



Human right to a healthy environment for a thriving Earth

Handbook for weaving human rights, SDGs, and the post-2020 global biodiversity framework



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Foreword

David Boyd

The Earth is the only planet in the universe that is known to support life. The only planet where the chemical and physical conditions somehow gave birth to biodiversity. This miraculous blue-green orb is our home, the only home we will ever know, and yet human society is causing unprecedented levels of environmental degradation. Human activities have sent concentrations of carbon dioxide in the atmosphere soaring above 400 parts per million, the highest level in hundreds of thousands of years. Pollution kills more people every year than wars, murder, road accidents, tuberculosis, HIV/AIDS, and malaria combined. Scientists have determined that rates of extinction are hundreds of times above background rates, indicating that humans are causing the sixth mass extinction in the 3.8 billion years of life on this planet. Not only the diversity but the abundance of other life forms has suffered a precipitous decline, with global wildlife populations plummeting sixty percent since 1970. The crash involves not only charismatic megafauna such as rhinos, tigers, and elephants, but also the Earth's enigmatic microfauna, including insects, frogs, and amphibians.

The direct causes of the decline in biodiversity include over-exploitation, habitat destruction, the introduction of invasive species, pollution, climate change and depletion of the ozone layer. Strides have been made in addressing some of these problems, pulling some species back from the brink. Inspiring examples range from blue whales, grey whales and humpback whales to eagles and falcons. Yet the overall trends are bleak. The underlying drivers of human population growth, economic growth and excessive consumption by the wealthy minority continue to be largely unaddressed.

An infamous attempt to replace Nature's goods and services with manmade substitutes, called Biosphere 2, was a complete failure. Built in Arizona in the Southwestern United States in the late 1980s/early 1990s, Biosphere 2 was intended to be a closed system that could mimic deserts, oceans, wetlands, rainforests and other natural biomes, along with a farm and a human habitat. Although it cost more than \$100 million, in less than two years the inhabitants of Biosphere 2 were miserable, hungry, and deprived of oxygen. Humanity's intellect and technological wizardry are no match for the unfathomable genius of Nature.

In light of the dire environmental challenges we face, it is absolutely imperative to recognise and understand that human beings are related to, and dependent upon, the species and ecosystems with whom we share the planet. The air we breathe and the water we drink are filtered by natural ecosystems. The food we eat and the homes where we live are ultimately based on the productivity of natural ecosystems and the goods and services they provide.

Many human rights depend on biodiversity, particularly in less wealthy regions of the world. The rights to food, water, health, culture, and even life itself depend on thriving biodiversity and ecosystems. The people who are most vulnerable to declining biodiversity are those who directly depend upon other species, including Indigenous peoples, artisanal fishers, hunters and gatherers, small-scale farmers, and pastoralists. By protecting biodiversity, we protect their human rights. At the same time, if their human rights are respected, these people are often the most capable of protecting, conserving, and sustainably using biodiversity.

Given the magnitude and the urgency of the environmental challenges faces humanity, we need to harness the most powerful tools and approaches available in order to conserve what remains of this planet's beautiful but beleaguered biodiversity and eventually restore it to its former glory. One of the most promising avenues, based on a series of remarkable historical precedents, is to employ the power of rights-based approaches to protect the people, places, and other living beings that we love and depend upon.

History is full of inspiring examples of the transformative power of rights, enabling grassroots movements to overcome powerful opposition and overturn the status quo. The abolitionists used rights to end slavery in a David and Goliath battle against wealthy landowners and corporations who profited from the exploitation of right-less people. The suffragettes successfully harnessed rights to propel women towards equality. The civil rights movement in the United States championed the constitutional rights of African-Americans, revolutionizing American society. Anti-apartheid activists, Indigenous people, LGBTQ advocates ... the list of rights movements that have achieved improbable gains is long and impressive.

There are two promising rights-based approaches that could dramatically enhance protection for the health and wellbeing of humans and ecosystems. The first is global recognition of the human right to a healthy and sustainable environment, and the second is the more radical extension of rights beyond humans to other species, ecosystems, and Nature herself.

The right to a healthy and sustainable environment already enjoys a surprising depth of acceptance around the world, but more needs to be done to make this right globally recognised and enforced. Over 120 States in Africa, Latin America, Europe, West Asia, the Middle East, and the Caribbean have ratified regional treaties that incorporate the right to a healthy environment. This right enjoys constitutional protection in more than 100 States, from Argentina to Zambia, and is also included in environmental laws in more than 100 States. In total, 155 States recognise the right to a healthy and sustainable environment. It is time for this right to be recognised by the United Nations as a fundamental human right belonging to all. Such global recognition would catalyse progress at the national level in terms of stronger laws, enhanced public participation, and improved enforcement.

Empirical evidence from numerous scholars demonstrates that recognition of the right to a healthy environment leads to superior environmental performance, including stronger protection for species such as endangered sea turtles, scarlet macaws, sharks, and salamanders. In dozens of countries, citizens and activists have employed environmental rights in lawsuits that have produced remarkable court decisions, in some cases resulting in substantial on-the-ground benefits for people and ecosystems. For example, the Mendoza decision of Argentina's Supreme Court in 2008 sparked a massive clean-up of the Riachuelo River watershed, as well as billions of dollars in spending for new drinking water and wastewater treatment infrastructure serving predominantly poor communities.

Recognition of the rights of nature also has the power to inspire both cultural and legal transformations. Ecuador's constitution recognised the rights of Pachamama in 2009, spurring changes to more than 75 laws and policies and enabling lawsuits to protect Nature, from the Galapagos to

the Vilcabamba River. Laws articulating Nature's rights have been enacted in Bolivia, Mexico, New Zealand and at the local level in dozens of municipalities in the United States. In New Zealand, extraordinary new laws reflect the Indigenous wisdom and culture of the Maori people, granting rights to the Whanganui River and an ecosystem formerly known as Te Urewera National Park. These path-breaking laws are poetic and powerful, transferring title to the legal persons established to represent Nature. In other words, the forests, mountains, lakes, and riverbeds now own themselves, with their rights defended by stewardship bodies led by the Maori people. Innovative court decisions regarding the rights of nature have been made from Colombia to India, although in some contexts implementation has not yet lived up to aspiration.

This important handbook provides additional detail about the ways in which rights-based approaches can be beneficial for both humans and Nature, with a particular focus on low-income countries. This publication builds on innovative dialogues that took place involving legal scholars, practitioners, and policy-makers working on human rights and biodiversity issues, mainly in the Global South. The authors have provided a useful guide, showing the pathways that could enable humanity to reverse the daunting trends of ecological deterioration, achieve the ambitious Sustainable Development Goals, and leave no-one behind. As the Intergovernmental Panel on Climate Change concluded in its 2018 Special Report, the future of human society depends on our ability to undertake rapid, far-reaching and unprecedented changes at all levels of society. This visionary publication merges law, policy and practice to illustrate, in the context of biodiversity, how we might achieve such transformations.

1. Setting the scene: the human right to a healthy environment for a thriving Earth

Claudia Ituarte-Lima and Maria Schultz



Figure 1. Weaving human rights principles, biodiversity and SDG16

1. Recognition of right to a healthy environment in global legal framework

A strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly has been voiced by various actors including current UN Special Rapporteur on Human Rights and Environment, Prof. David Boyd and former UN Special Rapporteur on Human Rights and Environment, Prof. John Knox.

Parties to the Convention on Biological Diversity and other relevant groups are currently discussing the process to develop the post-2020 global biodiversity framework. Informally, several organisations and governments are already exploring potential future content of the post-2020 global biodiversity framework.

Human rights principles and related considerations are included in the Strategic Plan on Biodiversity (2011–2020)



Nairobi and zebras (Nairobi National Park). Photo: Rodd Waddington

as crosscutting issues. Sustainable Development Goal 16 (Agenda 2030) is dedicated to 'Peace, Justice and Strong Institutions'. In light of both of these points, this is a strategic time to assess the linkages between human rights, good governance and biodiversity, and to develop proposals for these issues' inclusion in the post-2020 global biodiversity framework.

The aim of the policy report is two-fold:

- Clarify the ways in which the human rights principles and legal tools can contribute to implement the right to a safe, clean, healthy and sustainable environment with a focus on biodiversity related human rights obligations.
- Contribute to the conceptualization and design of draft elements to incorporate SDG16 and principles of human rights and good governance into the post-2020 global biodiversity framework in a new dedicated target and as crosscutting dimensions of all targets of this framework.

The report builds on technical peer-to-peer review support and contextual feedback by participants of the Peer-to-peer Dialogue on the human right to a healthy environment and SDGs: weaving SDG 16 and human rights law with the post-2020 global biodiversity framework convened by SwedBio/ Stockholm Resilience Centre, International Development Law Organization, Office of the High Commission of Human Rights-Special Procedures, UN Environment and

Natural Justice (Ituarte-Lima and Kibugi, 2018). A preliminary version of this chapter was included as part of the Living Document prepared for this Peer-to-peer Dialogue, which provided an opportunity to receive comments and feedback (see Acknowledgements).

2. Agenda 2030 and Sustainable Development Goals

The diversity of all forms of life on our planet and healthy ecosystems providing ecosystem services, such as food, pollination of crops and fulfilment of people's cultural life, are necessary for enjoying a broad range of universal human rights, for example, the right to food, the right to health and cultural rights. Conversely, the respect for, and the exercising of procedural rights, such as public participation, access to justice in cases of non-compliance with environmental regulations, and proactive public awareness and dissemination of relevant information, are necessary for a stronger engagement of a diversity of individuals and groups on environmental matters. Safeguarding Life on Earth for present and future generations relies on these rights (Knox, 2018; Ituarte-Lima, 2017; Ituarte-Lima and McDermott, 2017; Ituarte-Lima et al., 2014).

Innovative approaches are needed for enabling transformations for sustainability and implementing Agenda 2030 adopted at the UN Sustainable Development Summit in

Table 1.
Matching the human rights principles with Agenda 2030 and SDG 16 on peace, justice and strong institutions

Human rights based approach principles (UNDG, 2003)	Agenda 2030 and SDG 16 on peace, justice and strong institutions
Indivisibility, interdependence and interrelatedness of human rights	<p>“10. The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties...”</p> <p>E.g. “The interlinkages and integrated nature of the Sustainable Development Goals are of crucial importance in ensuring that the purpose of the new Agenda is realized”...The SDGs “seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible...”</p>
Equality and non-discrimination	16.b Promote and enforce non-discriminatory laws and policies for sustainable development
Participation and inclusion	<p>16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels</p> <p>16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements</p>
Accountability and the rule of law	<p>16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all</p> <p>16.5 Substantially reduce corruption and bribery in all their forms</p> <p>16.6 Develop effective, accountable and transparent institutions at all levels</p>

2015, including the Sustainable Development Goals (SDGs).¹ Agenda 2030 is intended to be the plan of action for all countries until 2030 for development that works for people, the planet and prosperity for all, leaving no one behind (UN, 2015). The thematic issues of sustainability, biodiversity and healthy ecosystems are crosscutting dimensions of Agenda 2030 (Schultz, Tyrrell, and Ebenhard, 2016). SDG15 life on land, SDG14 life below water, SDG6 clean water and sanitation, and SDG13 climate action, and are also key topics addressed by the Convention on Biological Diversity.

Like sustainability, human rights principles are also a crosscutting dimension of Agenda 2030. The human rights principles match SDG 16 on peace, justice and strong institution. SDG 16 aims to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” (see Table 1 and Appendix 1).

This raises three issues. First, the text of SDG 16 does not specify social-ecological dimensions. Hence, there is a need for the development of a conceptual framework and tools to be used for understanding and acting upon the connections between SDG 16 and biodiversity. Second, international guidance on how to implement SDG 16 and interlinked SDGs at national and local levels can contribute to integrated approaches for achieving Agenda 2030 at various levels. Thirdly, during CoP16 in December 2016, the CBD

State Parties agreed that a mainstreaming approach to biodiversity would be most appropriate. More specifically, through the Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-Being (CBD, 2016), State Parties to the CBD made a commitment to work at all levels of government, and across all sectors to mainstream biodiversity, by establishing effective institutional, legislative and regulatory frameworks incorporating full respect for nature and human rights.

3. Towards a global recognised right to a healthy and sustainable environment

Human rights provide an explicit normative framework, which has already been agreed upon by most countries through ratifying the main international human rights agreements - the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Likewise, some countries have incorporated the human rights principles as key pillars of international development cooperation (Regeringskansliet, 2014). This is because human rights are essentially inherent, irreducible (subject to permissible and lawful limitations only) and place a clear immediate or progressive obligation on the State as the main duty bearer. Protection of human dignity is an inviolable element of the human rights structure. Understanding that human rights are interdependent with, and indivisible from environmental protection, it is clear that stronger forms of legal protection for human rights could, when appropriately aligned, be

applied to provide stronger protections for biodiversity conservation and sustainable use.

Agenda 2030 explicitly recognises that it is grounded in international human rights treaties and calls for sustainability transformations to overcome poverty and safeguard life on land and underwater. Specifically, it mentions:

“10. The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties...” ...The SDGs “seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible....”

In 2018, Prof. John Knox presented the Framework Principles on Human Rights and the Environment to the 37th session of the UN Human Rights Council (Knox, 2018). He also made a strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly. He referred to Victor Hugo’s quote that, “it is impossible to resist an idea whose time has come”. He noted that while the right to a healthy environment had been recognised in regional agreements and in most national constitutions, it has not been adopted in a human rights agreement of global application.

Prior to this report, Prof Knox presented his 2017 thematic report on human rights and biodiversity to the Human Rights Council (Knox, 2017, para. 5), which contributes to the interpretation of the right to a healthy environment in the context of biodiversity-related human rights obligations. In this report, he acknowledges that the degradation and loss of biodiversity undermines the ability of human beings to enjoy their human rights. The report mentions that human rights law does not require that ecosystems remain untouched by human hands (Knox, 2017, para 8), because people depend on the use of ecosystems for their social development. However, in order to support the continued enjoyment of human rights, this development cannot overexploit ecosystems, but must be sustainable, and sustainable development requires healthy ecosystems and climate stability. This has created a valuable conceptual interdependency between the needs for successful attainment of sustainable development, and the underpinning human rights requirements such as observance and protection of fundamental human entitlements, as well as ecosystem protections and limits, on which realization of those rights, and development that is sustainable, depend (see Chapter 2).

The indivisibility of the link between sustainable development obligations to observe ecosystem limits and upholding human rights was affirmed in the 2016 Cancun Declaration on Mainstreaming the Conservation and

Sustainable Use of Biodiversity. Through this Declaration, Parties affirmed this indivisibility, by way of an agreement to promote the conservation, sustainable use, and where necessary, restoration of ecosystems. These and other actions are a basis for achieving good health, clean water and sanitation, food security, improvement of nutrition, the reduction of hunger, poverty eradication, prevention of natural disasters, resilient, sustainable and inclusive cities and human settlements, and climate change adaptation and mitigation. The role of the human right to a clean and healthy environment (the language varies from country to country) remains at the centre of this journey – and this right, substantively, and the accompanying procedural rights (access to court, access to information, right to public participation) remain central to mainstreaming biodiversity and human rights and integrating SDG16 fully into a post-2020 global biodiversity framework.

The momentum on this topic at the 37th session of the UN Human Rights Council was continued by the United Nations Special Rapporteur on the right to food, Elver Hilal, in the presentation of her report on the right to food and disasters (Hilal, E. 2018). The report provided important insights for the human rights, healthy ecosystems and resilience building nexus and the role of legal measures on the prevention and disaster risk reduction measures, in order to avoid environmental degradation and consequences on ecosystems and biodiversity. UN Environment also used the occasion to launch, with its partners, the Environmental Rights Initiative.

Progress at the international level, together with an increased sense that business as usual is no longer an option, can provide a window of opportunity for addressing significant growing challenges such as those associated with gender equality and the rights of environmental human rights defenders (see Chapter 3 in this report) who work to safeguard biodiversity and healthy ecosystems.² In 2017, the UN Special Rapporteur on human rights defenders, Michel Forst, presented his report on the situation of environmental human rights defenders to the UN General Assembly. His recommendations to the international community include “ensuring that the implementation of the 2030 Agenda for Sustainable Development is guided by a human rights-based approach, guaranteeing meaningful participation of environmental human rights defenders and affected communities, as well as empowering and protecting defenders at the international, regional and national levels.” (A/71/281, para 97 A).

Human rights are relevant to widespread biodiversity mainstreaming because of the cross-sectorial nature of human rights laws and policies. The Human Rights Council Resolution A/HRC/RES/34/20 recognises the need for mainstreaming the conservation and sustainable use of

1. Adopted at the UN Sustainable Development Summit in 2015.

2. For example, the Executive Secretary of the CBD expressed her concerns on this topic in her opening remarks at SBSTTA.

biodiversity for well-being, and explicitly refers to the Cancun Declaration adopted at the high-level segment of the thirteenth meeting of the Conference of the Parties to the Convention on Biological Diversity, held in Cancun, Mexico in 2016 (mentioned above).

Human rights is an issue that goes beyond a concern of governments and human rights organisations, to a concern that criss-crosses thematic and geographical areas of work of a wide range of institutions.

4. Human rights and the post-2020 global biodiversity framework

The 15th UN Biodiversity Conference in 2020 is expected to consider and adopt a post-2020 global biodiversity framework, as a follow up to the Strategic Plan for Biodiversity 2011–2020 including the Aichi Targets building on a participatory process (see appendix 3 and 4) (CBD, 2018a; CBD, 2018b; CBD n.d.a). Ahead of the 14th UN Biodiversity Conference in 2018, one of the agenda items under the second meeting of the Convention on Biological Diversity Subsidiary Body on Implementation was the discussion of a comprehensive and participatory process for the preparation of the post-2020 global biodiversity framework (CBD, n.d.a). Overarching principles, building on submissions of Parties and relevant groups, provide guidance to this process. These principles explicitly include participation, inclusion, and transparency, which mirror the human rights principles of Participation and Inclusion and the Principle of Accountability and Rule of Law, since transparency is a key dimension of this latter principle.

Operationalizing the principle of Accountability and the Rule of Law is key so that States meet the standards they set for safeguarding biodiversity and healthy ecosystems. The Secretariat of the Convention on Biological Diversity (SCBD) on assessing the progress towards the achievement of the Aichi targets stated that unless additional actions were taken, the status of biodiversity would continue to decline and the Aichi Biodiversity Targets would not be met. The SCBD assessed that the international community was on course to exceed only one of the 56 components of the targets and to meet only four (Secretariat of the Convention on Biological Diversity, 2014). Knox (2017, para 48) considers that, “States are not meeting the standards they themselves have set for the protection of biodiversity. In many developing countries, much of this failure may be due to lack of the necessary capacity, and in these cases developed countries and international institutions should increase their support for capacity-building”.

The need for a conceptual framework and guidance for understanding and acting upon the connections of human rights and SDG 16 with biodiversity and healthy ecosystems has been highlighted in various processes that SwedBio has organised and/or been actively engaged (see Appendix 2 for a

non-comprehensive list). Questions in these spaces included:

- Is there a need to reflect human rights standards more clearly in a post-2020 global biodiversity framework? If so, any elements in particular?
- Is it useful to have aspirational objectives, or more concrete targets?
- In what ways could or should a post-2020 biodiversity framework align with Agenda 2030 and the SDGs?³

SwedBio has also engaged in dialogue with its collaborative partners such as Natural Justice and International Development Law Organization (IDLO) on proposals for a stand-alone target mirroring SDGs 16, as well as crosscutting dimensions of human rights in the post-2020 global biodiversity framework. This includes addressing the questions:

- Will Parties to the CBD and others benefit from a Target (loosely dubbed ‘Target 21’) in the post-2020 global biodiversity framework that spells out the obligations under international human rights law and SDG16?⁴
- What elements related to human rights should be embedded as crosscutting elements of all targets within a post-2020 global biodiversity framework?
- How would such a stand-alone target and crosscutting dimensions in all targets integrate with the focus of SDG16 on Peace, Justice and Strong Institutions in terms of implementation?
- How could such a stand-alone target and crosscutting dimensions be measured (incl. indicators), reported and how could measures to support progress be designed and supported?
- Can such a stand-alone target and crosscutting dimensions that unify human rights elements and SDG16, conceptually and in practice, support mainstreaming of biodiversity nationally in specific socio-economic sectors and cross-sectorally; and internationally with the mandates of other related conventions such as UNFCCC, UNCCD in order to stop and reverse the decline of biodiversity?

In this context, SwedBio and partners are exploring how to respond to the questions above raised at the nexus of Agenda 2030 and the development of the post-2020 global biodiversity framework. In order to build on the existing CBD Strategic Plan and envision the future we want. Part of

3. These three questions were raised in the presentation by Tanya McGregor Gender Programme Officer of the Secretariat of the Convention on Biological Diversity Human Rights and Biodiversity Conservation: Scaling up the Synergies in the post-2020 Aichi Targets and the SDG Agenda (Co-conveners: SwedBio/SRC; CIPDP; Forest People Program, Natural Justice) at the side events at the tenth session of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions in 2017.
4. See Natural Justice and Future Law, concept note on Target 21.

the exercise will entail examining the current Strategic Plan for Biodiversity 2011–2020 and visualize how a stand-alone human rights target could have looked like and how human rights would ideally have been embedded in this strategic plan in a cross-cutting manner; and associated indicators.

With this background, additional guidance is therefore needed on how to tackle risks to the integrity of life on Earth and how to take advantage of the special protection of human rights - in particular, protecting populations in vulnerable situations in the Global South and local

communities and indigenous peoples against adverse impacts. Furthermore, guidance is needed to appropriately make visible and recognise the agency of right holders who are often not duly recognised, such as women and environmental human rights defenders. The chapters in this report aim to contribute to this process. The report also puts forward tailored legal and policy tools that are needed for living in harmony with nature. It is time to “walk the talk” on safeguarding biodiversity and respecting, promoting and fulfilling universal human rights of all people in the planet.

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2. Beyond borders: human rights, biodiversity and climate change

Claudia Ituarte-Lima and Tristan Tyrrell

1. Global and local dynamics

The impacts of climate change are not evenly spread. The onset of slow or rapid shifts in climate, and in particular the ability to respond effectively to climate change-induced natural disasters, varies greatly both within and between countries. The adaptability of communities and societies to such changes depends on the resources and rights available to them. As climate change takes hold, the need for effective legal measures that secure tenure and access rights to healthy natural resources becomes increasingly paramount.

While many human rights cases are local in their direct impacts, they are increasingly an outcome of interconnections and social-ecological system dynamics that go beyond national borders. These complex dynamics include, for example, the nexus between progressive and unexpected events derived from climate change and degradation of ecosystems. Biodiversity and healthy ecosystems, which are key for human prosperity, are rapidly being degraded and destroyed with grave and far-reaching implications for exercising a wide range of human rights, especially the rights of individuals and groups in vulnerable situations (Knox 2017).

“Networked global environmental risks” is a term used to refer to risks where causality and impacts are connected across continental scales, display complex systems properties, and are highly contested such as the 2008-09 food crises (Galaz et al., 2017). Academics and legal practitioners have made various proposals to address these global risks which include overarching principles for Earth system governance (Biermann, 2015), framework principles on human rights and environment (Knox, 2018), the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO Consortium 2013) and proposals to acknowledge “ecocide” as a “crime against peace” (Higgins et al., 2013). For example, Higgins et al. (2013) propose to expand the remit of the International Criminal Court to include ecocide as an international crime. They argue that ecocide should stand alongside other

Box 1. Framework principles 13 and 16 on human rights and the environment (Knox 2018)

Framework principle 13

States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights

Framework principle 16

States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development

international crimes such as genocide, war crimes, crimes against humanity and crimes of aggression to ensure global governance and protection against crimes of State and corporate actors that cause or fail to prevent climate disasters and other ecological catastrophes.

As for States’ extraterritorial obligations to protect human rights, innovative interpretations by national courts linking general principles of international law, climate and human rights law can offer interesting insights on the strategic use of international law to foster sustainability and climate justice.

For example, in the case *Urgenda Foundation v State of the Netherlands*, the Court recognised that Dutch emissions are among the highest in the world and employed general principles of international law, such as the ‘no harm’ rule as well as human rights such as the right to life (Article 2 ECHR) and the right to health and respect for private and family life (Article 8 ECHR) as a source of inspiration to define the State’s duty of care in a climate context (Lambrecht & Ituarte-Lima, 2016). These types of cases could serve to interpret point 25.a on “harm or threat of harm [that] originates or occurs on its territory” of the Maastricht Principles.

Likewise, the nexus between climate and biodiversity dynamics is relevant when understanding and acting upon States’ obligations to protect human rights and point 25.a of the Maastricht Principles in the context of contemporary social-ecological dynamics. The increase of pests is negatively affecting agro-diverse forestry systems. For example, the rust disease is significantly affecting shade-grown coffee which is the main source of livelihoods of millions of family farmers in the Global South (Libert et al. forthcoming). These impacts which are intertwined with climate dynamics can have significant effects on various human rights such as rights to food and right to health. States’ Obligations to protect human rights in these cases would entail, for example, a prompt declaration of phytosanitary emergencies and collaboration between States to address these types of socio-ecological crises. International schemes for financing climate mitigation and biodiversity have generated concerns about the effect of large influxes of money on the human rights of local land users. While there is agreement in the literature and in multilateral environmental agreements such as the Convention on Biological Diversity (CBD) and United Nations Framework Convention on Climate Change (UNFCCC) on the need for safeguards to prevent negative social effects including on groups in vulnerable situations, how prescriptive or flexible those safeguards should be, is not well understood. We have found that State’s procedural obligations (e.g. public participation, freedom of speech and expression, access to justice) in climate and biodiversity related mechanisms are intertwined with substantive rights such as tenure/property rights (Ituarte-Lima & McDermott, 2017; McDermott & Ituarte-Lima, 2016). Both types of rights and their interactions need to be taken into account respecting, protecting and fulfilling States’ obligations. The Maastricht Principles in particular Section V. on obligations to fulfil would be relevant in the interpretation of these obligations.

At the international level, the recognition of the rights of people to a healthy environment, one that allows them to effectively adapt to climate change, is not always explicit. A review of decisions taken by Conferences of the Parties (COP) to the CBD shows that there has been little attention given to taking a rights-based approach in the recognition of the interlinkages between climate change and biodiversity, and certainly as a supporting mechanism to climate change mitigation and adaptation. Rather, the focus has traditionally been on recognising climate change as a threat to biodiversity, with more recent discussions calling for the increased exploration and use of ecosystem-based approaches to addressing climate change. The difference in the wording between the biodiversity and climate change decisions taken at COP12 (decision XII/20, 2014⁵) and COP13 (decision XIII/4, 2016⁶) shows a marked positive

5. <https://www.cbd.int/decisions/cop/?m=cop-12>

6. <https://www.cbd.int/decisions/cop/?m=cop-13>



Climate change affects present and future generations.
Photo: Claudia Ituarte-Lima

change. Namely, a focus on mitigation through REDD+ and asking the Executive Secretary to compile and promote ecosystem-based approaches including adaptation, changed to calling on Parties themselves to actively review and implement such approaches. Such changes may have been influenced by decisions taken in other fora, such as the Paris Agreement and the 2030 Agenda for Sustainable Development, in which the role of nature in underpinning the fight against climate change and ensuring sustainable development became explicit. COP14 (decision XIV/5, 2018) took this even further with calls for Parties to recognise and implement numerous forms of ecosystem-based approaches, and acknowledged with concern the report of the Intergovernmental Panel on Climate Change (IPCC 2018) on the need for immediate action.

Human rights in the context of climate change remains absent from the CBD decision texts. While recognition is given to the role of traditional knowledge and practices in helping to address climate change through effective ecosystem management, there have been no calls for the legal recognition of tenure, access or ecosystem integrity for the health and well-being of local communities. However, one recent development in this regard is the development of *Voluntary Guidelines for the Design and Effective*

Implementation of Ecosystem-based Approaches to Climate Change Adaptation and Disaster Risk Reduction, which was led by the CBD Secretariat and contained in an annex to decision XIV/5. These include the undertaking of stakeholder and rights-holder analyses, guaranteeing the free, prior and informed consent of indigenous peoples and local communities, and ensuring that implementation of ecosystem-based adaptation (EbA) and ecosystem-based approaches to disaster risk reduction (Eco-DRR) involve the collaboration, coordination, and cooperation of stakeholders and rights holders.

Under UNFCCC, the recognition of the human rights concerns with climate changes is perhaps best expressed in the text of the Paris Agreement (FCCC/CP/2015/L.9⁷), where it states that “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.” This text has been adopted by almost all Parties to the UNFCCC and demonstrates that there is concern for the impacts of climate change on minorities and the more vulnerable. The right to a healthy environment might be considered implicit, but it requires sufficient interpretation at the national level in order for the correct actions, including the passing of appropriate legislation, to be taken.

Prior to the Paris Agreement, the Male’ Declaration on the Human Dimension of Global Climate Change⁸ was adopted in November 2007 by representatives of small-island developing States. It was the first intergovernmental statement that explicitly recognised the human rights dimension of climate change, including the rights to life, an adequate standard of living and the highest attainable standard of health. The Declaration called for the Human Rights Council (HRC) to convene a debate on human rights and climate change. In addition, the declaration called for the Office of the United Nations High Commissioner for Human Rights (OHCHR) to study the effects of climate change on the full enjoyment of human rights, and the UNFCCC COP to work with OHCHR and HCR in assessing the human rights implications of climate change. In February 2015, a number of countries⁹ signed the Geneva Pledge¹⁰ – a commitment to enable meaningful collaboration between national representatives in the UNFCCC and the HRC to increase understanding of how human rights

obligations inform better climate action. The statement acknowledges that the effects of climate change will be felt most acutely by those who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability. Human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes. As a result, the signatories to the Geneva Pledge sought to facilitate the exchange of expertise and best practice between their human rights and climate experts to build their collective capacity to deliver responses to climate change that are good for people and the planet. To which end, they aimed to include human rights knowledge in their delegations to the UNFCCC and, where applicable, climate change expertise in the HRC.

There have also been numerous calls from Observers to the UNFCCC to more formally recognise the rights of people, and in particular certain groups such as indigenous peoples and local communities, women, children and the elderly by the Convention, and for Parties to act accordingly. More recently, the Talanoa Dialogue process instigated by Fiji as the COP24 Presidency has allowed for both Party and Observer voices to come to the fore on this issue, perhaps more strongly than through the more formal COP and subsidiary bodies’ meetings, although the impact of such an approach remains to be seen. The most recent meeting of the COP, COP24 in 2018, agreed the rulebook to implementing the Paris Agreement (FCCC/CP/2018/L.23) which, while it recognises nature-based solutions to adaptation, fails to acknowledge human rights – providing an issue of concern that they will subsequently remain absent from Nationally Determined Contributions (NDCs) and other national climate change policy instruments. COP24 also failed to properly acknowledge the drastic call to action by the IPCC (IPCC 2018).

