

SUBMISSION TO THE UN EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

In relation to the call for submissions on access to justice in the protection and promotion of the rights of Indigenous peoples, in accordance with Human Rights Council Resolution 21/24 (Ref: A/HRC/21/24) on Human Rights and Indigenous Peoples

Office of the High Commissioner for Human Rights
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I. INTRODUCTION

1. This is a submission by Natural Justice: Lawyers for Communities and the Environment, an international NGO based in South Africa with regional offices in India, Malaysia, and New York. We welcome this opportunity to provide inputs to the EMRIP study on access to justice in the protection and promotion of the rights of Indigenous peoples, in accordance with Human Rights Council Resolution 21/24.
2. This submission consists of two parts. Part I includes inputs and experiences from several countries in Asia, Africa, and North and South America, with particular emphasis on the protection and stewardship of Indigenous peoples' customary territories and resources. These are primarily drawn from a series of legal reviews coordinated in 2012 by Natural Justice and Kalpavriksh Environment Action Group (India) on behalf of the Indigenous Peoples' and Community Conserved Territories and Areas (ICCA) Consortium.¹ It focuses on the following themes before setting out key recommendations from the legal reviews:
 - a) The relationship between access to justice and a range of other Indigenous peoples' rights;
 - b) Systemic and structural threats to Indigenous peoples' rights and their territories and resources;
 - c) Judicial systems themselves as a barrier to justice;
 - d) Landmark judgments;
 - e) Landmark legislation; and
 - f) Continuing challenges with implementation and compliance.
3. Part II suggests biocultural community protocols as an innovative tool for integrated legal empowerment to enable Indigenous peoples to access justice and to assert and affirm a range of other rights and responsibilities.

¹ Jonas, H., A. Kothari, and H. Shrumm, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as They Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*. Natural Justice and Kalpavriksh: India. Available at: <http://naturaljustice.org/library/our-publications/legal-research-resources/icca-legal-reviews>.

PART I

II. THE RELATIONSHIP BETWEEN ACCESS TO JUSTICE AND OTHER INDIGENOUS PEOPLES' RIGHTS

4. Access to justice is a procedural right enshrined in a wide range of international instruments, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of all Forms of Racial Discrimination, ILO Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, among others (see Annex).²
5. It is well-established that human rights are universal, inalienable, interrelated, interdependent, and indivisible. Just as the improvement of one right facilitates advancement of others, the deprivation of one right adversely affects the others. Substantive injustices are both symptomatic of and further contribute to procedural injustices such as access to justice. Access to justice is thus inextricably linked to the realisation of all other rights, and deprivation of it has implications for others.
6. Indigenous peoples have both individual and collective rights. As every right requires a remedy if infringed, Indigenous peoples are entitled to both individual and collective remedies.³ Access to justice can be considered a collective right of Indigenous peoples and realise that can contribute to realising the right to self-determination.
7. Indigenous peoples are securing increasingly important rights under a range of human rights, humanitarian, environmental, and other international instruments and organisations. Yet the harsh paradox is that even when hard-fought negotiations result in Indigenous peoples' rights being enshrined in law, their local effects are often muted because of the complex socio-political contexts within which communities live. For example, Linda Siegele *et al.* (2009) detail a plethora of rights relating to communities across a range of hard and soft law instruments. Their exhaustive review illustrates the scale of communities' rights agreed at the international level. However, their telling conclusion is that "good policy is just a starting point – good practice is more difficult to achieve."⁴

III. FROM INJUSTICE FLOWS INJUSTICE: SYSTEMIC AND STRUCTURAL THREATS TO INDIGENOUS PEOPLES' RIGHTS AND THEIR TERRITORIES AND RESOURCES

8. The **Doctrine of Discovery has been used throughout the world to support colonial claims of sovereignty over Indigenous peoples' territories.** It has also been used in judicial decisions to

² For more information about Indigenous peoples' rights in international law, please see: Jonas, H., J. E. Makagon, and H. Shrumm, 2012. *The Living Convention on Biocultural Diversity: A Compendium of Indigenous Peoples' and Local Communities' Rights Relevant to Maintaining the Integrity and Resilience of Territories and other Biocultural Systems*. Natural Justice: South Africa. Available at: <http://naturaljustice.org/library/our-publications/legal-research-resources/convention-on-biocultural-diversity>.

³ UNDRIP, Article 40; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Paragraphs 8 and 13.

⁴ Siegele, L., D. Roe, A. Giuliani, and N. Winer, 2009. "Conservation and Human Rights, Who Says What?", pages 47-76 in Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), *Rights-based Approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia.

further justify post-colonial governments' continued and additional claims over Indigenous peoples' lands.⁵

