCN made a clear choice to define protected areas by *management objective* and not on *conservation outcome*. There is no statement in the 1994 guidelines to the effect that protected areas should be effective, instead indicating that IUCN will develop further guidance on *management* effectiveness. Second, the guidelines make provision for governance of protected areas by government agencies and private entities – a step forward – but there is only mention of *management*, not governance, by "communities" (IUCN, 1994: 12). Third, it is acknowledged, particularly for Categories IV-VI (habitat/species management area, protected landscape/seascape, managed resource protected area), that there can be graduated levels of historic or ongoing human intervention within protected areas.

These are interesting points from the perspective of charting a trajectory from Yellowstone to modern protected areas, including its relevance to protected area equity, and the issues are further considered in **Section 4**. But a deeper observation emerges. The IUCN definition of a protected area and the management categories were developed for a specific purpose. In his introduction to the Guidelines, P.H.C. Lucas, then Chair of the IUCN Commission on National Parks and Protected Areas, frames the guidelines as a response to the many different kinds of protected areas, as arising from the need to "bring order to this diversity" and to provide "a common language" for people involved in protected areas work (IUCN, 1994: 1). Legal geography informs us that law and space co-constitute themselves. This is a good example of a type of socio-legal space – protected areas worldwide – being draw on to generate a definition and framework that describes and orders that reality.

This raises two issues. First, noting the framing of the exercise is important. The areas being drawn upon to develop the categories were diverse yet shared many of the characteristics of the Yellowstone model: mostly state-governed, exclusionary protected areas dedicated to conservation. The sample number was extensive yet conceptually limited, certainly not covering all possible approaches to the *in-situ* conservation of biodiversity. The framing led to a self-fulfilling – almost tautologous – kind of process. It can be illustrated in the following way, depicted in Figure 2.



Annex VI, Figure 2: A illustration of limiting a definition exercise to pre-defined examples that exist, and the self-fulfilling effects of enshrining the definition in law and policy.

There is nothing inherently wrong with the exercise undertaken; there was a perceived problem – a lack of means to order protected areas worldwide – and the guidelines represent an effective response: six management categories ordered by management objectives and related nomenclature. There is equally no problem, *per se*, of projecting the outcome as the 'universe' of protected areas; the framework was intended to apply to all protected areas, not a subset. But criticism can be levelled at the fact that, apart from making reference to the importance of "areas around protected areas" (IUCN, 1994: 13), protected areas were positioned as the paramount, if not only, approach to area-based conservation. The *universe of protected areas* will have been read by many as the *universe of area-based conservation*, describing the totality of effective, desirable area-based conservation.

Second, the development of related law and policy had real-world effects. The CBD and IUCN's 1994 Guidelines further established protected areas' hegemony and deepened and internationalised the entrenchment of the epistemology and accepted modalities of mainstream conservation. It simultaneously marginalised other approaches to the conservation of biodiversity and sustainable use of natural resources, particularly by Indigenous peoples. The effect of this was to further legitimise the establishment of protected areas in areas deemed important for biodiversity and delegitimise other kinds of approaches to landscapes and seascapes. It led to the continued territorialisation of the 'protected area' imaginary around the world and human rights abuses where this intersected with Indigenous Peoples' territories and areas. This period was highly significant for the ecogovernmentality of protected areas (perhaps a time of 'conservationality'). The turn of the millennium ushered in a second phase: the 'new paradigm for protected areas'.

1.2 Redefining a 'protected area' (2003-2008)

In September 2003, delegates met in Durban, South Africa, for the Vth IUCN World Parks Congress. The outcome documents, the Durban Accord and Action Plan, represented a high-water mark for international policy relating to protected areas. The Durban Accord celebrates the emergence of "a new paradigm for protected areas" (IUCN, 2003a: 1), and both documents speak to a range of measures explicitly related to Indigenous Peoples. These include: recognition of protected area governance by 'Indigenous Peoples and local communities', respect for traditional knowledge and contributions to conservation globally, and respect for human rights and Indigenous Peoples' rights – including the right of restitution (IUCN 2003a, b). Rooted in previous years' work on equity in conservation (Borrini-Feyerabend et al., 2014), this new paradigm had become an imperative that could no longer be ignored and helped to align the conservation sector with prevailing social, political, economic and scientific conditions (Phillips 2004; Stevens, 2014).