The 2030 Agenda for Sustainable Development¹¹, agreed in September 2015, envisages “a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; ... a just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met.” This should equally be considered in the context of climate change and ongoing biodiversity loss and ecosystem degradation. Sustainable development Goal (SDG) 13 – *take urgent action to combat climate change and its impacts* – builds fundamentally on the Paris Agreement. While it does not mention rights, it does call on countries to:

- 13.1 Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries.
- 13.b Promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities.

It could be argued that the only means to effectively ensure that everyone is resilient and capable of adapting to climate change is through the full recognition of their human rights. Equally, a rights-based approach to addressing climate change and its impacts should form a sound basis for ensuring the most vulnerable are well positioned to tackle the expected and unexpected effects of a changing climate.

Of the biodiversity-related SDGs, the only one that shows any direct relevance to the issue of human rights is SDG15 – *protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss*. Under it, the following target would consider many rights issues if implemented correctly:

- 15.9 By 2020, integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts

SDG16 – *Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels* – provides the framework for addressing the need for effective institutions and the rule of law that works for the benefit of everyone in society. With regards to human rights, biodiversity and climate change, the indivisibility of the SDGs as a whole would make all measures that promote a healthy, safe and stable way of life as being relevant. Despite this, there are four targets under SDG16 that are particularly important:

- 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all.
- 16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels.
- 16.9 By 2030, provide legal identity for all, including birth registration
- 16.b Promote and enforce non-discriminatory laws and policies for sustainable development.

One of the challenges to the successful achievement of the entire 2030 Agenda for Sustainable Development is the number of issues to be addressed, and the need for widespread changes in governance, societal and economic systems to make transformative change happen. Current systems need to be improved first and there are limited resources, which means that the implementation of some

SDGs and their targets will likely be prioritised using the monitoring system developed. As such, the indicators chosen to track progress will inadvertently provide the list of priority targets. A review of the indicators selected to track the 2030 Agenda for Sustainable Development provides the following:

- Indicator 5. Percentage of women, men, indigenous peoples, and local communities with secure rights to land, property, and natural resources, measured by (i) percentage with documented or recognised evidence of tenure, and (ii) percentage who perceive their rights are recognised and protected (SDG1¹²; SDG5¹³; SDG10¹⁴).
- Indicator 90. Proportion of legal persons and arrangements for which beneficial ownership information is publicly available (SDG16).
- Complementary National Indicator 15.1. Improved tenure security and governance of forests
- Complementary National Indicator 15.3. Vitality Index of Traditional Environmental Knowledge
- Complementary National Indicator 16.2. Compliance with recommendations from the Universal Periodic Review and UN Treaties (SDG16).

If such prioritisation were to be followed, it could see progress on tenure rights, at least on paper. Other rights would still be dependent on full and effective implementation of other treaties and agreements.

2. Synchronizing legal frameworks

In the section below we provide a synthesis of a case study on the process of transformation of international law relevant for the human rights, climate and biodiversity nexus into national legislation based on Ituarte-Lima & McDermott (2017).

How can the pursuit of climate change mitigation lead to local environmental justice and the enjoyment of human rights rather than to dispossession or disempowerment of vulnerable local communities?

Here we use Reducing Emissions from Deforestation and Degradation and forest enhancement (REDD+) as a way of approaching the question. REDD+ is a mechanism developed by Parties to the UNFCCC which aims to encourage developing countries in particular to curb deforestation, forest degradation and enhance carbon stocks. This is done by offering financial incentives to communities and individuals looking to convert forest areas into alternative land uses. This may sound like a good idea but there are drawbacks and significant economic interests of governments and others on what is often perceived as large amounts of money coming from the REDD+ mechanism.

7. <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>

8. http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf

9. Costa Rica, Chile, Guatemala, France, Ireland, Marshall Islands, Kiribati, Maldives, Micronesia, Mexico, Palau, Panama, Peru, Philippines, Samoa, Sweden, Uganda, Uruguay

10. <https://carbonmarketwatch.org/wp-content/uploads/2015/02/The-Geneva-Pledge-13FEB2015.pdf>

11. http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

12. SDG1: End poverty in all its forms everywhere

13. SDG5: Achieve gender equality and empower all women and girls

14. SDG10: Reduce inequality within and among countries



Community Monitoring Jaguars in Mexico. Photo: Claudia Ituarte-Lima

Stories of land grabs and violations of human rights to gain access to the financial benefits of REDD+ come out frequently, dispossessing local communities and possibly even transforming natural forest into carbon plantations. To prevent these kinds of outcomes, effective implementation of human rights and biodiversity law is needed.

2.1 Complex land structures

Over 80% of forested land in Mexico belongs to ejidos, communities combining communal and individual land rights to manage the land and its resources. The task of translating international climate agreements into national law brought attention to the complex dynamics surrounding Mexico's forests and highlighted the need to address a diverse but interconnected set of issues. The complex social-ecological systems in Mexico's forests made it necessary to address a diverse but interconnected set of issues that affect translating international climate agreements into law. The issues ranged from a system to monitor the reduction of carbon emissions to property rights, public participation, indigenous and local communities' legal identity and rights, and biodiversity protection and sustainable use. While right-holders and stakeholders were generally supportive of the inclusion of safeguards in Mexican law, they pointed out that broader socio-ecological issues were

Box 2. Methodology of the case study

The study analysed perspectives of people belonging to different organisations concerned with the development of Mexico's REDD+ legal reforms. The analysis included 68 semi-structured interviews, 10 focus groups and the sourcing of additional observations from participants in the legal processes. Interviewees included people from governmental organisations of the legislature and executive committee, as well as civil society organisations working locally, nationally and/or internationally. The information from interviews was then combined with a conceptual framework of legal prescriptiveness to perform a socio-legal analysis of the reform process in Mexico. The conceptual framework used for the analysis involved three criteria of obligation, delegation, and precision. In combination, these three criteria were used to describe the relative level of prescriptiveness of the relevant legislation from the international to the national level. The distinction and interactions between substantive and procedural human rights were also analysed.

The authors have also engaged in dialogue for sharing and receiving feedback to the findings of this paper in meetings in the research, policy and practice interface in Mexico and internationally. This paper has been highlighted in the Nature Sustainability Journal as a research highlight on environmental law.

left unresolved and that these would prevent them from exercising their individual and collective human rights and safeguarding healthy ecosystems. For example, the current policies on subsoil resource extraction in Mexico serve to weaken the rights of forest-dependent communities and ecosystem services in favour of mining companies. If issues such as these were not resolved, there would be significant challenges or obstructions to operationalising REDD+ related human rights issues in Mexico.

2.2 Tensions and challenges

One of the steps taken during the reform process involved providing expanded legal rights and processes to local communities. While these reforms may be positive for fostering equity in mechanisms regarding environmental management, they are not without their own challenges.

Some interviewees found tensions between different rights. For example, the right to information associated with the development of REDD+ monitoring, reporting and verification in a relatively short period of time and the right to public participation in forest and climate governance.

Other interviewees were concerned that the application of certain of these new legal procedures could interfere with the development of future REDD+ policies and potentially render REDD+ inoperable. Some also pointed out challenges that could arise from using the ejidos structure to implement climate mechanisms - such as the risks and disadvantages for those who do not formally hold legal land rights, particularly women and children.

Despite these challenges, the need for dialogue and the freedom to express how to better operationalise communities' human rights and international safeguards, in different ways that fit local contexts, was seen ultimately as a positive outcome for the future of ejidos and forest management.

2.3 Clarity on human rights obligations, room for dialogue on how to implement them

The legal reform did not focus on regulating who has property rights over carbon sequestration, but rather on the way in which benefits from contributing to ecosystem services, which are part of the bundles of property rights over natural resources, were shared. While it may seem like a minor distinction, this has legal implications in that the goals of REDD+ regarding carbon can be achieved but the economic benefits should go to people contributing to healthy ecosystems, of whom the majority are ejidos but also to other people such as women, who often do not hold formal legal land rights. Hence, the reform process went beyond the REDD+ commitments to carbon sequestration and extended to regulate benefit sharing of ecosystem services. Right holders and stakeholders felt both optimistic and cautious at the end of the reform process of transforming

international safeguards including protecting property and natural resources, as well as communities' human rights into national legislation.

The findings of the above-mentioned article argue for a legal approach that is 'not too tight, but not too loose'. Right holders were satisfied that the reform process was specific about the Mexican state's obligations to protect the human rights including vulnerable populations, the recognition of the right to free prior informed consent and benefit sharing, but also left room for right holders' dialogue on how to operationalize these rights into the future.

Table 1, next page, summarizes the above analysis of perspectives on precision and associated human rights implications (source: adapted from Ituarte-Lima and McDermott 2017)

3. Concluding remarks

Global environmental risks have very complex cause-effect links that are difficult to prove in human rights settings. Yet, they have significant impacts on human rights and a healthy environment. Hence there is an urgent need to understand and act upon these dynamics. The interplay between climate, biodiversity and human rights demands the rethinking of States' obligations to respect, protect and fulfil human rights in order to consider dynamics at multiple levels.

The international legal climate landscape and the connections with human rights and biodiversity related dimensions continue to evolve. As mentioned earlier, the recent 2015 Paris Agreement under the UNFCCC contains the first mention of human rights in a multilateral environmental agreement. This reference, together with general references to REDD+¹⁵, raises new questions for REDD+ law-making processes at distinct scales because it may affect the way REDD+ is translated and implemented at the national level. For example, in terms of the strength of States' obligations to fulfil the human right to information and participation as well as other interconnected human rights.

The indivisibility of the SDGs and their implementation should provide an overarching framework that would allow governments to identify the interlinkages between these fundamental issues facing society. However, while progress has been seen to be made on some the SDGs and their targets, such positive trends are not universal, and a key measure on the integration of biodiversity, climate change and human rights is not present to provide that clear path for countries to follow in order to act appropriately.

Key recommendations that arose from the peer to peer dialogue relevant to the human rights, climate change and biodiversity nexus included the following:

15. See e.g. Para 55 of the Paris Agreement: http://unfccc.int/paris_agreement/items/9485.php

Table 1

	Positive implications for the implementation of human rights	Negative implications for the environment enabling people to exercise human rights
CARBON SEQUESTRATION		
Substantive: Low prescriptiveness in defining property-related rights over carbon.	More comprehensive application of safeguards to environmental services financing mechanisms (e.g. biodiversity related, not only those carbon-related).	Property rights over carbon remain unspecified legally and open to subsequent definition. Local values and definitions concerning ecosystems embedded in consuetudinary norms of local and indigenous peoples are not explicitly recognised.
Procedural: Highest prescriptiveness in Monitoring Reporting and Verification (MRV) safeguard.	New information will be available to communities in a relatively short period of time for exercising their right to information on deforestation and forest degradation issues.	Timeline required by the law for MRV development may limit the possibilities of communities to exercise the right to participation in providing inputs for developing an appropriate MRV system that includes local values of forest ecosystems. This will also affect the quality of the information in the MRV system.
HUMAN RIGHTS RELATED PROVISIONS/SOCIAL SAFEGUARDS		
Substantive: Medium prescriptiveness on benefit distribution safeguard.	Positive for owners and legitimate possessors of forest land . In Mexico, most of them are ejidos and communities.	Negative for inhabitants or users of forest resources on land subject to ecosystem financing mechanisms schemes that lack legally recognised ownership or possession rights.
Procedural: Medium prescriptiveness in Free Prior Informed Consent (FPIC) safeguard.	Positive for ejidos, communities and indigenous peoples as it strengthens their legal FPIC in projects that may affect their livelihoods.	Potential negative consequences if FPIC is used as a one-size-fits-all problem-solving tool e.g. for policies and legislation where broader democratic processes are needed.
BIODIVERSITY SAFEGUARDS		
Substantive: Low precision in defining property-related rights over biodiversity.	New definition of ecosystem services positive for ejidos, communities and indigenous peoples for recognising the intertwined relationships between people and nature embedded in many indigenous peoples' worldviews.	Difficult for local communities to legally prove that specific benefits generated by ecosystems are necessary for the survival of the natural and biological system as a whole.
Procedural: No additional level of precision.		

Source: Ituarte-Lima, and McDermott, (2017)

- The participants emphasized that it is necessary to promote the use human right approaches to environmental protection through developing cross-linkages in the already existing Multilateral Environmental Agreements. Conventions such as UNFCCC and UN Convention to Combat Desertification Convention should, though Conference of Parties' decisions increase the role of human rights in achieving their targets. It was noted that the preamble to the Paris Agreement, 2015 already calls on States to respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, people in vulnerable situations as well as gender equality, empowerment of women and intergenerational equity.
- Further, the participants noted that good governance of land use is fundamental for addressing the root causes of unsustainability. They recommended that land tenure

rights, human rights and gender rights be at the center of the efforts being made to combat the challenges arising out of climate change, biodiversity loss, poor land use governance and the resultant human rights violations (like access to clean water).

- The participants felt that the targets for the post-2020 global diversity frameworks should shift their focus from a biocentric approach to one which includes socio-economic and legal dimensions. They emphasised that isolating the people from the targets they are supposed to meet resulted in ignoring socio-economic aspects that are key for engaging citizen in climate change and biodiversity discussions. They recommended that while mainstreaming human rights in the post-2020 agenda, it should be made clear the connection between the SDGs (including indicators relevant for sustainability), human rights and climate.



Landscape of Machakos, that hosted the Peer-to-peer Dialogue. Photo: Claudia Ituarte-Lima

- Another recommendation was to build better relations between governments and right holders instead of militarising agencies in protected areas and criminalising environmental defenders. These create a hostile environment instead of building a positive and powerful

relationship between States and right holders, including those who have lived in those territories and have valuable knowledge and practices relevant to biodiversity and healthy ecosystems.

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3. Women's courageous roles as guardians of the Earth's ecosystems

Claudia Ituarte-Lima

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Women are recognised in legal and policy instruments ranging from international human rights laws and standards, the Convention on Biological Diversity (CBD) and related targets and Sustainable Development Goals (SDGs). Yet, there is a gap in gender-centred assessments with integrated approaches. Furthermore, the recognition of women in different areas often focuses on avoiding discrimination against girls and women, identifying unique challenges and vulnerabilities and less on their essential roles and contributions for thriving ecosystems for present and future generations.

Given the lack of integrated approaches and the limited recognition of women's courageous roles as guardians of the Earth's ecosystems, this chapter is divided into two parts. The first part provides an analysis of existing framework relating to women, in an attempt to bring together the three domains that often operate in silos. It intends to deepen our understanding of how the silos intersect with each other with a focus on gender aimed at promoting an integrated and coherent approach to the formulation of gender-specific policies and to the implementation of policies in the area of the nexus between women's rights and biological diversity.

The second part of the paper focuses on women environmental defenders, one of the priority and urgent issues to address the protection and promotion of biological diversity. It introduces case studies of women environmental defenders who work tirelessly to protect healthy ecosystems and have successfully generated awareness and action on the environment and their human rights nexus.¹⁶

16. A prior version of this section was originally published at Rethink (Ituarte-Lima, 2018).

1. International law and policy

1.1 CBD and gender perspectives

Parties to the CBD and the Secretariat have committed to integrate a gender dimension in the implementation of the CBD through the Gender Plan of Action (2015 – 2020) and other associated programmes. The Strategic Plan for 2010 – 2020 and Aichi Target 14 aim to reflect the needs of women in restoring and safeguarding “ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and wellbeing”. Women play an essential role in protecting and managing ecosystems and the environment. For instance, women consist of 45% of agricultural labour force in developing countries and also engage in fisheries in several different ways. Furthermore, in some least developed countries such as Burundi and Congo the percentage of women working in agriculture can go up to around 90% (World Bank, 2018).

They are indeed in the forefront and centre of biodiversity actions as the guardians of agrobiodiversity; however, women are largely excluded in decision-making processes, formal land and resource tenure rights on forest and water. In addition, women's contributions are not adequately recognised and consequently, their rights relating to biodiversity are also not well understood and often lack formal support. Further action is needed to support for example Sustainable Wildlife Management reconciling the goals of promoting sustainable use and gender equality by strengthening women's leadership and decision-making power in relation to the use of resources. For this purpose, the collection of more sex-disaggregated data would support mainstreaming gender issues in wildlife management and support in monitoring and assessing outcomes (CBD, n.d.b).

In terms of CBD synergies with other multilateral environmental agreements on gender perspectives, the Secretariats of the three Rio Conventions – UNFCCC, CBD, and UNCCD – are working together to identify and develop opportunities for joint capacity building on gender issues with Parties and stakeholders under each of the Conventions.



Phorn Sopheak. Photo: Savann Oeurm/Oxfam

1.2 Human Rights Law and Women's Rights

Several international human rights laws and standards are also relevant in promoting and protecting women's rights in biological diversity-related actions. The principle of equality and non-discrimination is enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, among others.

While recognising vulnerable situations faced by women is relevant, just highlighting this dimension can contribute to

make invisible women's significant contribution. Hence in identifying relevant provisions for protecting women's rights in biological diversity-related actions enshrined in international law, it is vital to identify provisions that recognise women's agency. For example, the Convention on the Elimination of All Forms of Discrimination against Women contains Article 14 that relates to women working in rural areas where their activities are largely based on ecosystems. This article while recognising the problems also highlights women's significant roles “States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.” Women rights in this provision include “(a) To participate in the elaboration and implementation of development planning at all levels;... (e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; (f) To participate in all community activities;”¹⁷



Eleanor holding Declaration of Human Rights in Spanish at Lake Success, New York. November 1949. Photo: Blatant World/ Creative commons (CC BY 2.0)

17. The Committee on the Convention on the Elimination of All Forms of Discrimination against Women also adopted General Recommendation No. 34 that does a thorough review and interpretation of the Convention regarding the rights of rural women.



UN Human Rights Council. Photo: Jean-Marc Ferr on behalf of the UN, 2016

The nexus between climate change and healthy ecosystem is an area also relevant for women rights that treaty bodies have addressed. The Committee on the Convention on the Elimination of All Forms of Discrimination against Women's in its General Recommendation No. 37 recommends disaster reduction in the context of climate change.

The UN Human Rights Council at its 38th session adopted a resolution on climate change focusing on women (A/HRC/RES/38/4) urging states to strengthen and implement policies that take gender-sensitive climate change actions. It also decided to organise a panel discussion on women's rights and climate change at its 41st session in 2019. This kind of spaces emerge as opportunities where the courageous roles of women as guardians of the Earth's life support systems can be visualized in high level international fora.

1.3 SDGs and gender equality

The SDGs and its targets are interlinked and are supposed to be understood and implemented in relation to one another: "The interlinkages and integrated nature of the Sustainable Development Goals are of crucial importance in ensuring that the purpose of the new Agenda is realized"...The SDGs "seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible..."

SDG16 on peace, justice and strong institutions is connected to other SDGs such as SDG 5 on Gender Equality and SDG 6 on clean water and sanitation. As such, SDG 5 on Gender Equality and its Target 5A to "undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural

resources, in accordance with national laws", should be implemented in relation to other goals relevant to sustainability such as SDG 14 life below water and SDG 15 life on land.

Innovations are needed to address contemporary sustainability challenges in ways that support the human rights and agency of girls and women in relation to this and other interconnected SDGs such as SDG 16, 14 and 15 above-mentioned. For example, Lake Victoria – the largest lake in Africa, chief reservoir of the Nile and shared by Kenya, Tanzania and Uganda – is affected by the destructive and invasive water hyacinth. This invasive species decreases access to fresh water and threatens biodiversity and healthy ecosystems by depleting oxygen in water, which in turn kills native fish species. It also increases the risk of malaria, as it is a breeding ground for mosquitoes and parasites. After this water hyacinth invasion at Lake Victoria, initiatives have emerged to develop low cost, biodegradable sanitary pads made from the invasive water hyacinth. Such pads can be particularly helpful for girls living in poverty in rural areas of the Global South, who often drop out or miss a significant number of school days each month once they begin menstruating. Through the Empowering Women Period project, these pads are manufactured and distributed by women to women. The project thus aims to improve the living conditions for women and secure the right to education for girls and young women, while at the same time contributing to the health of Lake Victoria by reducing the amount of invasive plants. The sustainability of these kinds of initiative often depends on whether local women groups have been actively engaged from an early phase of this kind of initiatives (Howden and Ituarte-Lima 2018).



Phyllis Omido with her staff at the Centre of Justice, Governance, and Environmental Action. Copyright: Goldman Environmental Prize

2. The faces of women protecting a healthy environment

Frontline **environmental defenders**, many of them women, are critical in safeguarding healthy ecosystems. They work tirelessly to protect biodiversity and uphold human rights, and their efforts need to be formally recognised.

Many environmental human rights defenders are "risking their today for our tomorrow" according to John Knox, the UN special rapporteur on human rights and the environment. This issue concerns not just present, but also future generations.

One such defender is Phyllis Omido. She is a single mother living in Owino Uhuru, a community on the outskirts of Mombasa, Kenya's second-largest city. She learnt that her breast milk was making her baby sick. The streams that residents used to wash, cook, and clean were being polluted with untreated wastewater from an industrial plant that extracted lead from used car batteries. Omido also realised that her son wasn't the only one suffering the consequences.

She mobilised her community and used legal means to stop the pollution. In 2012, they initiated a process of evaluating the likely environmental effects of the plant's operations, taking into account how water pollution was affecting people's health. Health scans showed high levels of lead in the blood of local residents.

After a meeting with the UN special rapporteur on toxic waste, a committee of the Kenyan senate came to assess the situation. By 2014 the owner of the plant decided to close it.

In the process of bringing attention to the consequences of the pollution the plant was causing, Omido received support

from organisations such as Frontline Defenders and Human Rights Watch. They also helped her realise that her case was of international importance.

To avoid similar businesses setting up shop in the future, the community teamed up with pro-bono lawyers from *Avocats Sans Frontières*¹⁸ in Brussels and took the Kenyan government to court for exposing workers and local residents to lead pollution.

For close to a decade, Omido has been monitoring various illnesses, deaths, and miscarriages that have occurred in her community. She has been threatened, arrested by the police, and forced into hiding for organising the opposition to the industrial plant. The non-governmental organisation she founded, the Centre for Justice, Governance and Environmental Action – forced the plant's closure and now promotes environmental justice in Kenya's coastal regions. The organisation has built a network of support across the world, and in 2015 Omido was awarded the Goldman Environmental Prize – the world's largest prize honouring grassroots environmentalists.

"I have learnt over the years that I am not alone," Omido said in a recent interview. "Thousands of people from around the world risk their lives protecting their way of life – their rights over food, water, clean air and land. They stand up for their basic human rights."¹⁹

18. See more at <https://www.asf.be/>

19. See the video interview at <https://www.unenvironment.org/news-and-stories/video/uns-environmental-rights-initiative>

Paradoxically, often these people in marginalised situations in the Global South, such as Omido, are at the forefront of protecting vital ecosystems and natural resources. They foster sustainability for the planet and people and can provide new insights into how to tackle the increasingly rapid global biodiversity loss.

“This is not just about indigenous communities, the poor or the marginalised. This is about everyone, because environmental rights are enshrined in over 100 constitutions. Even with so many people recognising their rights, often people are unable to assert them when business or government are not held accountable for environmental violations,” says Omido.

Women all over the world see exercising their political rights as critical to their struggle to put food on the table but also as a key to their long-term security and sustainable human development. Research clearly shows the need for development practitioners – as well as politicians and business leaders – to recognise women as agents, not victims, and support them in their work to achieve environmental justice (Sweetman and Ezpeleta, 2017).

Omido has shown what can be achieved when people get access to basic information and networks, such as other organisations at a national and international level.

In some places, development workers reach out to illiterate women and train them in basic law. Shvetangini Patel, for example, has worked with women’s organisations in the state of Gujarat in India for many years to make sure that the law works for people. She has used creative methods, including illustrations, to train illiterate women on various environmental laws (Centre for Policy Research (CPR) – Namati Environmental Justice Program, 2018).

2.1 Paralegals offer support

As grassroots civil society efforts have proved effective in many parts of the world, the role of community paralegals has evolved significantly. Community paralegals are grassroots advocates who use their knowledge of the law to seek concrete solutions to instances of injustice. They are trained by law specialists and development workers, and are often linked to lawyers who provide guidance and are helping people to hold firms accountable for damage to rivers and farmland. They can play a vital role in empowering communities around the world, making it possible for community members to protect their rights and the biodiversity of their regions.

The Kenya hub of the civil society organisation Natural Justice is based in Nairobi and includes a team of lawyers, mainly women. They advise community paralegals in Lamu, on the northern coast of Kenya, who work with their communities on how to access environmental information at the county level, for example about the impact that infrastructure projects have on water.

Lamu was declared a UNESCO biosphere reserve in 1980, has a rich cultural heritage, and is the home of rare marine species such as sea turtles, sharks, and dugongs.²⁰ Concerns are now growing over the construction of a port and a coal plant in the region, where water pollution could have a devastating impact on marine wildlife and local fishing communities.

Local community paralegals have taken on the cause, as part of a larger collaborative partnership between Natural Justice and SwedBio at the Stockholm Resilience Centre to support legal empowerment in Kenya and Zimbabwe.²¹ The paralegals are writing letters to access information from the authorities concerning the construction of the Lamu port, complaint letters concerning the breach of environmental regulations, and follow-up letters when they do not receive replies. Thanks to these persistent requests, the paralegals are starting to make an impact. They have also expanded their efforts to educate public officials in the understanding of citizens’ rights to demand and receive records from public authorities.

In April this year, the High Court of Kenya declared that the construction of the Lamu port failed to meet basic constitutional and legal requirements. Compensation of 1.7bn Kenyan shillings (£12.7m) was awarded to the 4,600 fishers affected by the construction of the port. The case was led by Katiba Institute, with the support of the environmental protection organisation Save Lamu, Natural Justice, and Environmental Law Alliance Worldwide.

2.2 Defenders: safeguarding nature’s contributions to people despite threats and violence

Environmental human rights defenders are voicing the interest of their own communities but also defend those who are voiceless – plants and ecosystems, animals, and other living beings. The land and water they protect provides globally important carbon stores, havens for wildlife, life-saving medicines, and clean water for millions. For people to fully enjoy their human rights to good health and food, they need the providing, supporting and cultural services that healthy ecosystems provide (see Figure 2). Maintaining biodiversity is necessary to ensure that ecosystems remain healthy and resilient.²²

But the defenders face growing threats. Three UN special rapporteurs have stated that the UN’s sustainable development goals cannot be met if environmental defenders, who are on the frontline of sustainable development, are not protected.

20. See more at <http://www.vliz.be/projects/marineworldheritage/sites/3.1%20Lamu-Kiunga%20Archipelago.php?item=The%20Indian%20Ocean>
 21. See <https://naturaljustice.org/programme/extractives-and-infrastructure/>
 22. See <https://www.stockholmresilience.org/research/research-news/2017-04-06-healthy-ecosystems-are-crucial-for-the-enjoyment-of-universal-human-rights.html>

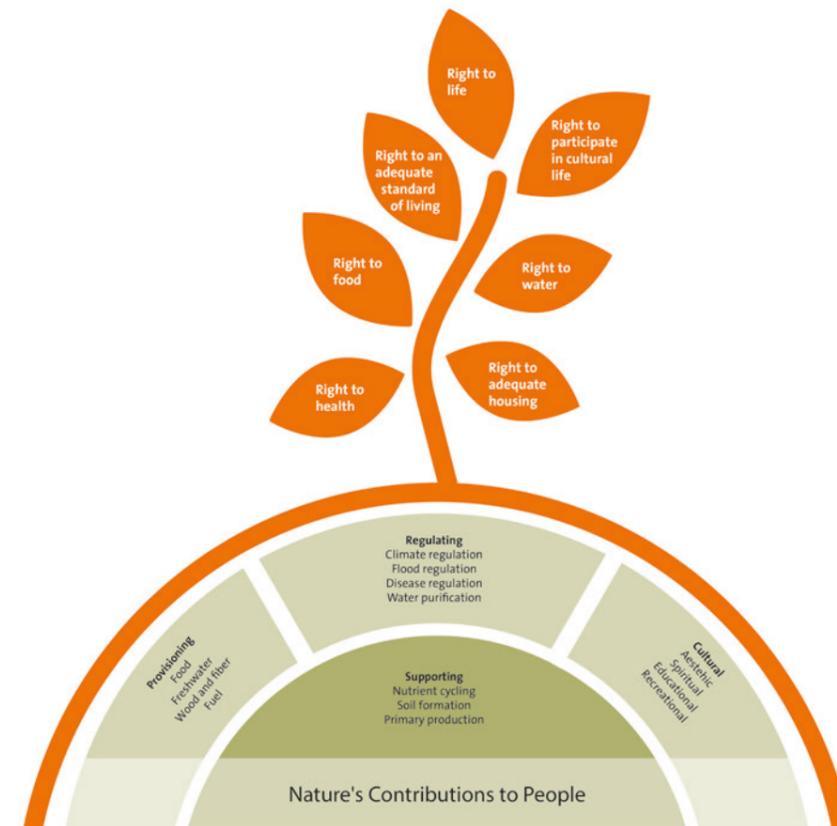


Figure 2 Source: own elaboration building on MEA (2005) and Diaz (2018)

The UN special rapporteur on the situation of human rights defenders, Michel Forst, has stressed that those working on land rights and natural resources are the second-largest group of human rights defenders at risk of being killed (Forst, 2016). He also highlights that women human rights defenders working on land and environment rights “are often excluded from land ownership, community negotiations and decisions about the future of their lands. When they engage in activism, they are often criticized for neglecting their domestic duties and endangering their families” (Forst, 2019, para 77). The Honduran human rights defender Berta Cáceres is one of at least 1,000 environmental defenders who have been murdered since 2002. Cáceres’ death in 2016 sparked a global outcry and environmental, human rights, and women’s rights movements have joined forces to call for justice.

Development projects often have international funders and investors. For example, both the Finnish and the Dutch development financiers were funding the hydroelectric dam opposed by Cáceres.²³ A key part of tackling the human

23. See <https://www.internationalrivers.org/blogs/227/agua-zarca-a-stain-on-the-dutch-and-finnish-human-rights-record>



With mandates from her local community, and travelling together with community leaders to the capital, Bertha Cáceres filed complaints against the proposed Agua Zarca Dam and its effects on the Gualcarque River, which is spiritually important to the Lenca people. Copyright: Goldman Environmental Prize.



Phorn Sopheak scrolls the timeline of her friend's Facebook that posted her photos during a five-day patrol combating illegal logging in central Cambodia. Copyright: Savann Oeurm/Oxfam.

rights defenders crisis is to see that states and businesses in industrialised countries, who invest in other countries, comply with their human rights obligations and ensure that the projects they finance do not violate those rights.

Under the UN Human Rights Council, there are discussions towards developing an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises²⁴. The UN Guiding Principles on Business and Human Rights (2011) spell out that while states retain a duty to protect populations against corporate human rights abuses, businesses have a responsibility to avoid human rights abuses resulting from their activities, or those of business partners, at home or abroad.