9. In Canada, systemic racism is a primary barrier for Indigenous peoples and hinders Indigenous conservation and governance. According to the 1996 Report of the Royal Commission on Aboriginal Peoples, "...ancient societies in this part of North America were dispossessed of their homelands and made wards of a state that sought to obliterate their cultural and political institutions. History shows too attempts to explain away this dispossession by legally ignoring Aboriginal peoples, in effect declaring the land *terra nullius* — empty of people who mattered."
10. The Indian Act (1876) continues to govern most status First Nation-Canadian relations. Its provisions dictate everything from personal identity, control over status First Nations lands and money, and powers of First Nation governments. In the past, this Act outlawed the practice of sacred ceremonies, required First Nation peoples to obtain permission from an Indian Agent to leave their reserve and made it illegal to bring claims against the government or even hire a lawyer to defend their interests.⁶
11. One of the most pervasive remnants of the Doctrine of Discovery is **conflict between statutory and customary legal systems** and resulting **lack of clarity in jurisdictions and corresponding rights and responsibilities**. Furthermore, laws compartmentalise the otherwise interdependent aspects of Indigenous peoples' ways of life by drawing legislative borders around them and addressing them as distinct segments. The state tends to view resources through a narrow lens, implementing corresponding laws through agencies that separately address, for example, biodiversity, forests, agriculture, and Indigenous knowledge systems. The result is that Indigenous peoples' rights and lives are disaggregated in law and policy, effectively fragmenting their claims to self-determination into specific issue-related sites of struggle.
12. Customary law and rights are recognised in some countries' statutory laws, but not without limitation. In Namibia, customary law is recognised in the constitution as having the same status as statutory law, but only as long as it does not conflict with the constitution and statutory laws.⁷ Similarly, in the Malaysian state of Sabah, Native Customary Rights pre-exist state legislation and continue to exist unless specifically legislated against. The Government of Sabah stands as a fiduciary (a trustee and 'protector') of the rights of all Natives.⁸ In Fiji, the abrogated Constitution (1997) recognised customary law and traditional rights to terrestrial lands as long as they are not inconsistent with any law or governing principle of the state.⁹ This illustrates a double-standard that statutory law always applies and customary law is relegated to optional or secondary application at best.

⁵ See, for example, the *Calder*, *Guerin*, *Wewaykum*, *Mitchell*, *Sparrow*, and *Van der Peet* cases in Canada. Wilson, P., L. McDermott, N. Johnston, and M. Hamilton, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 8: Canada*. Natural Justice and Kalpavriksh: India.

⁶ Wilson *et al.*, 2012.

⁷ Jones, B. T. B., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 4: Namibia*. Natural Justice and Kalpavriksh: India.

⁸ Vaz, J., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 15: Malaysia*. Natural Justice and Kalpavriksh: India.

⁹ Vukikomoala, K., S. Jupiter, E. Erasito, and K. Chand, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 19: Fiji*. Natural Justice and Kalpavriksh: India.

13. Canada and the Haida Nation have very different ideas about sovereignty, title and ownership of Haida Gwaii (off the coast of British Columbia). The Haida People are a sovereign nation and hold Aboriginal title to their territory. They have no treaty with Canada regarding either land or self-government. The 1993 Gwaii Haana Agreement states that the Haida Nation "...sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly." Despite this clear delineation of customary laws and authority, Canada has asserted sovereignty and legislative jurisdiction over the Haida People and their lands since British Columbia joined the Canadian federation in 1871.¹⁰
14. Government conservation-focused laws are a prevalent source of conflict and confusion, with state protected areas often overlapping with or subsuming traditional territories and customary laws of Indigenous peoples. In Suriname, for example, Indigenous peoples are supposed to observe the formal hunting season, but this does not always correspond to the actual mating or breeding season, which is accommodated by customary practice. Conversely, individuals who do not want to comply with customary rules for personal benefit can claim that they are not obliged to follow customary laws and rules set by the community leaders.¹¹
15. In central and northern Kenya, many new conservancies are now emerging on both Group Ranches and trust lands. Trust lands are basically un-adjudicated lands that local district-level governments hold and manage on behalf of the resident communities. This form of tenure renders these lands subject to mismanagement or misallocation by district government and prevents communities from securing land rights. For example, the Loita Forest in Narok District is a traditionally managed forest but is formally trust land, making it vulnerable to external encroachment or appropriation; it has been the subject of conflicts over jurisdictional control and use between local communities and district government for many years.¹²
16. In Fiji, while most land is held under customary landownership, marine and freshwater tenure is vested in the State by virtue of the Crown/State Land Act [Cap 132] and the Rivers and Streams Act [Cap 136]. This contradicts traditional customary law, through which traditional fishing grounds (*iqoliqoli*) belonged to adjacent communities.¹³
17. In these atmospheres of legal uncertainty and often harsh enforcement of imposed governmental rules, Indigenous peoples may invest less effort in conserving and sustainably using biodiversity and ecosystems according to their own customary rules and practices. This often corresponds with the decline of traditional knowledge, customs and traditions, as well as the loss of traditional custodianship over their territories, which makes these areas prone to 'lawlessness' and unsustainable use or depletion, including by outsiders.
18. Indeed, recognised challenges to the successful governance of Indigenous lands in Australia include balancing the conflicting priorities and expectations of kin-based customary governance

¹⁰ Wilson *et al.*, 2012.

¹¹ VIDS (Association of Indigenous Village Leaders in Suriname), 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 11: Suriname*. Natural Justice and Kalpavriksh: India.

¹² Nelson, F., 2012a. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 3: Kenya*. Natural Justice and Kalpavriksh: India.