In addition the Durban Accord and Action Plan, the Vth World Parks Congress issued a five-page message to the CBD that acknowledged the need for a new paradigm for protected areas and called on the CBD COP to consider adopting a programme of work on protected areas that responds to the needs identified at the Congress. This has been directly credited with the development and adoption by CBD Parties of the Programme of Work on Protected Areas (PoWPA) at CBD COP 7 (2004). Element 2 of PoWPA, on 'Governance, Participation, Equity and Benefit Sharing' drew on Durban's outcomes and invites parties, among other things to recognise and promote the procedural and substantive rights of Indigenous peoples, including recognition of their governance of protected areas (CBD, 2004).

IUCN drew on this momentum to facilitate a multi-stakeholder process, called 'Speaking a Common Language', and publish an updated set of protected area guidelines (Dudley, 2008) containing revised protected area management categories and the 'IUCN protected area matrix' that sets out the six categories against the four following governance types: government, private, Indigenous Peoples and/or local communities, and shared governance. It also presents a new definition of a 'protected area', now more inclusive of cultural and spiritual values of nature:

> *A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values. (Dudley, 2008)*

132 years after the establishment of Yellowstone National Park, the principle that Indigenous Peoples could govern (not just manage) protected areas had been enshrined in international policy. This period of protected areas law and policy undoubtedly represents monumental gains for Indigenous Peoples and local communities. But it also resulted in a deepened commitment by IUCN to defining protected areas by conservation objectives over outcomes.[87] The 2008 guidelines underscore this in the first of a set of principles that accompanies the definition and management categories:

> *For IUCN, only those areas where the main objective is conserving nature can be considered protected areas; this can include many areas with other goals as well, at the same level, but in the case of conflict, nature conservation will be the priority.* (10)

Moreover, the guidelines include the significant advancement that protected areas can be governed by Indigenous Peoples and local communities, but expressly reject engaging with areas that either do not have a primary conservation objective or cannot be recognised or do not want to be recognised as protected areas. This is also clear from the supplementary *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas* (Day et al., 2012: 10):

> *Spatial areas which may incidentally appear to deliver nature conservation but DO NOT HAVE STATED nature conservation objectives should NOT automatically be classified as MPAs [marine protected areas], as defined by IUCN. (Original emphasis)*

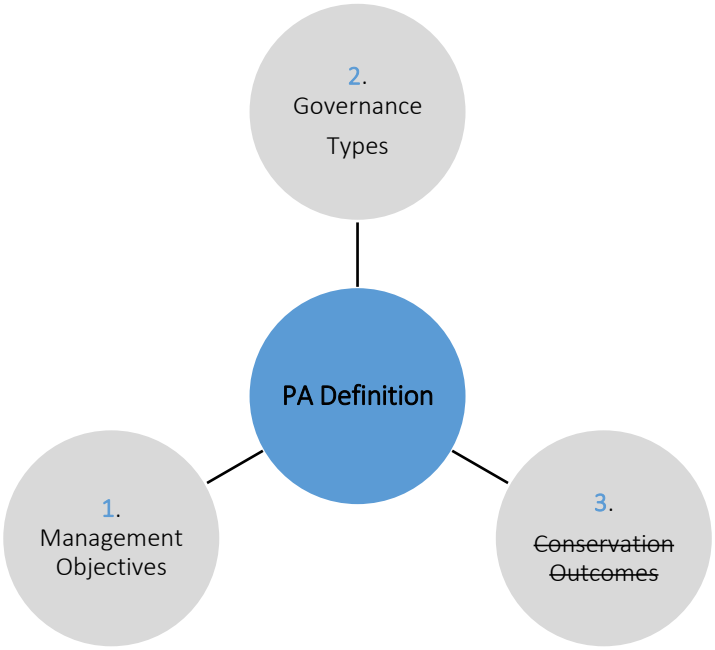
The global significance of these decisions becomes apparent when we analyse this approach in the context of the parallel conceptualisation of 'conservation' and 'sustainable use'.

2. Conservation and sustainable use, objectives and outcomes

As illustrated above, IUCN's 1978 management categories were developed to make sense of a large number of protected areas; albeit by drawing on areas which were similarly conceptualised. The 1994

[87] The 2008 Guidelines include the following text under 'to achieve [conservation of nature]: "Implies some level of effectiveness – a new element that was not present in the 1994 definition but which has been strongly requested by many protected area managers and others. Although the category will still be determined by objective, management effectiveness will progressively be recorded on the World Database on Protected Areas and over time will become an important contributory criterion in identification and recognition of protected areas".

and 2008 guidelines followed that approach, simultaneously broadening the concept of governance to include Indigenous peoples while deepening the principle that protected areas should be defined by management objective, not conservation outcome (**Figure 3**). This section steps back from 'protected areas' to analyse the developments of international definitions of 'conservation' and its relationship to 'sustainable use', from an objectives/outcomes perspective.



