

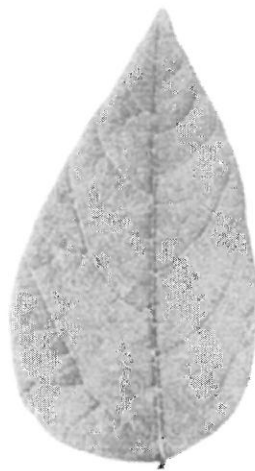
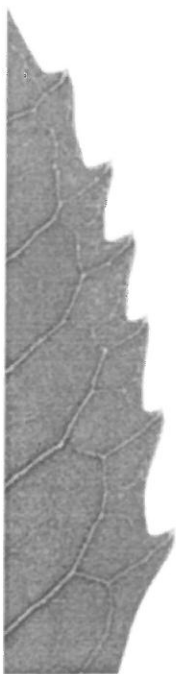
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APPROACHES TOWARDS VALUING LOCAL AND INDIGENOUS PEOPLES' USE OF
'NON-TIMBER FOREST PRODUCTS' IN THE CONTEXT OF LAND ACQUISITION

Hans Morten Haugen

ARTICLE



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1

INTRODUCTION

When estimating the value resulting from the conversion of different forms of land to other uses, including biofuels plantations, there must be an assessment of how present registered owners and other users are presently utilising the land. Products that are either reported or sold are easily integrated into such assessments. Products that are primarily harvested for direct consumption at the household level, and for which there are no reporting procedure, will be subject to best guess estimates. This article seeks to enhance the awareness of the harvesting of non-timber forest products (NTFPs), independent of whether the harvesting is done by persons who are formally owners or who are merely users of a given land. More specifically the article seeks to identify whether a human rights approach can serve as a tool in order to justify that unimpeded harvesting of NTFPs will enhance the human rights protection of households, local communities and indigenous peoples.

This article takes as its starting point that all land is used, in one way or another, but that there is an underestimation of the actual value of these uses.¹ Early studies found that NTFPs had the potential to generate more income than timber extraction,² but these

assessments have subsequently been challenged.³ Moreover, the article starts out from a premise that the quality of statistical information on NTFPs varies considerably, with CIFOR (Center for International Forestry Research) providing the most reliable and FAO (UN's Food and Agricultural Organisation) providing less reliable sources,⁴ and that industrial wood has more precise data as compared to fuelwood. Finally, the article is built on the premise that the harvesting of NTFPs is most important for the most vulnerable individuals and households, and for communities that seek to maintain a traditional lifestyle, even if the strategies for harvesting NTFPs differs considerably, as will be explained further below.

As a theoretical framework, two typologies will be presented; one categorising types of goods and one categorising types of property rights. The article will then present the relationship between NTFPs and the ecosystem services approach, which has gained prominence by the increased awareness of the carbon capture capacity of forests and other lands. When specifying and reviewing the human rights applicable to NTFPs, both individual and collective human rights – and the relationships between them – will be reviewed; identifying whether a human rights impact assessment can be a useful tool in order to identify the value of the unimpeded harvesting from the land. Finally, there will be a review of the qualities of statistics on NTFPs harvesting.

1 Joachim von Braun and Ruth Meinzen-Dick, 'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities, *IFPRI Policy Brief 132* (Washington D.C.: International Food Policy Research Institute, 2009): 'land leases are justified on the basis that the land being acquired by the foreign investor is 'unproductive' or 'underutilized'. In most instances, however, there is some form of land use, often by the poor for purposes such as grazing animals and gathering fuelwood or medicinal plants. These uses tend to be undervalued in official assessments...'

2 Norman Myers, 'Tropical Forests: Much More than Stocks of Wood', 4 *Journal of Tropical Ecology* 209 (1988); Charles M. Peters, Alwyn H. Gentry and Robert O. Mendelsohn, 'Valuation of an Amazonian Rainforest' 339 *Nature* 655 (1989); see also Forestry Department of Indonesia, quoted in Brian Belcher and Kathrin Schreckenberg, 'Commercialisation of Non-Timber Forest Products: A Reality Check' 25/3 *Development Policy Review* 355 (2007).

3 Brian Belcher, Manuel Ruiz Perez and Ramadhani Achdiwan, Global Patterns and Trends in NTFP Development (Paper presented at The International Conference on Rural Livelihoods, Forests and Biodiversity, Bonn, Germany, 19-23 May 2003), say that these reflected 'high expectations' which had been replaced by 'more realistic assessments'.

4 FAO's figures are said to be 'extremely unreliable or totally erroneous'; see Charlie Shackleton et al., 'Non-timber Forest Products: Concepts and Definitions', in Sheona Shackleton, Charlie Shackleton and Patricia Shanley eds., *Non-Timber Forest Products in the Global Context* 3, 4 (Berlin and Heidelberg: Springer, 2011). The main reason for this is that FAO depends on the countries' own statistical data, while CIFOR undertakes independent assessments. From 1945 to 1971, FAO collected and published Forest Products Other Than Wood in the *Yearbook of forest products statistics*, see Felice Padovani, 'Statistical Information on Non-wood Forest Products', Annex 4.4.4 in Report of the International Expert Consultation on Non-Wood Forest Products (Rome: FAO, 1995), available at www.fao.org/docrep/v7540e/v7540e00.htm.

The question sought to be answered by the article is: *How can an improved understanding of the value of NTFPs challenge both the notion of 'land not being used' and the assessments of economic benefits resulting from converting land to biofuel plantations, by identifying the content and scope of the substantive human rights as they apply to control over and use of natural resources?*

The article will be embedded in human rights law, and seeks to test whether such a framework will provide a more comprehensive approach than a framework emphasising 'livelihood', based on a definition of livelihood as 'a means of securing the necessities of life'.⁵

2 THEORETICAL APPROACHES

NTFPs have traditionally been defined as 'all biological materials, other than timber, which are extracted from forests, for human use'.⁶ This definition is being challenged, as the emphasis on forests only is too limited.⁷ CIFOR has produced a rich literature on NTFPs.⁸ Another term is non-wood forest products

(NWFPs), defined by the FAO as 'products of biological origin other than wood derived from forests, other wooded land and trees outside forests. NWFp may be gathered from the wild, or produced in forest plantations, agroforestry schemes and from trees outside forests'.⁹ Hence, we see that FAO includes also biological products harvested from plantations as falling within this definition. Therefore, by focusing on NTFPs, this article is closer to CIFOR's approach by including fuelwood.¹⁰

In brief, NTFPs can be classified as neither purely private nor purely public, but belong to what is termed *common-pool resources* (Figure 1) which are regulated by various forms of *property rights regimes* (Figure 2).

5 *Oxford Pocket Dictionary of Current English* (2009).

6 Jenne H. de Beer and Melanie J. McDermott eds., *The Economic Value of Non-Timber Forest Products in South East Asia* (Amsterdam: Netherlands Committee for IUCN, 1989).

7 C. Shackleton et al., note 4 above at 8 says that the definition should emphasize harvesting of all uncultivated plants or wildlife found anywhere; and on 16 they provide elements for a new definition.

8 See Sheona Shackleton, et al., note 4 above; Koen Kusters and Brian Belcher eds., *Forest Products, Livelihoods and Conservation: Case Studies of Non-Timber Forest Product Systems. Volume 1 – Asia* (Bogor: CIFOR 2004); Terry Sunderland and Ousseynou Ndoye eds., *Forest Products, Livelihoods and Conservation: Case Studies of Non-Timber Forest Product Systems. Volume 2 – Africa* (Bogor: CIFOR 2004); Miguel N. Alexiades and Patricia Shanley eds., *Forest Products, Livelihoods and Conservation: Case Studies of Non-Timber Forest Product Systems. Volume 3 – Latin America* (Bogor: CIFOR 2004); Cidalli López and Patricia Shanley eds., *Riches of the Forest: Food, Spices, Crafts and Resins of Asia* (Bogor: CIFOR 2004); Roderick P. Neumann and Eric Hirsch eds., *Commercialisation of Non-Timber Forest Products: Review and Analysis of Research* (Bogor: CIFOR 2000); Eva Wollenberg and Andrew Ingles eds., *Incomes from the Forest: Methods for the Development and Conservation of Forest Products for Local Communities* (Bogor: CIFOR 1998).

