

INTRODUCING THE LIVING CONVENTION AND A LANDSCAPE APPROACH TO LEGAL EMPOWERMENT

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Introduction

Indigenous Peoples have fought hard for the rights they have secured at the international level.² Decades of commitment, tenacity, personal sacrifices, and well-executed negotiating strategies have led to important rights gains and legal recognition, perhaps most significantly in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2007.³ In addition to this landmark instrument, Indigenous Peoples have also obtained greater recognition at the international level, in particular with the establishment in 2000 of the United Nations Permanent Forum on Indigenous Issues.⁴

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2 For an overview of this process, *see* International Law Association, *The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report*. (2010), pp. 1–6.

3 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49. Article 40 of the UN Declaration states that “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”

4 United Nations Economic and Social Council, *Establishment of a Permanent Forum on Indigenous Issues*, ECOSOC E/RES/2000/22, (2000).

Local communities have also successfully advocated for the development of a significant body of rights relating to their role in protecting and conserving biological diversity.⁵ Of particular importance are the UN Convention on Biological Diversity (CBD), the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol),⁶ and decisions issued by the CBD Conference of the Parties (COP).⁷ Today, Indigenous Peoples' and local communities' rights are enshrined in a wide range of international instruments. This distinct body of rights continues to grow as new international instruments are negotiated and adopted, as progressive jurisprudence is developed through tribunals at all levels, and as countries enact laws that respect the rights of Indigenous Peoples and local communities.

However, despite the proliferation of provisions in international law that supports the rights of Indigenous Peoples and local communities, their ability to exercise these rights in many cases remains a distant goal. Although the reasons for this are complex, this paper focuses on two in particular. The first fundamental cause is the fact that international law is largely inaccessible to those in less developed countries.⁸ This factor amounts to at least a procedural injustice, denying Indigenous

5 "Local communities" as used in this article refers to "local communities embodying traditional lifestyles" as referenced in Article 8(j) of the *Convention on Biological Diversity*, 1760 UNTS 79. For more information on local communities, including identification of some of their common characteristics, see Report of the Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, UNEP/CBD/WG8J/7/8/Add.1*, (2011).

6 The Secretariat of the Convention on Biological Diversity, *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, (2011): Montreal.

7 These include, for example, the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD COP Decision X/42, (2010), Annex, and the Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by Indigenous and local communities, CBD COP Decision VII/16 F, (2004), Annex.

8 See Jay Milbrandt & Mark Reinhardt, *Access Denied: Does Inaccessible Law Violate Human Rights?* (2012), 9 Regent J. Int'l L. pp. 55, 57–58

Peoples and local communities an understanding of their rights and responsibilities, as well as those of other actors, under international law.⁹ Second, the law fragments local landscapes, undermining more holistic approaches to social-ecological systems.¹⁰ For example, laws have a tendency to compartmentalise otherwise interdependent aspects of biological and cultural diversity. While communities manage integrated territories and areas, sometimes spanning entire landscapes and seascapes, States tend to see humans and nature in isolation from each other. States frequently view individual resources through a narrow lens, drawing legislative borders around land, natural resources, and traditional knowledge. This often leads to the exclusion of peoples and communities from areas in which they have lived for generations. It can also encourage policies and plans that privilege a singular view of the landscape's or seascape's value and purpose, for example, for 'agricultural use' or 'conservation purposes.'

Recognizing this, Natural Justice is actively rethinking international law and legal empowerment to better enable Indigenous Peoples and local communities to assert their international rights and local responsibilities. This article critiques the current approach to law making and implementation from a landscape perspective. Next it provides background on the integrated rights approach that greatly

9 “[N]umerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice.” Toby Mendel, Freedom of Information: A Comparative Legal Survey. (New York: UNESCO, 2008), p. 7.

However, “[i]n many cases, those who have the greatest need for knowledge of their human rights—those living in the developing world—have no way to access them.” Millbrandt & Reinhardt, *supra* note 8, at p. 60.