Appendix VI, figure 3: The definition of a protected area and questions of who governs the areas towards which objectives and for what outcomes are separate but related. IUCN chose to focus on management objectives, then governance types. 'Conservation outcomes' was not included in the evolving definition.

Alongside the development of protected area law and practice, IUCN and the CBD defined 'conservation' and 'sustainable use'. In 1980, IUCN published the *World Conservation Strategy*, which defines conservation as:

> *The management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. Thus conservation is positive, embracing preservation, maintenance, sustainable utilization, restoration, and enhancement of the natural environment.* (IUCN, 1980: 1)

It is interesting to note the explicit links to livelihoods. The Convention on Biological Diversity, adopted in 1992, does not define 'conservation' *per se*, instead defining the application of the concept in the form of 'in-situ' and ex conservation' *(quoted directly)* as:

- Ex-situ conservation means the conservation of components of biological diversity outside their natural habitats.
- In-situ conservation means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties. (CBD, Article 2)

The CBD also defines 'sustainable use':

> *The use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.* (CBD, Article 2)

Parties to Convention decided to disaggregate activities along a spectrum, with 'conservation' focusing on the functioning ecosystems and biodiversity, and 'sustainable use' encompassing biodiversity as it relates to human needs. The CBD provides important further context to these definitions. First, the CBD defines 'biodiversity as: "diversity within species, between species and of ecosystems", including "domesticated or cultivated species," being "species in which the evolutionary process has been influenced by humans to meet their needs" (CBD, Article 2). Second, the CBD calls on States to "[r]egulate or manage biological resources important for the conservation of biological diversity *whether within or outside protected areas*, with a view to ensuring their conservation and sustainable use" (CBD, Article 8(c), emphasis added). Third, the CBD also calls on parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities [sic] embodying *traditional lifestyles relevant for the conservation and sustainable use of biological diversity*", and to "[p]rotect and encourage *customary use of biological resources* in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements" (CBD, Articles 8(j) and 10(c); emphasis added).

IUCN updated its definition of conservation, in the 2008 guidelines, to: "the *in situ* maintenance of ecosystems and natural and semi-natural habitats and of viable populations of species in their natural surroundings" (Dudley et al., 2008). Notably, this definition includes the conservation of agrobiodiversity and in this context supports associated "traditional systems of management" (Dudley, 2008). Whether this extends to other customary uses of biodiversity is uncertain, although they could be considered part of 'maintenance' especially given that domesticated biodiversity is by definition in use.

Two things become clear from this analysis. First, what is considered to constitute 'conservation' and its relationship with activities related to 'sustainable use' is open to negotiation and change over time. Second, IUCN's approach to protected areas is more restrictive than 'area-based conservation' because a 'protected area' must be *dedicated* to *in-situ* conservation. Areas dedicated to activities more in line with the CBD's definition of 'sustainable use' or that do not have any conservation-related objective that nevertheless achieve the 'in situ conservation' of biodiversity do not meet the definition and cannot be reported as protected areas. The 'universe of protected areas' is clearly shown to be very different from the 'areas of effective conservation of biodiversity'.

This analysis also brings into focus the need to explore an additional dimension of conservation and sustainable use that becomes apparent when introducing objectives and outcomes to the discussion. Table 1 plots biodiversity related objectives against biodiversity related outcomes. An interesting insight emerges. By 2008, IUCN had developed a nuanced approach to describe protected areas that achieve the conservation of biodiversity (**1a**), that are underperforming (**1b**) and are failing (**1c**), of which the latter two are prescribed a greater focus on management effectiveness. Sustainable and

unsustainable uses of biodiversity were also described. But missing from this framework, crucially, was engagement with areas that have a secondary conservation objective (**2a**) and areas that have no biodiversity-related objective (**3a**) yet nevertheless achieve conservation outcomes. One could say that these kinds of spaces were largely invisible to policymakers and conservation agencies at that time, and therefore also not made visible by them to others.