9 FAO, *What are Non-wood Forest Products?* (Rome: FAO, 2008), available at www.fao.org/forestry/nwfp/6388/en/. In the *Global Forest Resources Assessment 2010, FAO Forestry Paper 163*, 104 (Rome: FAO, 2010), the definition is shorter, namely 'goods derived from forests that are tangible and physical objects of biological origin other than wood'. FAO, *Towards A Harmonized Definition of Non-wood Forest Products* (Rome: FAO, 1999), available at www.fao.org/docrep/x2450c/x2450c0d.htm#fao%20forestry, writes that the difference between NWFPs and NTFPs is that the latter 'include fuelwood and small woods', where the latter includes 'tools, household equipment and carvings'. According to Brian Belcher, 'What Isn't An NTFP?' 5/2 *International Forest Review* 161, 165 (2003) distinguishing between wood and nonwood is 'neither relevant nor helpful'.

10 The majority of the population in most least-developing countries is primarily relying upon fuelwood or charcoal as their primary energy source for cooking; see IEA (International Energy Agency) & OECD, *World Energy Outlook 2006*, 422 (Paris: IEA and OECD, 2006); see also World Bank, *Global Monitoring Report 2008*, 192 (Washington DC: World Bank 2008). Note in this context that 'Proportion of population using solid fuels' is a MDG indicator (number 29), belonging to the first target ('Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources') under MDG 7. While this author acknowledges that the burning of fuelwood has negative consequences for the human health, resulting in 1.6 million deaths annually; see World Health Organization, *Fuel for Life* 12 (Geneva: WHO, 2006); and that the intensive use of fuelwood will have negative impact on the quality of the soil and biodiversity; see IEA & OECD, above, 427-8; the author does not concur with the approach taken in *Our Common Future: Report of the World Commission on Environment and Development A/42/427*, Chapter 1, paragraph 8 (1987), saying that 'poor and hungry will often destroy their immediate environment in order to survive'. For a criticism against the perception that local communities tend to overexploit resources, see Tor Arve Benjaminsen, 'Is There A Fuelwood Crisis in Rural Mali?' 43/2 *Geojournal* 163 (1997).

	Exclusion easy	Exclusion difficult
Rivalrous in consumption	Private goods	Common-pool resources
Non-rivalrous in consumption	Club goods	Public goods

Figure 1: Types of goods.¹¹

Common-pool resources are of a challenging nature, because of three factors: they are difficult to produce, it is difficult to exclude someone’s use of the good, and such use reduces the resource.

	Strong institutions for enforcement of property rights	Weak institutions for enforcement of property rights
Specified individual owners	Private property	Common property
Not specified individual owners	Public property	Open access

Figure 2: Types of property rights.¹²

Which property regime that applies to territories where NTFPs is harvested by traditional communities will of course depend on the specific circumstances. In some states, public ownership of land is the prevailing form of ownership. In some instances this form of ownership is regulated in a manner where the property rights of the local population are not recognised at all or only

weakly recognised.¹³ In other instances the public land is administered by local villages. Hence, it is difficult to classify the property regime applying to NTFPs as exclusively belonging to *one* of the four categories identified above, but the dependency upon NTFPs seems to be particularly strong in areas where ownership structures are characterised by common property – even if there is a prevailing perception among certain actors that much forest land is ‘open access’.¹⁴

One additional theoretical foundation will be made: The management of these resources is better done on a local level, in order to ensure adequate restraint in use and effective monitoring, hence contributing more effectively to sustainable development than centralised or privatised management.¹⁵

3 NTFPs AND ‘FOREST SERVICES’, PARTICULARLY CLIMATE MITIGATION

There will first be an attempt of gaining a more comprehensive understanding of what access to NTFP might signify for a forest-dependent traditional community. Then there will be an assessment of how the various REDD initiatives (reduced emissions from

11 Margaret McKean, ‘Common Property: What It Is, What It Is Good for and What Makes It Work?’, in Clark C. Gibson, Margaret McKean and Elinor Ostrom eds, *People and Forests: Communities, Institutions and Governance* 27, 29 (Cambridge, Mass. and London: MIT Press, 2000).

12 Developed by the author based on McKean, *id.* at 36.

13 Asbjorn Eide, *The Right to Food and the Impact of Liquid Biofuels (Agrofuels)* 34 (Rome: FAO, 2008). FAO’s *Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources, Zero Draft*, says in paragraph 12.1 that ‘the large scale acquisition of tenure rights ... could have major negative impacts on the livelihoods of individuals, families and communities, and on the environment’. Moreover, the World Bank, FAO, IFAD and UNCTAD’s *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* 3 (2010) observes that ‘the fact that there is no option for formally recognizing group rights does in many cases force individualization of what is *de facto* still communal property, which leads to conflicts and provides opportunities for land-grabbing by elites’. On the latter Principles, *see also* note 31 below.

14 Erin Sills et al., ‘Evolving Perspectives on Non-timber Forest Products’, in Sheona Shackleton et al., note 4 above at 23, 26, pointing to governments which refer to forest land as ‘open access’, promoting policies to ‘develop the land’.

15 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge and New York: Cambridge University Press, 1990).

deforestation and forest degradation), which are a part of the UN Framework Convention on Climate Change (UNFCCC) work program,¹⁶ should be framed in order to secure the rights over land and access to resources.

3.1 NTFPs

When analysing the context for understanding NTFPs, the emphasis on 'products' should not imply that the approach is a purely materialistic one. First, the material basis for cultural life is recognised in several international treaties,¹⁷ declarations¹⁸ and interpretative comments.¹⁹ Second, the peoples who are able to continue their traditional lifestyles, especially those who are residing inside forests, will contribute to protecting the forests, in situations of forest fires, illegal logging or other forms of destruction of forests.

Hence, local peoples should have rights which allow them to participate in the decision making concerning

the extraction of resources. More specifically, the principle of free, prior and informed consent (FPIC) implies that the community shall be able not to consent to a given project,²⁰ implying that the investor must either downscale the project, find another location or end the project. Moreover, of crucial importance to the communities and peoples, their unimpeded access to the NTFPs contributes to the preservation of their culture and holistic worldview, so that they may uphold a particular way of life associated with the use of land resources.

An important contribution by FAO to enhance the understanding of NTFPs was the 1995 International Expert Consultation on NTFPs ('FAO Recommendations').²¹ Of more recent date is FAO's draft Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources, which builds explicitly on the understanding of states' human rights obligations and human rights principles.²²

3.2 Forests and Climate Mitigation

The term 'forest services' or 'eco-system services' refers to benefit that can be obtained from the preservation of biomes. These have been given increased attention recently due to the carbon capture capacity of forests

16 FCCC/CP/2010/7/Add.1, decision 1/CP.16: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, particularly paragraphs 70 and 76.

17 International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 U.N.T.S. 3 (1976) and International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, 999 U.N.T.S. 171 (1976), Article 1.2 says (extract) '*In no case may a people be deprived of its own means of subsistence*'. The human rights of minorities are explicitly recognised in the ICCPR, Article 27, including the right '*to enjoy their own culture*'. Moreover, ILO Convention 169 acknowledges in Article 13 the indigenous peoples' attachment to their land, for their cultures and spiritual values.

18 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, Article 4.2 says (extract): 'States shall take measures to create favourable conditions to enable persons belonging to minorities to...develop their culture, language, religion, traditions and customs'. *UN Declaration on Indigenous Peoples*, A/RES/61/295 (UNDRIP), Article 31, refers to 'human and genetic resources, seeds, medicines...' in the context of cultural heritage.