10 Scholars have used the theory of social-ecological systems to emphasise the integrated concept of humans in nature and to stress that the delineation between social systems and ecological systems is artificial and arbitrary. See Fikret Berkes, Johan Colding & Carl Folke, Navigating Social-Ecological Systems: Building Resilience for Complexity and Change. (Cambridge: Cambridge University Press, 2003) pp. 1, 3. Social-ecological resilience is measured by the amount or magnitude of disturbance a system can absorb without having its fundamental behavioural structure redefined, a property known as resistance. J.B. Ruhl, Adaptation and Resiliency in Legal Systems: General Design Principles for Resilience and Adaptive Capacity in Legal Systems-With Applications to Climate Change Adaptation (2011), 89 N.C.L. Rev. 1373, pp. 1376–77.

influenced the development of a resource—entitled the Living Convention: A Compendium of Internationally Recognized Rights That Support the Integrity and Resilience of Indigenous Peoples’ and Local Communities’ Territories and Other Social-Ecological Systems (The Living Convention)—designed to increase the accessibility of international law.¹¹ It then provides an overview of both The Living Convention and the landscape approach to legal empowerment as innovative forms of the larger global movement to improve access to justice for Indigenous Peoples and local communities. We argue that deep changes are required in the implementation of legal empowerment that reflect the broad array of interrelated social and cultural dynamics in communities.

Social, ecological landscapes and the law

John Muir said “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.”¹² In other words, everything is connected. Communities whose lives depend very directly on natural resources are acutely aware that a disturbance or change to one aspect of the system will have an effect on others. Their ways of life, customs, and laws, knowledge of the seasons, wild plants, and animals, and crops and domesticated livestock all interact as a living system. They protect against upstream forest clearance to prevent over-sedimentation that diminishes fish stocks; wise use of fire leads to the regeneration of savannah grasslands; and they engage in many other practices that help ensure the long-term sustainability of their cultures. Over generations, these kinds of human-ecological interactions have produced an extraordinary variety of social-ecological systems around the world, systems that have led to landscapes marked by a mega-diversity of peoples, communities, and ecosystems.

In contrast, the typically Western state- and market-centric approach to the environment is to compartmentalize and maximize the

11 The Living Convention is available online at <http://naturaljustice.org/library/our-publications/legal-research-resources/the-living-convention>.

12 John Muir, *My First Summer in the Sierra*. (Boston and New York: Houghton Mifflin Company, 1911) p. 211.

use of individual elements of an otherwise connected landscape. This approach is crystallized by systems of law making that disrupt and deny local realities.¹³ Laws that regulate agricultural production and genetic resources exclude the very livestock keepers and farmers who created the breeds and varieties so essential for food security. Forests are governed by legislation that turns a blind eye to the communities who shaped their very composition. Nomadic communities are criminalized and the waters and migratory species upon which they depend are divided by state borders. Landscapes, and the myriad of complex and endemic relations that define them, become fragmented by incoherent laws and disconnected institutions mandated to implement them.

The deeper rhythm of the landscape is subsequently lost in the cacophony of concurrent and often-contradictory targets, priority action plans, and programmes of work. Individuals and their communities, their relationships with their territories, and the broader integrity of those territories are effectively deconstructed locally and reconstructed remotely. Grandparents' knowledge becomes *intellectual property*, forests become *carbon sinks*, and rivers become contributors to *ecosystem services*. Communities are forced to understand and engage with externally imposed definitions of their cultural heritage, natural resources, and territories. Failure to do so can further marginalize them from the mainstream, while conforming to these norms can have significant consequences for who they are as individuals and their sense of belonging as a people or a community.¹⁴

13 Harry Jonas, Holly Shrumm & Ashish Kothari, Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities: An Analysis of International Law, National Legislation, Judgments Institutions as the Interrelate with Territories and Areas Covered by Indigenous Peoples and Local Communities. (Malaysia: Natural Justice & Kalpavriksh, 2012) (hereinafter The Legal Review).

14 Harry Jonas, Holly Jonas & Suneetha Subramanian, The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia. (Malaysia: Natural Justice and United Nations University–Institute of Advanced Studies: 2013).