		Biodiversity-related objective		
		1 *In-situ* conservation - primary objective	**2** Use and conservation	**3** No biodiversity-related objective
Biodiversity-related outcomes (i.e., conservation effectiveness)	**a** *In-situ* conservation	**PA**	Secondary conservation	Ancillary conservation
	b Minor degradation	**PA** Possibly requiring improved management effectiveness	Sustainable use	Sustainable use
	c Major degradation	**PA** requiring improved management effectiveness	Unsustainable use	Unsustainable use

Appendix VI, Table 1: The relationship between biodiversity related objectives and outcomes highlighting the important omission by protected areas law of areas that are not dedicated to the conservation of biodiversity but nevertheless achieve long-term conservation outcomes.

One broad coalition that began to challenge this paradox were advocates for recognition of what was at that time referred to as 'community conserved areas'.

3. Inclusive, too inclusive or not inclusive enough?

Another process was occurring at the turn of the millennium. Research on the negative effects of protected areas on Indigenous Peoples, work on conservation effectiveness of Indigenous Peoples' territories and ongoing campaigns for Indigenous Peoples rights began to fuse. One outcome of the discussions occurring at that nexus was a group who began to advocate within the context of the development of law and policy on protected areas for recognition of 'community conserved areas'.

The concept of 'community conserved areas' (CCAs) – now referred to as 'indigenous peoples' and community conserved territories and areas' (abbreviated to 'ICCAs' or 'territories of life') – began to emerge against this backdrop in the late 1990s and early 2000s. ICCAs can be described as natural and/or modified ecosystems containing significant biodiversity values, ecological functions and cultural values that are voluntarily conserved by Indigenous Peoples and mobile or local communities through customary laws or other effective means (Borrini-Feyerabend et al., 2014). ICCAs are extremely diverse and have existed for generations, sometimes hundreds or even thousands of years. Common characteristics include:

1) A people or community has a relationship with a particular site (territory, area, or habitat)

and/or species, which is inextricably linked to their culture, identity, livelihoods and/or well-being;
2) The people or community is the predominant or *de facto* decision-maker, with or without other actors; and
3) The people's or community's decisions and efforts contribute to conservation and associated cultural values, regardless of their outright objectives (for example, livelihoods or spirituality). (Borrini-Feyerabend et al. 2010: 3)

The concept of an 'ICCA' is not universally accepted by Indigenous Peoples and their advocates. Notwithstanding this issue, the question within IUCN at the turn of the millennium related to the relationship between such areas and protected areas. The misalignment between the two concepts and tension between objectives and outcomes appears in a number of outputs produced at that time, including in IUCN's seminal *Indigenous and Local Communities and Protected Areas* (Borrini-Feyerabend et al., 2004). The publication makes clear that many ICCAs would likely not have a primary conservation objective, but may well have conservation outcomes:

> *In this sense, the primary objectives of the relevant community initiatives are more often defined in relation to community needs, well-being, an ethical world view and sustainable use of natural resources than to the protection of biodiversity or wildlife per se. Yet, we speak of Community Conserved Areas only when we see examples of effective conservation.* (56)

Moreover, the authors are clear that for this reason not all areas that meet the definition of an ICCA would also meet the definition of a protected area because protected areas necessarily "involve an explicit and declared intent to protect and maintain biodiversity" (20). This they claim should not be a concern for ICCAs, because "it would appear that most Community Conserved Areas meet the … tests and can therefore be considered to be protected areas" (20). This appears to be a questionable claim in the context of the first quote, and they later submit the following, which feels closer to reality:

> *Although not all Community Conserved Areas may be classified as protected areas, all of them make an important contribution to conservation, and as such they require recognition and support from national governments and the conservation community, especially in cases where they face threats from different forces and when communities are in a situation of vulnerability. (51)*

Reading the publication, now almost 20 years old, there is sense of inconsistency, perhaps borne out of a desire by the authors for many ICCAs to achieve greater recognition and support as protected areas, whilst acknowledging that the primary conservation objective test will be challenging for many such areas. It highlights a misalignment between advocates of the conservation effectiveness of Indigenous peoples' territories and the concept of protected areas.