¹³ Vukikomoala *et al.*, 2012.

arrangements with contemporary democratic governance arrangements, and negotiating the complex layers of legal and cultural authorities that result from co-existing regimes of Indigenous cultural law, statutory law, and multitudes of tenures and native title.¹⁴

19. Another structural vestige of the Doctrine of Discovery is the **interrelatedness and often mutually reinforcing nature of rights violations, particularly those stemming from pervasive barriers to secure tenure** over customary territories and resources.
20. In Africa, the vast majority of rural communities remain without formal legal recognition of their customary land rights.¹⁵ Most states claim ownership over untitled land, effectively rendering rural communities as their tenants. Recent research by the Rights and Resources Initiative demonstrates that in Africa's most-forested countries, only about 3-5% of forests are recognised as being owned or securely allocated to rural communities, compared to more than 30% in Latin America.¹⁶ As a result, under the law, community lands are widely vulnerable to expropriation.
21. This status of land and resource tenure is fundamentally linked to wider political circumstances. Indigenous peoples' and civil society organisations' abilities to influence political processes to secure land and resource rights generally remain more constrained in sub-Saharan Africa than in other regions. With its antecedents in the colonial and post-colonial state-building eras, heavily centralised executive power remains pervasive across Africa; this circumscribes the influence of representative legislative bodies, independent judiciaries, civil society organisations, and individual citizens in general.¹⁷
22. In the Malaysian state of Sabah, infringement of Indigenous peoples' rights is closely associated with difficulties in securing government recognition of claims to communal lands and resources. Injustices include forced resettlement with inadequate or no compensation, poor or no consultation in decision-making, and persistent issues of corruption. Conflicts have arisen over the loss of livelihood, and impacts on quality of living arising from the degradation of natural ecosystems by resource extraction activities and the acquisition of customary lands for large-scale projects purported to be important for 'public purposes' (for example, dams, energy plants, and roads).
23. In neighbouring Sarawak, the state refuses to recognise Indigenous peoples' pre-existing rights to their ancestral territories and serious human rights abuses continue to occur, including a troubling record of disappearances and untimely deaths of individuals and leaders that have challenged incursions onto customary lands. Communities have reported threats and intimidation by companies and contractors, physical abuse and detention by the police, and sexual abuse of women and girls by logging workers.¹⁸ This fosters a sense of isolation, helplessness, and lack of trust and faith in the government, judiciary, and general rule of law.

¹⁴ Smyth, D., and H. Jaireth, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 18: Australia*. Natural Justice and Kalpavriksh: India.

¹⁵ Alden Wily, L., 2011. "The law is to blame: The vulnerable status of common property rights in sub-Saharan Africa". *Development and Change*, 42(3): 733-757.

¹⁶ Rights and Resources Initiative, 2012. *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights*. Rights and Resources Initiative: Washington, D.C.

¹⁷ Nelson, F., 2012b. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 2: Africa Regional*. Natural Justice and Kalpavriksh: India.

¹⁸ Vaz, 2012.

24. In addition to the broader issues of tenure and resource insecurity, a significant barrier to access to justice is the **inappropriate or non-recognition of the legal personality and representative institutions** of Indigenous peoples.
25. In Suriname, access to justice is fundamentally restricted. In addition to the absence of relevant legislation on Indigenous peoples' rights, Indigenous peoples are not legally recognised as such, making it procedurally impossible to start a legal case for their collective nature.
26. The non-recognition of Indigenous peoples' rights and traditional governance structures in Suriname also creates issues for governance and management of their territories and resources, particularly regarding general legal uncertainty and marginalisation. It results in ambiguous situations where Indigenous peoples cannot legally enforce their ownership, rules and control if the government issues exploitative concessions and other permits in their territories. The communities cannot undertake long-term planning in accordance with their own visions and aspirations; customary rules and traditions are overruled with force or politically motivated court decisions; and traditional leadership is actively undermined in favour of state government structures. In the words of an indigenous resource user, "It's as if we simply do not count and exist; the animals have more rights than us".¹⁹
27. In Canada, federal legislation unilaterally defined 'Indians' without regard to the terms of the treaties and without regard to cultural and national differences among Aboriginal peoples or their right to self-determination.²⁰ Inappropriate legal recognition can be just as damaging as non-recognition by imposing generalised or homogenised codifications of inherently diverse systems. As discussed below in Section VIII, it is important to ensure that legal recognition allows for and further fosters the diversity of customary laws and institutions it is mandated to support.
28. In South America (though arguably in other regions as well), the absence of legal recognition of Indigenous peoples' rights enables governments to grant concessions over natural resources without meaningful participation in decision-making, management, or monitoring by the affected peoples. This leads to over-exploitation of resources by concession-holders, with the inevitable negative impacts on the livelihoods, cultures, and traditions of Indigenous peoples and on the biodiversity and ecosystems upon which they depend. Such violations of Indigenous peoples' rights have increased in recent years at least in part due to the intensified focus on resource exploitation through aggressive economic policies (such as in Bolivia) and free trade agreements (such as in Chile). This creates an environment of uncertainty, fear and indecisiveness in Indigenous peoples who are marginalised in law- and policy-making processes at all levels and do not have access (either *de jure* or *de facto*) to justice and remedies.²¹

IV. JUDICIAL SYSTEMS THEMSELVES ARE A BARRIER TO JUSTICE

29. National and sub-national **judicial systems are inherently discriminatory and largely inaccessible** to Indigenous peoples. For various reasons, many Indigenous peoples and supporting civil society organisations lack the awareness and capacity to make full use of their rights and the associated legislative and judicial systems. Some countries do not have enough qualified and experienced lawyers able to take on cases involving Indigenous peoples. Conversely, governmental and private interests can be very effective at using the law and

¹⁹ VIDS, 2012.