19 General Comment 12 *The Right to Self-determination of Peoples* (Art. 1), GAOR Doc A/39/40, pp.142-143, paragraphs 1 and 5. General Comment 23, *The Rights of Minorities* (Article 27) (CCPR/C/21/Rev.1/Add.5) (1994), paragraph 7, addressing the connection between land resources and culture. General comments do not represent international law, but represent clarifications undertaken by the relevant treaty body, mandated to monitor the implementation of the respective human rights treaty.

20 International Labour Organization Convention 169 says in Article 16.2 that relocation, being an exceptional measure, requires the indigenous peoples' free and informed consent; see also Articles 6 through 9. In the UNDRIP FPIC is explicitly recognised in Articles 10, 19, 28.1, 29.2 and 32.2.

21 See FAO, note 4 above. The report has sections on NGOs; private sector; national governments; donor agencies and development assistance agencies; research institutions; and FAO and other international organizations.

22 In FAO's draft Voluntary Guidelines, note 13 above, human rights obligations and principles are explicitly outlined in Section 3; and other documents have stated clearly that the voluntary guidelines will be embedded in human rights; see particularly FAO, *Towards Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources* 12, 16-19 (Rome: FAO 2009); FAO, *Outcome Document of Consultation Meetings. Voluntary Guidelines on Responsible Governance of Tenure of Land and Other Natural Resources* 4-6 (Rome: FAO 2010) and FAO, *Governance of Tenure, Finding Common Ground* 4 (2010): 'The principles of participation, accountability, non-discrimination, transparency, human dignity, gender equity, empowerment and the rule of law apply to the approach of responsible governance'. Moreover, on p. 5: 'The guidelines on responsible governance of tenure will be a further elaboration of the [2004] Right to Food Guidelines'.

and other lands, based on the fact that at least eighteen per cent of greenhouse gas emission results from land use change, particularly converting forest land.²³ The Millennium Ecosystem Assessment categorised ecosystem services in four main categories: Provisioning (food, water, timber, fiber, fuel, biochemicals, medicines and genetic resources); regulating (climate, erosion, disease, waste and natural hazard); supporting (soil formation, photosynthesis, primary production, water and nutrient cycling); and cultural (aesthetic, spiritual, recreation, diversity, and knowledge).²⁴ While these services constitute considerable values, this list does not explicitly list biodiversity preservation. There are concerns over how maintenance of biodiversity is integrated in measures to mitigate climate change.²⁵

In the Millennium Ecosystem Assessment, timber and fuelwood is categorised as ‘commonly measured economic values’ while NTFPs and carbon sequestration (storage) is categorised as ‘non-marketed and other economic values’.²⁶ While the economic value of climate sequestration through forests and other lands can be calculated on a global scale, this is more difficult for NTFPs.

This article is based on a premise that any measures that will affect the traditional harvesting from the land, including any REDD projects,²⁷ must take into account the rights and interests of those who are living in and

from the forests.²⁸ An analysis of 25 Readiness Project Idea Notes (R-PIN) submitted to the World Bank’s Forest Carbon Partnership Facility (FCPF) in 2008 finds that the first projects financed by the FCPF were approved with little to no consultation with locals.²⁹ This lack of adequate consultation might be explained by the fact that these earliest projects are of an initial nature, and the World Bank itself says that RIP-N will lead to more extensive program with both more funding and more extensive consultations,³⁰ but it is also relevant to note that the World Bank as such has been very slow to

23 See World Bank, note 10 above at 219.

24 Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* 41-45; 103-122 (Washington DC: Island Press, 2005). This list is more comprehensive than the list of ‘forest services’ found in FAO and UNECE (United Nations Economic Commission for Europe), *European Forest Sector Outlook Study 1960-2000-2020: Main Report* 94 (Geneva: UNECE, 2005): recreation; conservation of biodiversity; protection of soil and water; and cultural preservation. We see that this latter list emphasises preservation more than provision.

25 Andrew Long, ‘Taking Adaptation Value Seriously: Designing REDD to Protect Biodiversity’ 3/3 *Carbon and Climate Law Review* 314 (2009).

26 See Millennium Ecosystem Assessment, note 24 above at 56.

27 While *The Government of Norway’s International Climate and Forest Initiative* (Oslo: Government of Norway, 2008) says that the Norwegian strategy is based on ‘the conservation of biodiversity and local and indigenous people’s rights’, the strategy does not promote unimpeded rights of local communities and indigenous peoples to dispose of the forests’ natural resources.

28 Charlie Shackleton, Sheona Shackleton and Patricia Shanley, ‘Building a Holistic Picture: An Integrative Analysis of Current and Future Prospects for Non-timber Forest Products in a Changing World’, in Shackleton et al., note 4 above at 255, 269, saying that if ‘local communities are excluded, then promotion of forest conservation is ... likely to have negligible or negative effects on local livelihoods’; see also Mongabay, *Carbon Conservation Schemes Will Fail Without Forest People*, 2008, available at <http://news.mongabay.com/2008/1016-indigenous.html>; and Simone Lovera, *The Hottest REDD Issues: Rights, Equity, Development, Deforestation and Governance by Indigenous Peoples and Local Communities* 10, (2008), available at <http://unfccc.int/resource/docs/2009/smsn/ngo/117.pdf>: ‘If REDD payments are directed to governments, they will be an incentive to repression ... This might have serious repercussions for the historical use rights of indigenous peoples, local communities, and women, and for their very livelihoods’.

29 Kate Dooley et al., *Cutting Corners: World Bank’s Forest and Carbon Fund Fails Forests and Peoples* (Brussels & Moreton in Marsh: Forests and the European Union Resource Network and Forest Peoples Programmes, 2008). Charlie For a thorough review of FPIC in international law, and as applied by international courts, primarily the Inter-American Court of Human Rights, see Hans Morten Haugen, *Promoting Free, Prior and Informed Consent Decisions – How to Ensure That the Most Affected Within the Minorities are Heard?* (forthcoming).

30 World Bank, *Forest Carbon Partnership Facility (F-CPF) Readiness Mechanism: National Consultation and Participation for REDD* (Note FMT 2009-2) (Washington DC: World Bank, 2009).

recognise FPIC.³¹ Within the FCPF, one million USD will be set aside for the purpose of supporting forest peoples participation in FCPF-assisted REDD activities.³² This is an indication that the World Bank wants to ensure adequate consulting of forest dwellers and users. There is, however, a substantive distinction between consultation, on the one hand, and FPIC, on the other hand.

In addition to the FCPF, which was established in late 2007, the Carbon Finance Unit of the World Bank administers – separately and jointly – more than ten

carbon funds and facilities.³³ It is reasonable to state that the World Bank promotes large scale thinking.³⁴

3.3 Summary

There can be no doubt that the unimpeded right to dispose of natural wealth and resources must include NTFPs, and in line with the resource dimension of the right to self-determination, all peoples are entitled to freely dispose of their natural wealth and resources, and may in no case be deprived of its own means of subsistence.³⁵ Hence, continued access to natural resources is an essential precondition for economic and social development for the communities dwelling in or depending upon the forests, and for ensuring an adequate standard of living.³⁶ The human rights approach will now be explored in more detail, as a means of getting better knowledge of the importance of NTFPs for indigenous peoples and local communities.