New approaches to International Law

A. Reengaging traditional resource rights

In the 1990s, Darrel Posey, together with Graham Dutfield, Alejandro Argumedo, and many others who were cognizant of these dynamics, drew on a range of Indigenous concepts and movements to develop the theory of traditional resource rights (TRRs) as a way to more accurately reflect Indigenous Peoples' views and concerns in law.¹⁵ Dr. Posey described TRRs as constituting “bundles of rights” already widely recognized by legally and non-legally binding international agreements, which include individual and collective human rights, and land and territorial rights.¹⁶ TRRs take into account the spiritual, aesthetic, cultural, and economic values of traditional resources, knowledge and technologies, and accordingly recognize the rights of Indigenous Peoples and local communities to control their use. Implicit in the concept of TRRs is an acknowledgment of the “inextricable link between cultural and biological diversity [that] sees no contradiction between the human rights of Indigenous and local communities, including the right to development, and environmental conservation.”¹⁷

TRRs focus on integrating otherwise disparate legal regimes, instruments and provisions. The framework is founded on four processes:

1. Identifying bundles of rights expressed in existing moral and ethical principles;
2. Recognizing rapidly evolving soft law influenced by the customary practice of states and non-binding agreements;

15 See, e.g., Darrel Posey & Graham Dutfield, Beyond Intellectual Property Rights: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities. (Ottawa: IDRC, 1996). For an overview of the full literature on traditional resource rights, see Harry Jonas & Holly Shrumm, Recalling Traditional Resource Rights: An Integrated Rights Approach to Biocultural Diversity. (Malaysia: Natural Justice, 2012).

16 Darrel Posey, Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?, (1995) http://www.ubcic.bc.ca/files/PDF/Posey_Indigenous.pdf, p. 20.

17 Posey & Dutfield, *supra* note 15, at p. 95.

3. Harmonizing existing legally binding international agreements signed by States, whereby areas of conflict between different agreements should be resolved, giving priority to human rights concerns; and
4. “Equitizing” the law to provide marginalized Indigenous Peoples and traditional and local communities with favorable conditions to influence all levels and aspects of policy planning and implementation.¹⁸

The first two processes required what might be referred to as *legal mapping*, where international instruments are surveyed and relevant provisions are identified, followed by what is referred to as *bundling*, where instruments are organized under relevant rights headings. By finding individual provisions that support Indigenous Peoples’ and local communities’ rights from across a range of international instruments and reordering them in a locally relevant and comprehensive manner, TRRs integrate an otherwise fragmented international framework of rights relating to the links between biological and cultural diversity.¹⁹ Using this methodology, Dr. Posey set out a range of relevant binding and non-binding instruments²⁰ from across a broad spectrum, bundled under the basic principles upon which TRRs are based.²¹ In effect, this approach attempts to

18 Darrel Posey, Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities. (Switzerland: IUCN, 1996) pp. 16–18.

19 For a comprehensive discussion of the fragmentation of international law and its implications, see Study Group of the International Law Commission entitled *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, G.A./CN.4/L.682 (New York: United Nations, April 13, 2006).

20 As Dr. Posey explains, non-binding instruments “lack legal status.” “In practice, soft law refers to a great variety of instruments: declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions, etc. Although all these kinds of documents lack legal status (are not legally binding), there is a strong expectation that their provisions will be respected and followed by the international community.” Posey & Dutfield, *supra* note 15, at p. 120. Determining the binding nature of a particular instrument is one of the major difficulties that arises in the bundling of its provisions.

21 These bundles of rights and their location within international agreements, identified by the Working Group on Traditional Intellectual, Cultural and Scientific

counter the abovementioned inherent challenges that international law poses for Indigenous Peoples and local communities. By reading and effectively reordering the legal landscape in an innovative way, Dr. Posey and his contemporaries reveal a novel formulation of an existing internal structure.

Looking at existing laws from a new integrated perspective enables a paradigm shift toward more comprehensive assertions of Indigenous Peoples' and local communities' rights. An integrated view allows a better understanding of what rights have actually been enshrined in existing instruments. Further, it provides a conceptual framework for proposing systemic changes to the way laws are developed and implemented. Dr. Posey also felt that TRRs could serve a useful purpose at the local level. Specifically, he argued that “[b]y prioritizing Indigenous peoples’ rights to say NO to exploitation” and “by acknowledging communities’ rights to control access to traditional resources and territories,”²² TRRs could guide negotiations and legal processes toward new partnerships based on increased respect for traditional communities. TRRs could also guide governments in more effectively implementing their international obligations and responsibilities relating to human rights, trade, environment, and development.