²⁰ Wilson *et al.*, 2012.

²¹ Lovera, S., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 6: Americas Regional*. Natural Justice and Kalpavriksh: India.

judicial systems to further their own interests, often at the expense of Indigenous peoples and their territories and resources.

30. As described above, many Indigenous peoples cannot show standing before the law due to the lack of recognition of their legal personality and representative institutions. This deprives them of the opportunity to defend their individual and collective rights and interests in court. In Suriname, for example, twelve members of the Indigenous community PK filed a complaint in 2003 against the State Suriname and a mining company S., regarding gravel mining in the ancestral territory of the community causing harm to the community members' livelihood (*Community members versus the State Suriname and mining company S*). The judge's decision denied the plaintiffs' claim as well as the company's counterclaim, partly because the community members did not (in the court's view) have the status to claim the measures requested.²²
31. Judicial systems operate on the basis of lawyers, judges and administrators deciding what's best for Indigenous peoples rather than them deciding for themselves through an appropriate system that responds to their particular situation. In essence, judicial systems undermine the right to self-determination and perpetuate a patriarchal system of 'trusteeship' between peoples and the state (see paragraph 11).
32. The length of time that court cases take and their associated costs (including financial costs of lawyers as well as costs for time away from daily activities, travel from rural areas, communication with legal advisors, and so on) can be significant deterrents, especially when cases are against parties with seemingly limitless funds and political clout to challenge adverse decisions.
33. For example, in Malaysia, most cases involving Indigenous peoples have only been brought to the courts after the plaintiffs have exhausted all other means of seeking recourse, including reports to the police and local government, appeals to local representatives, appeals through the media, and direct action such as setting up blockades to prevent access to forested lands by bulldozers and heavy machinery.
34. The majority of cases involve the acquisition of or entry into customary lands by corporations and government entities without the knowledge or consent of Indigenous peoples. There are over 200 such cases ongoing in Sabah, a similar number in Sarawak, and a sizeable number being brought by the Orang Asli in Peninsular Malaysia. These cases would have been extremely difficult for Indigenous peoples to pursue without the commitment and persistence of pro bono lawyers and social justice NGOs. The exhausting, frustrating and frequently demoralising process typically drags for years; even after a successful judgement, results can be overturned in the extended appeals process.
35. It is common for plaintiffs to abandon the process mid-way. They feel intimidated by the unfamiliarity and inaccessibility of the court process and the sustained drain on resources from repeated court appearances. Many cases outlive their plaintiffs. Court cases also impose a heavy burden on the judiciary to uphold the letter and the spirit of the law; this burden is not always upheld due to the highly political nature of cases against the government and powerful private sector interests.²³

²² VIDS, 2012.

²³ Vaz, 2012.

36. Similar challenges, constraints, frustrations, and disappointments are found in Australia in the context of statutory and native title land and sea claims. These include, among others, high financial cost of pursuing claims; excessive time required to achieve an outcome (often 10 years or more); emotional trauma of providing evidence about cultural connection to Country as part of land claim hearings; passing away of knowledgeable elders before land claims have been finalised; disappointment and grief when a claim is unsuccessful despite years of emotionally draining court proceedings; lack of resources and capacity to manage or benefit from land once it is successfully claimed; social and economic divisions created within Indigenous communities as a result of successful claims benefitting some groups and not others; and disappointment that successful land claims may not bring an end to social and economic marginalisation for Indigenous groups.²⁴
37. For these reasons, among others, some Indigenous peoples no longer have confidence in state judiciaries and turn to customary mechanisms instead to resolve disputes. This is the case for Indigenous pygmies in North Kivu (Democratic Republic of the Congo), who prefer to uphold justice in accordance with their traditional way of life and communal nature of their relationships and shared values. The lack of confidence in the provincial court system also reinforces the feeling of self-righteousness ('auto-justice') in these communities, and they tend to prefer the community way of conflict resolution. Such customary justice systems within the community generally take the form of a council of elders, wise men, or consultative committee.²⁵
38. As noted in Section V below, there are an increasing number of judgments being handed down by regional and national courts that are supportive of Indigenous peoples' rights. However, even when Indigenous peoples win cases, enforcing the judgements can be extremely challenging. This is often in part because of acute disrespect for the rule of law and corruption, which further undermine the integrity and effectiveness of the judicial system.
39. Landmark cases remain isolated examples against a backdrop of court-sanctioned injustice. Courts should not be the bastions of the privileged and must remain independent. Upholding the rule of law at all levels is fundamental to a functioning legal system that protects the rights of its citizens, rather than one that further entrenches the confluence between business and the state.²⁶

V. LANDMARK JUDGMENTS

40. A growing body of jurisprudence emerging from regional, national and sub-national courts supports the rights of Indigenous peoples, even when formal recognition under state law is lacking. This illustrates a concerted effort by certain judges and courts to understand and recognize the broad relationship between Indigenous peoples and their territories, which forms a fundamental basis for their cultures, spiritual life, economic survival, and the ecological integrity of their customary territories and resources.
41. The 2007 Inter-American Court of Human Rights decision on *Saramaka v. Suriname* was a landmark judgment for the **recognition of the collective legal standing and juridical personality** of the Saramaka people.