But many human rights defenders continue to face threats and violence. Concerned about the disappearing forest, people in a remote village have been defending a community-protected area in the Prey Lang forest in central Cambodia. One of them, Phorn Sopheak, was attacked when she went on a regular patrol to make sure illegal loggers were not cutting down trees. The illegal loggers routinely threaten her for speaking out against environmental destruction, and the attack was a warning of worse things to come. But Sopheak says she intends to continue her work: “The government has laws to protect the forest, and [...] has said that Prey Lang will be a protected forest. But local officials don't take serious action to protect the environment.”²⁵

24. See https://www.ohchr.org/Documents/HRBodies/HRCouncil/WG-TransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

25. <https://stories.oxfamamerica.org/stories/>

Biodiversity and ecosystem defenders often live in isolated areas, where many biodiversity hot spots are located. Many of the violations against them remain unreported because they take place in these remote places, for example deep within rainforests. In 2017, almost four people a week were killed worldwide in struggles against mines, plantations, poachers, and infrastructure projects, such as pipelines and dams.²⁶ The situation is particularly grave in Latin America and South East Asia, but it affects every region of the world.

2.3 Finding new ways to recognise defenders

Concerns are growing and vital steps are being taken on a global level to protect environmental human rights defenders who work to safeguard the environment on which the enjoyment of human rights depends. Last year, the UN Human Rights Council adopted a landmark resolution requiring states to ensure the rights and safety of environmental defenders.²⁷ And in March this year the UN Environment Programme adopted a policy on “promoting greater protection for environmental defenders”. In this policy, the UN recognises that women environmental defenders face increasing risks related to their activism.

The UN is also moving towards recognising the human right to a healthy environment. In March 2018, John Knox proposed 16 “framework principles on human rights and the environment”, and the first two principles emphasise the connections between human well-being and ecological well-being. In October 2018 the UN Special Rapporteur on human rights and the environment, David R. Boyd urged the UN General Assembly to recognise the right to a healthy environment. Dr. Boyd was tasked by the UN Human Rights Council to report to the highest body in the United Nations system, The General Assembly. He argues that while the right to a healthy environment has been recognised in regional agreements and in most national constitutions, it has not been formalised in a human rights agreement on a global level. A formal global recognition of a human right to a healthy environment could help protect those who increasingly risk their lives to defend the land, water, forests, and wildlife.

The Convention on Biological Diversity, a global treaty focusing on systems that sustain life on Earth, is also working to set new targets beyond 2020. Legal practitioners from around the world, invited by SwedBio at the Stockholm Resilience Centre and partner organisations, met in Machakos, Kenya in 2018 to discuss how environmental human rights could be addressed in relation to the human right to a healthy environment and biodiversity (Ituarte-Lima and Kibugi, 2018).

26. <https://www.globalwitness.org/en-gb/land>

27. <https://swed.bio/news/healthy-ecosystems-crucial-for-universal-human-rights/>



Phyllis Omido engaging with community members and former factory workers of Owino Uhuru. Copyright: Goldman Environmental Prize.

In addition to efforts for a global recognition of a healthy environment as a human right, work is also being done to support people in understanding and asserting their rights. The recently launched Environmental Rights Initiative, headed by the UN Environment Programme and other organisations, is aiming to bring environmental protection closer to the people, helping them to better understand their rights and how to defend them.

2.4 Strength in numbers

Women environmental defenders around the world are forming networks to push for change they cannot achieve alone. In South America, Central America and Mexico, the Mesoamerican Women Human Rights Defenders Initiative brings together national and international civil society organisations. Through the initiative, women from indigenous groups and local communities share their experiences and work together to improve the situation. A registry has been established to gather data on attacks and threats against women human rights defenders. Activists, leaders, and journalists are trained in risk prevention and four national networks have been created in Mexico, Guatemala, Honduras, and El Salvador to protect those under threat.

Omido points out that many people are on the frontline of the fight for a healthy planet. Her community took legal matters into their own hands and saw for themselves how change was happening. Even if it was a slow process, Omido's community has shown that change is possible. Omido is still working in the civil society organisation to promote environmental justice. She continues to raise

awareness in Kenya and beyond about the connections between law, a healthy environment, and people's well-being, and she is part of a growing movement.

“We want to show environmental defenders can use litigation as a tool and we want the UN to build up the capacity to enforce environmental law in courts around the world,” she told the Guardian. “Defenders are often treated as criminals or people who are hostile to development. That is not the case.”

3. A changing narrative coupled with legal and institutional effective mechanisms

A key recommendation for the global recognition of the human right to a healthy environment and development of the post-2020 global biodiversity framework is to adopt effective means to support the substantial contribution by women to sustainability, including the roles of women in the management of biodiversity and healthy ecosystems.

Beyond operating silos, integrated approaches building on advances on human rights law, multilateral environmental agreements and SDGs need to be further recognised and supported as highlighted by the participants of the Peer-to-peer Dialogue who included women and men from grassroots communities, academics, civil society members, lawyers, members of the judiciary and government, and inter-governmental organisations. Women contributions' and expertise range from selecting seeds with valuable nutritional qualities, to women working as legal advisers to indigenous peoples and local communities, and legal scholars advancing sustainability considerations in environmental and human rights law at national and international levels. These

contributions are often made invisible, especially those involving courage and risk-taking often stereotyped as domains of men. Furthermore, serious violation of the rights of women environmental rights defenders exist such as in the context of extractive industries; as well as in the implementation of adverse policies in the name of “conservation”. A change on narrative from an emphasis of vulnerability of women and girls in developing countries to also recognising women’s significant and courageous contributions to sustainability is vital for making gender equality a reality.

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4. Mainstreaming human rights principles and the ecosystem approach into the mining sector

Claudia Ituarte-Lima and Per Stromberg

This chapter focuses on the linkages between ecosystems services, human well-being and human rights. Human well-being and human rights hinge on ecosystem services. Globally, there is a growing demand for ecosystem services. At the same time, there is increasing degradation of ecosystems and consequently, a reduction in the capability of ecosystems to provide services. One such economic activity is mining, which is set for continued growth in the future. A challenge for decision-makers is that mining often poses an increasing demand for ecosystem services such as water and at the same time, it contributes to serious degradation of biodiversity and ecosystems. This chapter proposes a framework for connecting Ecosystems and Well-being Frameworks with SDG 16 on peace, justice and strong institutions, and the human rights principles. As such, the framework is a support tool to assess the full impacts of mining in order to support sound policies with positive social-ecological outcomes.

Biodiversity refers to the diversity of life on Earth. It is essential for the functioning of ecosystems that underpin ecosystem services that in turn ultimately affect human well-being. Ecosystem services are the benefits people obtain from ecosystems. However, mining operations are often allowed without sufficient information about negative impacts in biodiversity and ecosystem services.

Box 3. Participatory process and Acknowledgments

This chapter is based on Ituarte-Lima, C., and Stromberg, P., (2018) *Sustainable Development Goal 16 and biodiversity: mainstreaming biodiversity, ecosystem services and human rights in the mining sector, Stockholm: SwedBio at the Stockholm Resilience Centre, and Stromberg, P., Ituarte-Lima, C. (2018) Using the Ecosystem Services Approach for Assessing the Mining, Ecosystems and Human Rights Nexus, in UNDP (2018) Extracting Good Practices: A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector, United Nations Development Program*. The authors would like to thank Margaret Wachenfeld (Themis Research), Tim Scott (UNDP

and Marianne Kjellen (UNDP), Sanna Due (UNDP), Ann Pedersen (UNDP), Maria Bang (SEPA) for valuable comments to earlier drafts of this article. The article has also greatly benefited from feedback in the SEPA-UNDP webinars Environmental governance of the mining sector (GOXI, 2017), and a joint side-event co-convened by SwedBio/SRC, UNDP, SEPA, IDLO and Natural Justice at the Convention on Biological Diversity Subsidiary body on scientific, technical and technological advice in Montreal, Canada (Dec. 2017). We would also like to thank Aarushi Balani and Viveca Mellegård for their support in the editing process.

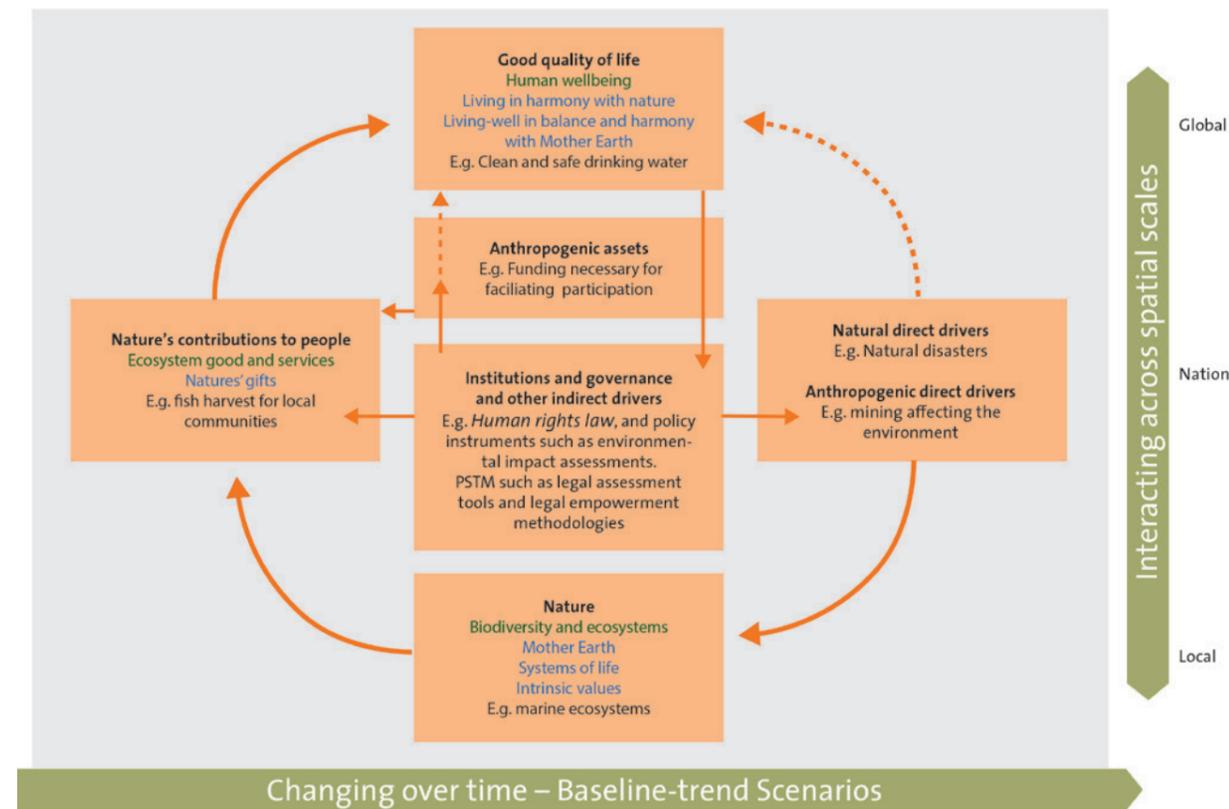
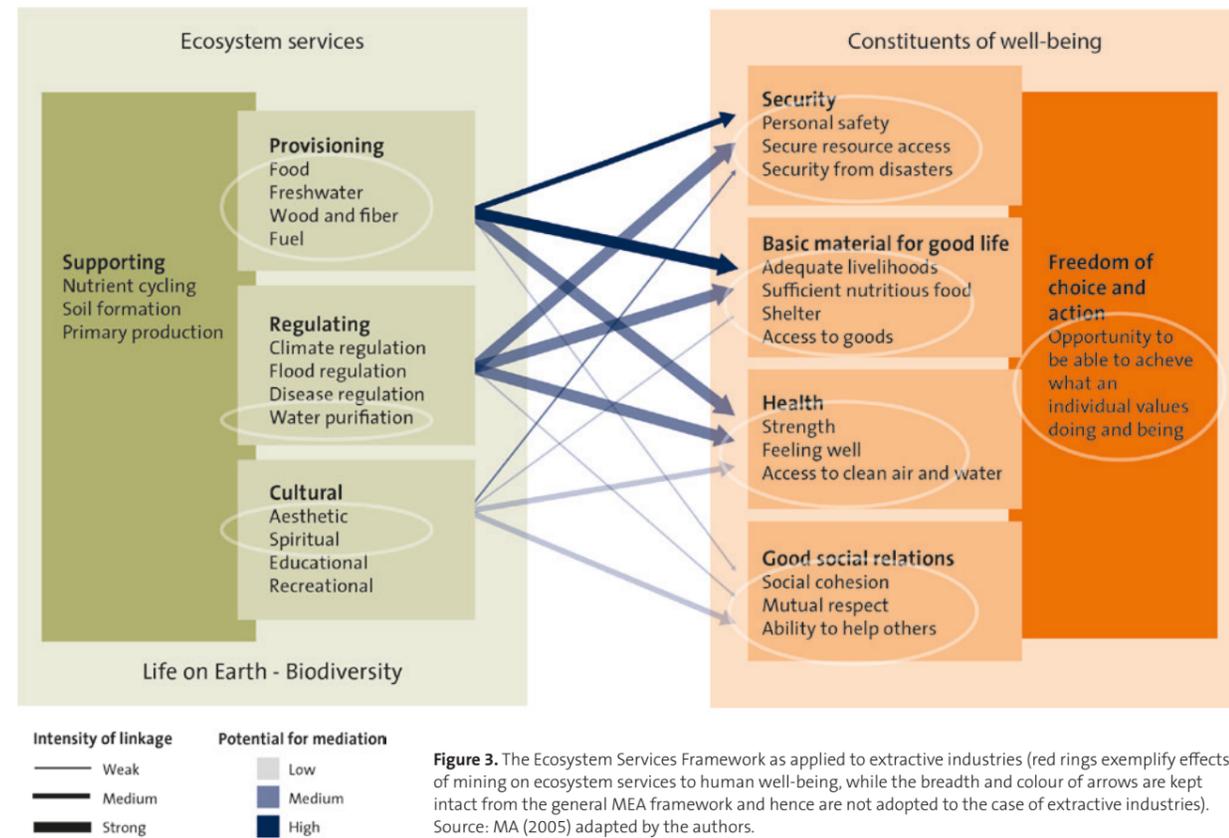


Figure 4. The IPBES framework showing nexus between mining, ecosystems and human rights. Source: adapted by authors from IPBES and Diaz et al 2018

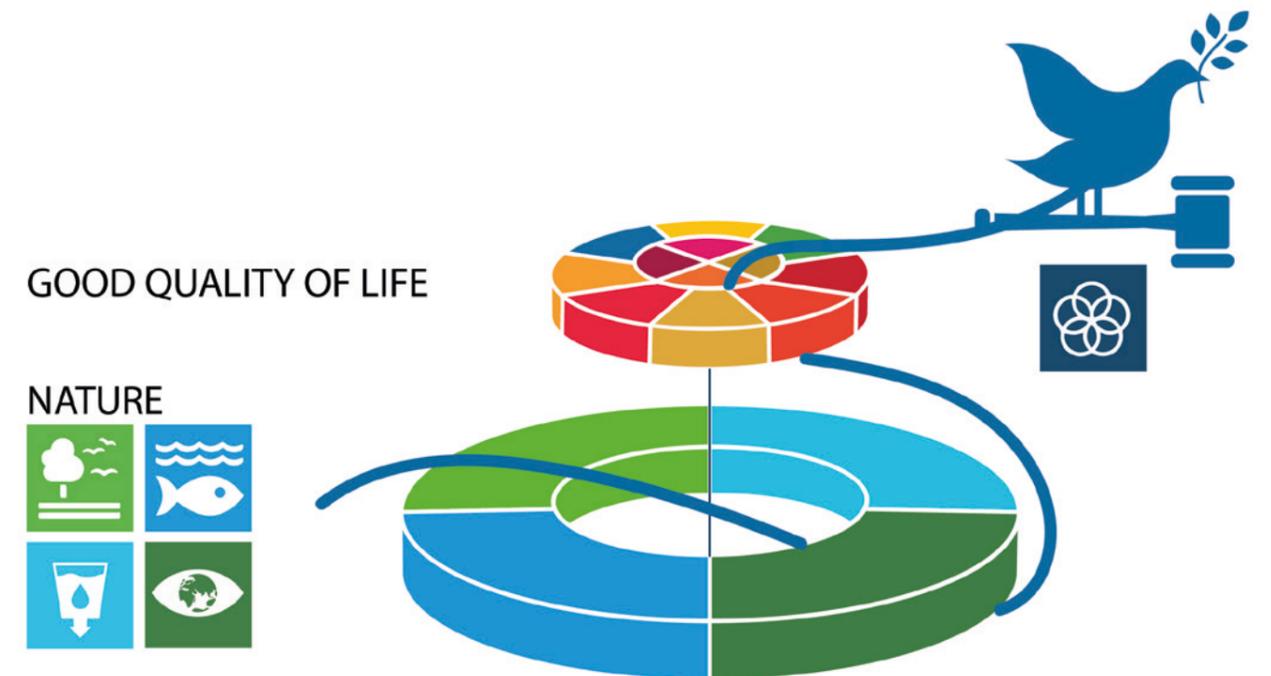


Figure 5. The SDG16 pigeon and human rights weaving nature and good quality of life. Source: own elaboration, building on Rockström and Sukhdev 2016

1. The Ecosystem and Well-being frameworks and their application to Mining

The framework examining the linkages between ecosystems and human well-being developed under the Millennium Ecosystem Assessment (see Figure 3) and the framework under the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) (see Figure 4) are applied to mining as a way to analyse how mining affects biodiversity, and ecosystem goods and services. The MEA Ecosystems Services Framework places human well-being as the central focus for assessment; highlights that biodiversity contributes to its many constituents directly and indirectly; and focuses on the interconnections between ecosystem services and different dimensions of human well-being as they are affected by changes in environmental quality and quantity.

The IPBES framework and its nexus between mining, ecosystems and human rights.

The IPBES framework is a simplified model of the complex interactions between natural world and human societies. It highlights the central role that institutions, governance and decision-making play in the link among the elements of nature, the benefits that people derive from it and a good quality of life. It aims to include a wide set of viewpoints and stakeholders to understand the diversity of people and nature relationships.

It helps to assess the impact and trade-offs that different economic activities have on human welfare, by mapping the effects of the mining on the contributions of nature to people (ecosystem services), through different localities, and, through time (Figure 4).

This framework's visual tools provide a shared language and common set of definitions and relationships to make complex systems relatively pedagogical and easy to understand. They include the main social-ecological dynamics and complexities. The framework is important for multi-actor dialogue between right-holders and duty bearers such as governments. It can be applied in distinct sectors, such as the mining industry, as well as institutions that finance mining and related infrastructure such as dams for water provision. By clarifying and focusing the analysis on social-ecological relationships, this conceptual tool supports communication across disciplines and knowledge systems and between knowledge and policy.

2. Weaving together SDG 16 with HR principles and EW frameworks

In this section, key conceptual entry points are introduced, which together we refer to as the EW-HR (Ecosystems Well-being – Human Rights) framework. This framework aims to be a legal/policy support tool to weave together Agenda 2030 in particular the Sustainable Development Goal 16, human rights and ecosystems and well-being frameworks (Ituarte-Lima and Stromberg, 2018).

Key entry points for the EW-HR framework:

- 1. Principle of interconnectedness and indivisibility:** connect distinct ecosystem services with interdependent human rights recognised in national constitutions, which in many countries is the legal instrument with the highest legal hierarchy. This is a helpful entry point for making a strong case for inter-sectorial coordination, which is key for mainstreaming human rights and biodiversity in the mining sector. Understanding the connections between distinct ecosystem services and human rights can provide important information that can also serve coordination between these Ministries and National Human Rights Commissions, local governments, parliaments and judiciaries. This also includes specifying the content of the duty bearers' obligations to respect, protect and fulfil human rights and safeguard healthy ecosystems, which is recognised in Constitutional law in many countries, such as in the Kenya Constitution.
- The second entry point is connecting the principle of **equality and non-discrimination** embedded in SDG 16.b "Promote and enforce non-discriminatory laws and policies for sustainable development" with the ecosystem approach. It is important to highlight both individual and collective dimensions when understanding the contributions of ecosystems and biodiversity to people. Assessing whether laws and institutions are promoting and enforcing non-discriminatory, sustainable development in regulating how access to ecosystem services is distributed among distinct groups is important in actions towards achieving SDG16. The proposed framework can help to identify who is affected (in a positive or negative way) by ecosystem alteration caused by mining. After evaluating what groups are in a relatively disadvantaged position, other tools can be weaved in to harness the human rights, ecosystems and well-being connections. For example, legal empowerment methodologies intended to support people in a disadvantaged position. Tools such as legal empowerment can be a means to foster an enabling environment for people to exercise human rights such as access to information and access to remedy for themselves rather than engaging on behalf of them in an on-going basis (Golub, 2010). Legal empowerment methodologies such as community protocols and paralegals can place local communities, including women, youth and elders, on a relatively more equal level playing field, in dialogue, mediation and/or court cases concerning the mining sector. Training community environmental legal advisers to identify and systematize actionable legal evidence can be a means to support and catalyse collective action in legal processes.
- A third entry point is connecting the **participation and inclusion human rights principle** embedded in SDG 16.7 "16.7 Responsive, inclusive, participatory and representative decision-making at all levels" and 16.10 "Public access to information and protect fundamental freedoms" with the ecosystems and well-being frameworks. Complementary to the connections presented in the IPBES framework, we propose to assessing the contribution of people to nature through exercising human rights such as freedom of speech and expression and being able to do so without discrimination.
Empowered right holders with reliable and understandable public information should be able to contribute to addressing the effects of mining and safeguard Earth's life support systems without any fear (Knox 2017b). The right to information, public participation and access to justice is interdependent and indivisible with the right to a clean and healthy environment as mentioned in the first entry point referring to the indivisibility and interrelatedness of human rights. The right to access biodiversity-related information as the basis for the rights of women, men, girls and boys to be able to participate in public consultations concerning biodiversity and ecosystem values needs to be enshrined in law and enforced in practice without discrimination.
- The fourth point is **connecting the accountability and rule of law principle** embedded in SDG 16.3 "Rule of law at the national and international levels and equal access to justice for all", 16.5 "Reduction of corruption and bribery in all their forms" and 16.6 "Effective, accountable and transparent institutions at all levels" with the ecosystems and well-being frameworks. The reason why healthy ecosystems are degraded in the mining sector is often due to the degradation of the rule of law and accountability mechanisms. Hence, the implementation of the human rights principle of rule of law and accountability is at the core of solutions for addressing, in practice, environmental challenges in mining. Specifically, the lack of compliance of environmental regulation in mining activities can be tackled through strengthening judicial mechanisms and non-judicial complaint mechanisms. As a human rights principle, it can also serve to guide the legal architecture for environmental impact assessment and environmental management plans in mining. Furthermore, legal provisions that would trigger compulsory human rights assessments connected to environmental impact assessments and monitoring can be part of the synergies between these tools for realizing human rights and healthy ecosystems.



Systems of Life include non-use values of biodiversity. Photo: Ituarte-Lima

3. The EW-HR framework: the case of human right to water

In 2017, the UN Special Rapporteur on Human Rights and the Environment, Professor John Knox (2017a), made a further step in linking biodiversity and related ecosystem services and specifying distinct but interdependent human rights obligations: substantive obligation, procedural obligations and obligations concerning people in vulnerable situations.

3.1 Substantive obligations: Using the example of the right to water and impacts of mining

Biodiversity underpins healthy ecosystems and continued provision of ecosystem services in turn affecting substantive human rights such as the right to water and right to health. Among the many distinct connections, the focus here is on highlighting the nexus of mining impacts on ecosystem services and the right to water. The mining industry typically has significant impacts on water but is also strongly reliant on water for processing and for hydroelectric plants supporting their high demand for energy. Water also provides vital ecosystem services. Given its importance to many dimensions of human well-being, in 2010, the UN recognised the human right to safe drinking water and sanitation as a separate right; it is also an important component of e.g. the right to an adequate standard of living. Regional human rights mechanisms such as the African Commission on Human and People's Rights, European Court of Human Rights and the Inter-American Court of Human Rights have also contributed to interpreting the content of the water-related obligations, as have various courts under national law (WaterLex and Wash United, 2014).

The right to water is a right for personal use. It does not apply to companies or operations like the mining sector. Instead, decision-makers must consider the mining sector's demand for water use in light of the rights of individuals and the communities to water. As the UN Committee on Economic, Social and Cultural rights in its General Comment No. 15 (2002) highlights that as with other human rights, the rights to water include obligations to respect, protect and fulfil human rights:

- **Respect** human rights which requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water such as by arbitrarily interfering with customary or traditional arrangements for water allocation or unlawfully diminishing or polluting watersheds and water-related ecosystems through waste from State-owned mining companies.
- **Protect** human rights, which requires States to prevent third parties such as non-state owned (i.e. private) mining companies from interfering with the enjoyment of the right to water
- **Fulfil** human rights requires States to adopt the necessary measures such as sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

In order to help governments and others set parameters around the right to water, the UN CESCR also sets out the different aspects of the right to water:

- **Availability** – whether there is a sufficient amount of water available within a given geographical area and whether there is a regular supply of water over time. It is an objective criterion, which can be measured through quantitative data
- **Accessibility** – has at least 4 dimensions – (i) *physical accessibility* means that water must be within physical reach and can be accessed without physical threats; (ii) *economic accessibility* is often referred to as affordability; (iii) *Information accessibility* of information on water; and (iv) *non-discrimination* which cuts across all dimensions of accessibility.
- **Acceptability** – consumer acceptability of water in terms of colour, odour, taste and cultural acceptability.
- **Quality** – water must be safe; the state must prevent, control and treat water-related diseases; and water facilities and services must be of sufficient quality. This can be defined by reference to water quality standards issued by technically competent, internationally recognised authorities – WHO or UNICEF (Jensen, Villumsen and Døcker Petersen, 2014).



Photo: Bent Christensen/Azote

3.2 Procedural obligations

Substantive rights such as right to water and right to health often depend on procedural rights. The procedural human rights obligations of States in relation to the environment include the three rights covered by Principle 10 (access to information, public participation and access to justice including remedy). For example, States have specific procedural obligations before granting a mining concession or authorizing a dam, which would cause the degradation or loss of biodiversity. These obligations include assessing the environmental and social impacts of the proposal, including through the ESIA processes, and facilitating that people exercise their rights to freedom of expression and association and public participation in the decision-making processes. Operationalizing the right to public participation can contribute to better informed decision-making about ecosystem services (See d) below). Procedural rights also include the right to access effective legal remedies for those who claim that their rights have been violated (Knox 2013; Ituarte-Lima, 2017).

3.3 Obligations concerning people in vulnerable situations

Adverse impacts to ecosystems by mining activities may have disproportionately severe effects on the enjoyment of human rights of members of minorities or indigenous peoples who rely directly on the ecosystems through traditional activities such as fishing. In these cases, States have heightened procedural obligations. For example, taking positive legal measures to ensure the effective participation of members of minority communities in decisions, which adversely affect their relationship with the ecosystems they depend on. Additionally, States have obligations concerning substantive rights such as the protection of the ecosystems themselves. Sometimes, whole groups can be in a vulnerable situation

such as indigenous peoples or ethnic minorities but it can also be sub-populations, such as women, youth, children and the landless. In communities who depend directly on the ecosystems for their livelihoods, women and children are often the ones fetching water. Restrictions on the physical accessibility of clean water can affect the possibilities, particularly of girls, to attend school and hence affect the conditions of a specific group to exercise their rights to education (Hey, 2009).

Ecosystem degradation often has its most direct and severe impact on people under poverty conditions in rural settings. Wealthier segments of the population control access to a greater share of ecosystem services and can often purchase alternative access to services, or offset local losses of ecosystem services by shifting production and harvest to other regions. For rural people in poverty situations, who are often the most affected by mining, substitutes for access to biodiversity and ecosystem services and alternative choices are often very limited. This has led to many conflicts between competing social groups or individuals over access to and use of biological products and ecosystem services. For these reasons, disaggregating the ecosystem services used by different sections of society and understanding and addressing how they will be impacted by mining operations can support the operationalization of the human rights principle of equality and non-discrimination (Daw et al., 2011; Ituarte-Lima et al., 2014).

3.4 Using the EW-HR Framework to understand and act upon the impacts of mining on ecosystem services and impacts on human rights

Using the right to water as an example, Table 3 gives an example of how the EW-HR Framework can also be used to understand and act upon the impacts of mining on ecosystem services and impacts on human rights. The Framework can

Table 1 Using the ES Framework to Consider the Right to Water in Mining (examples)

Category of Ecosystem Service	Direct or Indirect Impact of Mining	the EW dimension of the EW-HR Framework to highlight how mining affects human well-being through:	Associated links to Human Rights (International Covenant on Economic, Social and Cultural Rights 1976)
Provisioning	Depletion of groundwater / unsustainable extraction of surface water	<ul style="list-style-type: none"> A strong link between the provisioning service provided by water → negative impact on basic material for good life as a dimension of human well-being, would be indicated by the broad arrow. A low potential for mediation by socio-economic factors between the provisioning service water purification → basic material for good life as a dimension of human well-being, would be indicated by the light colour of the arrow 	<p><i>Right to an adequate standard of living, Right to water, Right to food and Right to education</i></p> <p>Mining impacts can limit the physical accessibility of clean water e.g. by diverting rivers in order to provide for dammed water used in hydroelectric plants for mining operations –</p> <ul style="list-style-type: none"> which limits use for productive purposes such as agriculture affecting the right to food can affect the time spent to collect water and hence the possibilities particularly of girls to attend school and to exercise their rights to education (Hey, 2009)
Regulating	Contamination of watersheds	<ul style="list-style-type: none"> A strong link between the provisioning service provided by water → negative health impact as a dimension of human well-being, would be indicated by a broad arrow. A weak potential for mediation by socio-economic factors between the provisioning service provided by water → health would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the water with something else in order to keep the impact on human well-being unchanged. 	<p><i>Right to life, Right to health & Right to water</i></p> <p>Water pollution by mining may affect:</p> <ul style="list-style-type: none"> quality of water drinking polluted water may impact the health or life of people; pregnant women and children may be at a greater risk. Colour, odour and taste of water used for personal or domestic use with impacts on acceptability of the water. This in turn may prompt people to resort to unsafe water alternatives
Regulating	Deforestation in order to enable open pit mining reduces the flood regulation ecosystem service	<ul style="list-style-type: none"> A strong link between the regulating service flood regulation → security as a dimension of human well-being, would be indicated by a broad arrow. A weak potential for mediation by socio-economic factors between the provisioning service provided by water purification → security from flooding would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the flood control with something else in order to keep the impact on human well-being unchanged. 	<p><i>Right to an adequate standard of living & Right to Food & Right to adequate housing</i></p> <ul style="list-style-type: none"> Mining impacts can prompt flooding such as by dam breaks for e.g. when these dams are not strong enough to withstand torrential currents during the typhoon season or earthquakes, or emergency releases, or through deforestation that reduces nature’s own flood control. These impacts can in turn affect local cultivation grounds causing food insecurity and also affect housing areas.
Cultural	Contamination of watersheds and inundation of land for dams to provide water for mining	<ul style="list-style-type: none"> A strong link between the cultural service spiritual aspects → possibly all aspects of human well-being including health and good social relations as a dimension of human well-being, would be indicated by a broad arrow. A weak potential for mediation by socio-economic factors between the cultural service provided by the spiritual aspects → possibly all aspects of human well-being would be indicated by light colour of the arrow. This would mean that it is not possible to substitute the spiritual aspects from the ecosystem service with something else in order to keep the impact on human well-being unchanged. 	<p><i>Indigenous peoples and local communities rights to ownership and control over their ancestral lands and resources</i></p> <ul style="list-style-type: none"> Inundation and siltation by large-scale corporate mining and associated dams can cause the dislocation of indigenous peoples and local communities from their ancestral lands and traditional livelihoods such as swiddens, hunting, grazing livestock, household gardens with vegetables and traditional medicinal plants.

help identifying different ecosystem services such as protection against erosion and purification of water, as well as how mining affects human rights of different groups.