This issue was addressed very directly in 2013, five years after publication of the IUCN's guidelines (2008). Govan and Jupiter (2013) argue that IUCN's definition of a protected area and the corresponding principles run counter to the approach taken by Indigenous Peoples across the Pacific region (and elsewhere) where the achievement of sustainable livelihoods has traditionally been the major driver for the establishment of locally-managed marine areas (LMMAs). Such local forms of

natural resource management, driven by livelihood interests in the sustainable use of natural resources, underpin many of the vast array of ICCAs and LMMAs documented around the world, and are increasingly incorporated into global and national conservation policies and programmes. These include community forests, pastoralists' grazing reserves, and many other areas where conservation is an outcome of traditional or locally adaptive resource use institutions, rather than the primary or central *objective* of those management efforts.

Yet not everyone was happy with the gradual broadening of the protected area concept. Harvey Locke and Philip Dearden (2005: 1) spoke for those who objected:

> *Wild biodiversity will not be well served by adoption of this new paradigm, which will devalue conservation biology, undermine the creation of more strictly protected reserves, inflate the amount of area in reserves and place people at the centre of the protected area agenda at the expense of wild biodiversity.*

They suggest that only the first four categories of protected areas should be recognised, and that categories V and IV – protected landscape and seascapes, managed resource protected areas – should instead be should be reclassified as "sustainable development areas" (1).

'Protected areas' had become the crucible for arguments about the relative merits of conservation and sustainable use as they related to area-based conservation. As a result, by 2010 the 'universe' of protected areas was showing signs of strain in its role of having to account for the full spectrum *in-situ* conservation areas. As per Nigel Dudley (2007), one of the authors of the 2008 definition of a protected area: "One of the problems with the definition as it stands is that it tries to encapsulate a whole philosophy and approach to conservation and development into a single short sentence."

4. 'Governance equity in protected areas' is not the same as 'conservation justice'

The 'new paradigm for protected areas' represents a series of important advancements for Indigenous Peoples. By 2004, Indigenous Peoples were recognised in law and policy as having the right to govern, not just manage, protected areas. All protected areas were required to be managed in ways that supported the rights of Indigenous peoples and delivered equitable outcomes and IUCN members had committed to processes by which restitution for past wrongs would be addressed. (It is important to note that a number of the commitments and tasks remain unfulfilled, almost 20 years after those momentous meetings.) Just as important, is the less considered issue that Indigenous Peoples were invited to join a previously agreed framework of protected areas, codified and elaborated through a process that began with the unjust establishment of Yellowstone National Park. That was the deeper paradigm they were joining, albeit made inclusive enough to accommodate their engagement.

Most significantly, while the protected areas framework expanded to include Indigenous Peoples, the central requirement of a primary objective remained. ICCAs that delivered conservation outcomes but did not meet this precondition would not be deemed to be protected areas. Moreover, the inclusion of Indigenous Peoples within national protected areas' frameworks had a further drawback. Some Indigenous Peoples who govern territories that might have complied with the IUCN definition of a protected area may have a range of legal, political or other reasons for not wanting their territory or

area to be considered a ‘protected area’ under the national system of protected areas. In many parts of the world, Indigenous Peoples and local communities are wary of a designation that may lead to greater regulation by and influence of state agencies. The result is that such peoples and communities, and the areas they govern and manage, are only provided with either weakened or inappropriate legal, institutional and financial support, with corresponding loss of opportunities to achieve and enhance actual conservation outcomes that could further global conservation goals and targets.

The protected areas model had changed, but the area-based conservation paradigm had not. Protected areas had become more inclusive of Indigenous Peoples, but remained exclusionary of areas that did not meet its definition. It was clear by the end of the millennium’s first decade that equitable protected areas was not the same as conservation justice. Further reforms were required.

Standing back further from this appendix, two other things become clear. Conservation law and policy has evolved a lot in a short space of time. If things changed in the past, they can change in the future. This is a positive message for reform-minded people. Second, IUCN is clearly a leverage point for broader transformation in the conservation sector. Put another way, and drawing on the experiences above, if the aim is to create global change to international conservation law and policy, working through IUCN as a way of influencing the CBD is an effective way to proceed. This insight informed our decision in 2014 to choose to progress our work on OECMs through the IUCN World Commission on Protected Areas (Jonas et al., 2014).

ANNEX VII: Categories of rights that can be negatively affected by conservation initiatives

Reproduced from Jonas et al., 2014a (16-17).