²⁴ Smyth and Jaireth, 2012.

²⁵ For more information, please see the joint submission by Natural Justice and PIDP-Kivu in response to the same call for submissions to EMRIP.

²⁶ Jonas, Kothari, and Shrumm, 2012.

42. At the heart of the case was the lack of state recognition that the Saramaka people can enjoy and exercise property rights as a community. The Court observed that other communities in Suriname have similarly been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered that they did not have the legal capacity necessary to request such protection. This placed the Saramaka people in a vulnerable situation where individual property rights may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their property rights recognised under Article 21 of the American Convention on Human Rights (1969).
43. In its operative decisions, the Court ordered Suriname, among other things: to delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws; to abstain from acts until delimitation, demarcation, and titling has been completed, unless the State obtains the free, informed and prior consent of the Saramaka people; to review existing concessions; to grant legal recognition of the collective juridical capacity and personality of the Saramaka people, in accordance with their communal system, customary laws, and traditions, and to guarantee the rights to access to justice and equality before the law; and to adopt legislative, judicial, and administrative measures to recognise, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied.
44. Notably, the state of Suriname had argued that it had not legally recognised Indigenous and tribal peoples' rights to the use and enjoyment of property in accordance with their system of communal property because of lack of clarity of the Saramaka people's land tenure system, and sensitivities regarding 'special treatment'. It also noted that although a judicial decision could recognise collective property rights, the members of the Saramaka people had refused to apply to domestic courts for said recognition. The Inter-American Court made clear that first and foremost, a distinction should be made between the state's duty under Article 2 of the American Convention on Human Rights to give domestic legal effect to the rights recognised therein, and the duty under Article 25 to provide adequate and effective recourses to remedy alleged violations of those rights. The Court further observed that although so-called judge-made law may certainly be a means for the recognition of the rights of individuals, particularly under common-law legal systems, the availability of such a procedure does not in and of itself mean that the State has fulfilled its obligation to give legal effect to the rights recognised in the American Convention. In other words, **the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights in statutory law.**²⁷
45. This judgment is of utmost importance not only for Indigenous and tribal peoples of Suriname and of other countries that have accepted the jurisdiction of the Inter-American Court, but also for other peoples around the world as this judgment is now part of established jurisprudence on the rights of Indigenous peoples and their collective legal standing.
46. The landmark ruling on the **Endorois case** issued by the African Commission on Human and Peoples' Rights (ACHPR) in February 2010 was one of the most significant developments in African treatment of community land and resource rights. In this case, the Endorois community, a sub-group within the Kalenjin ethnic group of Kenya's Rift Valley region, were evicted by the Kenyan government in the 1970s to make way for Lake Bogoria Game Reserve's establishment. Following many years of domestic legal action to challenge their eviction and reclaim their land, the ACHPR heard the case and found in favour of the community, declaring their expulsion

²⁷ VIDS, 2012.

illegal. The ACHPR issued a broad ruling which recognised the community's collective rights to their ancestral land and ordered a full remedy to be provided by the Kenyan government.

47. Minority Rights Group International, which assisted the Endorois in the case, notes that the ruling was the **first legal recognition of an African Indigenous people's rights over traditionally owned land**, and that although the decision did not award a full remedy to the Endorois community, it significantly contributed to better understanding and **greater acceptance of Indigenous peoples' rights in Africa**²⁸ and may facilitate the pursuit of justice by other local communities with similar grievances and land claims.
48. Similarly, co-counsel Cynthia Morel (2010) notes that the case is a landmark not only in terms of communities' ancestral land rights, but also in the recognition of an African form of Indigenous identity comparable to that which has emerged in other regions, particularly Latin America.²⁹
49. The Endorois case also highlights the **role of the ACHPR in advancing human rights** more generally **and community land and resource rights** in particular **at the regional level**.³⁰ The ACHPR, the region's leading human rights monitoring and adjudicative body, was established in 1987 as the Organization of African Unity's (now African Union) mechanism for promoting adherence to the 1981 African Charter on Human and Peoples' Rights. It is open to applications from a wide range of parties, whether or not they were directly affected by the alleged human rights violations, although its rulings are non-binding and implementation remains a challenge. In 1998, in order to provide a stronger regional enforcement framework, the African Court on Human and Peoples' Rights was established; although has not yet become meaningfully operational, it may also evolve into a more significant judicial institution. The ACHPR also has a Working Group of Experts on the Situation of Indigenous People/Communities in Africa, which has arguably influential, particularly in providing advisory opinions and legal justification for African states to endorse the UN Declaration on the Rights of Indigenous Peoples.³¹ The African Peer Review Mechanism under NEPAD is another significant regional initiative which is at least encouraging more open dialogue around critical governance issues. These developments illustrate how African regional institutions are gradually becoming more active and more receptive in ways that create greater opportunities to pursue justice and secure land and resource rights at that scale.³²
50. Aboriginal title (also referred to in various countries as Indigenous title, native title, original Indian title, or customary title) is a common law doctrine that the land rights of Indigenous peoples to customary tenure persist after colonial powers assumed sovereignty. The requirements of proof for the recognition, content and methods of extinguishing aboriginal title, as well as the availability of compensation in the case of extinguishment, vary significantly by jurisdiction. A number of important judgements have been handed down by national courts in Commonwealth countries affirming aboriginal title, including Botswana (*San-Central Kalahari Game Reserve Cases*), South Africa (*Richtersveld Community v. Alexor Limited*), Belize (*Cal v. Attorney General*), Canada (*Delgamuukw v. British Columbia*), and Australia (*Mabo v. Queensland (No. 2)*).³³

²⁸ Claridge, L., 2010. *Landmark ruling provides major victory to Kenya's indigenous Endorois*. Briefing. Minority Rights Group International: London.