Key dimensions of the EW-HR framework are as follows:

- **time horizons** (short-term, medium-term and long-term).
- **spatial dynamics / scales** (local, regional, global) (for example, a global market may lead to regional loss of forest that increases flood magnitude along a local stretch of a river.
- **factors that indirectly affect ecosystems**, such as population, technology, and lifestyle.
- that can lead to **changes in factors directly affecting ecosystems**, such as the catch of fisheries or the application of fertilizers to increase food production.
- The resulting changes in the **ecosystem** cause the ecosystem services to change
- thereby **affect human well-being**.

Mining impacts on e.g. water have wide spatial distribution, and often wide ranging and irreversible effects through time. Therefore, what may appear as a sound use of water today needs to be assessed through the lens of the full user chain of water both today and in the future, and locally and beyond. Mining needs to be carefully considered in the broader context of how it may affect such important matters of national security as the current and future ability of the country to supply its population with sufficient water and food, and the long term-prospects of local and regional economies. Such effects on water can be of substantial importance for local livelihoods but also regionally or even nationally and internationally.

4. The EW-HR framework: necessary (but not sufficient on their own) criteria for mining, guided by Human Rights Principles

The EW-HR framework described above is here aimed to enhance policies for mining. Human rights principles are applied to such mining challenges where we conceive that policy mistakes are particularly common, and provide a legal tool to motivate the use of the criteria. Moreover, it shows how weaving the human rights principles in SDG 16 helps internationally agreed biodiversity priorities, exemplified by the implementation of international biodiversity law commitments in terms of the CBD.

Box 4. Correspondence between and the human right principles

Assessment criterion 1: Is the mining venture too risky in terms of likely bankruptcy?

Guiding HR principle: Principle of Accountability and the Rule of law

These assessment criteria are basic business criteria. It is worth recognising that the material motivating the benefits of a project are often provided by the project proposer, a vested interest. Naturally, the potential benefits need to be scrutinized with the same rigour as the potential negative impacts of the project. Firms and policy planners may make different judgments about the riskiness of projects. This can be due to firms understating the financial cost of future environmental liabilities. Firms may commit this wrongdoing either in a planned way, or, become aware of it during the mining process. For different reasons, such revised information may not reach the policy makers who are also the main duty bearers of human rights.

CBD implications: Often, there are not sufficient funds after a bankruptcy to cover environmental liabilities. Similarly, even if economic securities are deployed, these may not work as intended (e.g. because they are too low, or for reasons outlined in criteria 4). Hence, these liabilities are either left unaddressed, meaning a direct effect on the environment. Alternatively, tax money is invested in cleaning up the environmental debt of the mine. In contrast, avoided bankruptcy frees up such tax money to invest in other biodiversity conservation and sustainable use activities. Hence, adhering to the Principle of Accountability and the Rule of law assists compliance with CBD through reduced risk of diverting resources to cleaning up the pollution from bankrupted mines and instead investing these resources in projects. For example, supporting local agroforestry systems rich in biodiversity that further the CBD goal of biodiversity conservation and sustainable use and the protection and fulfilment of human rights.

Box 5. Correspondence between Assessment criterion 2 and the human right principles

Assessment criterion 2: Are societal benefits of the project larger than societal costs? (without accounting for opportunity cost)

Guiding HR principle: Interdependency and Interrelatedness & Principle of Participation and Inclusion

Duty bearers have a margin of discretion for balancing environmental protection and other legitimate societal goals, however the balance must be reasonable, and never result in unjustified, foreseeable infringements of human rights (Knox 2017). To contribute to clarifying whether a reasonable balance has been struck, human rights bodies have identified key factors in the context of environmental harm and included whether the project in question is the result of a process that complied with the corresponding procedural obligations; whether it is non-retrogressive; whether it is non-discriminatory; and whether it is in line with international and domestic standards (A/HRC/25/53, para.

53–56). States should also fully implement their laws protecting human rights related to the environment in striking the balance between environmental protection and other legitimate societal goals.

This assessment criterion 2 (see Box 5) entails a comparison of societal benefits and costs, without accounting for other potential uses of the resources (see Criteria 3). Examples are income from taxes and royalties, direct expenditures such as when subsidizing infrastructure used by the mine, or hidden costs. Clearly, the revenues from the project need to exceed the host country's net cost for the project.

CBD implications: States may use more tax money than they receive from taxes from a mining venture. When there is more tax expenditure than tax gain from mining ventures, economic resources are diverted that could otherwise be invested in nature conservation and sustainable use. Hence, adhering to the Human Rights Principle of **Interdependency and Interrelatedness & Principle of Participation** contributes to compliance with the CBD through reduced risks of diverting resources from investing in the CBD goal of biodiversity conservation.

Box 6. Correspondence between Assessment criterion 3 and the human right principles

Assessment criterion 3: Does the project mean the most beneficial use of society's resources?

Guiding HR principle: Interdependency and Interrelatedness & Principle of Participation and Inclusion

This assessment criterion 3 (see Box 6) adds the opportunity cost of resources to the comparison of societal costs and benefit criteria. It is not sufficient that the mining venture contributes more than it receives from society (Criterion 2). It also needs to be established that the resources such as the minerals, the ecosystem services, the labour, would not contribute more to society if used in an alternative way. This is the so-called opportunity cost of resources,²⁸ for example, using these resources for agriculture and fishery activities, and to households. Hence this third criterion also needs to account for future use of resources. For example, it may be the case that the timing is not right for extracting the minerals. From the point of view of a foreign investor, there may not be time to wait for higher international raw material prices. However, in economizing with a nations' resources it may in some cases be preferable to wait for higher raw material prices in order to extract a higher economic rent from the mineral resource.

28. It is useful to have this as a criterion on its own, rather than to integrate it in criterion 2, in order to make the difference between the different elements more clear.

CBD implications: This reasoning applies to all four criteria: adhering to the HR Principle: Interdependency and Interrelatedness & Principle of Participation and Inclusion contributes to compliance with CBD through increased likelihood of saving the tax basis that could be used to invest in the CBD goal of biodiversity conservation and sustainable use.

Box 7. Correspondence between Assessment criterion 4 and the human right principles

Assessment criterion 4: Do the revenues from the project reach the nation's people without discrimination?

Guiding HR principle: Accountability and the Rule of Law & Principle of Equality and Non-discrimination

Assessment criterion 4 (see Box 7) concerns institutions for the correct use of benefits and distributional aspects. Even if criterion 3 is fulfilled, and the mining venture provides sufficient net-surplus benefits to the country, there are risks that these benefits are diverted and do not contribute to legitimate societal goals.

CBD implications: Adhering to the **Principle of Equality and Non-discrimination and the Principle of Accountability and the Rule of law** helps towards compliance with CBD through reduced risk of losing resources that could be used to invest in the CBD goal of biodiversity conservation, sustainable use and benefit sharing. The implications explained in Criterion 3 are also applicable to Criterion 4.

5. Concluding remarks

Mainstreaming biodiversity in the mining sector is necessary for safeguarding the contributions of nature to people that support the full enjoyment of a wide range of human rights, including the rights to life, water, health, and an adequate standard of living. Here tools for guiding policy makers are proposed, enabling them to trace the links between mining, environment, human well-being, and human rights. In order to protect human rights, States have a general obligation to safeguard biodiversity and ecosystems as they affect human welfare. In turn, enabling conditions to exercise rights in the mining sector can contribute to safeguarding life support systems. For example, the right to public participation in environmental impact assessments in mining, access to information e.g. base-line data concerning the status of biodiversity and ecosystems before a mining concession is granted, and access to justice in environmental matters.

Below we mention key areas where the Ecosystem and Human Well-being – Human Rights (EW-HR) Framework aims to contribute. They are followed by recommendations for different groups. It is worth noting that some recommendations to one group may also be relevant to other groups.

The operationalization of human rights principles in mining decision-making simultaneously helps to achieve SDG 16, and safeguard biodiversity and healthy ecosystems.

States, the main duty bearers of human rights, can use the policy support tool proposed in this policy paper, the EW-HR Framework, to:

- Assess and clarify key impacts of mining for sound legal and policy making. This, in line with the general human rights obligation to protect biodiversity and ecosystem services and also the full enjoyment of interdependent human rights;
- Highlight the urgent need to properly assess how mining affects biodiversity and ecosystem services, across locations and time;
- Promote legal and policy coherence by mainstreaming cross-cutting dimensions of Agenda 2030, specifically sustainability and human rights principles in the mining sector.

The EW-HR framework can contribute to assessing the full picture of the impacts of mining for informed decision-making. In contrast to a fragmented analysis (limited to, for example, hectares of trees affected in a mining project site, which may be compensated for elsewhere with other trees), the EW-HR framework helps to assess impacts beyond the extraction site and further ahead in time. In this context, the full picture of the impacts of mining means assessing relevant geographical connections, for example, impacts of mining downstream in contrast to solely in the mining project site. The proposed framework also helps to identify the impacts prior to a mining concession, during the mining exploitation active time, and after the mine closure - in contrast to only the time that the mining project is commercially active. In line with the HR principle of indivisibility and interrelatedness of human rights, the EW-HR framework helps to assess interrelated human rights obligations such as those associated with the right to clean drinking water and the general obligation to safeguard biodiversity and ecosystems.

Mining and related infrastructure industry, as well as investors in mining companies, can use the EW-HR framework to make sure they respect human rights through actions that may affect the contributions of nature to people, including by:

- Complying with the human rights principles specified in this policy report in all actions that may affect biodiversity and ecosystems, including by being transparent and accountable vis-à-vis public authorities and civil society about the full picture of impacts of their operations;
- Following the CBD relevant guidelines (e.g. CBD Voluntary guidelines for safeguards and Akwé:Kon voluntary guidelines) and recommendations of UN

Special Rapporteurs relevant to mining (e.g. recommendations of the Special Rapporteur on human rights and environment concerning biodiversity (A/HRC/34/49) and the Special Rapporteur on the rights of indigenous peoples with respect to extractive activities (A/HRC/24/41)) and;

- Avoid applying for concessions for mineral exploitation and related infrastructure such as dams in protected areas or indigenous and community conserved areas.

Civil society organisations are encouraged to use the proposed EW-HR Framework as a means for:

- Contributing to prevent and address the effects of mining on life support systems for a prosperous future for current and future generations. Exercising the right to information, public participation and access to justice, is interdependent and indivisible with the right to a clean and healthy environment;
- Systematizing and sharing good practices, for example, with groups using legal empowerment methodologies and community protocols and paralegals that place local communities, including women, youth and elders, on a more level playing field, in dialogue, mediation and/or court cases concerning the mining sector.

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5. Connecting the dots between Human Rights, Environmental Impact Assessments and the Convention on Biological Diversity

Rodrigo Martinez-Peña, Claudia Ituarte-Lima, Isabell Kempf and Grace Wong

1. Introduction

In this article, we present two different legal/policy instruments for implementing the human rights principles to biodiversity governance. Firstly, we address biodiversity guidelines that serve in facilitating the design, implementation and assessment of policies and strategies. Specifically, we use as an entry point the CBD voluntary guidelines for safeguards in biodiversity financing (Ituarte-Lima et al. 2018a). The purpose of these guidelines is to safeguard both biodiversity and human rights in biodiversity financing mechanisms, such as payment for ecosystem services, biodiversity offsets and official development assistance, inter alia. Metaphorically speaking, this international legal/policy instrument serves to ‘fine tune’ other more applied legal/policy instruments at national level. Secondly, we utilize the CBD voluntary guidelines as a framework to analyse a concrete policy instrument whose implementation takes place at national level, namely environmental impact assessment (EIA). We use a case study approach to analyse the environmental and social impact assessment policy instrument (ESIA) from Lao People’s Democratic Republic, which was tested, piloted and implemented with international development assistance from the UNDP-UNEP Poverty and Environment Initiative, the Finnish Environmental Management and Support Programme (EMSP) and Swiss Centre for Development and Environment (CDE).

In this article, we unveil connections between human rights principles, the CBD voluntary guidelines for safeguards, ESIA in Lao PDR and international cooperation. The findings presented aim to provide insights on how to adapt EIA national systems to address social-ecological dimensions, by means of implementing Sustainable Development Goal 16, the Framework Principles on Human Rights and the Environment, and the human right to a safe,

clean, healthy and sustainable environment. We close the chapter with recommendations for States, official development cooperation agencies and business sector. Recommendations were enriched through the multi-actor, Peer-to-peer Dialogue on Weaving Human Rights and Biodiversity with SDG16 that took place in Machakos, Kenya the 29th-31th of May, 2018, whereby time was dedicated to examine the connections between human rights, environmental impact assessments, biodiversity and healthy ecosystems.

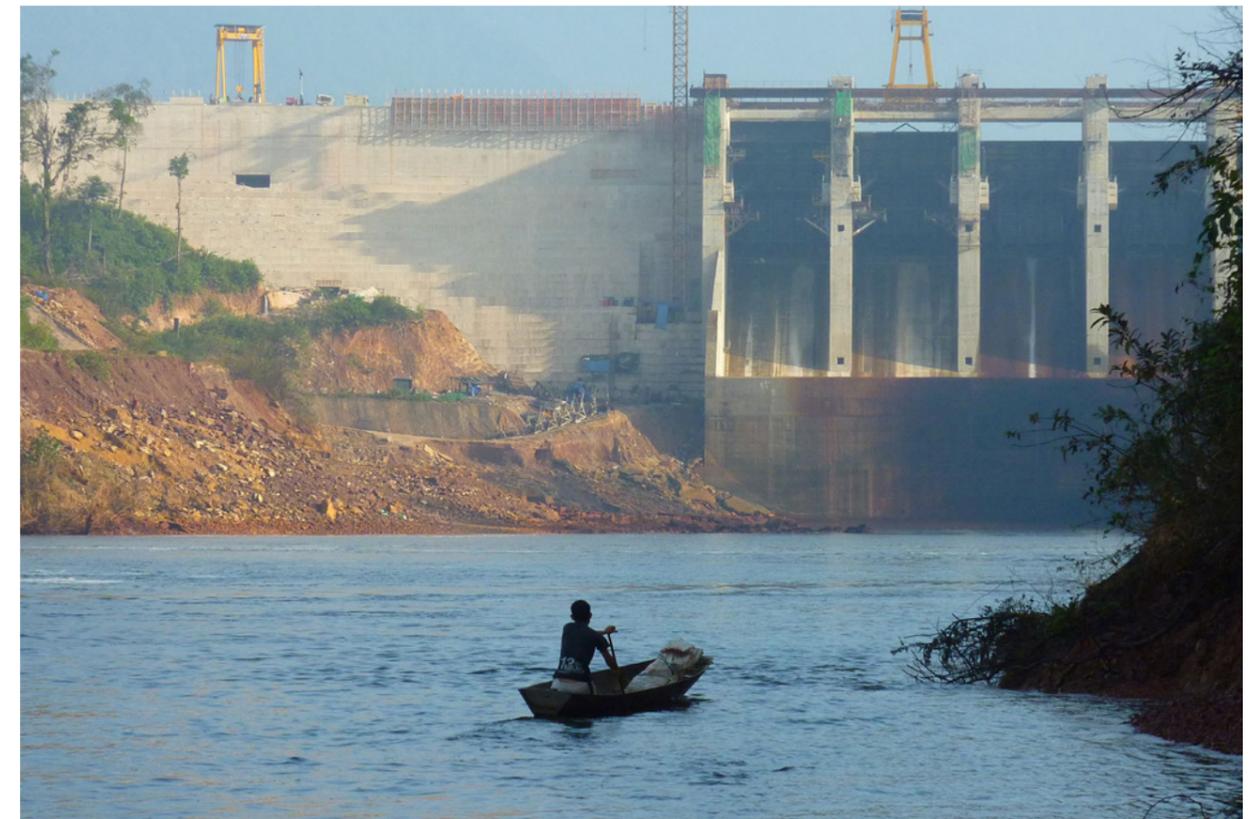
2. CBD Voluntary Guidelines for Safeguards as a Means to Apply a Human Rights-based Approach to Biodiversity Governance

The CBD voluntary guidelines for safeguards are considered an instrument suitable to select, design, evaluate and adapt policies and strategies to protect biodiversity and society from the risks of biodiversity financing mechanisms (see the CBD guidelines in Box 8). We argue that CBD voluntary guidelines for safeguards are additionally useful to adopt a human rights approach to biodiversity governance. Our argument is based on the fact that voluntary guidelines fit human right principles (see Table 5 for further details).

2.1 Guideline (a): Biodiversity underpins local livelihoods and resilience

Guideline (a) follows the human right principle of *indivisibility, interdependence and interrelatedness, which can be understood as follows, “the enjoyment of one right (or group of rights) requires enjoyment of others – which may or may not be part of the same ‘category’”* (Whelan 2008).

Biodiversity is a constitutive part of the environment to which the right to a safe, clean, healthy and sustainable



Nam Ghouang dam on a tributary of the Nam Theun River. Photo: Eric Baran

Table 5. Fit between human rights principles and CBD voluntary guidelines for safeguards

Human rights based approach principles	CBD Guidelines for Safeguards in BFM
Indivisibility, interdependence and interrelatedness	(a). Biodiversity underpins local livelihoods and resilience
	(c). Local and country-driven/specific processes linked to the international level
Equality and non-discrimination & participation and inclusion	(b). People’s rights, responsibilities and effective participation
Accountability and the rule of law	(d). Governance, institutional frameworks, transparency, accountability and compliance

Source: own elaboration based on UNMG (2003) and CBD Guidelines for Safeguards in BFM

environment refers. It has been recently recognised that rights to health, life, food, water and culture are supported by ecosystem services, and that biodiversity is necessary for ecosystem services (UN General Assembly 2017). If the right to a safe, clean, healthy and sustainable environment is violated, the enjoyment of biodiversity dependent rights will

be compromised. Guideline (a) captures this relation by addressing biodiversity and its contribution to livelihoods and wellbeing, and by adopting a systemic perspective to the relation between society and ecosystems. Furthermore, it highlights the relation between the right to culture and the right to a sustainable environment by taking into account intrinsic values of biodiversity that may relate to traditional and local ecological knowledge.

2.2 Guideline (b): People’s rights, responsibilities and effective participation

Guideline (b) fits with the principles of equality and non-discrimination, as it incorporates a criterion of equality in defining both responsibilities and rights. Additionally, it incorporates the principle of effective participation by stating that, “all actors concerned” should be taken into account. Furthermore, it incorporates prior informed consent and emphasizes participation of less privileged groups such as indigenous people and local communities.

2.3 Guideline (c): Local and country-driven/specific processes linked to the international level

Guideline (c) fits with human right principle of *indivisibility, interdependence and interrelatedness*. It states that safeguards should align international agreements that



Muang Khua Akha woman. Photo: Moto Lao

incorporate human rights, such as human right treaties, the United Nations Framework Convention on Climate Change, and the United Nations Declaration of the Rights of Indigenous Peoples.

2.4 Guideline (d): Governance, institutional frameworks, transparency, accountability and compliance
Guideline (d) fits the human right principle of accountability and the rule of law as it provides concrete means to

operationalize this principle through institutional frameworks, mechanisms of enforcement and evaluation for guaranteeing transparency, accountability, and compliance with related safeguards.

3. Environmental Impact Assessment

Environmental Impact Assessment (EIA) is a formal study conducted prior to making a decision on and implementation of a policy or a project. It is used to analyse the policy or

Box 8. CBD guidelines for safeguards in biodiversity financing mechanisms (UNEP/CBD/COP/DEC/XII/3).

(a). Biodiversity underpins local livelihoods and resilience. The role of biodiversity and ecosystem functions for local livelihoods and resilience, as well as biodiversity's intrinsic values, should be recognised in the selection, design and implementation of biodiversity financing mechanisms;

(b). People's rights, responsibilities and effective participation. Rights and responsibilities of actors and/or stakeholders in biodiversity financing mechanisms should be carefully defined, at national level, in a fair and equitable manner, with the effective participation of all actors concerned, including the prior informed consent or approval and involvement of indigenous and local communities, taking into account, the Convention on Biological Diversity and its relevant decisions, guidance and principles and, as appropriate, the United Nations Declaration of the Rights of Indigenous Peoples;

(c). Local and country-driven/specific processes linked to the international level. Safeguards in biodiversity financing mechanisms should be grounded in local circumstances, be developed consistent with relevant country-driven/specific processes as well as national legislation and priorities, and take into account relevant international agreements, declarations and guidance, developed under the Convention on Biological Diversity and as appropriate, the United Nations Framework Convention on Climate Change, international human rights treaties and the United Nations Declaration of the Rights of Indigenous Peoples, among others;

(d). Governance, institutional frameworks, transparency, accountability and compliance. Appropriate and effective institutional frameworks are of utmost importance for safeguards to be operational and should be put in place, including enforcement and evaluation mechanisms that will ensure transparency and accountability, as well as compliance with relevant safeguards.



Xe Kaman dam project. Photo: Frédéric Glore

project's potential effects on the environment and in some cases also includes an evaluation of whether impacts can be mitigated and managed (UNEP 2010). Recently, the UN rapporteur of the HR to a healthy environment pointed out that, in order to protect the environment States should take the procedural measures to, "Assess the social and environmental impacts of all proposed projects and policies that may affect biodiversity" (UN General Assembly 2017). Moreover, the UN appointed rapporteur developed framework principles that recognise a relation between environmental assessment and the full enjoyment of human rights (see Box 9). Monitoring performance and compliance of the EIA and Environmental Management Plans, if implemented adequately, are recognised as a tool to

Box 9. Framework principles 8 and 16 on human rights on the environment (UN General Assembly 2018)

Framework principle 8

"To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights."

Framework principle 16

"States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development."

implement transparency and accountability. In national and international development financing and official development assistance, EIA can serve as a procedural safeguard for the full enjoyment of human rights, including those of indigenous peoples and local communities, and for the conservation and sustainable use of biodiversity.

4. Lessons Learned from ESIA in Lao PDR

Lao People's Democratic Republic (PDR) has received a high inflow of foreign direct investment during the last decades, which has driven remarkable economic growth (World Bank 2017). However, foreign direct investments in the mining, biofuel, hydropower, forestry and agriculture sectors have significantly contributed to deforestation, land cover conversion, pollutants spills, erosion, and damage to waterways and fish stocks (UNEP-UNDP Poverty-Environment Initiative 2010). These changes have had detrimental impacts on biodiversity, healthy ecosystems and human rights – such as the right to safe, clean, healthy and sustainable environments – of local communities in spite of regulations addressing these issues (Regulation on Environment Assessment in the Lao PDR 2000). In the last decade, the government of Lao PDR has aimed to take a series of measures to minimize negative impacts of foreign direct investment while maximizing the benefits. One stream of Lao PDR's policy has focused on strengthening the ESIA process. Over the past decades, several development programs have supported the ESIA, from the drafting and reviewing of the policy instrument to its implementation

through capacity building and development of guidelines and pilot testing. These included the Poverty-Environment Initiative (PEI) - an UNDP-UNEP programme addressing country-specific poverty-environment nexus – the Finnish-funded Environmental Management and Support Programme (EMSP), replacing the earlier Swedish Strengthening Environment Management, and the Swiss-funded Centre for Development and Environment. The role of the PEI is highlighted in this paper, as its support is focused on integrating human rights and environmental safeguards into national development planning, including regulating foreign direct investment (UNEP-UNDP 2015). Since 2009, PEI has supported Lao PDR to transition towards a pro-poor and environmentally sustainable trajectory, which included strengthening of EIA as one of the strategic streams (UN PEI 2015).

Although ESIA has been integral part of laws regulating natural resources and land concessions (e.g. Water and Water Resources Law 1996, Mining Law 1997, Law of Minerals 2011), compliance was very uneven across the country and associated rules and procedures were unclear. There wasn't enough capacity or resources to monitor investments and agreements with investors were made before conducting EIA, often without the participation of all the stakeholders in consultations (Jusi 2010, Poverty-Environment Initiative Lao PDR 2010a, Poverty-Environment Initiative Lao PDR 2010a) (see Box 10 that highlights some challenges in ESIA implementation). Because of these issues, Lao PDR and PEI's strategy was to strengthen EIA regulatory framework.

Box 10. The challenges and loopholes of ESIA in Lao PDR

Understanding cross-sector impacts on livelihoods and biodiversity:

Laos has taken up the gauntlet of implementing its ESIA regulations to safeguard against negative social and environmental impacts in the development process. An ESIA or IIE is mandated of all development projects and is typically carried out by the project developer for its individual project. In the case of Laos, where hydropower dams and large-scale plantations have been some of the key driving forces behind economic growth, the cumulative and cross-sector effects of both types of projects have had multiple cascading impacts on local livelihoods and environmental degradation (Ian and Barney 2017). The livelihood strategies of local villagers in areas along the Mekong often encompass river and land ecosystems (Baird et al. 2015, Barney 2007). As such, the local outcomes of hydropower and plantation projects can only be fully understood when their interventions and effects are considered in relation to each other, and to local livelihood and resource management strategies. Moreover, these cascading socio-ecological transformations can also undermine developers' efforts at meaningful mitigation action and livelihood compensation.

Scientific quality is part of a meaningful consultation process for ESIA:

There was a recent report that an official impact assessment for a new Lao dam being reviewed at the Prior Consultation meeting led by the Mekong River Commission has been directly copied and pasted from a previous report for another dam about 400 km upstream, including "at least 90 per cent of the Social Baseline Condition section ... including photos, tables and text" (Voa News 2018). Hydropower is the only sector that examines cumulative effects of projects but with more than 140 dams planned for the Mekong and its tributaries, the scientific quality of these assessments is of critical importance to understand the far reaching social and ecological consequences. Civil society partners expressed concern that there has not been any meaningful public participation in the preparation of the assessment, since the "Public Involvement section is an almost exact copy of the ... (other) report, with the main change being the name of the dam". They argued that without a scientifically robust report, the Prior Consultation process would merely be relegated as an item on the checklist for rubber stamp approval.

Lessons learned from Lao PDR's government and international development assistance processes relevant to EIA have also specific connections with biodiversity and healthy ecosystems (see Table 6 and Table 7). For understanding further these connections, lessons have been categorised below according to the CBD voluntary guidelines for safeguards.

4.1 Lessons learned from looking at ESIA in Lao PDR through the lens of guideline (a) Biodiversity underpins local livelihoods and resilience and HR principle of interconnectedness and indivisibility

Recognising the underpinning role of biodiversity for human rights. The Laotian Constitution (2003a) allocates the responsibility of protecting the environment and natural resources to 'all organisations and citizens'. This provision can be interpreted as confirming the State's human rights obligations related to biodiversity and healthy ecosystems. Human rights - such as the right to life, health and food - depend on ecosystems that can provide what is necessary for people to live and biodiversity underpins healthy ecosystems (UN General Assembly 2017).

Safeguarding places of high bio-cultural value. According to the EIA Decree, investment projects are divided in two categories depending on their potential impact: Environmental and Social Impact Assessment (ESIA) or the Environmental Evaluation (IEE) (Decree on Environmental Impact Assessment 2010a), which is less stringent. If an investment project is likely to affect sites of either high

Table 6. Lessons learned from safeguard-related legal provisions of the ESIA regulatory framework in Laos PDR

Provisions		Biodiversity related human rights provisions	Lessons learned from the case
Biodiversity	Substantive	It is the duty of all organisations and citizens to protect the environment (Art. 19. Laotian Constitution).	It could gain from recognising biodiversity as underpinning ecosystem services, on which human rights depend stantive
	Procedural	Ministerial Agreement No. 8056/ MONRE (Remarks) establishes that if an investment project is likely to affect sites of high value either environmen-tal or social, conducting the most comprehensive EIA is mandatory. Environmental Impact Assessment Guidelines (Appendix 9 – 2.1) contain a system for evaluation of impacts on biodiversity that is based on scien-tific knowledge. Ministerial Agreement No. 8056/ MONRE (Remarks) specifies with high level of detail what type of projects should undertake either ESIA or the lesser strict study IEE. Land use rights are granted to customary users (art.26. Decree on the Implementation of the Land Law No. 88/PM). Article 17 of Laotian Constitution establishes that 'The State protects the property rights (such as the rights of possession, use, usufruct and disposition)'	This safeguard could gain from speci-fying which impacts on biodiversity and ecosystems are not allowed. The evaluation system could gain from including values from other knowledge systems. High level of specificity makes proce-dures easier to comply, assess and monitor Recognition of customary rights could gain from coherence with procedural safeguards preventing legalization of involuntary re-settling.
Social	Substantive	Land use rights are granted to customary users (art.26. Decree on the Implementation of the Land Law No. 88/PM). Article 17 of Laotian Constitution establishes that 'The State protects the property rights (such as the rights of possession, use, usufruct and disposition)'	Recognition of customary rights could gain from coherence with procedural safeguards preventing legalization of involuntary re-settling.
Cultural	Substantive	Informed public involvement free of power abuse is a joint responsibility of both the government and the project developer (<i>Ministerial Instructions No. 8029/MONRE and 8030/MONRE</i>). Additionally, local population hold the right to participate in all the EIA-related discussions at all government levels (Decree No 112/PM). Approval of EIA is mandatory before investment projects can begin (<i>Ministerial Instructions No. 8029/MONRE and 8030/MONRE</i>) Project developers must compensate project-affected persons for loosing land use rights, means of production and assets (Art. 6 Decree on Compensation and Resettlement Management in Development Projects No. 192/PM). Likewise, project developers must compensate cultural losses (Art. 3; Decree on Compensation and Resettlement Management in Development Projects No. 84) Project developers have the responsibility of funding public involvement and making it effective (Art. 8; No 112/PM On Environmental Impact Assessment; Ministerial Instructions No. 8029/MONRE and 8030/MONRE) Project-affected persons hold the right to submit a proposal to the government regarding compensation, resettlement, and rehabilitation of their livelihood from the development project; (Art. 3; Decree on Compensation and Resettlement Management in Development Projects No. 84)	Several provisions could jointly achieve FPIC if project-affected persons and local stakeholders have and enjoy the right of veto. If compensation is not linked to FPIC, it risks to legalizing cultural loss or involuntary displacement. As interests of the public and project developers might be opposed, a third party could undertake participation responsibilities. Access to grievance mechanisms is key to operationalize this procedural safeguard.

biological or social value, according to other regulations, it is mandatory to conduct the most comprehensive EIA (MONRE 2013a). Although conservation forests and UNESCO areas are recognised, this safeguard could gain from specifying other social, cultural, biodiversity and ecosystems related criteria of “no-go areas” such as customary lands or ecologically fragile areas, which are not formally recognised.