When looking into the future in the late 1990s, Dr. Posey surmised that proper development of TRRs would require “a process of dialogue” between Indigenous Peoples, local communities and governmental and non-governmental institutions on a wide range of issues, including local economic interests, accountability, human rights, and Resource Rights (Working Group on Resource Rights) of the Global Coalition for Bio-Cultural Diversity, include: basic human rights; right to development; rights to environmental integrity; religious freedom; land and territorial rights; right to privacy; prior informed consent and full disclosure; farmers’ rights; intellectual property rights; neighboring rights; cultural property rights; cultural heritage recognition; and rights of customary law and practice. Posey, *supra* note 16, at p. 36 (Appendix 6). Notably, the Working Group on Resource Rights also carried out a survey of 63 statements and declarations made by Indigenous Peoples from which they identified 80 common demands. From these, they elaborated six main topic areas, namely: self-determination; territory; free, prior and informed consent; human rights; cultural rights; and treaties. Posey, *supra* note 18 at p. 16.

22 Darrel Posey, National Laws and International Agreements Affecting Indigenous and Local Knowledge: Conflict or Conciliation?, 15 (APFT Working Paper, 1997). (Capitalization in original.)

environmental concerns for long-term sustainability.²³ That mantle has been carried by a number of organizations²⁴ and by practitioners and academics in various settings.²⁵ The approach has not, however, been applied to the international instruments that have been adopted in the meantime, including the watershed UN Declaration on the Rights of Indigenous Peoples. The Living Convention undertakes that task, applying the TRR methodology to the full spectrum of contemporary international law of relevance to the protection of Indigenous peoples' territories and other social-ecological systems.

B. Reimagining International Law: The Living Convention

One of the basic obstacles standing in the way of Indigenous Peoples and local communities exercising their rights under international law²⁶ is a lack of knowledge of those rights.²⁷ A lack of knowledge of rights impedes the capacity to access justice at both the national and

23 Posey, *supra* note 16 at pp. 2–3.

24 See, e.g., Alejandro Argumedo & Michel Pimbert, Traditional Resource Rights and Indigenous Peoples in the Andes. (London: IIED, 2005); Alejandro Argumedo & Michel Pimbert, Protecting Indigenous Knowledge Against Biopiracy in the Andes (London: IIED, 2007).

25 See, e.g., Fernando Villalba, *Un-discovering Wilderness: Protecting Traditional Resource Rights in U.S. National Parks*, (2010) 17 IUCN-CEESP Policy Matters. p. 126; Union of BC Indian Chiefs, Protecting Knowledge: Traditional Resource Rights in the New Millennium. (2000). Session outlines available online at: <http://www.ubcic.bc.ca/Resources/conferences/PK.htm#axzz11IKtrnCl>.

26 The term “international law” is far from precise, but its formally recognized sources are set forth in article 38(1) of the Statute of the International Court of Justice: international conventions; international custom; general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations. See James Crawford, Brownlie's Principles of Public International Law, 8th ed. (United Kingdom: Oxford University Press, 2012). In developing The Living Convention, Natural Justice focused on “international conventions” and other international instruments setting forth rights and duties in written form.

27 The United Nations Development Programme (UNDP) has identified “legal awareness,” as the “[d]egree of people’s knowledge of the possibility of seeking redress through the justice system, whom to demand it from, and how to start a formal or traditional justice process,” as a principal area of support on access to justice. UNDP, Programming for Justice: Access for All. (New York: UNDP, 2005), p. 7.

international levels.²⁸ Remediating this problem is difficult for at least three reasons:

1. The sources of the rights are diffuse, and “rights” are codified in provisions contained in a wide range of international instruments that are themselves located within distinct categories of laws such as human rights, the environment, intellectual property, and culture;
2. An individual’s or a group’s specific rights will depend on, among other things: a) whether they are Indigenous Peoples or from other marginalized or minority groups; b) whether their lifestyles are relevant for the conservation and sustainable use of biodiversity; c) the uniqueness of their ways of life, for example, whether they are farmers, livestock keepers, forest-dependent, or fisher folk; and d) the nature of their self-defined territories and areas on which they depend, for example, whether these are coastal or marine areas, mountains; and whether they are living in or near externally-defined protected areas; and
3. International instruments are of differing legal weight and each is adopted, signed, ratified, or otherwise agreed to by a different list of countries, which has a direct bearing on the value of the instrument for enforcing rights at the national and local levels.