²⁹ Morel, C., 2010. "Conservation and Indigenous Peoples' Rights: Must one necessarily come at the expense of the other?" *Policy Matters*, 17: 198-205.

³⁰ Nelson, 2012b.

³¹ Wachira, G. M., 2008. *African Court on Human and Peoples' Rights: Ten Years on and Still No Justice*. Minority Rights Group International: London.

³² Nelson, 2012b.

³³ Jonas, Kothari, and Shrumm, 2012.

51. As an example of a national judgment regarding the legal status of Indigenous peoples' institutions, the Fijian Court of Appeal approved the decision in *Waisake Ratu No 2 v. Native Land Development Corporation & Anor CA No 801/1984 Civil Action No 580 of 1984*, which considered that the *mataqali* or a *tokatoka* were not institutions alien to the applied law of Fiji. Justice Cullinan stated that the *mataqali*, as well as all the individual divisions of the Fijian people, had been recognised as a central proprietary unit by the statute law of Fiji for over a hundred years and therefore could not be regarded as alien entities to formal law.³⁴

VI. LANDMARK LEGISLATION

52. A number of recent legislative developments at the national and sub-national levels are of particular note for recognition of Indigenous peoples' rights, including self-government and jurisdiction over customary territories and resources, application of customary law, and use of customary dispute resolution mechanisms. Select examples are outlined below.

53. The 1987 Constitution of the **Philippines** states that within the framework of national unity and development, the government is mandated to address social justice and equity issues affecting the farmers, fishers, and Indigenous peoples, who together constitute the vast majority of the poor in the country. The national government subsequently enacted a number of reform legislations, including the landmark 1997 **Indigenous Peoples' Rights Act (IPRA)**. IPRA provides Indigenous peoples with a bundle of rights, including to ancestral domains and lands, self-governance and empowerment, social justice and human rights, and cultural integrity (Sections 4 to 37). Of particular relevance to access to justice, Section 63 provides that customary law, traditions and practices of Indigenous peoples shall be applied first with respect to property rights, claims of ownership, hereditary succession, and settlement of land disputes, and that any doubt or ambiguity in the interpretation thereof shall be resolved in favour of the Indigenous peoples. Section 65 states that customary laws and practices shall be used to resolve disputes involving Indigenous peoples.³⁵

54. In **Sabah** (Malaysia), the **Native Courts Enactment** (1992) constituted the native court system to adjudicate *adat* (customary) laws throughout Sabah. The native courts have often focused on moderating intra-community interactions under native law, but are increasingly seen as relevant for conserving sites of historical and cultural importance and verifying ownership and rights to land and resources. Legal pluralism in the context of land tenure is problematic in practice, however, because unless land is expressly titled, it is owned and managed by the state,³⁶ and the fast-tracking of communal titles hand-in-hand with joint ventures has raised significant concerns over the past few years. Despite this and other practical shortcomings, the native court system (which also exists in Sarawak) nevertheless offers a less expensive and more accessible alternative to other judicial systems in Malaysia.³⁷

55. In **India**, the **Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006** has been revolutionary in enabling the *gram sabha* (village assembly) to play an important role in a number of areas, from initiating proceedings for the recognition of forest rights (Section 6(1)) to providing consent to resettlement plans (Section 4(2)(e)). This breaks

³⁴ Vukikomoala *et al.*, 2012.

³⁵ Pedragosa, S., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 16: The Philippines*. Natural Justice and Kalpavriksh: India.

³⁶ Vaz, 2012.

³⁷ Lasimbang, J., 2010. "Indigenous Peoples and Customary Law in Sabah, Malaysia", pages 38-43 in *Indigenous Affairs: Development and Customary Law*. International Work Group for Indigenous Affairs: Copenhagen.

from the past, in which authorised government officials only played this role. The process for granting forest rights, outlined in Section 6, involves various stages of approval and clearance starting with the *gram sabha* (Section 6(1)) and a number of divisional, sub-divisional, and district-level committees comprised of representatives of select government departments as well as the local *panchayats* (local self-governments). This ensures that decision-making powers are not held exclusively by the forest department with jurisdiction over the forests in question.³⁸