31 FPIC is included in the *draft Guidelines on Stakeholder Engagement in REDD+ Readiness*, 2 (Washington and New York: Forest Carbon Partnership Facility & UN-REDD, 2010), saying that countries will be expected to adhere to the FPIC principle. World Bank's *Operational Policy 4.10 Indigenous People*, paragraph 20 (2005), requires that 'the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process'. Moreover, World Bank, et al., note 13 above at 11 says that 'the consultative process should allow communities to turn down investors if they so desire', and requires a formal record of all agreements made, which must be understood as being close to the FPIC. Hence, while this author concurs with most of the criticisms raised in FIAN et al., *Why We Oppose the Principles for Responsible Agricultural Investment (RAI)* (2010), the allegation on p. 5 that principle 4 does 'not foresee or truly allow for [a decision not to carry out this kind of project] at all, and are in this sense profoundly flawed' is imprecise. Moreover, the allegations by FIAN et al. concerning the term 'existing rights' in principle 1 is not based on a good faith reading of what is actually said under principle 1 (see note 13). For other substantive criticisms against RAI, see *Remarks made by Olivier De Schutter, UN Special Rapporteur on the Right to Food, at the High-level session of UNCTAD's Commission on Investment, Enterprise and Development* (2010) available at <http://farmlandgrab.org/wp-content/uploads/2010/04/UNCTAD26AprilDeSchutter.pdf>; *Access to land and the right to food* (A/65/281) (2010); and *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights Challenge* (A/HRC/13/33/Add.2) (2009). According to Joji Cariño and Marcus Colchester, 'From Dams to Development Justice: Progress with 'Free, Prior and Informed Consent' Since the World Commission on Dams' 3/2 *Water Alternatives* 423, 426 (2010), IFAD (International Fund for Agricultural Development) is 'the international development fund which has gone furthest in recognizing FPIC....'

32 See Dooley et al., note 29 above at 6.

4 HUMAN RIGHTS APPROACHES IN THE CONTEXT OF NTFPs

When applying a human rights approach, the emphasis can be either on the substantive human rights or the human rights principles, which can be understood as

33 World Bank, *Carbon Finance for Sustainable Development* (Washington DC.: World Bank, 2008).

34 On the front page of the Carbon Finance 2008 Report, *id.*, the text 'ScaleImpact' appears. This indicates an approach towards large-scale projects, which might reduce transaction costs, but such large-scale approach will also be demanding on the overall consultation process.

35 See ICESCR and ICCPR, Article 1.2, note 17 above.

36 ICESCR, Article 11.1 reads (extract): 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing'.

minimum standards of conduct,³⁷ Human rights principles can only be adequately understood in relation to the substantive human rights. Therefore, from a human rights point of view, it is not adequate to list principles which are similar to the human rights principles, as is done in the 'Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources'.³⁸ While these principles links agricultural investments and national strategies for poverty reduction, community empowerment strategies, and private sectors strategies to better incorporate social and environmental concerns,³⁹ this represents no guarantee that the human rights of local communities and indigenous peoples will be adequately secured.⁴⁰ In this article, the emphasis will be on identifying the content and scope of the substantive human rights as they apply to control over and use of natural resources. Particularly regarding economic, social and cultural rights, one can choose a progressive realisation approach or a violations approach,⁴¹ or one

can focus on the rights or the obligations.⁴² This article will apply a progressive realisation approach, focusing on State obligations to implement legislation and in other ways secure an adequate regulation of the actors, to ensure unimpeded harvesting of NTFPs, which is crucial for human rights protection, at the level of households, local communities and indigenous peoples.⁴³

The analysis will be framed under four headings, which are all related to substantive human rights provisions: NTFPs harvesting as essential for an adequate standard of living, by acknowledging NTFPs as a 'means of subsistence';⁴⁴ NTFPs harvesting as means of economic development;⁴⁵ NTFPs harvesting as a means to maintain and preserve natural resources;⁴⁶ and NTFPs harvesting as a means to preserve culture.⁴⁷ Fuelwood will be included at the end of the first two subsections

37 FAO has taken an active role in promoting human rights principles, which were specified in 2007 to include participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law, FAO, *Focus On: Right to Food and Indigenous Peoples 2* (Rome: FAO, 2007) available at http://www.fao.org/righttofood/wfd/pdf2007/focus_indigenous_eng.pdf. Human rights principles listed in the draft voluntary guidelines, see Eide, note 13 above at 6-7, under the heading Principles of implementation, include 'equity and justice', 'holistic approach' and 'continuous improvement', while empowerment is not included.

38 See World Bank et al., note 13 above. There are no references to binding human rights treaties, which can be explained by the fact that the Principles address agricultural investments as undertaken by corporate entities. The Principles cover transparency, accountability, participation, empowerment and rule of law, but the document addresses vulnerable groups on 11-12 and 16-17, without linking this explicitly to the principles of human dignity or non-discrimination.

39 *Id.*, at 21.

40 Note in this context the observations on Indonesia in Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits?* 42 (Washington D.C: World Bank, 2010): 'limited ability to uphold local rights, together with free provision of land to large investors, led to processes of area expansion that caused immense social disruption and environmental damage. Such land price subsidies have encouraged speculative landholding and displacement of traditional land users'; see also p. 142.

41 Audrey Chapman, 'A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights', 18/1 *Human Rights Quarterly* 23 (1996); Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', 20/1 *Human Rights Quarterly* 81 (1998).

42 Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp, Oxford and New York: Intersentia, 2003); Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford and New York: Oxford University Press, 2006). Note that there are immediate obligations within a progressive realization approach, as outlined in *General Comment 3: The Nature of States Parties Obligations (Art. 2, par.1)*, CESCR 1990, paragraphs 1 and 2, namely to end all forms of discrimination and to take steps aiming at full enjoyment of the recognized human rights. Moreover, there is an obligation to cooperate internationally for the realisation of these rights, *id.*, paragraphs 13 and 14.

43 It could have been possible to focus on violations, more specifically land transfers or forced displacements, without any adequate processes or without adequate redress possibilities, in accordance with UNDRIP, note 18 above, Article 28 and Article 20.2; but this article rather seeks to illustrate 'best practices'.

44 ICESCR, Article 11.1, note 36 above and Article 1.2, note 17 above.

45 ICESCR, Article 11.1, which after the recognition of the right of everyone to an adequate standard of living, recognizes the right 'to the continuous improvement of living conditions'. See also ICESCR, Article 1.1 which says that the right to self-determination of peoples includes the right to 'freely pursue their economic, social and cultural development'.

46 ICESCR, Article 1.2, note 17 above, and Article 11.2(b), saying that the measures taken with regard to food production, conservation and distribution shall be taken 'in such a way as to achieve the most efficient development and utilization of natural resources'.

47 ICCPR, Article 27, note 17 above; and ICESCR, Article 15.1(a) and 15.1(c), recognizing the right of everyone '[t]o take part in cultural life' and '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author', respectively.

below, as wood cannot be presumed to play an equally important role in the latter two, on preservation of resources and preservation of culture.

4.1 Adequate Standard of Living

A number of studies have assessed the relationship between forest products and livelihoods.⁴⁸ Common for these studies is that they take the broader approach of NTFPs, and that they acknowledge the importance of controlling and disposing of such resources. The studies seem to recommend that using these resources locally in order to ensure an adequate standard of living is inferior to applying a market strategy, by promoting specialised producers and intensified production.⁴⁹ There has been a tendency to distinguish between communities, based on the degree to which these communities chose to specialise and be integrated into the cash economy, and regional distinctions have been identified, as African communities tend to be associated with *subsistence* strategies; Latin American communities with *diversified* strategies; and Asian communities with *specialised* strategies.⁵⁰ In these studies, there seems to be a normative assessment, implying that all communities should strive towards specialisation. This normative approach in the categorisation can be challenged.⁵¹

Increased reliance upon markets can also be a way to enhance dependency for previously self-sufficient communities.

FAO recommends the various actors to place 'adequate emphasis on NWFP activities which have a high potential for poverty alleviation' and 'not to lock people into activities that do not have growth potential'.⁵² This must be understood as an acknowledgement of the contribution of NWFPs as a means to ensure an adequate standard of living, but the recommendation is also based on an understanding that being a part of a market economy and gaining income is better than to be self-reliant and outside of a market economy. Hence, securing subsistence is understood as being inferior to market integration.

Moreover '[t]o resolve land use conflicts over use of NWFP resources, stakeholders are to be encouraged to pursue mechanisms that bring together all parties involved to clarify tenure, access, user-rights and benefit sharing issues'.⁵³ It can be no doubt that formal recognition of land rights, control over and unimpeded access to this land is crucial for maintaining appropriate levels of subsistence, including the right and ability to exclude external intruders.⁵⁴

Moreover, this recommendation is the only one addressing benefit-sharing. This emphasis is much weaker than what is found in the Convention on Biological Diversity (CBD).⁵⁵ The main explanation for this ignorance is that NTFPs are provided by the local communities themselves, while the benefit-sharing provisions of the CBD regulate the access to and the sharing resulting from the commercialisation of biological resources – when collected by others. On the other hand, those communities that are seeking to export their NTFPs products⁵⁶ are obviously concerned that as most of the income from selling to the end-users end up in the harvesting communities.