Integrating values from different knowledge systems. Although ministerial regulations (MONRE 2013b) state that knowledge of local stakeholders and project-affected persons regarding impacts on biological aspects must be included in the environmental impact assessment, the system that evaluates the relevance of biodiversity and ecosystems is based on ‘consensus in the scientific community’ (Environmental Impact Assessment Guidelines 2011a). Including values from different knowledge systems in the evaluation process, would complement the capacity of scientific knowledge to safeguard important components of biodiversity and ecosystems (Tengö et al. 2014). Furthermore, it would attribute relevance to species and ecological processes that underpin livelihoods at the local level and which should be used sustainably.

Linking compensation for cultural loss to FPIC. EIA guidelines include compensation for cultural losses such as those related to traditional livelihoods, institutions and use of natural resources (Environmental Impact Assessment Guidelines 2011b). This provision constitutes a disincentive for developers that risk impacting on local societies that traditionally use biodiversity and ecosystems sustainably. To contribute to the full enjoyment of human rights, compensation provisions need to be synchronised and do not replace the need to safeguard procedural rights such as FPIC, public participation and access to information.

4.2 Lessons learned from looking at ESIA in Lao PDR through the lens of guideline (b) People’s rights, responsibilities and effective participation

Need to synchronise procedural and substantive rights. The EIA Decree recognises the right to information by stating that project-affected persons have the right to be thoroughly informed about development projects, the right to discuss at all government levels EIA related documents and processes, including information on substantive issues such as compensation, mitigation resettlement and restoration (Decree on Environmental Impact Assessment 2010b). Furthermore, Ministerial Instructions No. 8029 MONRE (2013b) and 8030 MONRE (2013c) state that project developers should not make use of “threat, coercion, force, violence, bribery or deception”. These procedural safeguards could jointly constitute the equivalent of rights to FPIC by also including the right of veto.

Recognising land tenure rights. The Laotian Constitution recognises property rights which is a substantive right: “The

State protects the property rights (such as the rights of possession, use, usufruct and disposition)” (Lao PDR Constitution 2003b). Nonetheless, the State holds the right to resettle or compensate property right holders if their land is to be used for projects of national importance. This has been exploited in cases of mining, plantation and hydropower development, and has led to involuntary resettlement (Delang and Toro 2011). Furthermore, a ministerial decree recognises customary use rights (Decree on the Implementation of the Land Law 2008), which protects groups that have traditionally used their territory in spite of not having certificates. However, this is still not yet part of the Land Law which is currently undergoing revision and negotiation, and hence remains unimplemented in practice (Kenney-Lazar et al. 2018). Finally, regulations on compensation and resettlement establish that project developers must compensate impacts on lands of project-affected persons by providing a similar piece of land in a different location (Decree on Compensation and Resettlement Management in Development Projects 2005). Under these conditions, compensation mechanisms risk legalizing involuntary displacement, unless FPIC is adopted as safeguard.

Implementing public participation and avoiding conflict of interests. Laotian regulation establishes that government and project developers have the shared responsibility of making public involvement in ESIA studies effective, providing information in local language, collecting opinions of project-affected persons and other stakeholders (Decree on Environmental Impact Assessment 2010b), and promoting informed public involvement free of power abuse. Similarly, financing involvement of project-affected persons is a cost assumed by project developers (MONRE 2013a, MONRE 2013b). Making project developers responsible for public participation creates conflict of interests. Project developers have the incentive to not include the voices of participants who might oppose the investment project being evaluated. Allocating responsibility of implementing public participation procedures to an independent agency with no economic and/or political interest in the outcome of the assessment, to which right holders have direct access and can express their concerns and proposals, could be a way forward to address this challenge.

Improving public participation. In order to assess efforts on improving participation, PEI provided officials from the Department of Environmental and Social Impact Assessment with training to obtain evidence of public involvement in the hydropower, agriculture plantation and mineral sectors. The connections between public participation in an ESIA and whether such participation was taken into account in the actual decision-making would be in line with a human rights perspective of public participation which stresses that participation should be effective and meaningful.

Providing access to remedies. Project affected persons have the right to enter in dispute with the project developer



Resettlement village Nakai Plateau, Khmmoune Province, Lao PDR. Photo: Stanislas Fradelizi/World Bank

on rights and responsibilities in managing and utilising of natural resources and biodiversity (Decree on Environmental Impact Assessment 2010b). Likewise, project affected persons have the right to submit a proposal to the government in regards to compensation, resettlement, and rehabilitation of their livelihood from the development project (Decree on Compensation and Resettlement Management in Development Projects 2016). In order to improve the effectiveness of these safeguards it is relevant to provide and ensure access to concrete mechanism for submitting proposals.

4.3 Lessons learned from looking at ESIA in Lao PDR through the lens of guideline (c) Local and country-driven/specific processes linked to the international level

Investigating local reality for tailored strategies. PEI, an initiative implemented by UNDP and UN Environment conducted several case studies across many sectors in order to identify local necessities and institutional gaps. This information aimed to raise awareness among policy makers, and was helpful to tailor strategies to strengthening institutions and better handling foreign direct investment which can foster an enabling environment to exercise human rights. Through PEI, Lao PDR has engaged with neighbouring countries to learn from their EIA experiences (Thailand) and shared their lessons with others (e.g. Myanmar). These exchanges can benefit the countries to

strengthen their policy and legal framework and ensure that foreign direct investment benefits the sustainable use of their resources and their people and at the same time prevent and end human rights violations linked to the exploitation and use of natural resources.

Relying on pre-existing regulations. PEI’s general strategy to enhance the safeguarding capacity of ESIA was supported on pre-existing national regulations. For instance, the development of Ministerial Instructions No. 8030/MONRE and No. 8056/MONRE rely on a regulatory framework that includes Constitution of Lao PDR, the Environmental Protection Law, the EIA Decree, the Law on Investment Promotion, among others. Furthermore, PEI collaborated with other development programs such as the Finnish-supported Environmental Management Support Program (EMSP) and the Swiss-funded Centre for Development and Environment (CDE) to coordinate efforts in supporting implementation of these policies.

4.4 Lessons learned from looking at ESIA in Lao PDR through the lens of guideline (d) Governance, institutional frameworks, transparency, accountability and compliance

Enhancing specificity for sorting types of impacts. PEI supported the advancement of the Ministerial Instruction No. 8056/MONRE (2013a) that specifies the projects that must undertake either ESIA or IEE. It did so by supporting the consultation process and by creating a platform for all



A group of woman plant paddy rice seeds in a field near Sekong. Photo: Jim Holmes

stakeholders to share their views and comment on the proposed regulation. The process was developed in collaboration with the Ministry of Natural Resources and Environment, and the regulation subsequently reflected PE considerations. This provision constituted a social and biodiversity safeguard as it specifies that EIA is mandatory in sites of high biological or social value.

Implementing standard procedures. PEI addressed the problem with lack of clear procedures by developing guidelines for reviewing ESIA (UNEP-UNDP Poverty–Environment Initiative 2010), by working closely with EMSP to develop guidelines for the technical reviews of ESIA submitted by project implementers, and guidelines for the monitoring of social and environmental impacts. PEI complemented this procedural safeguard by providing the staff of the Department of Environmental and Social Impact Assessment (DESIA) with training at both central and provincial levels. Likewise, PEI worked with the Ministry of Planning and Investment to develop Memorandum of Understanding legal templates and Concession Agreement for the agriculture and tourism sectors that reflects social and environmental considerations (UNDP-PEI 2016). These legal

templates can be part of the diverse legal instruments that States may use to mainstream human rights and biodiversity into sectors such as agriculture and tourism, while considering the interactions between provisional, national and international institutions.

Self-financing the ESIA system. Aiming to achieve financial sustainability of the ESIA system, PEI developed a manual on financial management regulations (UNDP-PEI 2016). This financial management system is for internal use of DESIA in MONRE to monitor financing received from ODA and also those from investment projects and their associated expenditures.

Promoting synergies on monitoring between government agencies. PEI worked together with CDE to promote coordination and collaboration between the Investment Promotion Department and the Department for Environmental and Social Impact Assessment. Jointly, they worked to link their investment compliance database and environmental and social compliance databases, which enhanced their ability to monitor development projects. This procedural tool can contribute to increased transparency and compliance. To do this, PEI linked the two databases of IPD

Table 7. Regulations for implementing the CBD guidelines for safeguards, and corresponding lessons learned from the ESIA regulatory framework in Laos PDR.

CBD Guidelines for safeguards in BFM	(a) Biodiversity values and ecosystem functions	(b) Rights and responsibilities of actors and/or stake-holders	(c) Local and country-driven/specific processes linked to the international level	(d) Governance, enforcement and accountability
Instruments	EIA includes specific criteria for assessing the value of biodiversity and ecosystems that might be impacted by development projects. Criteria are based on scientific consensus (Appendix 9 – 2.1. Environmental Impact Assessment Guideline)	Article 8 of the Environmental Impact Assessment Decree widely establishes procedures for informing and consulting project-affected persons and local stakeholder all along the stages of the development project.	Both guidelines for conducting and for reviewing EIA state that relevant international agreement should be included in the EIA among other elements to take into account. (Chapter 4.4.3 EIA Guidelines, 2011; Guidelines and Checklists to Review Environmental and Social Impact Assessments)	Ministerial Instruction No. 8056/ MONRE specifies what types of development projects have to conduct Environmental and Social Impact Assessment, which enhanced compliance. Additionally, it specifies that projects likely to affect sites of high social or biological value are obliged to conduct ESIA.
Lessons of the case	Including local knowledge systems as assessment criteria would complement the capacity to safeguard important natural components at local level as well as sustainable practices.	Safeguarding participation related rights such as the right to information and the right to consultation is key, but in order to gain effectiveness it is required to safeguard the right to veto.	These procedural measures could gain from increasing the obligation level of complying with international agreements.	PEI general strategy to enhance the safeguarding capacity of EIA consisted in providing means to enhance compliance of pre-existing national regulations.

and DESIA. Joint monitoring led to an increase in resource efficiency. It also enabled better networking, coordination and information sharing between MPI and MONRE. They identified remaining gaps, made a list of what more they would like to get from the consolidated database and are currently working on it. The database is institutionalized which helps ensuring sustainability of PEI results.

5. Human rights, environmental impact assessments and the post-2020 global biodiversity framework

As we have shown in the first section of this chapter, the CBD voluntary guidelines fit human right principles. In this section we also demonstrate that these fit with the Aichi targets. While the voluntary guidelines for safeguards contribute to pursuing Aichi target 20 on effective mobilization of financial resources for the CBD Strategic Plan for Biodiversity 2011-2020, each of the guidelines also contributes to implement other targets, as shown in table 4.²⁹ In terms of the post-2020 global biodiversity framework, we

propose that the four human rights principles, mentioned in the table below and earlier in this chapter, can become key elements for the stand-alone target on human rights in the post-2020 global biodiversity framework. These human rights principles intertwined with the framework principles on human rights and environment (UN General Assembly 2018), and CBD guidelines including the CBD Guidelines for Safeguards in BFM can also serve to inform crosscutting dimensions for other targets. Building on human rights related issues already included in the Aichi Targets will also be helpful in identifying fits and gaps.

6. Recommendations

The following recommendations are drawn from the analysis of the case and were complemented by inputs from experts and stakeholders through a Peer-to-peer Dialogue.³⁰ Recommendations mainly focus on States because, according to the UN rapporteur of the right to a healthy environment, they are the main duty bearers when it comes to assessing impacts (UN General Assembly 2017) (see Box 9). Although

29. Although the guidelines for biodiversity financing contribute to make operable many Aichi targets we have selected only a few that stand out in their connection with the guidelines for safeguards in biodiversity financing mechanisms, and relevance to EIA.

30. A participatory workshop on EIA was held with experts and relevant stakeholders during the International Peer-to-peer Dialogue on Weaving Human Rights and Biodiversity with SDG16 that took place in Nairobi the 29th – 31st of May, 2018.

Table 8. Fit between human rights principles, CBD guidelines for safeguards and Aichi targets as possible elements to include in the post-2020 global biodiversity framework

Human rights based approach principles	CBD Guidelines for Safeguards in BFM	The CBD Aichi targets and key elements for the post-2020 global biodiversity framework
Indivisibility, interdependence and interrelatedness	(a) <i>Biodiversity underpins local livelihoods and resilience.</i>	Target 14. By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being , are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.
	(c) <i>Local and country-driven/specific processes linked to the international level</i>	Target 17. By 2015 each Party has developed, adopted as a policy instrument, and has commenced implementing an effective, participatory and updated national biodiversity strategy and action plan.
Equality and non-discrimination and Participation and inclusion	(b) <i>People’s rights, responsibilities and effective participation</i>	<p>Target 4. By 2020, at the latest, Governments, business and stakeholders at all levels have taken steps to achieve or have implemented plans for sustainable production and consumption and have kept the impacts of use of natural resources well within safe ecological limits.</p> <p>Target 18. By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.</p>
Accountability and the rule of law	(d) <i>Governance, institutional frameworks, transparency, accountability and compliance</i>	Target 2. By 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.

representatives of communities, academia and States contributed to the content of this section, they did so as experts and not on behalf of the organisation they belong to. The fact that we included the following recommendations does not mean that all organisations necessarily agreed on them. We sorted the recommendations corresponding to each type actor according to the human right principles.

States:

- *Indivisibility, interdependence and interrelatedness*
 - Increase coordination across different sectors and ministries on policy implementation and administrative processes.
- *Accountability and the rule of law*
 - Build on existing regulations at the national and international level that recognise human rights to implement or strengthen EIA. Alternatively, follow safeguard systems that comply with the minimum standards set by international human rights law.
 - Make Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment³¹ or similar instruments mandatory at national level in order to explicitly include a biodiversity dimension. This should include richness and abundance of species at local, national and regional

- levels, and the effect of cumulative impacts to both society and biodiversity.
- Handle conflict in the development and assessment of EIA by collaborating with an independent mediator between state, community and proponent.
- Establish independent organisations that ensure the application of procedural rights e.g. right to information, administrative justice, participation, and substantive rights e.g. the right to food, water, culture of indigenous peoples and local communities in EIA’s processes.
- In order to avoid conflict of interests, the proponent should pay an EIA fee to the government who then appoints, in a transparent way, an independent expert holding a license to carry out the EIA study.
- *Participation and inclusion*
 - Implement effective and meaningful participation in EIA and free prior informed consent processes, to

31. Secretariat of the Convention on Biological Diversity, Netherlands Commission for Environmental Assessment. 2006. Biodiversity in Impact Assessment, Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment, Montreal, Canada. [online] URL: <https://www.cbd.int/doc/publications/cbd-ts-26-en.pdf>.



Peer-to-peer Dialogue participants engaging in a group discussion on EIA as biodiversity and human rights safeguarding measure. Photo: Dennis Wachira

- support the enjoyment and ensure provision of human rights and avoid biocultural loss that could impact on livelihoods and wellbeing by e.g. involuntary displacement.
- Provide feedback to project affected people about the results of the monitoring once the project has started.
- Legally empower communities so they possess the basic knowledge about how EIA functions and their implications, and their rights in connection to the EIA process
- Include local knowledge systems in the valuation of biodiversity and ecosystem services as part of the EIA process.
- EIA studies should take into account impacts to all the right-holders sharing “resources”, especially those that are indirectly impacted or getting impacts far away from the place where the development project takes place.
- *Equality and non-discrimination*
 - Make EIA related information available to the public in the tongue that local communities speak and in a language that is easy to understand, at all stages of the development project.
- Recognise the substantive right of land ownership for local communities entailing the veto right over development of projects within their territories.
- Widen the decision-making process to ensure that decisions are responsive to the community’s needs at all stages of the development project. Development projects should not be prioritised over local communities’ development.
- Provide the means for indigenous peoples and local communities to undertake audits of execution and compliance of projects, according to the EIA regulations, at all stages of the development project.

Official development cooperation agencies:

- *Indivisibility, interdependence and interrelatedness*
 - Support integration of local knowledge systems in formal procedures, such as biodiversity valuation.
 - Promote collaboration of relevant government agencies to increase coordination and coherence in the implementation of policy instruments, such as in the case of EIA compliance databases.
 - Improve coordination and collaboration across different development organisations working on similar issues to leverage resources, expertise and partnerships between projects, state agencies and civil society.

- *Accountability and the rule of law*
 - Assist in evaluating the performance of the national EIA system in order to adapt it to needs and minimum standards of international human rights law.
 - Identify, communicate and collaborate with States to identify existing regulations that already fit human rights and incorporate provisions to enhance safeguarding policy instruments, such as the EIA system.
 - Provide technical support to develop contextually relevant tools to strengthen the EIA system and provide training for government officials.
- *Participation and inclusion*
 - Collaborate with local civil society organisations, land-right holders and environmental defenders to bring forward local concerns into the policy process.
 - Inform and engage decision-makers with data from local assessments.

Business sector

- *Accountability and the rule of law*
 - Project developers may use EIA as an opportunity for promoting sustainable development and human rights in order to enhance credibility of business operations in the community.
 - Project developers may adopt EIA as a means to fulfil corporate social responsibility and corporate governance practices.
- *Equality and non-discrimination*
 - Agencies carrying out EIA studies may provide their staff with training on the human rights and biodiversity nexus.

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Photos:

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6. Stemming the tide: local community approaches to legal empowerment for sustainable development

Rose Birgen, Gino Cocchiario and Emmanuel Siakilo.

Studies completed by Natural Justice have analysed the various legal and non-legal forms of recognising Indigenous Peoples' and Local Communities' Conserved Territories and Areas (ICCAs) (Jonas, Kothari and Shrumm, 2012). These comprehensive studies, undertaken in twenty-two countries, provided strong evidence on the external pressures facing indigenous peoples and local communities (communities) and their environments.

The key pressures were divided into three categories. The first category consisted of the broader or systemic pressures on the environment and biodiversity worldwide. These pressures included habitat loss, overexploitation of resources, rapid urbanization, pollution, invasive species and climate change.

The second category included direct pressures such as infrastructure projects like roads, dams, ports; extractive industries, like oil extraction and mining, land use change caused by large-scale agriculture; and exclusionary conservation practices. The third category related to the lack of legal recognition of rights for communities and their environments, including the lack of legal implementation and weak institutional accountability. The marginalization from and inability to access legislative, judicial and administrative systems or other decision-making processes at all levels exacerbated the impacts of both systemic and direct pressures.

The third category of pressures demonstrated that communities were rarely meaningfully involved in drafting relevant legislation. Laws were often undermined by state agencies either because they didn't implement the laws adequately or because they implemented the law in a manner outside its original intent. The standard of accountability and transparency in relation to enforcing these laws was inadequate and was exacerbated further by communities' low levels of knowledge about their rights and capacity to use them.

These studies brought to light questions about which measures should be in place and what action is needed to address these challenges in order to achieve the goals set out in Agenda 2030 including the Sustainable Development Goal 16.

This chapter will examine two approaches being utilized by communities in Kenya and Zimbabwe in order to increase their agency to deal directly with pressures on their environments and ways of life.

1. What is legal empowerment?

Empowerment has been described as, "a group's or individuals' capacity to make effective choices, that is, to make choices and then transform those choices into desired actions and outcomes" (Alsop and Heinsohn, 2005). In addition, legal empowerment aims to increase the control that marginalized or disadvantaged groups have over their lives through the use and application of law. This is not an easy feat when one considers that the law is out of the reach for four billion people (Namati.com, 2018). Moreover, as highlighted by our research, governmental and corporate interests in fact use the law as a tool for further oppression and marginalization of communities. Meanwhile, lawyers are costly and often focused on formal court channels that are impractical for most people (Namati.com, 2018).

Legal empowerment methodologies have been applied for numerous years (UNDP, 2014). For instance, legal empowerment may apply grassroots methodologies such as education, information, organising, and mediation, similar to those used in social accountability and empowerment, but backed up by the possibility of high-level advocacy and litigation when other methods fail (Open Society Justice Initiative (OSJI), 2012). Most often, non-judicial strategies will be more effective than litigation in resolving a dispute, especially when relationships need to continue, and the consent or approval of the community or the parties is



Farming and fishing community in Lamu meet to discuss their community protocol. Photo: Natural Justice

necessary for enforcement. One example is a group of farmers receiving compensation from the mining company that damaged their land. Such flexibility enables appropriate solutions to be found, even in places where the formal justice system is severely dysfunctional (OSJI, 2012). It should be noted that the term legal empowerment was first used in the 2001 Asia Foundation Report and later gained traction in the 2008 report of the Commission on Legal Empowerment for the Poor (CLEP) (Golub, 2010). The adoption of the UN Secretary General's report prepared based on the UN General Assembly resolution 63/142, 'Legal Empowerment of the Poor and Eradication of Poverty (2009)', further raised its profile within the UN System and as part of international law.

The general approach that legal empowerment methodologies take is to increase the knowledge and use of the law, so that communities are able to increase participation in decisions concerning their ways of life and environments. Communities are then able to insert themselves within the decision-making system by using the law and legal systems. In this way, legal empowerment can be differentiated from other types of rule of law work that seek legal reform in order to provide a trickle-down benefit to disadvantaged groups (Golub, 2012).

"Activating" the law can help to identify the gaps and advocate for modifying laws. This can result in repealing retrogressive laws and introducing policies, laws and

regulations geared towards the protection of human rights. Increasing legal access has the potential to overcome inequalities and create an equal playing field.

"In many developing countries, laws, institutions, and policies governing economic and social interactions do not afford equal opportunity and protection to a large segment of the population, who are mostly poor, minorities, women and other disadvantaged groups. Instead of fostering inclusive and equitable growth, some laws and institutions tend to impose barriers and biases against the poor." (UNGA, 2009)

The process of activating people's legal rights can lead to systemic change as institutions come under pressure to act within their legal mandates and improve their accountability. This bottom up approach to legal reform strengthens the rule of law and allows communities to engage with legal frameworks. When communities become familiar with legislation, they can identify gaps in the law and, as a result, legal empowerment offers a practical response to the call to governments and development actors in the Sustainable Development Goals on leaving no-one behind (UNGA, 2015, para 4).

Two legal empowerment approaches currently being used by communities are community protocols and paralegals.



Farming and fishing community in Lamu meet to discuss their community protocol. Photo: Natural Justice

2. Community Protocols

The challenges that communities face when participating in decisions concerning their environments are numerous and often involve significant gaps in understanding between community groups and external actors. One way of addressing these challenges is by supporting communities to come together and articulate information they deem relevant in forms that can be understood by external parties. This can inform external actors about the community's identity and ways of life, customary values, laws, and procedures for engagement. Ideally, sharing such information will lead to constructive dialogue and collaboration to support the community's plans and priorities in locally appropriate ways. Though there are many ways that communities can articulate this information, one method being utilized by communities is the community protocol.

Community protocols are instruments that facilitate culturally rooted, participatory decision-making processes within communities, with the aim of asserting rights over their environments and traditional knowledge. They are based on communities' customary norms and are consistent with national and international laws and policies in order to set out clear terms and conditions to external parties for engaging and accessing traditionally held lands and resources. They describe the way of life of the community, its customary laws, values, governance and decision-making structure all of which contribute to the management of their local environment. Through this process, the community is able to identify its current challenges and lay claim to a range of rights in domestic and international law (Community Protocols, 2011). The protocol should be seen as a living entity that can be revised and updated depending on the community's needs. Therefore, it plays two key roles. Firstly, as a set of internal norms for communities. Often new

situations arise that communities haven't come across before and as a result, they can't refer to customary norms for solutions. Secondly, as a basis for dialogue with external parties. Whilst the community protocol is an articulation of a community's own norms, rules or protocols, which would often be unique to a particular community, there are a few factors common in every process.

What a community needs to develop a community protocol often varies. They could adopt a defensive approach, for example to address challenges from an extractive industries project or to oppose a project all together. They could also be aspirational, for example where a community wants to obtain recognition of their ways of life and relationships with their territories and areas. The introduction of a community protocol can come in a number of ways, but very often it is through organisations working with specific communities and some knowledge of community protocols. The community would then undergo a decision-making process of deciding whether or not they want to develop a protocol.

If the community decides to move forward, the process then involves a comprehensive participatory phase. This phase provides an opportunity for all community members, including women, youth, elderly and other underrepresented groups, to come together to share information, discuss issues, and decide what they want the protocol to focus on and what goals they want to achieve. Wide participation ensures the integrity of the process and accounts for the varying voices within a community. Meetings can also include trainings on relevant legal frameworks, negotiations techniques, and other issues the community deems important. A small team consisting of community members and possibly members of a supporting organisation are responsible for compiling information gathered at the



Community members vote during the community protocol building process. Photo: Natural Justice

meetings. Once the community is prepared to make the protocol public it is often shared in the form of a document. This could be shared widely at public launches or with specific parties that the community deems important when dealing with particular decisions.

Community Protocols are recognised under the Convention on Biological Diversity's on Access to Genetic Resources and Benefit-Sharing (2010), which supports the development of community protocols by indigenous and local communities for access and benefit-sharing. Although the original context for community protocols was within the access and benefit sharing mechanism, they are also used in a wider context related to biodiversity conservation and sustainable use.

3. The application of community protocols: cases from South Africa, Kenya and Zimbabwe

In Bushbuckridge, South Africa, a group of traditional health practitioners rallied together to address the continued overharvesting of medicinal plants and uncompensated bioprospecting of their traditional knowledge. Overharvesting of medicinal plants in South Africa, for example, will affect millions of people who depend on traditional health services.³² Health practitioners are often unable to provide adequate treatment to their clients due to the loss of such medicinal resources in communal areas. This has also increased pressure on conservation areas to provide access to some important medicinal plants, something they are often reluctant to do for fear of overharvesting.

One action that the health practitioners took to deal with these issues was to develop a community protocol, which was supported by the Kruger to Canyons Biosphere

Management Committee and regional organisation, Natural Justice. The community protocol process led to the formation of the Kukula Traditional Health Practitioners Association, which now has approximately 300 members. In addition to the community protocol, the Association also set out a code of conduct to govern traditional health practices, including on medicinal plant harvesting practices. Whilst the protocol was first used to engage local companies interested in utilising their traditional knowledge, the health practitioners have also extended its use to engage with conservation agencies, traditional authorities and the government ministries. More recently, the health practitioners have entered into an arrangement with South African National Parks to conserve and sustainably use endangered plant species, which are also commonly used for medicinal purposes. Though harvesting within National Parks is usually not permitted, the Association's community protocol demonstrated the importance that specific medicinal plants play in community health, the Association's organisation and levels of accountability. This has led to a greater level of confidence that sustainable harvesting would take place.

The indigenous Endorois community of Lake Bogoria, Kenya, are developing a community protocol, to announce their process of consent and benefit sharing with respect to their resources and associated traditional knowledge. The community protocol, developed with the support of Kenya Wildlife Service and the County Government of Baringo, will be used in negotiations with researchers to explore the potential utilizations of microbial enzymes found within Lake Bogoria. The participatory process being undertaken by the community, involves trainings on consent and consultation provisions within national and international law and comprehensive discussion on benefit sharing models to be adopted by the community.

32. South African Water Research Commission (November, 2013)



Photo: Natural Justice

The indigenous Endorois community of Lake Bogoria, Kenya, are developing a community protocol to make public their process of consent and benefit sharing with respect to their resources and associated traditional knowledge.

The Endorois³³ are a pastoralist community of approximately 60,000 people who have lived in the Lake Bogoria area of Baringo County for thousands of years. The areas adjacent to the lake have provided fertile land for the community's cattle and also housed numerous cultural and spiritual areas of significance. Though the community was forcefully removed from their ancestral lands in the 1970's to create a national reserve, a decision of the African Commission on Human and Peoples Rights (Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, 2009) acknowledged their rights to the areas around the lake and the importance it has had to their livelihood, traditional knowledge, culture and spirituality. This ruling has allowed the community to become more involved in the activities of the national reserve, currently being managed by the County Government of Baringo and the Kenya Wildlife Service. Recently, a number of Kenyan universities sought to

undertake research on genetic resources within the lake and sought permission from the County Government and Endorois community to do so.

The community protocol was developed to collate the views of community members on the use of their resources and traditional knowledge, which will be used as the basis for negotiations with universities on access and benefit sharing. During the development of the protocol, the community received training on consent and consultation provisions within national and international law and discussed how any benefits from the utilization of the resources would be shared.

For a number of years, diamond mining has impacted communities in Marange, Zimbabwe. Though the community had been engaged in various advocacy efforts, community leaders decided to make use of the participatory nature of the community protocol process to set out community priorities in the context of serious environmental challenges. The process involved meetings with approximately 2500 community members in order to document their grievances and development the priorities. Community members were also trained in negotiation skills, conflict resolution, environmental law, human rights, and national and international grievance mechanisms. Community priorities included stopping or mitigating environmental degradation and pollution. Paralegals, advocacy and litigation are also helping to advance these priorities (Cocchiario and Makagon, 2016).

4. Community Paralegals

When communities remain largely, and in most instances, completely unaware of environmental regulation, their ability to assist in holding authorities and business accountable and ensuring compliance is largely diminished. The community paralegal methodology is designed to equip community members with the basic knowledge and skills in order for them to utilize law and regulations to deal with particular problems.

Community paralegals are from communities affected by a particular pressure, often in the form of an industrial or extractives project. They are often paid to work full or part-time. After being approached to provide assistance, the paralegals will work with community members to investigate the exact nature of the environmental problem and to establish if any violations of law, including project-licensing conditions, have occurred. Community members receive training about relevant laws and learn how to document evidence of environmental legal contraventions and how to monitor and collate evidence of similar projects. There is also training on how to engage government or private actors through appropriate administrative channels. This approach trains community members on the law and builds skills, such as negotiation, mediation and community organising.

If an environmental impact is detected, community members are trained to file a written complaint, with the necessary legal evidence, to the relevant government institution. This ensures that complaints refer to specific legal violations, provide convincing evidentiary material and are delivered to institutions mandated to deal with those specific environmental problems. Further, the complaints clearly set out the remedy that those impacted by the legal violation are required to solve the problem. Solutions are suggested by community members and usually supported in law or regulation. Solutions commonly available in law include project stop orders, environment restoration orders, penalties for non-compliance, improvements to project license conditions and compensation.

Government institutions have a clearer understanding of the problem and the impetus to meet with the affected community group to observe the impact or legal violation directly. Possible remedies can also be discussed. This process affords communities closest to the sites of environmental impact a high level of participation throughout the project cycle, especially during operations.

The results of this process are recorded and used to evaluate how environmental legal standards are functioning. The record is then used to support policy change at the national and international levels.

The continuous and direct legal empowerment methodology aims to enhance community agency, through greater knowledge of the law and decision-making processes. The purpose of citizen engagement is ultimately to increase accountability of government institutions and seek fairer decisions.