56. In the 2009 **Constitution of Bolivia**, there is clear and unconditional formal recognition of the territorial rights and autonomy of Indigenous peoples. Article 2 states: “Considering the pre-colonial existence of nations and original Indigenous peasant peoples and their ancestral dominance over their territories, the free determination within the framework of the unity of the State is guaranteed, which consists of their right to autonomy, self-government, their culture, the recognition of their institutions and the consolidation of their territorial entities, in accordance with this Constitution and the Law”. The right to collective title over lands and territories of Indigenous peoples is recognised in Article 30 and further elaborated in Article 403.
57. The Constitution also recognises the possibility for Indigenous peoples to apply their own norms, administered by their representative structures, and the definition of their development according to their cultural criteria and principles of living harmoniously together with nature. Article 179 of the Constitution recognises that the jurisdiction of Indigenous peoples is seen as equal to the jurisdiction of the state, and Article 190 subsequently recognises the jurisdictional functions, principles, and procedures of Indigenous peoples. Indigenous authorities also have a clear role in the management of water resources on their territories, which are considered a renewable natural resource over which they exercise full rights.³⁹
58. In **Kenya**, the adoption of the 2009 **National Land Policy** and the 2010 **Constitution** and the envisioned transformation of trust land to community land together have the potential to greatly enhance the security of Indigenous peoples’ territorial and resource rights, as well as improve wider access to justice and public accountability, particularly in relation to state protected areas and natural resources.⁴⁰
59. The Ogiek hunter-gatherers may benefit both from Kenya’s new Constitution and the ACHPR’s Endorois ruling. The Ogiek live in highland forests that have progressively been gazetted as National Parks or Forest Reserves, making them squatters on government land with their customary rights unacknowledged and extinguished. They have filed at least six court cases to challenge this and reclaim their land rights, but have faced delays and hostile rulings from the Kenyan judiciary. Now, however, the Endorois case may present an opportunity to challenge these rulings outside of Kenya, and Article 63(d)(ii) of the 2010 Constitution also seems to support Ogiek interests by including “ancestral lands and lands traditionally occupied by hunter-gatherer communities” within the definition of community lands.⁴¹

³⁸ Pathak Broome, N., S. Bhutani, R. Rajagopalan, S. Desor, and M. Vijairaghavan, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 13: India*. Natural Justice and Kalpavriksh: India.

³⁹ Vadillo, A., and C. E. Miranda, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 7: Bolivia*. Natural Justice and Kalpavriksh: India.

⁴⁰ Nelson, 2012a.

⁴¹ Nelson, 2012a.

VII. CONTINUING CHALLENGES WITH IMPLEMENTATION AND COMPLIANCE

60. In many countries, there is a **significant gap between rights and obligations agreed at the international level and what is actually enacted at the national or sub-national level**. The mere inexistence of statutory laws and judicial mechanisms for recognising and supporting Indigenous peoples' rights is used by states as justification for continued violations.
61. Whether or not states have ratified or adopted the international instruments plays a role to an extent, but this argument does not hold vis-à-vis certain standards and rules that are now considered customary international law. Even states that are not parties or signatories to specific instruments in which such rules are embodied are still bound by them. A recent report of the International Law Association found that **several provisions of UNDRIP correspond to rules of customary international law**, including rights to self-determination, self-government (including their own institutions), traditional lands and resources, reparation and redress for wrongs suffered, and fairly negotiated treaties to be honoured and implemented in respect of the Indigenous negotiators' spirit and intent, among others.⁴²
62. In Suriname in particular, the Inter-American Commission and Court of Human Rights have both acknowledged and rejected the insufficiency of state legislation's recognition of Indigenous peoples' self-governance structures, self-determination, and right to legal representation through their own freely chosen institutions. Several cases before national judges have been unsuccessful for various reasons, including due to procedural aspects such as the impossibility of representation of communities as such (as collectivities with rights) or because judges have 'not been able to find support in the law' for claims of violations of Indigenous peoples' rights.
- Similarly, traditional knowledge is not legally protected in Suriname and there are sufficient examples of biopiracy, including by well-known international organisations that are well-aware of international standards and best practices but simply claim that they are acting in accordance with Surinamese legislation and therefore doing 'nothing illegal'. The legal environment in Suriname related to the recognition of Indigenous and tribal peoples is thus discriminatory and lagging far behind international norms and standards. This in turn undermines Suriname's international commitments and responsibilities with respect to upholding human rights and the rule of law, as well as in relation to the conservation and sustainable use of biological diversity and the broader environment.⁴³
63. At the heart of many continuing challenges to implementation and compliance with Indigenous peoples' rights is the **failure to respect the rule of law**. This ranges from blatant failure to respect treaties and other arrangements with Indigenous peoples to broader and more systemic issues such as corruption in all stages and levels of decision-making.
64. Canada in particular has failed to respect the rule of law with respect to Aboriginal rights and interests. Canada failed to negotiate treaties in broad swathes of the country (as required by the Royal Proclamation of 1763) and continues to ignore its obligations under this law, evidenced by the ongoing occupation and development of lands in Canada that remain under Aboriginal title. Canada and its provinces do not consult on a regular basis, as required by Canadian common law and various decisions of the Supreme Court. This is an ongoing source of frustration and litigation for many Indigenous peoples in Canada.

⁴² International Law Association, 2010. *The Hague Conference on the Rights of Indigenous Peoples: Interim Report*. Available at: <http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D>.

⁴³ VIDS, 2012.