These issues, which are by no means exhaustive, make it difficult for those who lack an understanding of multilateral instruments to access international law. For example, an individual or a community who would like to understand and exercise their rights to free, prior and informed consent (FPIC) over activities relating to their lands, would have to review a variety of different instruments to gain a complete picture of what FPIC means and how it is applied.²⁹ Provisions

28 See *Ibid.* at 6 (noting that part of capacity development for access to justice involves “key skills people need to seek remedies through formal and informal systems, including legal awareness, legal aid, and other legal empowerment capacities.”)

29 There are now several resources that address FPIC to help make it accessible and understandable to non-experts. See, e.g., Abbi Buxton & Emma Wilson, *FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects*, (London: IIED, 2013), <http://pubs.iied.org/16530IIED.html>. FPIC is used in this instance as an illustrative example

relevant to FPIC are contained in at least the following international instruments: the UN Declaration; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (commonly referred to as ILO Convention 169); FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security; Nagoya Protocol; Tkarhwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities; and the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

The wide range of different instruments that often address the same rights (such as FPIC), and the different contexts under which those instruments are drafted, hinders the accessibility of the information to the very individuals, communities and peoples it is intended to support. To address this issue, and with the TRR concept in mind, the authors produced and continue to develop a resource entitled *The Living Convention*.³⁰ Forty years after the 1972 UN Conference on the Human Environment, and in the wake of the 2012 Rio+ 20 Conference on Sustainable Development, *The Living Convention* takes stock of the breadth and depth of the provisions at the international level that support Indigenous Peoples' and local communities' rights to maintain the integrity and resilience of their territories and social-ecological systems. *The Living Convention* is directed primarily toward Indigenous peoples and local communities, as well as their supporting organizations and other stakeholders and interested parties. It constitutes an easily accessible resource for exploring the full range of provisions in international law that address the interrelationships among: individuals, communities and peoples; livelihoods, culture and spirituality;

of the fact that certain principles and rights can be addressed in a wide range of instruments.

30 This process is ongoing, and it is anticipated that *The Living Convention*, in its second edition as of 2013, will continue to be revised and updated to be more comprehensive and reflect changes in existing law.

territories, landscapes and seascapes; and many other categories relevant to the rights of Indigenous Peoples and local communities.³¹

Facilitating legal environment

A. Landscape approaches to legal empowerment

While the production of useful resources is an important process, deeper changes are required in the way practitioners think about legal empowerment if structural barriers to justice are to be overcome. Legal empowerment aims to enable Indigenous Peoples and local communities to engage with such laws and legal processes. There is a wide range of legal empowerment models and corresponding analysis, including on legal empowerment generally;³² regional approaches;³³ sectoral or issue-based approaches;³⁴ particular

31 The Living Convention contains provisions copied verbatim from a wide range of international instruments that support the integrity and resilience of Indigenous Peoples' and local communities' territories and other social-ecological systems. These provisions have been reorganized under headings chosen to reflect rights as expressed and deployed in practice at local, national and international levels. As an example, all provisions that deal with FPIC, regardless of whether they are located in human rights instruments or multilateral environmental agreements, are grouped under the heading "Free, Prior and Informed Consent." For a more detailed discussion on the issues touched upon in this section, see Part I of The Living Convention, available online at <http://naturaljustice.org/wp-content/uploads/pdf/The-Living-Convention-second-edition.pdf>.

32 Tiernnan Mennen, The Legal Empowerment Approach to International Development. (Haki Legal Empowerment Network, 2011), <http://www.hakinetwork.org/wp-content/uploads/2011/06/Haki-Legal-Empowerment-White-Paper.pdf>; Legal Empowerment: Practitioners' Perspectives. Stephen Golub & Thomas McInerney eds. (Rome: IDLO, 2010); Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone. (New York: UNDP, 2008), http://www.unrol.org/doc.aspx?n=Making_the_Law_Work_for_Everyone.pdf

33 Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa. Lorenzo Cotula & Paul Mathieu eds. (London: IIED, 2008).