5. The application of the paralegal approach: examples from Kenya

Kenya's long-term development policy, Vision 2030, aims to transform Kenya into a newly industrialized, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment (Vision2030, 2007). As a result, the government's vision for the country is focused on increased energy production, large-scale infrastructural and industrial development (Vision2030, 2007). Whilst these projects may offer much needed economic development in marginalized areas of the country, communities living in and around extractive, industrial and infrastructural project areas are vulnerable to their social and environment impacts. Furthermore, the projects are being developed in the context of a legal system with generally progressive laws that are being poorly implemented (National Environmental Policy, sec. 2.4(a), NEMA, 2014, p. 5).

In Kilifi County, Kenya, six privately owned salt manufacturing industries are in operation. It is a major economic activity in the county and contributes to Kenya's overall GDP. This has come at a serious cost to local communities and their environments. Access to fishing sites is reduced or lost, mangroves and sacred groves are destroyed, there is dust pollution, and a significant decrease in fresh and potable water for domestic use due to the loss of water sources because of land appropriation and salinization. The Natural Justice paralegal program has worked with the local organisation, Malindi Rights Forum and local community members to document evidence of numerous legal violations and to report these to the environmental authority.

Since the environmental agency fails to sufficiently monitor the project, affected residents have begun to monitor the salt companies' actions themselves. Collaboration between the Malindi Rights Forum and Natural Justice paralegals has led to training in which the affected communities learn to identify and document violations and use administrative complaints mechanisms to put forward a suitable solution. The community filed complaints to government institutions, which resulted in a stop order being issued to one company and official site inspections occurring in other sites (Birgen and Cocchiario, 2017).

In northern Kenya, community paralegals worked with a local organisation to monitor and report the illegal operations of an abattoir that was causing significant environmental and health impacts. After a sustained process of compiling evidence and complaints to two government institutions, the abattoir was closed until the required environmental and health standards were met (Abraham, 2017).

At the coast of Kenya, the construction of a port has significantly impacted the livelihoods of over 3,000 fishermen. Community paralegals worked with a group of fishermen, through the Beach Management Unit, to monitor the port constructor's implementation of regulations and

33. The Endorois are sometimes classified by others as a sub tribe of the Tugen tribe of the Kalenjin group. Under the 2009 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiyo, Tugen, Marakwet among others. Statistics suggest that, within the larger grouping of 75,000, the Endorois Community number around 60,000 persons.

environmental license conditions. Over the course of four months, numerous instances of legal non-compliance were documented, including a failure to develop and share an environmental management plan and utilise methods to limit the impacts of dredging. This evidence was used in the ongoing litigation efforts in the High Court of Kenya, a matter recently resolved in favour of the local community.

6. Connecting local legal empowerment to global frameworks

In May 2018, during a Peer-to-peer Dialogue held in Nairobi Kenya, community members, academics, civil society members, lawyers, members of the judiciary and government discussed various innovative approaches to connect SDG 16 and other human rights law into the post-2020 Global Biodiversity Strategic Framework. During the two-day meeting, participants were asked to discuss how the use of legal empowerment methodologies might be used to maintain ecosystem integrity and stem negative impacts on the biodiversity. Four key recommendations were made:

1. Local communities should strive and be supported to establish formally recognisable units that provide clear position on which they wish to engage and be engaged.
2. Headway must be made to enable relevant government agencies to fulfil the mandate of sustainable development through the promotion and protection of environmental and local community interests.
3. States should enact strong laws and regulations, with adequate penalties for non-compliance, which ensure public access to all relevant project information and public participation in industrial and infrastructure project decision-making processes.
4. Building on present decisions and strategic plan under Convention on Biological Diversity, the post-2020 Global Biodiversity Strategic Framework recognises the importance of legal empowerment methodologies to allow greater opportunity for communities in environmental decision-making and to increase the implementation the laws that safeguard biodiversity.

Examples of legal empowerment methodologies discussed were community protocols, community paralegals and mediation. Further, mediation was recommended as a key dispute resolution methodology that communities could utilise to address conflicts caused through impacts on their local environments.³⁴



Community member in Isiolo, northern Kenya, voices his concern on infrastructure projects that would impact pastoralist areas. Photo: Natural Justice

7. Conclusion

The 15th UN Biodiversity Conference in 2020 is expected to consider and adopt a post-2020 global biodiversity framework as a follow up to the Strategic Plan for Biodiversity 2011–2020. We suggest that this Framework adequately recognise the role that communities play in the conservation of biodiversity. With ever increasing pressures on the environment, communities that are dependent on biodiversity for livelihood and culture will inevitably have to play an even greater role in its protection. In order to strengthen this role, there must be commensurate recognition and acceptance of the rights that enshrine the centrality of communities in environmental decision-making.

This article has highlighted two legal empowerment approaches currently being used by communities to protect their environments and maintain the integrity of their ecosystems. Though such approaches may also be used in conjunction with other strategies, those that are within the reach of and controlled by community members should be promoted if we are to achieve the sustainable development goals. Approaches or methodologies that provide a clear framework to tackle challenges, improve knowledge and use of laws, that increase the space for community voices and champion their leadership, are a key step to balancing power asymmetries that exist and preventing the continued destruction of the environment.

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34. An example of mediation as a dispute resolution mechanism in Nepal was provided. In Nepal many communities have significant difficulties accessing the justice system to resolve conflicts. However, a comprehensive mediation mechanism is being utilised that provides affordable and accessible resolution services.

7. Legal assessment tool for mainstreaming biodiversity and human Rights and insights for the post-2020 global biodiversity framework

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1. Context for mainstreaming biodiversity conservation and the role of legal tools

The Convention on Biological Diversity (CBD) calls for the conservation, sustainable use and equitable sharing of benefits from the use of biodiversity. Adopted in 1992, it is amongst the most highly ratified international treaties with 196 Parties. A core priority of the CBD, as evident by the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, in CBD Decision X/2 (2010), and affirmed by the Parties through CBD Decision XIII/3 (2016c), is for Parties to mainstream biodiversity into national plans, programmes and policies in order to support economic and human development that is environmentally sustainable. Recent reviews indicate that countries are increasingly identifying biodiversity mainstreaming as a priority in National Biodiversity Strategies and Action Plans (NBSAPs and IDLO-FNI-SwedBio, 2016). This is important because the Sustainable Development Goals (SDGs) Target 15.9 states that by 2020, countries should integrate ecosystems and biodiversity values into national and local planning, development processes and poverty reduction strategies, and accounts. National laws and policies that regulate practices in related sectors and cross-sectors are increasingly integrating biodiversity considerations (IDLO-SwedBio, 2016). Nonetheless progress remains insufficient to reach the Aichi Biodiversity Targets by the target deadline of 2020, as well as, SDG Target 15.9 by 2030. CBD Decision XIII/3 noted that while most NBSAPs that have been revised since 2010 contain targets related to the Aichi Biodiversity

Targets, it is only a minority of countries that have established targets with a level of ambition and scope commensurate with the Aichi Biodiversity Targets (CBD, 2016a, para 6).

This chapter discusses a Legal Assessment Tool (LAT) that has been developed in response to the invitation made to governments and Parties through CBD Decision XIII/3 (2016c) as well as CBD Decision XIII/1 (2016a). With a focus on cross-sectorial mainstreaming, the LAT selected the cross-cutting public policy area of human rights, taking into account the importance of human rights, and the superior treatment they receive in international law, and national legal instruments. The implementation of human rights is guided by three core obligations of states as duty bearers: to respect, protect and fulfil human rights. Development of the LAT involved setting out a methodology, informed by the primary legal positioning of human rights mechanisms within legal systems, the indivisibility and interdependence of human rights and the environment, the role of human rights in fostering participation and inclusiveness, and the fundamental role of human rights in fostering the rule of law. All these governance elements are also relevant to biodiversity governance. In addition, the methodology involved review of CBD decisions and priorities, and interrelating them with the core elements of the human rights system.

The development of the LAT has gone through a structured process of peer review and stakeholder consultations as highlighted in Box 11 next page.

Box 11. The Participatory and review process of developing the LAT.

1. A Technical Review Team was established, comprising biodiversity experts based in Kenya.
2. The team undertook extensive review of the research methodology, and, iteratively reviewed the progression of the LAT, providing valuable feedback through working sessions.
3. A Stakeholder Reference Group was established, comprising stakeholders based in Kenya, who are drawn from institutions working in the realm of biodiversity governance, and who could become users of the LAT, and potentially participate in the case study, when this LAT is subjected to a pilot implementation in Kenya.
4. A Global Panel of Experts, drawn from experts with international and comparative experiences, mainly drawn from organisations working on biodiversity governance, from an international perspective.
5. The LAT has been presented for review and discussion to experts and stakeholders during side events held alongside the SBSTTA and SBI meetings of the CBD during 2017 and 2018.
6. A Global Peer-to-peer Dialogue was organised by SwedBio and IDLO together with other partners in May 2018, and the role of the LAT in supporting mainstreaming of the human right to a clean environment in the post-2020 Global Biodiversity Governance Framework was discussed.

The LAT provides a methodology and approach through which governments can evaluate how national legal frameworks are supporting implementation of the CBD, the Strategic Plan for Biodiversity 2011-2020, as well as various Conference of Parties (CoP) decisions. Legal frameworks, in this context, have been interpreted to include constitutions, statutes, policy documents (including for instance NBSAPs), subsidiary legislations, and institutional mandates and functions. In its methodology, the LAT recognises the value of, and makes an emphasis on the role of governance, effective institutions and the rule of law akin to the aims of Sustainable Development Goals (SDG) 16.3, 16.6 and 16.7. Therefore, the intended outcome of the LAT is to enable governments to evaluate, in context of national circumstances, how their national legal frameworks have mainstreamed human rights and biodiversity in order to support conservation and sustainable use of biodiversity. The information and knowledge arising from this legal assessment will inform governments on actions required to enhance the utility of law in reinforcing mainstreaming of biodiversity with human rights, and into other relevant sectorial and cross-cutting areas of public policy.

This builds on this LAT as well as the Living Document of the Peer-to-peer Dialogue (Ituarte-Lima *et al.*, 2018) on weaving SDG 16 and human rights law with the post-2020

global biodiversity framework. It also builds on the policy report on SDG16 and biodiversity: mainstreaming biodiversity, ecosystem services and human rights in the mining sector, which proposes to use the human rights principles recognised in the UN common understanding of the human rights-based approach as key elements for implementing mainstreaming biodiversity and human rights commitments (Ituarte-Lima and Stromberg, 2018). As in the Peer-to-peer Living Document, in this policy report we propose that the draft elements be included as a stand-alone target and, as cross-cutting elements of the post-2020 global biodiversity framework, be based on the core human rights principles of interdependence and interrelatedness of rights; participation and inclusion; the principle of equality and non-discrimination and the principle of accountability and the rule of law.

2. The mandate for mainstreaming biodiversity

The CBD, through article 6(b), calls on State Parties to “integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programs and policies”. Further, article 10(a) of the CBD calls on the Parties to “integrate consideration of the conservation and sustainable use of biological resources into national decision-making.” The need for integration has been confirmed by the CBD CoP decisions, including CBD Decision X/2 (2010), when Parties adopted the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets. For instance, Strategic Goal A requires parties to “address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society.” CBD Decision XIII/1 (2016a, paras. 6 and 9) noted that only a minority of Parties have established targets with a level of ambition and scope commensurate with the Aichi Biodiversity Targets; and that a limited number of national biodiversity strategies and action plans (NBSAPs) refer to indigenous peoples and local communities, customary sustainable use, or the involvement of indigenous peoples and local communities in the revision of national biodiversity strategies and action plans.

In order to address this challenge, the Parties through CBD Decision XIII/3 (2016c) reiterated that the integration of biodiversity considerations into sectoral and cross-sectoral policies, plans and programmes at all levels is critical for harnessing the benefits of enhanced synergies and policy coherence (2016a, Preamble). Thus, governments were urged to create and strengthen cross-sectoral coordination mechanisms that enable biodiversity mainstreaming across various sectors, and to establish milestones for the mainstreaming of biodiversity in national agendas. In order to enhance cross-sectoral mainstreaming that reduces and reverses biodiversity loss, CBD Decision XIII/3 (2016c, paras 17(a) and (b)) invited governments to, among other actions,

develop coherent and comprehensive policy frameworks that integrate biodiversity across sectors; to review the implementation of cross-sectoral mainstreaming measures undertaken at the national level, including national institutional mechanisms to support the implementation of the Convention and the Strategic Plan for Biodiversity; to identify gaps, if any; and to strengthen such measures, as needed.

3. A working definition for biodiversity mainstreaming

The application of the term “mainstreaming” to conservation and development has stemmed from the need to influence dominant institutions, whose core concern may not be biodiversity conservation, with the values and practices of conservation which may, otherwise, have less political or legal influence (Huntley and Redford, 2014). The objective of mainstreaming biodiversity then is to integrate biodiversity conservation and related sustainable use principles into policies, plans, programs and production systems where the primary focus has previously been on production, economic activity and development (Huntley and Redford, 2014). One proposal for a working definition for biodiversity mainstreaming is “the process of embedding biodiversity considerations or concerns into policies, strategies and practices of key public and private actors that impact or rely on biodiversity, so that biodiversity is conserved, and sustainably used, both locally and globally” (Huntley and Redford, 2014) Another alternative definition of mainstreaming is “the integration of biodiversity concerns into defined sectors and development goals, through a variety of approaches and mechanisms, so as to achieve sustainable biodiversity and development outcomes.” Morgera and Berger (forthcoming, 2017), argue that the reference to “concerns” in the definition enables the term to encompass the third objective of the CBD, which is access and benefit sharing.

These definitions of mainstreaming focus on two methodological elements: (i) the integration of “biodiversity concerns” into sectoral goals, and (ii) the resulting “sustainable biodiversity and development outcome,” from mainstreaming. Further, two key additional elements are essential to biodiversity mainstreaming. First, that a process of mainstreaming involves the internalization or embedding of biodiversity concerns into the policy, strategic or operational realms or interests of public and private actors, where such realms or interests impact, or rely on biodiversity. Second, the outcome of the process of embedding biodiversity/mainstreaming must be conservation and/or sustainable use of biodiversity.

As a matter of process, regulatory and institutional mechanisms, biodiversity mainstreaming can be attained through various means, including a focus on enabling environments at local, national or global levels; or a focus

on development policy, legislation, land-use planning, capacity building; or through action pursued by a wide range of actors, from conservation NGOs to industries, governments or even communities (Huntley and Redford, 2014). The methodology, and approach taken in development of the LAT is an exploration of how biodiversity mainstreaming can be undertaken through legal, and institutional mechanisms, starting with administering a legal assessment that brings out qualitative information on the prevalence of biodiversity mainstreaming across sectors, through legal and institutional mechanisms or mandates. Subsequent to the legal assessment, the outcomes of the LAT would be applied in making modifications to the legal and institutional mechanisms in order to implement and enhance biodiversity mainstreaming, across specific sectors, including with cross-cutting governance areas, such as human rights. In maintaining fidelity to the CBD, country and national circumstances remain critical.

4. Methodology of cross-sectoral mainstreaming through a correlation of the interdependence of human rights and biodiversity

In its findings, the 2005 Millennium Ecosystem Assessment (MEA) reported that “... everyone in the world depends completely on Earth’s ecosystems and the services they provide, such as food, water, disease management, climate regulation, spiritual fulfilment, and aesthetic enjoyment. The Assessment further noted that, over time, humans have changed these ecosystems more rapidly and extensively than in any comparable period in human history, largely to meet rapidly growing demands for food, fresh water, timber, fibre, and fuel. This transformation of the planet has contributed to substantial net gains in human well-being and economic development.” However, according to the MEA, the benefit has not been universal, and has harmed many people, with the full costs of this transformation only now becoming apparent.

One legal avenue or means to remedy this inequitable situation, as highlighted in the MEA, is to support implementation of global efforts for mainstreaming of biodiversity, through internalization or embedding of biodiversity concerns into sectoral, and cross-cutting areas of governance. Mainstreaming biodiversity into cross-cutting governance sectors includes selection of elements core to governance and development, such as the human rights which, globally and within national legal systems, enjoy high levels of protection in international law and through national legal enactments of sovereign states. Therefore, execution of biodiversity mainstreaming can be undertaken through a correlation between human rights and development, and particularly the pursuit of sustainable development, such as through the Sustainable Development Goals (SDGs). The SDGs provide an explicit link between concerns for

upholding and protecting human rights, with specific calls to protecting biodiversity, and integrating biodiversity concerns into other areas of governance in pursuit of development that is sustainable, and within the ecological limits of the earth. For instance –

- (i) SDG 13.1 calls on action to strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;
- (ii) SDG 13.2 calls for action to integrate climate change measures into national policies, strategies and planning;
- (iii) SDG 15.9 calls for action to integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts; and
- (iv) SDG 16.3 calls for action to promote the rule of law at the national and international levels and ensure equal access to justice for all

In all these instances, the socio-economic and environmental rights and interests of members of any community are linked with the need to take environmental action to protect vulnerable ecosystems, in order to prevent extreme weather events from combining with hazards to become disasters. The utility of the SDGs in supporting biodiversity mainstreaming and realizing the objectives of the CBD is enhanced through clear references to the need to enhance recognition of the functionally critical role of biodiversity through mainstreaming (SDG 15.9), and reinforcing their implementation through reliance on strong institutions underpinned by universal justice and rule of law. The UN Special Rapporteur on Human Rights and the Environment stated in his first report that one “firmly established” aspect of the relationship between human rights and the environment is that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights” (UNGA, 2012). The Human Rights Council has stated (Resolution 16/11) that, “environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights.”

In line with the foregoing arguments, the focus of the LAT is to provide a tool to examine how the objectives of the CBD, including the approaches elucidated through articles 6(b) and 10(a), as well as various CBD CoP decisions, can be enhanced through national legal frameworks. This would be done in context of national circumstances, to support conservation and sustainable use of biodiversity, through integration with human rights tools and biodiversity protection systems. Thus, the methodology of the LAT, when administered in the various national contexts, is to support a legal assessment of whether, and how governments are undertaking actions to integrate conservation and sustainable use of biodiversity into the human rights sector, and utilizing the often superior legal and institutional protections enjoyed by human rights across various jurisdictions. This is

consistent with the commitment by governments, as reflected in the Cancun Declaration (2016d), “To work at all levels within our Governments and across all sectors to mainstream biodiversity, establishing effective institutional, legislative and regulatory frameworks...”

5. Human Rights Principles that reinforce Biodiversity Conservation

It is important to demonstrate the complementarity that the human rights system, within a national context, can provide to implementation of actions for biodiversity conservation and mainstreaming through the use of legal instruments, and systems. States are duty bearers, with the obligations to respect, protect and fulfil human rights, and therefore, it is argued in this report that human rights provide a valuable legal avenue to enhance biodiversity mainstreaming at all levels of government, and across sectors. The following human rights principles are relevant:

5.1 Indivisibility, interdependence and interrelatedness of rights

The March 2017 Report of the Special Rapporteur on Human Rights and Environment, submitted to the Human Rights Council (Knox, 2017, para 5), noted that full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems, which in turn depend on the health and sustainability of ecosystems, which in turn depend on biodiversity. The report (para 8) reiterated that human rights law does not require that ecosystems remain untouched by human hands, since economic and social development depend on the use of ecosystems. However, in order to support the continued enjoyment of human rights, this development cannot overexploit natural ecosystems, but must be sustainable, and sustainable development requires healthy ecosystems. Sustainable development has attained legal status internationally, for instance through adoption of the Sustainable Development Goals. In national contexts, various recent constitutions now include binding and non-binding provisions on sustainable development, such as the 2009 Bolivian Constitution (article 342) which creates a duty on the State and population, together, to conserve, protect and use natural resources and the biodiversity in a sustainable manner, as well as, to maintain the equilibrium of the environment. The 2010 Kenyan Constitution, includes a provision where sustainable development is set out as one of the mandatory and binding principles and values of national governance (article 10), which are to be applied when making, interpreting or implementing the Constitution, any laws or public policy decisions, including implementation of the Bill of Rights. Indeed, the Court of Appeal of Kenya, in a 2017 Judgment in *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others*, made a firm determination on the legal

status of sustainable development within the Kenyan constitutional system, arriving at “the clear conclusion that article 10 (2) of the Constitution is justiciable and enforceable immediately,” and that the values espoused in article 10 are neither aspirational nor progressive; they are immediate, enforceable and justiciable. Further, according to the Appellate Court, a violation of article 10 can found a cause of action either on its own, or in conjunction with other Constitutional Articles or statutes, as appropriate (IEBC v. NASA Kenya, paras. 80-81).

5.2 Participation and inclusion, through universal rights and procedures to access decision-making mechanisms, and affirmative action

In Rio+20, The Future We Want (UN, 2012), assembled Heads of States and Governments recognised the need for inclusion of major groups of people and stakeholders through a process of participation. The Rio+20 Outcome document, more specifically noted that “sustainable development requires the meaningful involvement and active participation ... all major groups: women, children and youth, indigenous peoples, non-governmental organisations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families as well as older persons and persons with disabilities” (UN, 2012, para 43) This is consistent with SDG16, which calls on States to take action to ensure responsive, inclusive, participatory and representative decision-making at all levels; and to ensure public access to information and protect fundamental freedoms.

Further, the focus on, and prioritization of public participation is consistent with the 1992 Rio Declaration. Principle 10 of the Rio Declaration reiterated that “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.” It further set the pathways of public participation as: access to justice, access to information, public awareness, and consultation of the public during decision-making. In the context of legal frameworks, the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), makes provisions aligned with Principle 10, and seeks to reinforce meaningful and inclusive participation in environmental decision-making.

There has been an evolution of the rules relating to locus standi (Legal Standing). The Supreme Court of the Philippines recognises the injury element of standing (where a plaintiff is required to demonstrate they have suffered legal injury from the impugned action), but has given it a more liberal interpretation with regard to environmental claims. This was established by the Court in *Oposa v Factoran*, where it was held that representatives suing on behalf of

succeeding generations had standing based on an “inter-generational responsibility insofar as the right to a balanced and healthful ecology is concerned,” therefore providing a catalytic pathway for activation of public participation as a tool for environmental enforcement. In Kenya, on other hand, the Supreme Court has held, based on its interpretation of the Constitution, that “public participation is the cornerstone of sustainable development” (Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others, 2014) This is supported by the Constitution of Kenya which firmly provides that a person need not show legal standing to bring an action to protect fundamental rights, and thus, has expanded access to justice pathways, and strengthened participation.

5.3 Equality and non-Discrimination

The achievement of equity and equality is a desired outcome from implementation of mechanisms for public participation. Therefore, for instance, taking into account gender considerations, in order to enhance and optimize the roles of different genders in decisions- making, is important. Elimination of gender-based discrimination, particularly against women, remains a key global concern. Article 1 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Article 18 of the African Charter on Human and Peoples’ Rights binds every contracting African State Party to “ensure the elimination of every discrimination against women...” Therefore, the failure to put in place mechanisms for gender mainstreaming, as a sub-set of efforts to enhance public participation in biodiversity mainstreaming across society, could result in human rights violations.

Through CBD Decision IX/8 (2008a), Parties agreed to develop a national biodiversity strategy and action plan or adapt existing strategies, plans or programmes, as required by Article 6 of the Convention, and in so doing, promote the mainstreaming of gender considerations. CBD Decision IX/24 (2008b) adopted the Gender Plan of Action under the Convention (2008-2010). CBD Decision X/2 (2010), recalling Decision IX/8, requested Parties to mainstream a gender perspective into the implementation of the Convention and promote gender equality in achieving its three objectives, and further, requested Parties to mainstream gender considerations, where appropriate, in the implementation of the Strategic Plan for Biodiversity 2011-2020 and its associated goals, the Aichi Targets, and indicators.

The recognition of indigenous peoples’ and local communities’ rights is another important issue that impacts the human rights principle of equality and non-discrimination. It has been addressed by many international law instruments, which either call for recognition of the rights of indigenous peoples and local communities, or recognises such rights. These protections provide a fundamental point of reference, in law, for the active and constructive roles of indigenous peoples and local communities in biodiversity conservation. The African Court on Human and Peoples’ Rights in a decision made on 26 May 2017 in *African Commission on Human and Peoples’ Rights v. Republic of Kenya* (para 197), recognised that the African Charter on Human and Peoples’ Rights does not define indigenous peoples, and relying on various international legal instruments, deduced the criteria applicable to Africa.

The Court determined that in identification and recognition of an indigenous population, the relevant factors to consider are (i) the presence of priority in time with respect to the occupation and use of a specific territory; (ii) a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of productions, laws and institutions; (iii) self-identification as well as recognition by other groups, or by State authorities that they (indigenous population) are a distinct collectivity; and (iv) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist. In a 2007 decision, *Saramaka People v. Suriname* (para 107), the Inter-American Court of Human Rights held that according to Article 1(1) of the American Convention on Human Rights, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.

This approach is consistent with the SDGs, particularly SDG 16.7, which calls on States to ensure responsive, inclusive, participatory and representative decision-making at all levels; and SDG 16.b, which calls on States to promote and enforce non-discriminatory laws and policies for sustainable development.

5.4 Accountability and the rule of law

The human rights system provides a valuable path to holding the State accountable, and enhancing or enforcing the rule of law. This is because human rights present State as a clear duty-bearer and guarantor of the rights. Further, a responsibility is placed on the State to provide the infrastructure for realization of these rights. As is evident from the 1948 Universal Declaration of Human Rights (UDHR), human rights are universal, which reinforces the rule of law principle regarding equal application of the law. Human rights are inherent to the people, rather than being

granted as a privilege by the States.

Jurisdictions across the world have entrenched detailed constitutional provisions for protection of human rights, through Bills of Rights, and similar provisions, whereby the State is charged as guarantor of those rights, and as the primary duty bearer. In addition, the principle of constitutional supremacy means that where any law is enacted, the makers must ensure it is compliant with, and maintains fidelity to both the letter and spirit of the Constitution, otherwise it could be adjudged as unconstitutional, or inconsistent with the Constitution, by a responsible court or tribunal. Examples on constitutional supremacy include the Constitution of the United States (Article VI, Clause 2); Kenya (article 2).

6. Procedural rights

Procedural rights are available within national constitutions for access to court in order to protect or enforce human rights, by any aggrieved person. This includes, through judicial decisions, addressing rules on legal standing, with a contrast between countries requiring persons to show “sufficient” interest before a suit is accepted in court, and countries where no direct legal standing is required. The Supreme Court of India, in *S.P. Gupta v. Union of India*, has upheld the approach of “sufficient interest”.

Article 22 of the Constitution of Kenya has removed the need for a person to show legal standing, and thus provides the legal entitlement and basic rules of procedure for access to court to enforce fundamental rights, which is important for implementing the principle of accountability and rule of law: “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” This provision has, further, also eased the rules of standing, through a clear provision that proceedings can be instituted directly by the affected person, or, a person acting on behalf of another person who cannot act in their own name; or, a person acting as a member of, or in the interest of, a group or class of persons; those acting in the public interest. In this instance, no requirement is made for a person to demonstrate that they have sufficient interest.

Further, article 22 of the Constitution of Kenya requires that rules of procedure should be made to ensure that formalities, during proceedings, are kept to the minimum, including entertaining proceedings on the basis of informal documentation. The use of informal documentation evolved in India, through the concept of epistolary jurisdiction, that arose in the case of *Sunil Batra v. Delhi Administration*, where the Supreme Court of India accepted a letter written by one Sunil Batra, a prisoner from Tihar Jail complaining inhuman torture by the Jail Warden, of another prisoner serving life term in the same jail. This is a simplified procedure through which a person affected by violation of a human right, such as the right to a healthy environment,

could commence legal action by writing a letter (called an epistle) to the Court – and the court provides support in converting the letter to legal documents required to file suit.

7. Environmental rule of law

The role of environmental rule of law is critical, with constitutionalizing environmental rights to play an important role in enhancing the rule of law, and creating effective institutions. The World Declaration on the Environmental Rule of Law (IUCN, 2016) identifies key governance elements upon which the concept of environmental rule of law is premised, as including -

- (i) The development, enactment and implementation of clear, strict, enforceable, and effective laws, regulations and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality at national, sub-national, regional and international levels;
- (ii) Measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil and administrative enforcement actions, and mechanisms for timely, impartial and independent dispute resolution;
- (iii) Effective rules on access to information, public participation in decision-making and access to justice;
- (iv) Environmental auditing and reporting, together with other effective accountability, integrity and anti-corruption mechanisms.

Constitutionalizing environmental law, in addition to conventional human rights, has emerged as a safeguard toward entrenching the environmental rule of law. This approach of inserting environmental protection provisions in national constitutions sometimes takes the form of environmental rights, such as in Kenya, (article 42, 69); and South Africa (art. 24). In the 2012 Canadian Scholar David Boyd (now the UN Special Rapporteur on Human Rights and the Environment) reported (Boyd, 2012, p. 45-77) that three-quarters of the world's constitutions (147 out of 193 at the time), included explicit references to environmental rights and/or environmental responsibilities. While the number of national constitutions may have increased, Boyd's report includes an online link (<https://open.library.ubc.ca/cIRcle/collections/ubcpres/641/items/1.0058133>) to a 329-page appendix containing excerpts from all the 147 Constitutions, demonstrating the content of the environmental rights referred to in the 2012 book.

As an illustration, Article 14 and 15 of the Constitution of Ecuador makes provision to secure the rights to a healthy environment that include legal enactment of the indigenous approach to sustainable development through the concept of *sumac kawsay* (sustainability and good way of living). Calzadilla and Kotzé (2017), argue that the rights of nature that the Ecuadorian Constitution recognises are self-

executing, meaning that they may be invoked without the need for legislative embodiment or implementation. Thus, according to these scholars, anyone can revert directly to the Constitution to invoke protection on behalf of nature. In addition, they cite article 11(4), which provides that no legal regulation can restrict the contents of rights or constitutional guarantees. Theoretically, they argue that given the supremacy of the Constitution of Ecuador, any subsequent law (such as a mineral or oil exploitation laws), which may restrict or infringe the rights of nature could be declared unconstitutional through court action that can be presented by any person, individually or collectively (Calzadilla and Kotzé, 2017, p. 179-180).

In certain instances, Constitutions, while not conferring explicit rights to nature, include human rights to a clean environment, to which protection of the environment is indivisibly attached. Thus, the Constitutions of South Africa (article 24), and Kenya (article 42), provides everyone with the right to an environment that is not harmful to their health or wellbeing; and to have the environment protected, for the benefit of present and future generations.

8. Proposed Legal Assessment Framework and Indicators to evaluate the Mainstreaming Biodiversity and Human Rights

Supported by the human rights principles reviewed in section 5, it is the contention of the LAT that due to the superior treatment of the human rights framework, and the indivisibility and interdependence with ecosystem protection and sustainable use, the mainstreaming effect in this case is dual. This means that biodiversity concerns will be integrated into the human rights framework, in order to enhance the utility of human rights legal tools in protecting biodiversity. Additionally, States are duty-bearers with clear legal responsibilities to protect human rights, and as a consequence any elements of biodiversity conservation that may violate core human rights entitlements and obligations have to be modified for concurrence with such human rights obligations and norms.