48 Sheona Shackleton, Claudio O. Delang and Arild Angelsen, 'From Subsistence to Safety Nets and Cash Income: Exploring the Diverse Value of Non-timber Products for Livelihoods and Poverty Alleviation', in Shackleton et al., note 4 above at 55; William Sunderlin et al., 'Livelihoods, Forests and Conservation in Developing Countries: An Overview' 33/9 *World Development* 1383 (2005); and J. E. Michael Arnold and Manuel Ruiz-Pérez, 'Can Non-timber Forest Products Match Tropical Forest Conservation and Development Objectives?' 39/3 *Ecological Economics* 437 (2001).

49 Brian Belcher, Manuel Ruiz-Perez and Ramadhani Achdiawan, 'Global Patterns and Trends in Use and Management of Commercial NTFPs: Implications for Livelihoods and Conservation', 33/9 *World Development* 1435 (2005) and Manuel Ruiz-Pérez et al., 'Markets Drive the Specialization Strategies of Forest Peoples' 9/2 *Ecology and Society* (2004), available at www.ecologyandsociety.org/vol9/iss2/art4/.

50 See Ruiz-Pérez et al., *id.*; see also Kusters and Belcher, note 8 above and Shackleton et al., note 48 above, the latter observing that NTFPs are critical for subsistence use relating to health, nutrition, shelter and energy.

51 See Belcher and Schreckenber, note 2 above. Moreover, Shackleton et al., note 48 above at 75 notes that diversification is precisely one way to increase household security; see also Shackleton et al., note 28 above at 265.

52 See FAO, note 4 above Section A, 1.1.

53 *Id.*, at 1.6.

54 Sunderlin et al., note 48 above at 1392. At 1388, they observe that forest-dependent people are politically weak or powerless.

55 The CBD provisions regulating benefit-sharing most directly are 15.7, 19.2, 20 and 21.

56 Export orientation is particularly relevant in the context of specialized strategies, see Ruiz-Pérez et al., note 50 above.

Conflicts over various forms of ownership raise complex legal issues, and are addressed differently in different jurisdictions. Certain states, particularly in South America, have demarcated indigenous lands. In many Asian states, legal land titles are reserved for individual owners, while communities might only enjoy forms of user-rights. As the UNDRIP as a declaration is formally non-binding,⁵⁷ the most explicit international law provision on indigenous peoples' lands is found in ILO Convention 169, Article 14.2, which reads:

Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

We see that the term 'right of ownership and possession' is applied in the context of indigenous peoples. The legal effects of having such rights recognised might differ between jurisdictions, but the requirement is that the protection of these rights shall be 'effective'. The part of the provision requiring the State parties to 'take steps necessary to identify the lands' is not adequately implemented in certain States which have ratified the Convention, including Norway.⁵⁸

One of the undisputed strengths of an explicit human rights approach when addressing access to resources is the emphasis on non-discrimination.⁵⁹ This is a most appropriate recommendation, as women are more involved in gathering NTFPs than men. They also have a more responsibility for the overall running of the household, including provision of the most basic goods. None of the studies have included gender perspectives in their analysis, however. Any impeded access to NTFPs will therefore harm women relatively more than men. In order to secure an adequate subsistence, the efforts of women must be recognised and it must be

ensured that they are able to influence all relevant decision-making processes, both those taken within and outside of the communities.

Finally, on the importance of fuelwood for an adequate standard of living, the estimates on the amount of fuelwood as a source of energy indicate that ten per cent of all energy consumption globally comes from biomass and waste, representing 1149 million tons of oil equivalents (Mtoe), and estimated to rise to 1615 Mtoe by 2030.⁶⁰ Most of this is fuelwood, either pure or in the form of charcoal. Hence, there can be no doubt that wood is and will continue to be crucial for subsistence, in particular for the most vulnerable people.

4.2 Economic Development

While the primary motivation for ensuring local communities and indigenous peoples' access to and harvesting of NTFPs should be to maintain a mutual relationship between people and nature, the selling of the NTFPs on the local, national or international market can be a crucial means of improving economic development for the communities involved in the gathering and processing of NTFPs. Many forest-dependent households and communities are in a weak bargaining position, also when engaging in market transactions.⁶¹

If the price these communities receive is much below the price that can be achieved from the final purchaser, this will impede on the prospects for economic development, as there will simply be too limited income from selling the NTFPs to obtain an adequate standard of living. Several studies have recommended a more comprehensive understanding of the relevant actors involved in the distribution of NTFPs, frequently termed 'value chain', in order to identify which actors that receive the largest share of the price paid by the

57 Note, however, that UNDRIP, note 18 above, is frequently referred to, which might indicate that some of its provisions might become international customary law. Its most relevant provisions on land include Article 18, 25, 26 and 27.

58 In 2008, 18 years after the Norwegian ratification of ILO 169, the Finnmark Act, Section 29 established the Finnmark Commission to 'investigate rights of use and ownership to the land...'

59 A FAO recommendation addressing gender says: 'Gender considerations should be given appropriate importance while implementing policies and programmes relevant to NTFPs', see FAO, note 4 above, Section A, 1.8.

60 IEA and OECD, *World Energy Outlook 2007*, 592 (Paris: IEA and OECD, 2007).

61 Mirjam A.F. Ros-Tonen and Koen Kusters, Pro-poor Governance of Non-timber Forest Products: The Need for Secure Tenure, the Rule of Law, Market Access and Partnerships', in S. Shackleton et al., note 4 above at 197, noting that in the context of market opportunities, 'benefits accrue to the most powerful'.

final consumers.⁶² The latter analyses under which conditions the commercialisation approach will be successful or not, in terms of both conservation and livelihood perspectives.

FAO calls upon all relevant actors 'to ensure that decisions regarding the use of NWFPs are placed in a context that recognises their values and consequences that currently go unrecorded'.⁶³ Moreover, it was recommended to establish a system of dissemination of information on the uses and markets of NWFPs, with an international centre for this purpose; to collect and publish international statistical information on production, trade and consumption of major NWFPs on a regular basis; and to develop a system of classification of NWFPs harmonised with existing trade and industry classification systems.⁶⁴ There has not been an implementation of these recommendations concerning international statistics and classifications.

For a better recognition of the value of NTFPs, there must also be more strategic information dissemination. If better information is also made available to the primary producers, it must be expected that they will be in a better negotiation position, in order to ensure a larger proportion of the retail price for themselves.⁶⁵ One study shows that harvesters in Laos draw thirteen per cent of the retail value, said to represent a higher proportion than found in other contexts.⁶⁶

62 Anders Jensen, 'Valuation of Non-timber Forest Products Value Chains 11/1 *Forest Policy and Economics* 34 (2009); Dirk Willem te Velde et al., 'Entrepreneurship in Value Chains of Non-timber Forest Products', 8 *Forest Policy and Economics* 725 (2006), Soren Gram, 'Economic Valuation of Special Forest Products: An Assessment of Methodological Short-comings' 36 *Ecological Economics* 109 (2001), Ruiz-Pérez et al., note 49 above and Belcher and Schreckenberg, note 2 above.

63 See FAO, note 4 above, Section A, 1.5.

64 *Id.*, Section E.4, recommendations 6, 5, 2 and 7.

65 For warnings that inequalities might become more severe as a result of modernisation and marketisation of NTFPs harvesting, see J.E.M. Arnold and Manuel Ruiz Pérez, 'The Role of Non-Timber Forest Products in Conservation and Development', in Wollenberg and Ingles eds, note 8, above at 17, 26-27.