34 Rachael Knight et al., Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda. (Washington, DC: Namati, 2012); Lorenzo Cotula, Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa. (London: IIED, 2007).

projects;³⁵ paralegals;³⁶ and participatory methods as means for realizing procedural rights.³⁷

One of the most recent project publications in this lineage is on land documenting in Africa.³⁸ The three-year study (2009–2011) detailed in the publication sought to better understand both the type and level of support that communities require to successfully complete community land documentation processes. Importantly, it also explored the intra-community dynamics inherent in the processes and provided guidance on the kinds of approaches that can enhance the overall outcome. Its findings included the following:

- A community-led land documentation process was a valuable opportunity to resolve local land conflicts;
- The process of drafting community by-laws or constitutions was a very useful participatory methodology for the community members involved. Community land documentation processes structured to proactively address intra-community governance led to changes in women's substantive and procedural rights, as well as improved intra-community governance and leadership accountability;
- Paralegals were the most effective form of legal support. Paralegals possess skills relating to successfully navigating intra-community tensions or obstacles that others (such as outside professionals) do not; their beneficial influence may also have broader impacts throughout the region in which they are based; and
- Notwithstanding the above, administrative or bureaucratic inefficiencies linked to lack of necessary staffing and state resources, lack of political will, and other institutional

35 Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone and Worldwide*, (2006) 31 *Yale Int'l L.*, p. 426; Sanjay Upadhyay, *Law for the People: Interactive Approaches to Legal Literacy in India*. (2005) 53 *Participatory Learning and Action*, p. 23.

36 Open Society Foundations, *Community-Based Paralegals: A Practitioner's Guide*. Felisa Tibbitts ed. (New York: Open Society Institute, 2010).

37 Manjula Amerasinghe, et al., *Enabling Environmental Justice: Assessment of Participatory Tools* (Cambridge, MA: MIT, 2008).

38 Knight et al., supra note 34.

obstacles were the greatest impediments to successful land documentation.

While the report's findings underscored the transformative nature of participatory legal empowerment and the uniquely important role played by local paralegals in this regard, securing rights to land is only the first step in increasing legal empowerment and access to justice. Communities also need tools to help ensure that rights to land are respected, and mechanisms for redress are available when their rights are violated. Additionally, as discussed above, part of ensuring respect for rights and redress requires communities to understand their rights and possess the capacity to seek remedies in the proper forum when those rights are violated.³⁹

Natural Justice's work⁴⁰ highlights some interesting points regarding land documentation. Especially in Africa, it is evident that while appropriate land reform offers one of the most direct means to improve the lives of millions of rural people,⁴¹ a range of other laws are also important sites of struggle toward the same aim of securing the resources necessary for people to live with dignity and according to their customs. These include laws that address, for example:

- **Indigenous Peoples' rights:** Laws relating to the rights of Indigenous Peoples (such as in Bolivia, Panama, and the Philippines) lead to significant advances in a range of important rights relating to Indigenous territories and waters;
- **Environment:** Specific environmental laws can have profound effects on communities (both positive and negative). In India, the Forest Rights Act has been hailed as a progressive piece of legislation that could improve the lives of millions of forest dwellers, but has so far suffered from ineffective or non-existent implementation;⁴²

39 The report's authors are now working with the communities to ensure that they are empowered to negotiate with investors and to increase conservation.

40 See, e.g., *The Legal Review*, *supra* note 13.

41 Fred Nelson, *An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 2: Africa Regional*. (Malaysia: Natural Justice & Kalpavriksh 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewAFRICAREGIONAL.pdf>

42 This Act has been inadequately used by communities to claim rights to and

- **Protected areas:** While conservation has moved beyond the ‘fines and fences’ approach to what is hailed as the ‘new conservation paradigm’ or ‘rights-based approaches to conservation,’ practice lags behind. Some countries’ protected areas programmes (such as Australia’s support for Indigenous Protected Areas) offer new spaces for communities in which to retain the integrity of their cultures;
- **Wildlife:** Namibia provides Africa’s leading example of a formalized, government-crafted process of devolving clearly delineated rights over wildlife to rural communities. Communal Conservancies⁴³ provide for rural communities to form conservancies and gain use rights over wildlife and tourism within the conservancies;
- **Traditional knowledge:** Since the Nagoya Protocol was adopted in 2010, State parties have been drafting laws relating to genetic resources and associated traditional knowledge. Such laws have enormous potential to either support or undermine communities at the local level; and
- **Climate change:** Policies and projects relating to reducing emissions from deforestation and forest degradation (REDD) are heavily contested due to the impact they can have on communities’ forests and lives (both positive and negative).

governance of forests. There are several reasons for this, including: lack of awareness about the Act or how to make claims, lack of proactive assistance from government departments, deliberate obstruction by some government agencies or officials, difficulties in finding evidence to file with the claims, and superimposition of top-down boundaries related to government schemes rather than acceptance of customary boundaries of the community. See Tushar Dash & Ashish Kothari, *Forest Rights and Conservation in India*, in The Right to Responsibility, *supra* note 14, at p. 150.