The analysis in this section takes the need for this duality into account and proposes a unique legal assessment framework. The legal assessment framework is focused on eight (8) thematic governance areas drawn from the human rights framework, and biodiversity tools. These are:

The LAT undertakes an evaluation of the applicable law to demonstrate the suitability of each governance area for application to mainstream biodiversity and human rights governance. Subsequently, indicators have been identified and set, with a list of questions for each indicator for use in application of the LAT. The questions have been developed to elicit qualitative responses from users of the LAT and respondents, allowing for responses beyond Yes/No answer. Thus, when the LAT is applied to examine the status of mainstreaming of biodiversity and human rights within any

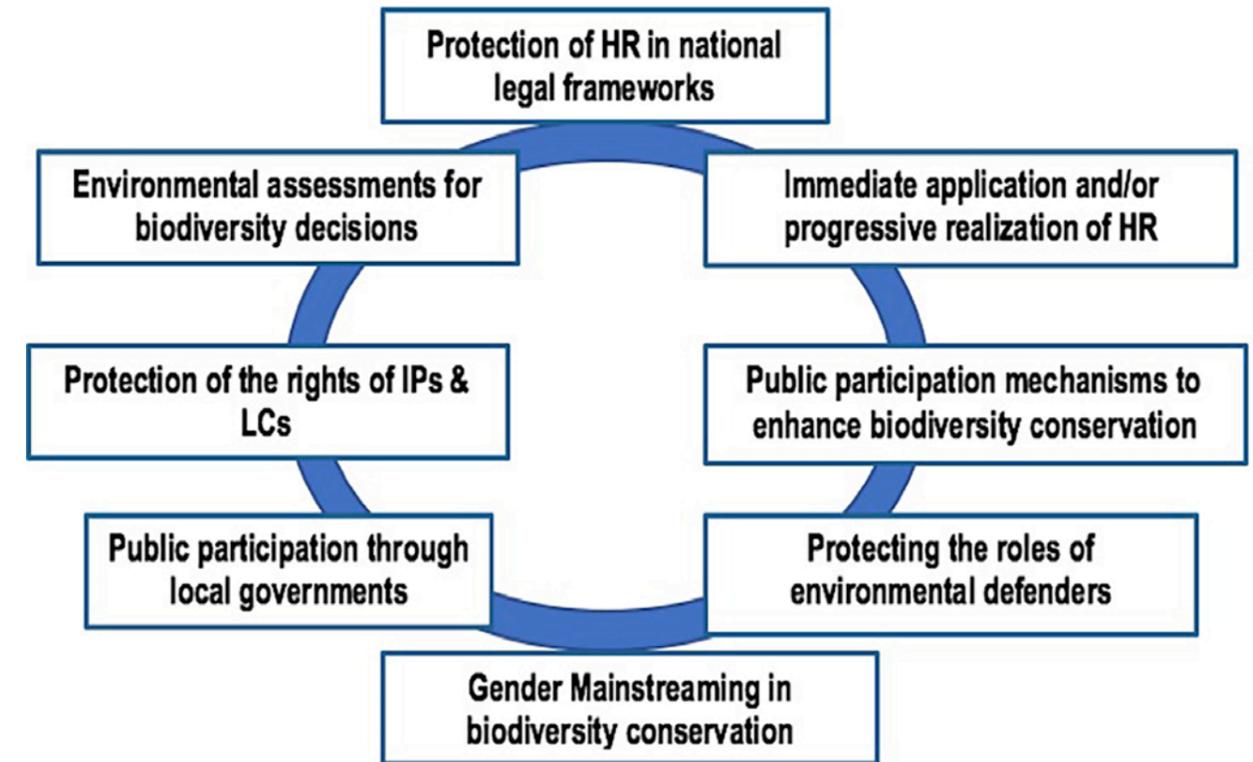


Figure 6. Legal Assessment Tool on Human Rights and Biodiversity Mainstreaming. Source: IDLO (2018).

specific national legal framework, having questions that permit qualitative responses allows respondents to provide explanations on the current status, including background, context, and other valuable information. A sample of the Indicators and questions drawn from the foregoing thematic areas are shown in Figure 5.

8.1 Protection of human rights in national legal framework

The rights protected in national legal frameworks include substantive human rights, such as right to life, or the right to a clean environment; as well as procedural rights, including the rights reflective of Principle 10 of the 1992 Rio Declaration that include access to information, access to justice, and public participation. The scope of these human rights is reinforced by recent legal instruments, such as the SDGs (e.g., 16.3 & 16.6) which call for promotion of the rule of law and equal access to justice; and the development of effective, accountable and transparent (strong) national institutions.

The expanded focus on rule of law and strong institutional frameworks is integral to the SDGs, and to protection of human rights, which, in addition to relying on independent judicial mechanisms, and access to justice mechanisms (such as those discussed earlier in section 3) also

relies on independent institutional implementation and oversight mechanisms. These include Ombudsman systems, human rights and/or environmental defenders, or even human rights commissions that enjoy constitutionally protected independence from interference by the Executive arm of government (Kenyan Constitution, article 59, 252(3)).

8.2 Public participation mechanisms to Enhance biodiversity conservation actions across society

Aichi Target 1 has set the object that by 2020, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably. This target on public awareness was established in the context of Strategic Goal A, such that public awareness on biodiversity values is a key towards mainstreaming biodiversity across government and society. CBD Decision IV/10 recognised the importance of public education and awareness as central instruments to achieve the Convention's goals and to ensure effective implementation of the Convention at the national level. The decision urged Parties to place special emphasis on the requirements of Article 13 of the Convention in the development of their national strategies and action plans, and to translate the provisions of the Convention into the respective local languages to promote public education and awareness-raising of relevant sectors, including local

Box 12. Illustrative sample of indicators and questions for legal assessment.**Indicators and Questions to assess level of human rights protections in national legal frameworks, and applicability of this protection for biodiversity conservation****Indicator – Existence of a Bill of Rights in the National Constitution.****Questions:**

- Does your national Constitution define any environmental, or biodiversity type human rights in the Bill of Rights?
- Are all sections of the Bill of Rights legally enforceable / justiciable?
- Does your Bill of Rights contain human rights obligations pertinent to biodiversity that require progressive realization?
- Does your Constitution open the entitlement to human rights fulfilment and protection to all persons, or are there limitations to citizens or other classes of persons?

Indicator – Interdependence of substantive and procedural rights and duties**Questions:**

- Does your legal system provide substantive rights supportive of environmental and biodiversity conservation? (These include right to life, right to a clean environment)
- Does your legal system provide a specific human right for protection and conservation of the environment and biodiversity, including legal measures through which such actions are taken?
- Does your legal framework provide procedural rights that support justifiability, compliance and enforcement of substantive rights, including access to court for enforcement of the Bill of Rights, access to information, recourse mechanisms for fair administrative action?

Indicator – Independent National Human Rights Protection Institutions**Questions:**

- Does your national framework set out distinct and independent institutional mechanisms for monitoring and enforcement of human rights?
- Does the jurisdiction of the national human rights institutions extend to rights pertinent to biodiversity protection, and oversight on institutions responsible for biodiversity?
- Does your national human rights protection institutional mechanism including an ombudsman system to review administrative actions (e.g. complaints regarding public participation)?

Box 13. Illustrative sample of indicators and questions for legal assessment.**Indicator and Questions to assess the mainstreaming of public participation in biodiversity conservation processes****Indicator – Mechanisms for public participation in decision-making including biodiversity conservation****Questions:**

- Does your national legal framework recognise public participation in governance as a human right?
- Does your legal framework make provision for public participation in environmental and biodiversity management?
- Does your national legal framework distinguish and implement the different avenues of public participation in decision-making: access to information, public consultation, and public awareness?
- Does your legal framework provide for access to justice without a requirement for legal standing in order to bring an action to enforce human rights, or protect the environment?

communities. In the context of Principle 10 of the Rio Declaration, the scope of public participation includes the recognition and implementation of several procedural human rights: (i) public consultation during decision-making, (ii) public representation during decision-making, (iii) access to information, (iv) access to justice, (v) and proactive public awareness activities, and information disclosure, by the State and other actors.

8.3 Protecting the roles of environmental defenders

According to the Report of UN Special Rapporteur on Human Rights and the Environment (Knox, 2017), globally, there are many failures to meet procedural obligations in relation to biodiversity, and therefore, many States need to provide more effective remedies to those harmed by the loss and degradation of ecosystems. In this circumstances, the report (para 31) argues, the continuing failure to protect environmental human rights defenders remains a most egregious problem, despite clear links between environmental defence and the enjoyment of human rights. For instance, in 2015 alone, there were 185 confirmed killings of environmental and land defenders around the world (Knox, 2017, para 32).

The UN Special Rapporteur on the situation of human rights defenders, in an August 2016 Report, applied the term “environmental human rights defenders” to refer to individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna (Forst, 2016, para 7). Further, the report urges that the State has a parallel duty

Box 14. Illustrative sample of indicators and questions for legal assessment.**Indicators and Questions to assess legal protections for environmental human rights defenders****Indicator – Legal provisions for facilitating the work of, and the protection of environmental human rights defenders****Questions:**

- Does your legal framework recognise the roles of various categories of environmental human rights defenders?
- Does your legal framework guarantee the right of public participation, including by environmental defenders in affairs of government, and decision-making, including consultation, access to information, and access to court process?
- Does your legal framework provide mechanisms to provide state protection for environmental defenders who may face real and actionable threats to their lives, from any sources, relating to their environmental work?
- Does your legal framework provide mechanisms for recognition of the works of various categories of environmental defenders?

to protect environmental human rights defenders from violations committed by both State and non-State actors (Forst, 2016, para 3), since protecting environmental human rights defenders is crucial to the protection of the environment and the human rights that depend on it (Forst, 2016, para 4).

8.4 Gender mainstreaming in biodiversity conservation

As highlighted earlier, the achievement of equity, and equality, is a desired outcome from implementation of mechanisms for public participation. Therefore, taking into account gender considerations, in order to enhance and optimize the roles of different genders in decisions-making is important. More specifically, the elimination of gender-based discrimination, particularly against women, remains a key global concern. This is evidenced, as pointed out earlier, by CBD Decision IX/8, where Parties agreed to develop a national biodiversity strategy and action plan or adapt existing strategies, plans or programmes, as required by Article 6 of the Convention, and in so doing, promote the mainstreaming of gender considerations.

Protection of the rights of indigenous peoples and local communities

The UN Special Rapporteur on Human Rights and the Environment, in the March 2017 Report to the Human Rights Council (Knox, 2012, para 55), stated that

Box 15. Illustrative sample of indicators and questions for legal assessment.**Indicator and Questions to assess the mainstreaming of gender considerations in biodiversity conservation processes****Indicator – Mechanisms for gender mainstreaming in biodiversity conservation decision-making****Questions:**

- Does your legal framework make provision for equal rights for all genders, and the mandatory recognition and implementation of gender equality?
- Does your legal framework recognise the special roles of women in biodiversity management?
- Does your legal framework provide mechanisms to disaggregate and differentiate how women impact or are impacted by biodiversity conservation and management?
- Does your legal framework make provision for affirmative action on the roles of, and participation of women in decision-making concerning environmental and biodiversity management?

protections for non-indigenous as well as indigenous people may arise from the principle of non-discrimination, which is recognised in article 2 of the UDHR, and throughout human rights laws. In this case, according to the Special Rapporteur, States have heightened obligations to ensure that such laws and policies satisfy the requirements of legitimacy, necessity and proportionality, because measures that adversely affect ecosystems may well have disproportionately severe effects on the enjoyment of human rights of members of marginalized ethnic groups who rely directly on the ecosystems (Knox, 2012, para 55).

It is important to reiterate that the CBD (article 8(j)), calls for the knowledge, innovations and practices of indigenous and local communities to be respected, preserved and maintained and customary use of biological resources to be protected and encouraged. CBD Decision XII/5, in the preamble, recognises that many currently poor communities have traditionally been very effective conservers of nature and its biodiversity, such as through various forms of indigenous and community conserved areas and territories, and have been users of biodiversity and ecosystem services. This is consistent with part 1(f) CBD Decision XI/24 (2012) on Protected Areas, which called on Parties to give due attention to the conservation of wild relatives of cultivated crops and wild edible plants in protected area and in community conserved areas, thereby contributing to achieving Aichi Biodiversity Target 13 and food security. In this context, para 11 of CBD Decision XII/5 encouraged

Parties, other Governments, international organisations and relevant stakeholders to support indigenous and community conserved areas and territories, community-based management, customary sustainable use and community governance of biodiversity, and ensure the full and effective participation of indigenous and local communities in decision-making processes, taking into account international instruments and law related to human rights in accordance with national legislation.

CBD Decision XII/3 (2014b) recognised, in the financial reporting framework, the role of collective action, including by indigenous and local communities, and non-market-based approaches for mobilizing resources for achieving the objectives of the Convention, including approaches such as community-based natural resource management, shared governance or joint management of protected areas, or through indigenous and community conserved territories and areas (CBD, 2014a, para 29). CBD Decision XII/3, further, resolved to include activities that encourage and support such approaches into reporting under the Convention. This approach is critical, according to the ICCA Consortium, because reference to non-market based approaches by the CBD CoP 12, underscores the voluntary and non-monetary systems under which Indigenous peoples and local communities are often based, which is an important alternative to mainstream market based approaches that tend to undermine the complex social and cultural systems underpinning indigenous peoples and local communities (ICC, 2014).

During the same CoP 12, CBD Decision XII/5 (2014, Annex, Section 3/B, para (b)) urged that in dealing with issues of natural resource governance, there is need to appropriately recognise indigenous and community conserved territories and areas and their traditional knowledge and conservation practices as the basis for local biodiversity conservation plans without interfering in their customary governance systems (helping to meet Aichi Biodiversity Target 11), and to set local biodiversity conservation plans as the basis for programmes aimed at poverty eradication for sustainable livelihoods in order to enhance the basis for the achievement of sustainable development goals. This action, it was noted in CBD Decision XII/5, would be consistent with article 10(c) of the CBD, on customary use.

Further, in CBD Decision XIII/2 (2016b, para 7), Parties, and where appropriate, the International Union for Conservation of Nature (IUCN), the ICCA Consortium and other partners in consultation with the Secretariat, to develop voluntary guidance and best practices to identify and recognise territories and areas conserved by indigenous peoples and local communities, including in situations of overlap with protected areas, and their potential contribution to the achievement of the Aichi Biodiversity Targets.

Box 16. Illustrative sample of indicators and questions for legal assessment.

Indicators and Questions to examine how protections of the human rights of indigenous peoples can support biodiversity mainstreaming

Indicator 1 – Legal provisions for mechanisms recognising the rights of indigenous peoples and local communities
Questions:

- Does your legal framework make provision for protection from discrimination, including non-discriminatory laws, policies, and official actions?
- Does your legal framework provide non-discrimination provisions that are specific for indigenous communities?
- Does your legal framework identify, in any way, or set out criteria for identification of indigenous peoples and local communities?
- Does your legal framework make provision for affirmative action, or other legal special measures to enhance protection of the rights of indigenous peoples?

Indicator 2 – Legal provisions for recognising the rights of indigenous peoples and local communities in biodiversity conservation
Questions:

- Does your legal framework provide recognition of, and protection of culture and traditional practices of local and indigenous communities in natural resources management?
- Does your legal framework provide mandates and mechanisms, for specific institutions to recognise and respect the rights of indigenous peoples' and local communities to land, natural resources, and community resource management to promote biodiversity conservation and sustainable use?
- Does your legal framework recognise the rights of indigenous peoples and local communities with respect to land tenure and access to biodiversity resources, to promote biodiversity conservation and sustainable use?
- Does your legal framework recognise the rights of indigenous peoples and local communities in sustainable use of biodiversity in protected areas to promote biodiversity conservation and sustainable use?
- Does your legal framework provide mechanisms to ensure the full and effective participation of indigenous and local communities in decision-making processes concerning biodiversity conservation and tenure rights

CBD Decision XIII/3 (2016c, para 7) encouraged Parties to make use of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) (FAO, 2012), to promote secure tenure rights and equitable access to land, fisheries and forests. The VGGT recognise that indigenous peoples

and other communities with customary tenure systems on land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women, and that effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems.

Development of the LAT has been taken through a structured process of peer review and stakeholder consultations, as presented in Box 11. One critical part of the process was presentation of the LAT as a discussion document during a Peer-to-peer Dialogue organised in May 2018 by SwedBio and IDLO together with other partners (UN Environment, OHCHR, Natural Justice). Participants during this South-South dialogue provided key recommendations on how the LAT could be utilized, as presented in the following section.

9. Recommendations from the Global Peer-to-peer Dialogue on the role of the LAT in the post-2020 global biodiversity framework

A key concern of the post-2020 global biodiversity framework has been to ensure firm mainstreaming of human rights and biodiversity, either through a stand-alone human right to a healthy environment, or through integration of human rights principles cutting across various biodiversity targets. The summary report of the global Peer-to-peer Dialogue (Ituarte-Lima and Kibugi, 2018), has presented the following recommendations, from participants, on how the LAT approach could be utilized to promote mainstreaming human rights and biodiversity:

- i) Participants recommended that States should apply LAT across government agencies in order to identify and resolve the deficits/gaps of legal frameworks in the 8 thematic areas through public participation and that states engage with regional and international human rights treaty bodies and integrate the recommendations into their National Biodiversity Strategies and Action Plans (NBSAP's) and other national processes.
- ii) Participants recommended that there was need for international organisations to pursue integration of the LAT in the post-2020 framework methodologies as a mandatory instrument, for assessment and continuous monitoring of the fit between their legal frameworks and CBD commitments. This could be adapted to the various regional and international instruments to promote the protection of human rights and biodiversity.
- iii) Participants recommended that private sector, civil society, national human rights institutions, IPLCs and

other non-state actors should participate in peer reviews of the LAT assessment outcomes carried out by states. They should produce shadow/independent reports based on use of the LAT with an aim of keeping governments accountable to their commitments, especially on human rights mainstreaming in the post-2020 Global Biodiversity framework, and its national level application, for instance through NBSAPs. Participants recommended that this could be developed in a similar form as the United Nations Office of the High Commission on Human Rights' Universal Periodic Review process. This is based on the view that a review system of this kind could enhance participation between governments, civil society and Indigenous peoples and local communities, and compel governments to continuously report on their progress towards achieving the Human rights – with shadow reports produced to ground truth the government reports.

- iv) Participants recommended that in order to provide a basis for learning, the LAT could be piloted in several countries, and the lessons learnt and challenges faced shared widely through the CBD CoP system. This way, the successes, challenges and opportunities of the LAT application could be used as an example to ensure that there was buy-in from other state actors in the adoption of the LAT into the post-2020 Biodiversity Framework.

In general, as seen from the above recommendations, the participants were positive about the development of the LAT as it would promote a standard approach through which to assess the baseline of their specific country, and to guide how countries can integrate human rights and biodiversity in the post-2020 legal framework. This, they argued, would enable governments, civil society organisations, indigenous peoples and local communities to assess the stage that their nations were at ex-post (after the fact) and progressively during implementation, in order to promote the application of human rights and biodiversity considerations in decision-making. It is for this reason that participants emphasized the need for the LAT system to have a peer review system integrated into them in order to ensure meaningful participation of the civil society organisations and indigenous peoples and local communities.

10. Conclusion

As explained in the introduction, the Convention on Biological Diversity (CBD) calls for the conservation, sustainable use and equitable sharing of benefits from the use of biodiversity. This is affirmed by CBD CoP Decision XIII/3 (2016c), where Parties agreed to mainstream biodiversity into national plans, programmes and policies in order to support economic and human development that is environmentally sustainable.

This chapter has presented a Legal Assessment Tool (LAT) that has been developed in response to the invitation made to governments and Parties through CBD Decision XIII/3 (2016c) as well as CBD Decision XIII/1 (2016a). With a focus on cross-sectoral mainstreaming, the LAT selected the cross-cutting public policy area of human rights, taking into account the importance of human rights, and the superior treatment they receive at international law, and within national legal instruments. The implementation of human rights, the chapter has argued, is guided by three core obligations of states as duty bearers: to respect, protect and fulfil human rights. The development of the LAT involved setting out a methodology, informed by the primary legal positioning of the human rights mechanisms within legal systems, the indivisibility and interdependence of human rights and the environment, the role of human rights in fostering participation and inclusiveness, and the fundamental role of human rights in fostering the rule of law, and the enduring principle of equality and non-discrimination. All these are governance elements that are relevant to biodiversity governance. In addition, the methodology involved review of CBD decisions and priorities, and interrelating them with the core elements of the human rights system.

The LAT is designed to provide a tool through which governments, within national context and circumstances, can apply the set of assessment questions (covering several thematic areas as outlined in section 8) to evaluate the current status in the mainstreaming of human rights and biodiversity. Out of this process, a government can make a determination concerning the legal, institutional or administrative changes required to enhance mainstreaming of human rights and biodiversity. Incorporating the recommendations from the Peer-to-peer Dialogue reinforces the utility of the LAT to enhancing the role of human rights in the post-2020 global biodiversity framework.

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8. Concluding remarks on weaving Human Right to a Healthy Environment, Sustainable Development Goals and the post-2020 global biodiversity framework

Claudia Ituarte-Lima and Robert Kibugi

This chapter is based on the summary report by the co-chairs of the peer-to-peer dialogue on human rights, biodiversity and SDGs. The dialogue was conceptualized and organised as part of the ongoing collaboration and partnership between SwedBio, the International Development Law Organization (IDLO), Natural Justice, UN Environment and the United Nations Office of the Commissioner for Human Rights (OCHR). The intended outcome of the dialogue was combining various methodologies, such as conceptual, technical and advocacy, to frame proposals that could be presented to States Parties to the CBD, and the Secretariat of the CBD, to integrate human rights into the core of the post-2020 Global Diversity Framework. It also builds on other international meetings mentioned below.

1. Forward looking: human right to a healthy environment and the post-2020 global biodiversity framework

In the final part of the Peer-to-peer dialogue, participants were divided into breakout groups to reflect on the process and outcomes of the three-day dialogue. Their discussions led to specific recommendations on the global recognition on the human rights to a healthy environment. An elementary structure and conceptual framework for including human rights in the post-2020 global biodiversity framework was also put forward, such as a stand-alone target on human right to a healthy environment and good governance and as cross-cutting dimension of all targets. The proposals rested on the internationally recognised human rights norms, standards and principles embedded in most countries as part of their national laws. For example, the human right to a clean and a healthy environment.

We start this section by highlighting key insights concerning human rights principles and biodiversity followed by recommendations emerging for the above mentioned participatory processes.

1.1 Key highlights on the principles of indivisibility and interdependence of human rights and accountability and rule of law

- Human beings enjoyment of rights such as the right to water, food, health care and ultimately the right to life, depends on the ability to protect a healthy environment. Failing to interlink human rights with the environment results in environmental degradation, and violation of human rights, including existential threats to the right to life.
- Participants agreed that it was important for governments to take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of the right to a clean and healthy environment and other interdependent human rights obligations.
- One reason for the global recognition of the human rights to a healthy environment is that human rights, biodiversity and also their connections to climate change are beyond borders.
- In some instances, the interconnections may pose problems, for instance in human-wildlife conflicts.
- The adverse impacts of climate change, particularly in the developing countries, increased the vulnerability of populations, economies and the environment, making them less resilient. This has the effect of undermining critical human rights, such as the right to food, shelter, employment, among other human rights.



Photo: Participants to the Peer-to-peer Dialogue on weaving human rights principles, biodiversity and SDG 16

- Ecosystem services help to combat climate change – both through carbon sequestration in natural forests and through their contribution to resilient ecosystems and societies. In addition, the impacts of climate change adversely affect human rights, by reducing resilience of communities, which has the effect of increasing vulnerability to social, economic, political and environmental shocks.

1.2 Key highlights on gender equality and the rights of environmental human rights defenders:

- **Recognising the significant contribution of women and environmental defenders to sustainable development.** Women contribute substantially to sustainability and the management of biodiversity. An example is the expertise and experience of rural women in selecting seeds with valuable nutritional qualities, and women working as legal advisers to indigenous peoples and local communities, as well as legal scholars advancing sustainability consideration in environmental and human rights law. Women's important contributions are often not properly recognised or acknowledged. The violation of the rights of environmental rights defenders in the extractive industries like mining, continues. Adverse policies are also implemented, in the name of "conservation". This includes evictions that exposes women to loss of livelihood as well as intimidation, threats, reprisals and sometimes loss of life. It was reported that state agencies that managed protected areas were often responsible for these human rights violations. The participants believed that there should be better

mechanisms through which states would undertake their conservation efforts without depriving the rights of the women and environmental defenders and instead work together as allies for positive social-environmental outputs.

- **Building strategic synergies between governments and right holders instead of militarization and criminalization of environmental human rights defenders.** The work of environmental rights defenders has become politicized, subject to criminal penalties and is therefore risky. The militarization of the agencies responsible for protected areas was highlighted as an example. This is an approach which, according to the participants, results in a hostile environment, instead of building enduring relationships between government agencies and right-holders including those who have historically lived in their territories and have valuable knowledge and practices relevant to biodiversity and healthy ecosystems.
- **Implementing suitable land tenure systems and user rights for thriving indigenous peoples and local communities (IPLCs) and healthy ecosystems.** Indigenous peoples and local communities often reside in areas which are communally held or are declared government reserves. In many cases, this situation results in limitations to the rights of IPLCS such as exercising their culture and traditions, or accessing means of livelihood attached to the ancestral lands. In various contexts, the communities face evictions without recourse to legal mechanisms due to denial of both land tenure and user rights, to which they can lay a legitimate and/or legal ancestral claim. There is need for land ownership

rights, and user rights, to be well articulated in the laws that will ensure that the communities are not denied these rights to their ancestral lands.

2. Recommendations for implementation of human right to a healthy environment

The participants made the following recommendations on what actions could be taken by States, international organisations and civil society:

- **Awareness and know-how by national and subnational governmental institutions for being proactive on environmental justice issues**

In many states, environmental laws are not applied comprehensively. This could be due to the limited capacity of government organisations and legal systems not providing sufficient legal standing to citizens to pursue cases concerning violation of human rights. It is necessary that public institutions develop the technical know-how on the nexus between human rights, biodiversity and climate change, and on required actions to build capacity. They must allow wide access to courts through a review of legal standing rules.

- **Reinforcing procedural human rights for inclusive biodiversity and climate governance**

Participants recommended increase of utilization of public interest in environmental litigation to enhance the rule of law by increasing accountability and transparency which result in effective and efficient governance of safeguarding biodiversity and human rights. To improve access to justice, countries must widen the legal scope of the rules on standing (*locus standi*). This would lead to an increase in the number of public interest litigations and would require judiciaries to build capacity to be effective in supporting the balanced necessity for the interdependence between human rights and sustaining the environment.

- **Land use and good governance vital for addressing the root causes**

Participants recommended that land tenure rights, human rights and gender rights should be at the core of efforts made to address challenges resulting from climate change, biodiversity loss, poor land use governance and resultant human rights violations (such as lack of access to drinking, food, etc.).

- **Internationally endorsed human rights standards can help set higher environmental protection standards**

Since human rights are universal, this approach would help to standardize environmental protections across borders while recognising cultural, economic and political differences/specificities. By adopting a broader interpretation of human rights to include the nexus to environment, countries lagging behind in their environmental protection law and policies can elevate the

legal status for safeguarding biodiversity and healthy ecosystems.

2.1 Recommendations to State that are parties to the CBD

- Adopt a human rights approach to environmental protection in the post-2020 global biodiversity Framework. This would require, at international level, and at national level, putting in place legal instruments setting out minimum standards for biodiversity and ecosystems' protection, and embedding key human rights principles across all sectors.
- States could achieve this human rights approach by linking the various institutions mandated to undertake protection of human rights to collaborate with their peers undertaking environmental governance. States should ensure public participation, and related procedural rights, as enshrined in the legal framework.
- States should establish a group of champion countries to encourage common positions favourable to this goal, and undertake lobbying intended to achieve the adoption of a mechanism to mainstream human rights and biodiversity governance in the post-2020 period.
- Nationally and internationally, states will support budgetary allocations to finance these actions to mainstream biodiversity and human rights, including through development cooperation agreements.

2.2 Recommendations to International Organisations:

- International organisations working with the rule of law, environment/biodiversity, and human rights should facilitate negotiations for the creation of a binding global agreement on a human right to a healthy environment or the global recognition of the human right to a healthy environment by the UN General Assembly. This could be informed by the Framework Principles on Human Rights and the Environment presented to the 37th session of the UN Human Rights Council (A/HRC/37/59), by the UN Special Rapporteur on Human Rights and the Environment in 2018.
- International organisations could contribute to the conceptual and methodological content to ensure that the proposed binding agreement should have a strong monitoring, compliance, reporting and review components.
- These organisations could seek to engage all the actors including the private sector, and be leaders in establishing a global lobbying movement for advocacy for the human right to a healthy environment.

2.3 Recommendations to Civil Society Organisations:

- CSOs should participate at the international and national levels depending on respective mandates, through advocacy, in order to raise awareness on the interdependent nature between human rights and healthy ecosystems.
- A role for CSOs nationally, for instance, provides a mechanism through which CSOs can monitor the compliance levels by the governments, or even the level of commitment in working towards the goal in question. CSOs could provide shadow reports to the progress reports given by their governments to treaty bodies, or develop an independent country position to be compared with that developed by the government.
- The role of CSOs nationally is critical because of the role they play in supporting public participation, such as through access to court (public interest environmental litigation) or access to information as a means for enhancing compliance by government with the rule of law, and supporting implementation of SDG 16.

3. Recommendations for the post-2020 global biodiversity framework.

Participants made general recommendations as well as targeted recommendations to States, international organisations and civil society organisations regarding actions each of the respective actors could undertake in order to shape solutions in developing the post-2020 global biodiversity framework.

3.1 General recommendations

- **Bringing biodiversity targets closer to the people**
New targets are needed in a post-2020 global diversity framework that include more governance, law and economic dimensions. Participants emphasized that some of the “targets are isolated from the people who are supposed to meet the target” and this resulted in ignoring social-economic aspects that were key in engaging citizens to biodiversity and climate change discussions. Therefore, in mainstreaming human rights in the post-2020 global biodiversity framework, there is need to have a clear linkage to the SDGs, including indicators relevant for sustainability, human rights and climate.
- **Measurable targets enabling transparent monitoring of biodiversity governance commitments**
Targets in the post-2020 framework should be measurable and smart to receive more political attention and willingness by various actors to find implementations. Measurable biodiversity governance targets will provide a clear and transparent means for monitoring the levels of success in implementation, as well as documenting the emerging challenges. This is

critical because it helps in monitoring the immediate and progressive realization

- **Baseline evaluation of existing legal approaches:** to establish how the existing rights to a clean environment have been structured. This would provide thoughts on what a globally accepted approach could be, specifically within the post-2020 global biodiversity framework.
- **CSOs and advocacy of states to take action:** to advocate states to pursue the dual obligation of enhancing biodiversity and protecting the human right to a clean and healthy environment, as they are indivisible and interdependent.
- **Generate evidence to support value of the human right to a healthy environment:** support multi-actor efforts to develop empirical and qualitative evidence to generate awareness on how a stand-alone human right to a healthy environment can contribute to enhancing both biodiversity management and human rights protection.
- **Balancing between anthropocentrism and ecocentrism:** key in putting communities at the centre of environmental conservation as well as synchronizing local mechanisms to the conservation of biodiversity. It would also implement the balance sought by the indivisibility and interdependence of human rights and the environment.
- **Clear targets and measurable indicators:** make crosscutting approach smart and measurable, in order to track and monitor implementation.
- Mainstreaming human rights in the post-2020 global biodiversity framework needs to have a clear linkage to the SDGs, and possibly, build on relevant indicators established for the related SDGs, such as SDG 16.