66 See Jensen, note 62 above at 40. For an overview of various studies on the total incomes generated from NTFPs, see Shackleton note 48 above at 58; the highest figure (Mogano, Limpopo state, South Africa) being an average household income of 1130 USD; and Ruiz-Pérez et al., note 49 above, particularly Table 1.

While there is little reason to doubt that unimpeded access to NTFPs will be crucial for reducing vulnerability and improving household security,⁶⁷ a more intriguing question is whether NTFPs harvesting and marketing will be a means to escape poverty permanently. Acknowledging that harvests and hence revenues differ both between households, seasons and years, a chapter summarising more than 20 years of research, finds that NTFPs will contribute to poverty elimination if the household also has other sources of income, a strategy termed 'integration of livelihoods'.⁶⁸

4.3 Natural Resources Conservation

A harmonious relationship between social and economic development and environmental protection is encompassed in the concept of sustainable development, defined as a 'process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.⁶⁹ Without establishing a mutual relationship between the social, economic and ecological spheres one cannot grasp the full content of sustainable development, but substantial harvesting from the land will affect biodiversity.⁷⁰ While there is a strong link between 'livelihood' and 'conservation',⁷¹ there are no similar relationships between 'commercialisation' and 'conservation'. The conservation classification of an area will obviously affect how NTFPs can be extracted. One study finds that more intensive extraction of NTFPs will be a result of commercialisation.⁷²

In addition to the human rights principles which define the minimum standard of conduct in any intervention,⁷³

67 See Shackleton et al., note 48 above at 75. Burton Mwamila et al., *Feasibility of Large-Scale Bio-Fuel Production in Tanzania* 119 (Morogoro and Dar es Salaam: Sokoine University of Agriculture, UDSM, Ardhi University, 2009), reporting that the total value of fuel wood and charcoal represents between 60 and 660 USD in 'use value' for an average household, representing between 25 and 92 per cent of all NTFPs.

68 *Id.*

69 See Our Common Future, note 10 above, Chapter 2, paragraph 15.

70 See Arnold and Ruiz Pérez, note 65 above at 19.

71 See Kusters and Belcher, note 8 above, Sunderlin et al., note 48 above, and Arnold and Ruiz-Pérez, note 48 above.

72 See Belcher and Schreckenberg, note 2 above at 365, 366.

73 See FAO, note 37 above.

substantive human rights must be protected, specifically the rights to adequate food, water, housing, health (including environmental hygiene)⁷⁴ and culture. For any traditional community, access to resources, and the non-depletion of resources are crucial for the enjoyment of all these rights. Therefore, an assessment of the values of the land must take into account the total value of the enjoyment of these human rights for the community as a whole.

In this context, it is also relevant that land which has not been used for cultivation for several years will have much greater biodiversity than land that is allowed to rest for a more limited number of years.⁷⁵ This illustrates that land that is seemingly degraded or at least 'under utilised', can provide a rich biodiversity, which can serve both ecological and consumption functions.

In the context of 'Resource Management and Environment', one of the recommendations to FAO, requests that 'socio-economic sustainability of NWFPs should be considered being criteria and indicators of sustainable forest management'.⁷⁶ The development of criteria for sustainable forest management can be done on the basis of substantive human rights and by ensuring that no decision is taken without these communities giving their FPIC. Moreover, there is a direct relationship between the principle of FPIC and peoples' right to self-determination.⁷⁷

As there is a relationship between traditional knowledge and the resources on which this knowledge apply, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁷⁸ measures to protect traditional knowledge are crucial. The emphasis on the need to preserve such knowledge emerged in the 1990s,⁷⁹ and such preservation might be easier if forest-depending communities enjoy secure use rights or property rights.⁸⁰ Among the FAO Recommendations is that information about such knowledge 'should be fed into data bases and dissemination systems'.⁸¹ Such systematisation of traditional knowledge in the form of data bases is controversial, as this implies that such knowledge will be available for everyone to utilise. WIPO says that 'holders of TK should not disclose their TK to third parties or to undertake or consent to its documentation or publication without fully considering the implications and possible damage to their interests'.⁸²

4.4 Cultural Preservation

The strong relationship between free and unimpeded access to all natural resources, including biological resources, and the maintenance of culture must be considered as evident, as we also have seen in the treaties, declarations and interpretative comments referred to

74 See ICESCR, Article 12.2(b); this paragraph is outlined in greater detail in General Comment 14, *The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, paragraphs 15 and 51, and General Comment 15, *The Right to Water*, E/C.12/2002/11, paragraphs 8 and 44(b).

75 See Arnold and Ruiz Pérez, note 65 above at 21; see also Shackleton et al., note 48 above at 62, referring to Dclang's study in Laos of land being fallow for one, three and 11 years, respectively. The highest biodiversity was found after 11 years, with 126 taxa, 55 of which were for food, and the lowest biodiversity was found after three years, with 13 taxa, seven of which were for food.

76 See FAO, note 4 above, Section E.1, 1. Moreover, FAO is asked to 'prepare guidelines for sustainable management and utilisation of NWFP resources' (*id.*, Section E.3, 1). Neither criteria or indicators nor guidelines, have been developed by FAO in accordance with these recommendations.

77 See ICESCR and ICCPR, Article 1.2, note 17 above. The present author concurs with Alex Page, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System' 4/2 *Sustainable Development Law & Policy* 16, 17 (2004): 'The dual concepts of collective rights and self-determination for indigenous peoples are essential in understanding how FPIC may be properly implemented'.

78 See UNDRIP, note 18 above, Article 31, encompassing 'manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds...'

79 Thomas Griffiths, *Indigenous Knowledge and Intellectual Property: A Preliminary Review of the Anthropological Literature* (Oxford and Leiden: Working Group on Traditional Resource Rights, 1993) and Martha Johnson ed, *Lore: Capturing Traditional Environmental Knowledge* (Montreal: IDRC, 1992).

80 See Arnold and Ruiz Pérez, note 65 above at 17.

81 See FAO, note 4 above, Section A.3, 1.

82 WIPO, *Recognition of Traditional Knowledge Within the Patent System. Document prepared by the Secretariat, WIPO/GTRKI/IC/7/8 1*, paragraph 2 (2004). The same document, 6, paragraph 10(vii) refers to two data bases; the 'Traditional Knowledge Digital Library' (TKDL) and the Honey Bee Network, the former which is available only for Patent Offices under TKDL Access Agreement. On intellectual property rights in the context of NTFPs, see Belcher and Schreckenber, note 2 above at 362, 363; Sarah Laird et al., 'Regulating Complexity: Policies for Governance of Non-timber Forest Products', in Shackleton et al., note 4 above at 227, 244; and Tamara Ticktin and Charlie Shackleton, 'Harvesting Non-timber Forest Products' Sustainably: Opportunities and Challenges', in Shackleton et al., note 4 above at 149, 161.

above.⁸³ There has been a neglect of the cultural significance of NTFPs,⁸⁴ but the strong relationship between culture and recognition of ownership over land has been reemphasised. General Comment no 23 of the right of minorities says: ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources...’⁸⁵ UNDRIP presents the indigenous peoples’ relationship to the land as a distinctive spiritual relationship.⁸⁶ In other words, the indigenous peoples’ belonging to their land implies a mutually reinforcing relationship between the physical and spiritual realm. Therefore, sites and natural resources have more than merely an instrumental value. The maintenance and development of indigenous peoples’ cultural heritage depends on their unimpeded access to natural resources, and any impediment in this access might constitute a direct threat to their culture. Hence, there is a direct relationship between the resource dimension of peoples’ right to self-determination and the cultural rights of these peoples.