Substantive Individual and Collective Rights

- Overarching human rights
- Women
- Children
- Indigenous Peoples (collective rights)
- Traditional governance systems and customary laws
- Cultural, spiritual and religious integrity
- Assimilation
- Cultural traditions
- Cultural expressions
- Knowledge, innovations and practices
- Education and languages
- Development
- Cultural and natural heritage

Substantive land, and natural resource rights

- Lands and Territories
- Stewardship, governance, management, and use of territories, lands and natural resources
- Customary use
- Sustainable use
- Equitable conservation of biodiversity
- Protected areas
- Sacred natural sites
- Food and agriculture
- Water
- Climate change
- Forests
- Deserts

Procedural Rights

- Benefit sharing
- Precautionary approach
- Free, prior and informed consent
- Cultural, environmental and social impact assessments
- Information, decision making and access to justice
- Capacity building and awareness

APPENDIX VIII: International instruments with human rights implications in a conservation context

Reproduced from Jonas et al., 2014a (14-15).

- Universal Declaration of Human Rights (UDHR)
- ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries
- United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention of the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- Convention on Biological Diversity (CBD), including:
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
- Cartagena Protocol on Biosafety
- Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol
- Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities
- Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity
- Akwé: Kon Guidelines
- Strategic Plan for Biodiversity 2010 – 2020 (including the Aichi Biodiversity Targets)
- United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests
- United Nations Forum on Forests Non-legally Binding Instrument on All Types of Forests
- Convention on Wetlands of International Importance
- United Nations Framework Convention on Climate Change and the Cancun Agreements
- United Nations Convention to Combat Desertification
- The International Treaty on Plant Genetic Resources for Food and Agriculture
- Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration on Animal Genetic Resources
- FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
- FAO Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines)
- Convention on the Law of the Non-navigational Uses of International Watercourses
- The Agreement on Trade-Related Aspects of Intellectual Property Rights
- Convention Concerning the Protection of the World Cultural and Natural Heritage
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- Convention for the Safeguarding of the Intangible Cultural Heritage

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

ANNEX IX: IUCN/CEESP Task Force on Advancing Human Rights in Conservation (Draft, September 2017)

In the last decade, governments, donors, UN agencies, grassroots organizations and non-governmental organizations have increasingly understood that healthy environments are necessary to realize many fundamental human rights, and that realizing human rights is essential for achieving durable conservation outcomes. Nonetheless, progress on translating this insight into consistent action has been fitful, leading to critiques by indigenous, community and human rights organizations, and efforts to reform conservation practice from within and outside the conservation community.

There is a general consensus that important gaps in conservation and human rights practice need to be addressed, including:

- The slow pace of national policy and institutional reforms, and implementation in practice – often exacerbated by limited active collaboration among conservation and human rights actors to inform and influence change, and limited opportunities for governments to share and learn about good practice
- The lack of a consolidated set of standards that clearly articulates the human rights obligations of conservation actors (government and non-government), as a basis for their implementation and monitoring
- Insufficient mechanisms to resolve conflicts, particularly around protected areas, that undermine local rights and conservation in areas of significant biological and cultural diversity

In response, IUCN/CEESP is assembling a Task Force, which will bring together representatives of the IUCN Secretariat, IUCN Members, IUCN Commissions, and external partners and experts who are working actively on conservation and human rights initiatives with direct relevance to focal strategies. The overall objective of the Task Force will be to: Advance commitments to a human rights-based approach to conservation by consolidating standards, promoting increased country-level collaboration around good practice, and strengthening mechanisms for conflict resolution.

To this end, the Task Force will develop and undertake implementation of several areas of activity with a focus on synthesizing and securing best practice in advancing human rights in conservation:

- Articulate and communicate the human rights standards applicable to conservation initiatives and develop guidance on how to implement those standards.
- Provide input to the development of guiding principles on Human Rights and the Environment by the UN Special Rapporteur on Human Rights and the Environment, and to the (possible) establishment of an ongoing working group
- Strengthen the Whakatane Mechanism and related activities to resolve conflicts between communities and protected areas
- Catalyse increased country-level collaboration and concrete action to secure indigenous and community rights as they relate to conservation
- Advance broader knowledge, learning, and collaboration on human rights and conservation

The Task Force will be hosted by the CEESP Theme on Governance, Equity and Rights (TGER), working in close collaboration with the IUCN Global Program on Governance and Rights (GPGR). It is anticipated that the Task Force will consist of smaller subgroups focused on particular activity areas,

in line with participants' own roles and ongoing work. A Coordination Team will ensure synergies and information-sharing at the level of the overall Task Force.