3.2 Recommendations to States that are parties to the CBD

Participants recommended that States should:

- Ensure the post-2020 framework explicitly recognises the equal role of women, and protects the rights of environmental rights defenders.
- Put in place regular and periodical monitoring frameworks to ensure that states comply with international law as well as the national guidelines and laws in existence with regard to biodiversity conservation and sustainable use
- Undertake baseline assessments of their legal frameworks to test whether they have done enough to mainstream human rights and biodiversity, and to determine how much remains to be done. This can be achieved, for instance, through utilization of the Legal Assessment Tool (LAT).

- States should take direct actions towards advocating for integrating human rights obligations throughout the provisions of the post-2020 global biodiversity framework. This includes respecting the rights of IPLCS and their role in biodiversity management.
- Harmonize national laws and international conventions in order to adopt practices to protect environmental rights defenders.
- Take decisive legal and administrative actions to specifically protect the rights of women from IPLCs who bear the brunt of confrontation between IPLCs and the state in the conservation context.
- Protect the tenure rights and user rights of IPLCs while undertaking conservation, as well as economic activities (such as extractives) on lands occupied by or used by IPLCs.

- Develop mechanisms to hold states accountable in meeting their international commitments concerning women and human rights defenders.

4. Breaking new ground: towards the global recognition of the human rights to a healthy environment at the UN General Assembly and beyond³⁵

As we have shown in this handbook there is a unique opportunity for the global recognition of the human rights to a healthy environment in various fora. This window of opportunity can be used also to mainstream the human rights principle embedded in SDG 16 into the post-2020 global biodiversity strategic framework. The roadmap of the pigeon weaving the SDG 16 map in Figure 6 is illustrative of this point.

In order to chart how to engage in this roadmap, the Peer-to-peer Dialogue brought together, and provided an opportunity and the methodology through which participating legal practitioners, rights holders, human rights and biodiversity experts, environmental human rights defenders, representatives of national human rights institutions, among others, could engage in a dialogue including by identifying key international processes to engage portrayed in Figure 6 as the weaving map of the SDG 16 pigeon. The insights of this handbook/policy report has been enriched by participating in various events after the peer-to peer dialogue. Some highlights are mentioned below.

High Level Political Forum

As mentioned earlier, sustainability, biodiversity and human rights are deeply rooted in the Agenda 2030 as cross-cutting issues. SDG15 life on land and SDG 6 clean water and sanitation were goals reviewed in the 2018 High Level Political Forum on Sustainable Development in New York and key insights of the peer-to peer dialogue on the human right to a healthy environment and SDGs were discussed in a side-event co-organised by SwedBio and partners.

Expert Meeting: Challenges and Opportunities for Human Rights and the Environment

UN Special Rapporteur on human rights and the environment, Mr. David R. Boyd convened The Expert Meeting discussing the challenges and opportunities for advancing human rights and the environment nexus. UN Environment, Terre des Hommes and SwedBio/SRC co-organised the meetings which took place on 22 and 23 October, 2018. The expert consultation was held the day before the UN Special Rapporteur's first interactive session

3.3 Recommendations to international organisations:

Participants recommended that International organisations should:

- Develop and implement frameworks for advocating governments and other international bodies, such as the CBD secretariat, or the Conference of Parties, to include clear statements and commitments on mainstreaming human rights in the post-2020 global biodiversity framework.
- Develop mechanisms for monitoring the implementation of State's obligations, facilitating cross-learning, and capacity building of both duty bearers and right-holders.
- Integrate human rights perspectives in their own systems. Examples include internal application of the human rights based approach to programming, as well as good governance mechanisms such as transparency and accountability.

3.4 Recommendations to Civil Society Organisations

- Work to build networks to identify and strengthen local, national, regional civil society organisations that can articulate the role of, and advocate implementation of the environmental dimensions of human rights as stipulated in international and regional instruments.
- Enhance their roles in developing public awareness on human rights, and the procedural means available for enforcement. For example, how citizens can engage with their own governments to lobby for their governments to take a public position on supporting mainstreaming human rights in the post-2020 global biodiversity framework. Strengthen the capacities of IPLC's and organisations to enable them to engage with governments as right-holders in the conservation and development agenda.

35. Thank you to Aarushi Baalani who supported synthesising this section.

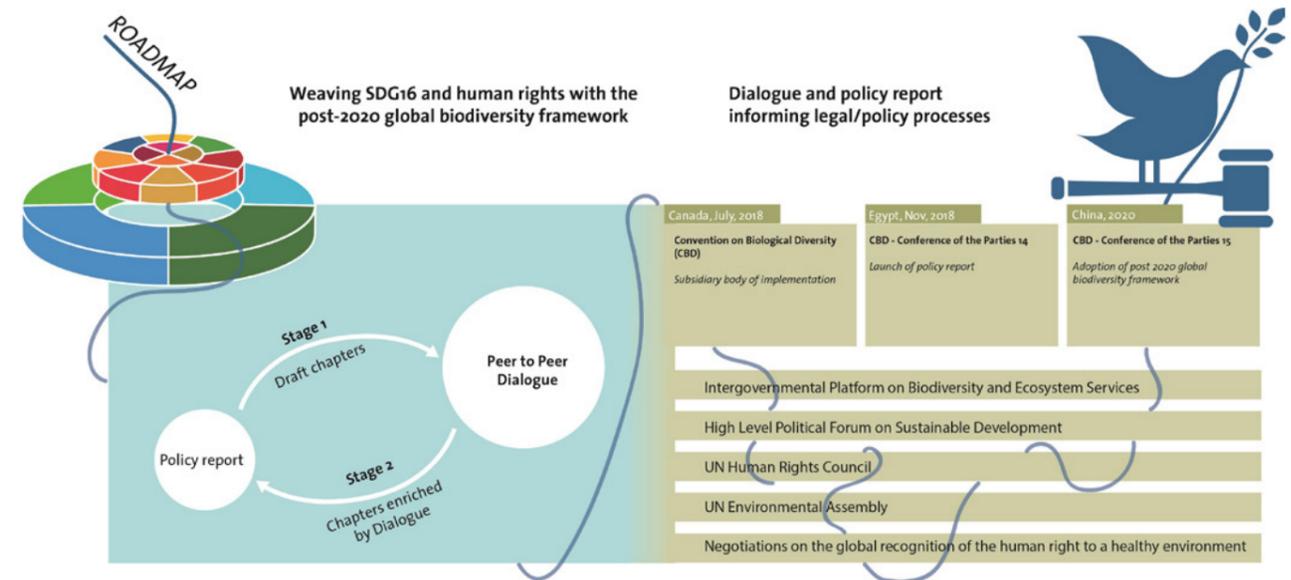


Figure 6. Roadmap of the fora where the outcomes of the Peer-to-peer Dialogue, included in the present policy document, were planned to be presented.



Photo: Johanna von Braun / Side-event at the High-Level Political Forum

with the General Assembly. The Human Rights Council renewed the mandate of the Special Rapporteur and tasked him to report to the Human Rights Council as well as the highest body within the United Nations system, the UN General Assembly.

The objective of the expert meeting was to build on the work of the first Special Rapporteur, Mr. John Knox who also participated in the meeting. Discussions focused on measures that can help address current challenges and seize opportunities through the legal recognition of the right to a healthy and sustainable environment at the global level and

its implementation at the national and sub-national level.

Dr Claudia Ituarte-Lima, SRC centre researcher and SwedBio international environmental law adviser, participated in the expert consultation and facilitated the dialogue session. A key outcome included identifying strategic synergies between the UN Special Rapporteur's work and the diverse group of experts from a wide range of organisations and countries working on the human rights and environment nexus.

Third Committee, 34th meeting – General Assembly, 73rd session

David R. Boyd began his speech by summarising the work and finding of his predecessor Prof John Knox. After 6 years as the Special Rapporteur, Prof Knox concluded that there is a gaping hole in the UN human rights systems because the UN has not yet globally recognised the right to a healthy and sustainable environment. Even though the UN has not recognised this right, over 150 Member States have recognised the right to a healthy environment, either through their constitution, national environmental legislation or regional treaties. There are many benefits to legal recognition of this right. These include stronger environmental laws and policies, implementation and enforcement of a level playing field with other social and economic rights and greater public participation in environmental decision-making. Mr. Boyd stated that the ultimate test was to see if the right to a healthy and sustainable environment contributes to healthier people and ecosystems. There are positive indicators which show that the recognition of this right at the national levels



Photo: Claudia Ituarte-Lima

has enabled people to breathe cleaner air, drink cleaner water and reduce their exposure to toxic substances. Recognition of the right to a healthy and sustainable environment has the most impact on vulnerable groups like women, children, the elderly, indigenous people, persons with disabilities, and

persons living in poverty. In 2008, the Supreme Court of Argentina upheld the right to a healthy environment and improved the lives of people living in the poorest areas of Bueno Aires.

Box 17. Biodiversity Law and Governance Day at the CBD-COP 14 -Fourteenth meeting of the Conference of the Parties to the Convention on Biological Diversity Sharm El-Sheikh, Egypt, 2018

Among the events at CBD-COP 14 to engage in dialogue on the insights of this handbook was a session at the 2018 Biodiversity Law and Governance Day. Also a special luncheon event with negotiators, expert authors, leaders of international organizations and guests featured the launch of “Co-Chairs’ Summary Report of the Peer-to-peer Dialogue on the Human Right to a Healthy Environment and SDGs: Weaving SDG 16 and Human Rights Law with the post-2020 Global Biodiversity Framework.”³⁶

Key highlights of this session were that if we weave human rights, environmental law and the Sustainable Development Goals together, it could accelerate the transition towards sustainable consumption and production patterns across the world; the access to clean and safe drinking water for millions; and the protection of the diversity of our planet. Another conclusion was that, if the UN General Assembly recognized the human right to a healthy environment, it would be a significant step in bridging the fragmentation between human rights and environmental law and would also be a meaningful way to empower courageous environmental human rights defenders, women and men, youth and children who are ready to stand-up for human rights and healthy ecosystems, leaving no-one behind.³⁷



Photo: Hannah Griffiths-Berggren

36. Ituarte-Lima, C., and Kibugi, R., (2018) Co-chairs’ Summary Report of the Peer-to-peer Dialogue on the human right to a healthy environment and SDGs: weaving SDG 16 and human rights law with the post-2020 global biodiversity framework, SwedBio/Stockholm Resilience Centre, International Development Law Organization, Office of the United Nations High Commissioner for Human Rights (OHCHR) – Special Procedures, UN Environment and Natural Justice, https://swed.bio/wp-content/uploads/2018/11/7017-0008-SRC-Co-chairs-summary-of-the-peer-to-peer_Web.pdf

37. Proceedings of the 2018 Biodiversity Law and Governance Day, <http://www.cisd.org/wp-content/uploads/2019/04/Biodiversity-Law-and-Governance-Day-2018-Proceedings-Report-Final-Draft.pdf>

Box 18. Workshop back to back with the United Nations Environment General Assembly (UNEA) and an event at the green tent in UNEA in Nairobi, Kenya

In 2018, a workshop back to back with the United Nations Environment General Assembly (UNEA), and an event at the green tent in UNEA were organized by Natural Justice, SwedBio/SRC, OHCHR, UN Environment and other partners.³⁸ These events were also part of a collective efforts to discuss how to weave the CBD three objectives, rights-based approaches and SDGs into the post-2020 global biodiversity framework. Two complementary strategies to inform the post-2020 global biodiversity framework were further developed, building on previous events such as the Machackos peer to peer Dialogue: a) a right to a healthy environment as a stand-alone target (see proposed text below) and b) a rights-based approach incorporated across all targets.

a) Towards right to a healthy environment as a stand-alone target

By 2030, ensure the respect, protect and fulfillment of the human right to healthy, clean, safe and sustainable environment and its ecosystems for present and future generations, through effective laws, policies and institutions implementing the three CBD objectives, including full and meaningful participation in decision-making, access to information and justice, in compliance with international human rights law and standards.

b) Towards rights-based approach incorporated across all targets

The principles of the human rights-based approach also embedded in SDG 16 can serve to inform crosscutting dimensions for all targets while building on already related elements of Aichi Targets and identifying gaps in other targets. Some issues that have emerged in various fora concerning these cross-cutting dimensions include:

- Awareness of the interdependency between biodiversity and human rights, where a full enjoyment of human rights can only be attained when the biodiversity is safeguarded and thriving and ensure that everybody has the right to a healthy environment.
- Integration of the rights to a healthy environment in targets addressing specific thematic issues (e.g. sustainable fisheries, forestry, agriculture, protected areas, etc.)
- Recognition and protection of tenure rights of IPLCs in safeguarding territories of life including while undertaking conservation policies, as well as economic activities (such as extractives) on lands occupied by or used by IPLCs.
- Harmonisation of international conventions and national laws in order to respect protect and fulfil the rights of environmental human rights defenders including IPLCs, women, youth and children.
- Adoption of a review and compliance mechanisms to monitor and ensure progress towards commitments concerning mainstreaming biodiversity and human rights.

38. This box is part of a synthesis document prepared by Claudia Ituarte-Lima and Melina Melina Sakiyama for the Nairobi workshop co-organizers, participants, networks and others who aim to conduct further work on the topic and to inform submissions to the post 2020 global biodiversity framework.

Role of the UN General Assembly in recognising the right to a healthy environment

Mr. Boyd presented 5 different options for the UN General Assembly to consider:

- A new international treaty, such as the Global Pact introduced by France in 2017.
- Development of a new optional protocol to the existing human rights covenants.
- Development of a new international covenant focused on the right to a healthy environment.
- A resolution adopted by the UN General Assembly, similar to the Resolution 64/292 passed in 2010 recognising the right to water and sanitation.
- A declaration on the right to a healthy environment.

Mr. Boyd urged the UN General Assembly that it is time for the UN to recognise the right to a healthy environment. Not only would that be consistent with the state of the law in the majority of the Members States, it would also provide important, tangible benefits. Recognition would complement, reinforce and amplify the regional and national norms that have developed over the last few decades and acknowledge that this right must be universally recognised. The UN can be a driving force for more nations to recognise and implement the right to a healthy environment through their national and legal frameworks. Mr. Boyd went on to encourage States in Latin America and the Caribbean to promptly sign and ratify the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin



Photo: Claudia Ituarte-Lima

America and the Caribbean. This agreement has been already signed by 16 countries³⁹.

Recognition of the right to a healthy environment by the UN would be a meaningful way to empower, protect, energise and inspire the courageous people who fight for biodiversity, healthy ecosystems and human rights, often

risking their lives in the process. Likewise, it would serve as a catalyst to accelerate the transition towards a renewable energy future, to accelerate the access to safe drinking water and adequate sanitation for million and, to protect the diversity of our planet and safeguard life.

39. <https://www.cepal.org/en/escazuagreement>

Appendices

Appendix 1

SDG 16 Sustainable Development https://sustainabledevelopment.un.org/sdg16	
Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels	
SDG 16 Complete set of targets	
16.1	Significantly reduce all forms of violence and related death rates everywhere
16.2	End abuse, exploitation, trafficking and all forms of violence against and torture of children
16.3	Promote the rule of law at the national and international levels and ensure equal access to justice for all
16.4	By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organised crime
16.5	Substantially reduce corruption and bribery in all their forms
16.6	Develop effective, accountable and transparent institutions at all levels
16.7	Ensure responsive, inclusive, participatory and representative decision-making at all levels
16.8	Broaden and strengthen the participation of developing countries in the institutions of global governance
16.9	By 2030, provide legal identity for all, including birth registration
16.10	Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
16.A	Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime
16.B	Promote and enforce non-discriminatory laws and policies for sustainable development

Appendix 2

In co-designing the Dialogue, we built on other recent meetings SwedBio/SRC co-organised or was actively engaged. Among these prior meetings include:

In 2018:

- UN Office of the High Commissioner on Human Rights and SwedBio made presentations at the UN Environmental Management Group Nexus Dialogue on Biodiversity - Biodiversity Mainstreaming in the context of Human Security and Wellbeing.
- UN Office of the High Commissioner on Human Rights, UN Environment, SwedBio and partners convened a side-event on the Framework Principles on Human Rights and the Environment at the 37th session of the UN Human Rights Council. (UN OHCHR, UN Environment and SwedBio, 2018)
- SwedBio part of the conveners and speaker of the NBSAPS Forum webinar series on human rights and environment. (Ochoa, 2018)

In 2017:

- SwedBio, UNDP-UN Environment Poverty-Environment Initiative, UN Environment Ecosystems Division, in collaboration with Natural Justice and International Development Law Organization organised a peer-to-peer learning forum on tools and strategies for implementing a human rights based approach to the environment with a focus on biodiversity, which was held in Nairobi Kenya. The objective was to exchange experiences on the use of tools and strategies for implementing a rights based approach to the environment including biodiversity and identify synergies among these tools and strategies for delivering the Sustainable Development Goals (SDGs) in an integrated way.
- The IDLO-SwedBio collaborative partnership included a learning and dialogue forum on the Legal Assessment Tool for Mainstreaming of human rights and biodiversity in Nairobi.
- Stockholm Seminar “Human rights, climate change and biodiversity”. The seminar was given at the Royal Swedish Academy of Sciences and attended by scientists, students, media and policy makers in the public and private sector.

- SwedBio, Forest Peoples Programme, Natural Justice, and others also organised a Peer-to-peer Dialogue on Human Rights and Biodiversity Conservation in Eldoret, Kenya with the objective to identify and suggest improvements to existing approaches, tools, and practices for ensuring that respect for human rights strengthens the ability to achieve conservation targets, and that securing conservation targets improves communities’ ability to secure their human rights.
- SwedBio, the Institute of Latin American Studies, the Department of Political Science at Stockholm University, and Mistra Geopolitics held a workshop to explore the hands on, emerging governance strategies of indigenous peoples in the face of various risks such as climate change, biodiversity loss and increasing resource extraction. Scientists, human rights professionals, and representatives of indigenous communities from Latin America and Scandinavia worked alongside policymakers with inputs also of Secretariat of the Convention of Biodiversity, to analyse the role that human rights, the Sustainable Development Goals (SDGs) and climate mitigation instruments are playing on indigenous territories.
- Presentation in Webinar on mainstreaming biodiversity and ecosystem services in the mining sector, part of the NBSAPS Forum and Goxi Platform Learning Series and an outcome of the collaboration with SEPA and UNDP (Blessing, 2018).
- Seminar on “Connecting Peace and Ecosystems: A Legal and Governance Perspective at the Wangari Maathai Institute for Peace and Environmental Studies (Kong’ani, 2018).
- Three side events in Montreal: the Convention on Biological Diversity, 21st meeting of the Subsidiary Body on Scientific, Technical and Technological Advice: Strategies and legal tools for mainstreaming biodiversity and human rights in the mining sector (Co-conveners: SRC/SwedBio, UNDP, Swedish Environmental Protection Agency, IDLO, Natural Justice); side events at the tenth session of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions on Using the CBD Voluntary guidelines for safeguards in

Biodiversity Financing Mechanisms as a tool for implementing CBD article 8(j) and related provisions (Co-conveners: SRC / SwedBio, Convention on Biological Diversity, IDLO, Natural Justice, RMIB-LAC; Human Rights and Biodiversity Conservation: Scaling up the Synergies in the post-2020 Aichi Targets and the SDG Agenda (Conveners: SwedBio/SRC; CIPDP; Forest People Program, Natural Justice).

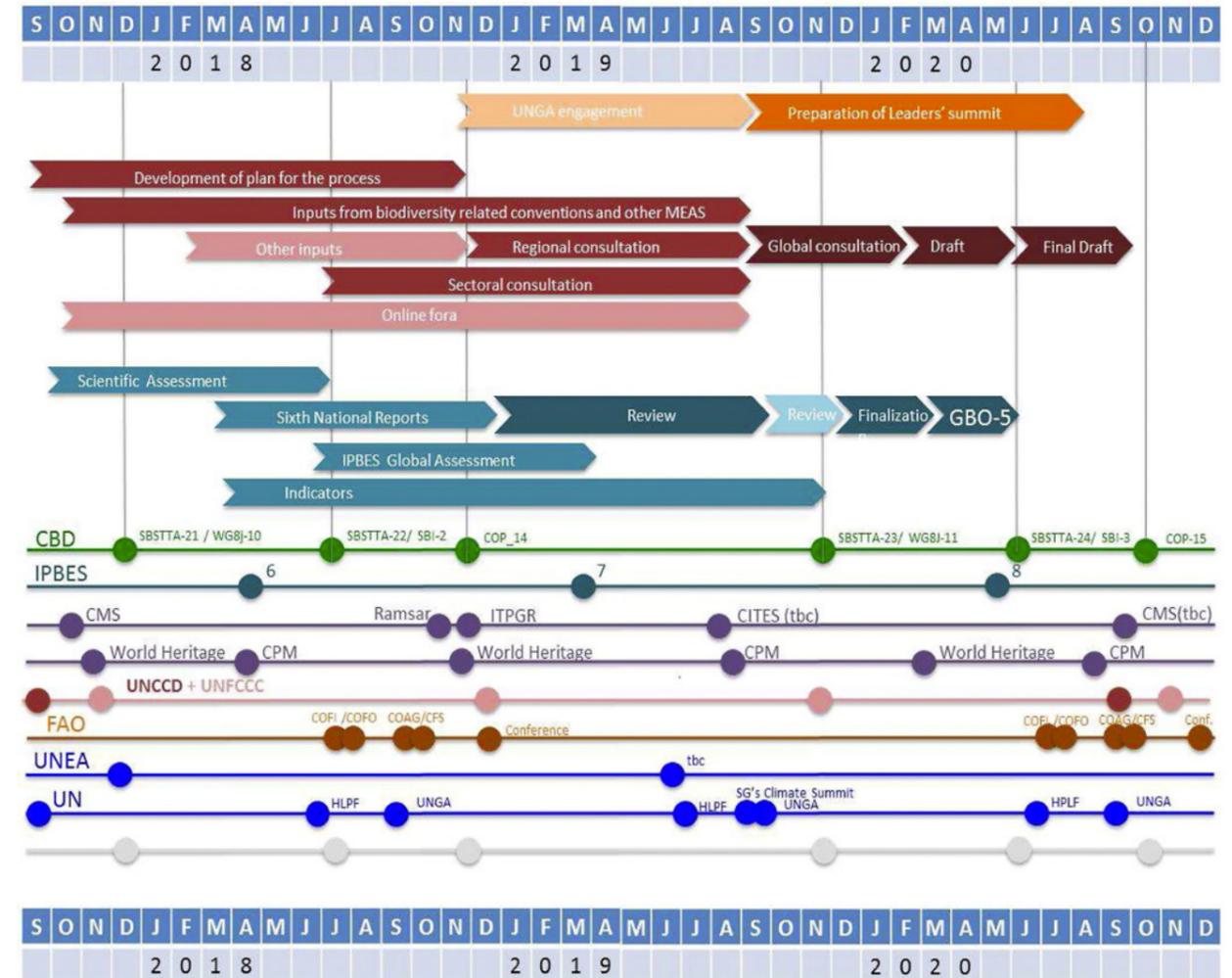
In 2016:

- Two events at the UN Biodiversity Conference (CBD-COP13): (i) a law seminar “Why ecosystems are a human rights issue” chaired by SwedBio and the Safeguarding research project, part of the Biodiversity Law and Governance Day at the UN Biodiversity Conference, and (ii) the side-event “Implementing the SDGs: Mainstreaming biodiversity within law, human rights and economic instruments” co-organised by IDLO, SwedBio/SRC and IDDRI, and these meetings will inform this dialogue.
- The two-day expert consultation on HR and biodiversity by the UN Special Rapporteur on human rights and environment on how to clarify pathways for safeguarding human rights whilst maintaining healthy ecosystems and biodiversity, the subsequent presentation of John Knox’s report on human rights and biodiversity at the Human Rights Council in March 2017, and related meetings (SRC, 2016). In addition, a presentation of the report was made at the UN Permanent Forum on Indigenous Issues.

Appendix 3

Indicative timeline of main steps in the preparatory process and key meetings for the post-2020 global biodiversity framework. Source of Figure: “Proposals for A Comprehensive And Participatory Process for The

Preparation Of The post-2020 Global Biodiversity Framework, Draft for Consultation <https://www.cbd.int/doc/strategic-plan/Post2020/post2020-process-draft-en.pdf>



Appendix 4

Indicative chronology of key activities leading to the consideration of the post-2020 global biodiversity framework by COP-15, COPMOP10 and COPMOP4. Source of Table: “Proposals For A Comprehensive And Participatory Process

For The Preparation Of The Post-2020 Global Biodiversity Framework, Draft for Consultation <https://www.cbd.int/doc/strategic-plan/Post2020/post2020-process-draft-en.pdf>

Date	Activity
April 2018	The Secretariat issues document for SBI-2 containing the proposed preparatory process for the development of post-2020 global biodiversity framework
9–13 July 2018	SBI-2 considers the proposed preparatory process for the development of the post-2020 global biodiversity framework, provides a recommendation to COP- 14 & requests the Executive Secretary to begin implementing relevant elements.
August–October 2018	Parties and observers submit initial views on the post-2020 global biodiversity framework, including possible voluntary commitments.
October-December 2018	The Secretariat issues a discussion paper on the submissions received and Parties and observers invited to submit views
10–22 November 2018	COP-14, COPMOP9 and COPMOP2 consider the proposed preparatory process for the development of the post-2020 global biodiversity framework
December–May 2019	Regional Consultation workshops
February–May 2019	Revised discussion paper issued and Parties and observers submit views on the post-2020 global biodiversity framework
July–September 2019	Revised discussion paper issued and Parties and observers submit views on the post-2020 global biodiversity framework
September 2019	Global science consultation workshop
October–December 2019	Revised discussion paper issued and Parties and observers submit views on the post-2020 global biodiversity framework
November 2019	SBSTTA-23 reviews the draft of GBO-5 and the IPBES global and regional assessments and prepares a recommendation on the implication of these for the post-2020 global biodiversity framework
November 2019	WG8J-11 examines the potential role of traditional knowledge, customary sustainable use and the contribution of the collective actions of indigenous peoples and local communities to the post-2020 global biodiversity framework.
January–March 2020	Draft post-2020 global biodiversity framework made available for peer review
February 2020	Global policy consultation workshop
March 2020	Draft updated the post-2020 global biodiversity framework made available for peer review
May 2020	IPBES Assessments & information from the Biodiversity Indicators Partnership. GBO-5 published on the basis on the 6 national reports, updated NBSAPS the
May–June 2020	SBSTTA-24 considers the draft the post-2020 global biodiversity framework with a view to providing advice on targets to SBI-3
May–June 2020	SBI-3 considers the post-2020 global biodiversity framework with a view to developing a recommendation for COP-15
September 2020	Leaders’ summit meeting on the margins of the opening of the UN General Assembly to give political direction and momentum to the development of the post-2020 global biodiversity framework
October 2020	COP-15, COPMOP10 and COPMOP3 consider the final draft of the post-2020 global biodiversity framework with a view to adoption

Appendix 5: Inputs from CBD Alliance to the Machakos Peer-to-peer dialogue

A consultation process by **CBD Alliance** members led to suggestions on the Living Document prepared by SwedBio and other partners, and to comments on the idea around the linkages and relevance of the interconnection between human rights and biodiversity. The inputs below do not represent a common position but rather a compilation of views and suggestions from experienced members of the CBDA.

While moving forward with the efforts of strengthening the human rights and biodiversity nexus, members considered important to learn from past experiences. Regional spaces, like the Advisory Opinion 23/17 of the Inter-American Court of Human Rights that focuses on the human right to a healthy environment was highlighted. Learning from challenges from prior CBD processes was also raised such as in the Expert Group on Poverty and Biodiversity.

As part of framing the connections, one of the suggestions put forward was the inclusion of Biocultural Rights of Life’s

Diversity, where Human Rights and Right of Earth’s life are integral to each other. In connection with the on-going mainstreaming process of the CBD, suggestions were made on enhance the protection of activists, indigenous peoples and local communities in vulnerable positions resisting extractive activities whose rights are not being respected in many countries

An urgent need for implementation and accountability mechanisms for enforcing the binding obligations of the CBD was highlighted, rather than only engaging in long text discussions. While implementation in developing countries is partly caused due to lack of capacities, concrete pressures to trigger political will to allocate resources for implementation is necessary. In relation to this, it is an important strategy to consider the varying social, political and legal situations of Parties under the Convention that will be in charge of enforcing decisions of the COP. Joint efforts from a big and diverse community who do not only participate in the decision-making process of the COPs, but is also willing to follow-up on the targets is key to ensuring that the momentum is not lost.

Human right to a healthy environment for a thriving Earth

Handbook for weaving human rights, SDGs, and the post-2020 global biodiversity framework

This handbook, edited by Claudia Ituarte-Lima and Maria Schultz, discusses strategies on how to weave the human right to a clean and healthy environment together with the Sustainable Development Goals (SDGs) and the post-2020 global biodiversity framework with a focus on the Global South. The authors, from various institutions and countries, reveal innovative strategies being utilized at international, national and local levels to recognize and implement the right to a healthy environment. Implementing these strategies helps accelerate the transition towards sustainable consumption and production patterns across the world, the access to clean and safe drinking water for millions and, the protection of the diversity of our planet. The global recognition of the human right to a healthy environment would be a significant step in empowering courageous environmental human rights defenders, women and men, youth and children who are ready to stand-up for human rights and healthy ecosystems. The handbook is premised on the fact that taking a human-rights approach to the post-2020 global biodiversity framework is critical since human rights provide an explicit normative framework which most countries have agreed to by ratifying the main international human rights agreements. Building on collective efforts such as the Machakos peer to peer Dialogue and the Nairobi workshop, two complementary strategies are proposed to inform the post-2020 global biodiversity framework: a) a right to a healthy environment as a stand-alone target and b) a rights-based approach incorporated across all targets.

“The authors have provided a useful guide, showing the pathways that could enable humanity to reverse the daunting trends of ecological deterioration, achieve the ambitious Sustainable Development Goals, and leave no-one behind. As the Intergovernmental Panel on Climate Change concluded in its 2018 Special Report, the future of human society depends on our ability to undertake rapid, far-reaching and unprecedented changes at all levels of society. This visionary publication merges law, policy and practice to illustrate, in the context of biodiversity, how we might achieve such transformations.”

David Boyd, UN Special Rapporteur on human rights and the environment, and Associate Professor of Law, Policy, and Sustainability at Institute for Resources, Environment and Sustainability and School of Public Policy and Global Affairs at University of British Columbia.



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