While the above arguments apply to indigenous peoples as distinct peoples, similar concerns would apply to minorities that have an uninterrupted and historical relationship to certain lands, but are not officially recognised as indigenous peoples.⁸⁷

Moreover, which customary and collective rights that are recognised vary considerably between states. In some states, such as Indonesia, even if these rights are formally recognised, there is a limited ability to uphold these rights.⁸⁸

There has been a development over the last two decades in recognising that the indigenous peoples themselves should be actively involved in any processes relating to their traditional lands and resources, as a crucial means to maintain their culture, most explicitly through the FPIC provisions of the UNDRIP.⁸⁹ In this context, it is also relevant to observe the changes from the CBD, adopted in 1992 and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation, adopted in 2010, and which has not yet entered into force. The former requires in Article 15.5 prior informed consent from the Contracting parties, but not from indigenous peoples. The latter says that prior informed consent shall be given by the indigenous peoples, but then qualifies this by referring to domestic legislation.⁹⁰ There is no guarantee that domestic law works to the benefit of indigenous peoples.

Hence, even if the internationally binding treaty are formulated in relatively vague terms, and by substantive qualifications, there is an increasing recognition of FPIC. This recognition is also evident in international biofuel standards.⁹¹

4.5 Summary: Can Human Rights Impact Assessment be a Basis for Improved Measuring of Impacts?

We see that human rights provisions are applicable in the context of control over and unimpeded access to

83 See ICESCR, ICCPR, ILO Convention 169, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNDRIP, General Comment 12 and General Comment 23, notes 17 through 19.

84 See Shackleton et al., note 28 above at 257; see also 277. In the FAO Recommendations, culture is mentioned once: ‘The policies and related plans and regulations should acknowledge the social, cultural and economic practices and priorities of the communities’; see FAO note 4 above, Section B.1, 1 (extract).

85 See General Comment no 23, note 19 above, paragraph 7.

86 See UNDRIP, note 18 above, Article 25.

87 In accordance with UNDRIP, *id.*, preambular paragraph 2, it is the indigenous peoples themselves who have the right to ‘consider themselves different, and to be respected as such’. This must be understood to imply that it is not up to the state – but to the collectives themselves – to define their indigenity.

88 See Deininger and Byerlee, note 40 above at 42.

89 See note 20 above, which also refers to Article 16.2 of ILO 169.

90 CBD COP Decision X/1, Annex, Article 6, paragraph 3(f) (‘subject to domestic access and benefit-sharing legislation’) and Article 16, paragraph 1 (‘as required by domestic access and benefit sharing legislation’).

91 RSPO, *Principles and Criteria for Sustainable Palm Oil Production, Including Indicators and Guidance* (2007), criterion 2.3: ‘Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent’. RSB, *Principles & Criteria for Sustainable Biofuels Production, Version 2.0* (2010), criterion 12 b: ‘Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations’. Moreover, FPIC is referred to in Bonsucro, *Production Standard – Version 3.0*, 22 (2011). The notes to Principle 1.1 (‘To comply with relevant applicable laws’, which are found in Appendix 2) read (extract): ‘The more strict regulation or convention ratified by the country - national or international - should prevail’.

natural resources, primarily based on the prohibition of being deprived of one's means of subsistence and the right to an adequate standard of living.⁹² Moreover, as specified in the section on natural resources above, the aggregated value of the enjoyment of the substantive human rights, including the rights to adequate food, water, housing, health and culture, must be applied as a basis for assessing the current value of the land.

The above analysis shows that any approach that tends to view NTFPs isolated from these communities' natural and cultural environment cannot be seen as being appropriate. While many forest dependent communities are facing resource constraints, a situation where these peoples are self-sufficient by harvesting of NTFPs might be as appropriate in order to ensure for everyone an adequate standard of living as a situation where these peoples are strongly integrated into the market economy.

Moreover, there is a problem related to undervaluation, both of the land itself and of what is found on the land. The implication of this undervaluation is that rural areas continue to be viewed as unproductive.⁹³ If such valuation had been more adequate, the indigenous peoples and minorities living in the forests would have a better bargaining position vis-à-vis external actors, and states concerned would seek to protect these resources and the communities who depend upon them better than today. A human rights approach, which encompasses the *local* social and ecological impacts, will strengthen the position of these communities.

This still leaves the question on the degree to which human rights be a basis for measuring these impacts. While human rights as such only provides a minimum standard for what constitutes a life in dignity, and does not constitute in itself a measurement method, human rights impact assessment (HRIA) is a means through

which human rights will be operational in the context of investment decisions.⁹⁴

In brief, the steps of the HRIA as outlined by the Special Representative are the following and applies to the geographical area which will be affected by the activity: catalogue all applicable legislation and regulations, including customary law; describe human rights conditions; identifying likely changes resulting from the activity; address all human rights risks; and develop a management plan with baseline indicators, with mechanisms for monitoring and consultations with affected parties.⁹⁵ A similar approach has been proposed in the Guide to Human Rights Impact Assessment and Management (HRIAM), which identifies seven stages that should be part of the company's management system.⁹⁶

The main difference between an ordinary sustainability impact assessment is that a HRIA specifies the legal context and emphasises the local and social impacts, and describing these impacts by using human rights terms. Any impacts on the human right to an adequate standard of living and to cultural life, as well as the prohibition against being deprived of a peoples' means of subsistence must be by specified – and mitigated – by the means of an HRIA. As human rights do apply to

92 See ICESCR, note 17 above, Article 1.2, and note 36 above, Article 11.1.

93 Fiona Paumgarten and Charlie M. Shackleton, 'Wealth Differentiation in Household Use and Trade in Non-timber Forest Products in South Africa' 68/12 *Ecological Economics* 2950 (2009).

94 UN Special Representative on Business and Human Rights, A/HRC/4/74, Human Rights Impact Assessments – Resolving Key Methodological Questions (2007); this report responded to his original mandate, specified in E/CN.4/Res/2005/69, paragraph 1 (d) ('develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises'); see also James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessment*, Annex 2 of the report of the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, 23-24 June 2010; Hans Morten Haugen, 'Human Rights Impact Assessment in the Context of Biofuels: Addressing the Human Right to Food and the Human Right to Water' 68/1 *Nordic Journal of Human Rights* 39 (2010); Gauthier de Beco, 'Human Rights Impact Assessment' 27/2 *Netherlands Human Rights Quarterly* 139 (2009).

95 See UN Special Representative on Business and Human Rights, *id.*, paragraphs 12-16 and 23.

96 International Finance Corporation, United Nations Global Compact and International Business Leaders Forum, *Guide to Human Rights Impact Assessment and Management (HRIAM)*, 2010, available at www.guidetohriam.org/app/images/documents/Guide%20to%20HRIAM%20booklet%20English.pdf.

control over and access to natural resources, a HRIA is fully applicable in order to analyse any business activity's impact on the harvesting of NTFPs. Hence, a HRIA might be a relevant tool, both for measurement and mitigation purposes.

We will now move to a brief investigation of the accuracy of the information concerning both NWFPs and fuelwood. This is based on a presumption that the lack of reliable information can actually impact negatively on the quality of policy responses, and that the existence of such information generates better policy responses.

5 QUALITIES OF STATISTICS

There is still a poor quality of the country statistics on NTFPs. The most comprehensive assessment of all relevant aspects of forests is the Global Forest Resources Assessment (FRA), which has been undertaken regularly since 1946, with gradually improved methodology.⁹⁷ An analysis of the value of NWFPs for local consumption will be followed by an analysis of the value of use of fuelwood for local consumption.

5.1 NWFPs

Regarding NWFPs, it is reasonable to state that both the FRA 2005 and the FRA 2010 contain relatively sparse information on NWFPs. While giving separate statistics on 'Removals of non-wood forest products' and 'Value of wood and NWFP removals 2005', respectively,⁹⁸ the data contained in the relevant tables is incomprehensive,

97 The most comprehensive FRA is the 2010 assessment, see FAO, note 9 above.

98 FAO, *Global Forest Resources Assessment (FRA) 2005*, FAO Forestry Paper 147, 286-297 (Rome: FAO, 2006), gives columns for 8 different categories of NWFPs. Some countries, like Pakistan and India, give figures for 7 out of 8 categories, and Brazil give figures for 6 of 8 categories, while figures for Eastern and Southern Africa and Western and Central Africa are extremely sparse, with less than 5 per cent of the figures actually given. FAO, note 9 above at 289-93 gives overall figures for 'industrial roundwood', 'woodfuel' and 'NWFP', respectively.

but it clearly shows that harvesting of food is the most important in all regions.⁹⁹ Moreover, FAO explicitly admits that 'the reported statistics probably only cover a small fraction of the true total value of NWFPs removals',¹⁰⁰ saying that the figures are 'very unreliable'.¹⁰¹ The weak reporting by the respective states is the main explanation for this incomprehensiveness. The statistics show, however, an improvement from the FRA 2005, in line with the evaluation of the FRA 2005 on 'more comprehensive estimates of environmental, social and economic values'.¹⁰² The total recorded value of NWFPs is said to be USD 18.5 billion,¹⁰³ which is almost four times the amount recorded in the 2005 FRA, but this figure is certainly lower than the actual value of harvested NWFPs.