43 Policy on Wildlife, Management, Utilisation and Tourism in Communal Areas (1995) and the subsequently enacted Nature Conservation Amendment Act (1996). See Brian Jones, An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 4: Namibia. (Malaysia: Natural Justice & Kalpavriksh: 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewNAMIBIA.pdf>.

In addition to the bearing that the above areas of law have on communities and their territories and ways of life, it is important to note that a potentially supportive law can be severely undermined by a) other laws that contravene their provisions (such as those that facilitate extractive industries or industrial agriculture), or b) implementing agencies that deny the intent of supportive laws, either wilfully or by neglect.⁴⁴

B. Integrated legal empowerment for landscapes

In this context, a critical lesson for legal practitioners relates to the social-ecological interrelationships that exist at the local level, such as between traditional knowledge, management of natural resources, land tenure, and resilience of crop varieties and livestock. When communities want to protect their ways of life and foster new phases in their growth, they are compelled to engage with a range of laws and institutions. Livestock keepers, for example,⁴⁵ have to engage at least with the laws and institutions addressing land, biodiversity, agriculture, protected areas, and potentially access and benefit sharing. Legal empowerment efforts should therefore adopt an integrated approach, connecting the full extent of the respective communities' social-ecological existence with an equally holistic approach to the myriad laws that support them.

Legal empowerment that focuses too narrowly on one issue or area of law ("implementing REDD," for example) without also looking at related issues such as land rights or the protection of traditional knowledge and adaptation strategies further compounds the tendency of the law to fragment otherwise connected localities. Similarly, engaging with only one level of laws (such as international, bilateral, state, or

44 See, e.g., Dash and Kothari, *supra* note 42; Samson Pedragosa, An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 16: The Philippines. (Malaysia: Natural Justice and Kalpavriksh, 2012), <http://naturaljustice.org/wp-content/uploads/pdf/ICCALegalReviewTHEPHILIPPINES.pdf>.

45 See Ilse Köhler-Rollefson, *Livestock Keepers' Rights in South Asia* in The Right to Responsibility, *supra* note 14, at 135.

customary) leads to a one-dimensional and limited understanding of communities' and other actors' rights and responsibilities.

In sum, the current focus on rights-based approaches can be improved by a) exploring hybrid legal empowerment and participatory methodologies more deeply, and b) adopting an integrated approach to supporting peoples and communities within their territories and areas. This also necessitates focusing on rights and responsibilities. In this light, there is a clear need to cultivate a new generation of legal empowerment that strives to reconnect social-ecological systems and that places as much emphasis on affirming responsibilities as asserting rights.⁴⁶

Conclusion

The fragmentation of law and related institutional arrangements continue to undermine Indigenous Peoples and local communities intent on self-determining their futures and retaining the social and ecological integrity of their territories and other areas. In this light, new approaches to understanding the law and to using the law are required. *The Living Convention* attempts to employ a new approach in order to make international law more accessible to Indigenous peoples and local communities. In doing so, it helps increase access to justice by democratizing the law and allowing a range of non-lawyers to identify and to utilize provisions in international law that are relevant to their needs. *The Living Convention* and the concept of 'legal empowerment for landscapes' are modest contributions to this ongoing and multi-stakeholder endeavor. It is the authors' sincere hope that these ideas contribute to the on-going work in this area and, by promoting an unorthodox reading of an existing legal landscape, helps Indigenous Peoples, local communities and their supporters to identify "space to place new steps of change."⁴⁷

46 This approach is the focus of an African regional symposium being hosted by Namati and Natural Justice in Cape Town in November 2013.

47 Maya Angelou, *Inaugural Poem*, January 20, 1993.