Hence, while acknowledging that it will be impossible to gain a full overview of the value of NWFPs – and these resources' importance for local communities and indigenous peoples' adequate standard of living and prohibition of being deprived of its own means of subsistence¹⁰⁴ – the present author concurs with the FRA 2010, stating: 'NWFPs often deserve a higher priority in the development of national poverty alleviation policies, rural development projects and forest conservation strategies'.¹⁰⁵ If accurate figures on the NWFPs were produced, this will most likely give incentives to maintain current harvesting, and seek to facilitate it better than today.

5.2 Fuelwood

Regarding fuelwood, there is a lack of information in many countries, but the number of countries which

99 See FAO, note 9 above at 140.

100 *Id.*, at 109; see also Shackleton et al., note 4 above.

101 See FAO, note 9 above at 141; see also at 105, explaining that 'data on removals are often limited to those NWFPs that are (inter-)nationally traded', which represent a 'significant underestimate of the full range of NWFPs gathered in the country'.

102 FAO, *Expert Consultation on Global Forest Resources Assessment (FRA): Towards FRA 2010 (Kotka V)* 6 (Rome: FAO, 2006). The 2010 FRA itself says that 'the amount and reliability of data probably improved significantly', See: FAO, note 9 above at 141.

103 See FAO, note 9 above at 138.

104 See ICESCR Article 11.1, note 36 above; see also ICESCR Article 1.2, note 17 above.

105 See FAO, note 9 above at 104.

provide information is higher than for NWFPs.¹⁰⁶ Moreover, the information is more comprehensive and the total figures are considerable higher in the 2010 FRA as compared to the 2005 FRA.¹⁰⁷ Comprehensive national data on fuelwood production are also given in the Energy Statistics Yearbook,¹⁰⁸ UN Data,¹⁰⁹ and FAOSTAT,¹¹⁰ respectively.

Compared with the 2005 FRA, the 2010 FRA figures on fuelwood consumption are considerably higher – and more in line with other UN statistics.¹¹¹ As the FRA is based on the countries' own data collection and reporting, this gives figures which are still too low, however.

6 CONCLUSION

The actual amounts of harvesting NTFPs represents convincing argument against the notion of 'land not being used', implying that this formulation should never

be applied. This acknowledgement must be one of many factors that must be taken into account in any push towards transfer of property rights applying to and conversion of land. Additionally, emphasis on 'forest services' or 'eco-system services', in particular climate mitigation, represents strong arguments against any land conversion, but the problem is that the emphasis is on the global environmental effects, not the local effects.¹¹²

While human rights arguments are increasingly present in policy debates relating to the protection of both the forests and the peoples living in, or depending on these forests, there actual application of human rights standards and principles is still limited. One example is the Principle launched by the World Bank, FAO, IFAD and UNCTAD in 2010,¹¹³ which speaks about rights, but does not have one reference to human rights. Another is in the context of REDD projects. Among the nine R-PINs studied, none contained any explicit human rights approach or language, and only two (Paraguay and Liberia) mention land rights or tenure in any form.¹¹⁴

While human rights standards cannot replace standards and criteria relating to *global* environmental issues, they are fully applicable to *local* environmental issues. A human rights framework, building on specific human rights provisions and human rights principles,¹¹⁵ and which by its very nature has its attention towards the most vulnerable and marginalised persons and communities, will be a more robust framework than developing standards and criteria isolated from international human rights.

Collective or common property and the control over natural resources are fully recognised by human rights. Moreover, there is an obligation on states to take measures for 'reforming agrarian systems...'¹¹⁶ This can encompass measures to secure effective protection of collective property rights and regulate the activities of

106 See FAO, note 9 above at 137 and 289-93, finding that for 'industrial roundwood' 'woodfuel' and 'NWFPs', there were 102, 72 and 47 countries, respectively, which provided information.

107 FAO, note 9 above at 138 says that the total value of 'woodfuel' was USD 17, 2 billion, which is three times higher than the total value given in the 2005 FRA.

108 United Nations, *Energy Statistics Yearbook 2006* Section 13 (New York: United Nations Publications, 2009).

109 Total production ('quantity') of fuelwood (in m³) is available at <http://data.un.org/Data.aspx?d=EDATA&f=cmlID%3aF^W%3btrID%3a01>.

110 Global, regional and national data – including import and export value, but not total production value – are available at <http://faostat.fao.org/site/626/DesktopDefault.aspx?PageID=626#ancor>.

111 The most glaring discrepancy appears for India, which is by far the country with the highest removal of fuelwood, followed by Brazil and Ethiopia. According to the FRA 2005, 3.5 million m³ of fuelwood is removed in India annually, while the 2010 FRA gives a figure 261 million m³. Also this figure, however, is lower than the other two statistics. FAOSTAT says that 299 million m³ and UN Data says that 397 million m³ of fuelwood is removed in India annually. The figures for developing countries are still too low (FRA 2010 gives an overall figure of less than 1800 million m³, while FAOSTAT gives an overall figure of more than 2100 million m³).

112 For one example, see Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, Article 17 (2009).

113 See World Bank et al., note 13 above.

114 See Dooley et al., note 29 above at 14-17.

115 See FAO, note 37 above.

116 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3 (1976). Article 11.2(a) (extract).

commercial actors' in a strict manner. While some regulation of local communities harvesting might be necessary, the states should seek to avoid overregulation, but rather seek to develop regulations based on these communities' customary law.¹¹⁷

This, however, must not imply that international human rights can be applied as a general argument for *status quo* in all situations. Rather, the ICESCR acknowledges the positive role of science and technology.¹¹⁸ Therefore, if a given local community or indigenous peoples are found to be chronically food insecure, participatory plant breeding programmes should be initiated with the view of improving the overall food production in these communities.

The article argues for seeing access to NTFPs as crucial elements in achieving an adequate standard of living and being a source for supplementary income. This approach will also be more beneficial for natural resources conservation and cultural preservation. Moreover, full observance of human rights principles, to which FPIC can be a tool, will mean substantively improved processes in any situations where ownership over land is to be transferred and land is converted to non-traditional uses.¹¹⁹ This insight should also inform the process towards the adoption of the Voluntary guidelines on responsible governance of tenure of land and other natural resources,¹²⁰ under the auspices of FAO.

117. See Laird et al., note 82 above at 248; see also Arnold and Ruiz Pérez, note 65 above at 28 and Sarah A. Laird, Rebecca J. McLain and Rachel P. Wynberg eds, *Wild Product Governance: Finding Policies That Work for Non-timber Forest Products* (London: Earthscan, 2010).

118. See International Covenant on Economic, Social and Cultural Rights, note 116 above. Article 11.2(a), saying that states shall take measures which are needed to 'improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge...' and Article 15.1(b) acknowledges the right of everyone '[t]o enjoy the benefits of scientific progress and its applications'.

119. An additional problem is that alternative means of securing an income seldom materialise, which is partly explained by fact that job generation and infrastructure promises that the investor makes, tend not to be implemented; see Deininger and Byerlee, note 40 above; see also Anonymous, 'When Others are Grabbing Your Land' *Economist* 57, 58 (2011)

120. See FAO, note 13 above.

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