65. In addition, Canada has failed to respect the spirit and intent of treaties that were signed with Indigenous peoples. Treaties of Peace and Friendship in the eastern part of the country, for example, were long presumed by Canada to include land cessions to the Crown. Only relatively recently (in the past 30 years), Canada has bowed to pressure from Indigenous peoples and the Courts to enter into negotiations with peoples of those territories. Challenges also remain in the case of treaties that explicitly transfer land to the Crown, as many Indigenous peoples argue that the negotiations were not undertaken fairly or accurately transcribed into English.⁴⁴
66. In Tanzania, governance legislation and forest policy are strongly supportive of devolved forest management and the Forest Act of 2002 provides communities rights to harvest timber based on a management plan and right to retain 100% of the revenue. This has led to the establishment and recognition of extensive forest-based community conserved areas at the village level. Despite this success, the sustainability of these Village Land Forest Reserves (VLFRs) is imperilled because most are not yet able to generate revenue from sustainably harvesting the valuable timber stocks they possess, despite the strong desire of many communities to gain such economic benefits. However, the problem lies not in the laws themselves but in informal processes and governance relations. Both district and national officials often benefit directly from the areas established as VLFRs and the timber therein, through either formal or informal means (for example, issuance of harvesting licenses, and bribes and shares in timber companies, respectively); nearly all logging carried out is nominally illegal. This creates incentives for higher-level government officials to create additional administrative and bureaucratic barriers to prevent communities from effectively implementing their VLFRs in ways defined by legislation. The rule of law is thus very weak; compounding this is communities' limited knowledge of their rights and few functional judicial means of pursuing them. Administrative officials' self-interested interpretations of the law make the distinction between *de jure* and *de facto* reality of limited meaning.⁴⁵
67. Hand-in-hand with failure to respect the rule of law is the **impunity of business interests**. Legislation and court decisions that recognise **Indigenous peoples' rights are generally the first to be violated when there are more powerful interests at stake**. Such interests are usually driven directly by the private sector, but can also emanate from government initiatives 'for the public good' such as strictly protected areas, large-scale infrastructure, and military presence.
68. In the Philippines, the greatest threat to Indigenous peoples' rights and territories is the Philippine Mining Act of 1995. While the law allows for the rights of Indigenous peoples to their ancestral lands as under the Philippine Constitution, recent and existing mining activities have displaced many Indigenous communities, destroyed their cultural and sacred sites, instigated massive social conflicts (including within and between communities), and resulted in torture and extra-judicial killings of Indigenous leaders and activists, among other gross violations of human rights.
69. The Republic Act No. 6657 (Comprehensive Agrarian Reform Law, as amended by RA 9700) was originally intended as a social justice measure to correct the historical injustice that the peasantry has suffered under the hands of landlords and plantation owners in the Philippines. However, it is increasingly abused to deprive Indigenous peoples of their lands. In many cases, poor farmers are being used against Indigenous peoples to foment land conflicts that often result in violence, and the land eventually ends up back with the landowners or their corporations.

⁴⁴ Wilson *et al.*, 2012.

⁴⁵ Nelson, 2012b.

70. Overall, whenever there is a conflict between the Philippines' landmark IPRA and other laws, ensuing harmonisation in implementation almost always results in the subjugation of the IPRA provisions and with it the rights of Indigenous peoples. This has been the case for IPRA vis-à-vis both the Comprehensive Agrarian Reform Law and the Philippine Mining Act.⁴⁶
71. Indigenous peoples throughout Malaysia have faced enormous challenges to securing recognition of their customary rights to land. Although there are provisions in state and federal laws that acknowledge the existence of *adat* (customary laws) and native land rights, these have not consistently translated into secure tenure. It has instead been the norm for these rights to be limited in their interpretation, with the strength of claims watered down in tandem with increasing competition for and expropriation of land and natural resources. In Sabah in particular, conflicts between Indigenous peoples and the private sector or government agencies typically arise from contested claims over who has rights to an area or resource. Invariably, Indigenous peoples are at a disadvantage due to the fact that tenure security continues to elude them as a result of the slow registration process with the Department of Lands and Surveys.
72. The broader context of these struggles is the Malaysian state's preoccupation with modernisation, economic development, and deriving revenue from its primary resources to meet the needs of a growing population and administration. This has been manifested in massive forest exploitation, industrial agriculture schemes (primarily palm oil), and highly-visible infrastructure projects such as dams, highways, and airports, which often overlap with and appropriate Indigenous peoples' lands. Laws enabling land acquisition for public purpose have been used to force the resettlement of Indigenous peoples; scant compensation (if any) is offered for their loss of livelihoods and sometimes doesn't materialise at all.⁴⁷
73. In Fiji, Indigenous peoples generally do not have legal authority to fully restrict access to their customary territories and resources as they see fit. Although native Fijians have land tenure, this right does not exist below the high tide mark or for freshwaters, though a right of access is acknowledged. These gaps in legal recognition could potentially be filled with new protected area legislation (development of which has been approved by the Fiji Cabinet) that could grant greater recognition to Indigenous conservation measures. However, this would need to be reconciled with provisions under current legislation whereby protected area status can be overturned in the interest of national government. For example, the current Mining Act gives the Director of Mineral Resources broad powers to issue prospecting licenses over land areas without owner consent and to declare a site less than 250 hectares a mining site if it has 'importance to the nation', even if it is in a gazetted protected area.⁴⁸
74. The Bolivian legal framework is undoubtedly one of the most advanced for its recognition of Indigenous peoples' territorial rights and autonomy. However, the practice has been very different, with a clear tendency to prioritise the interests of powerful elites over the rights and needs of Indigenous peoples. The Bolivian Government has combined a discourse of defending the 'rights of Mother Earth' and the need for a *buen vivir* (good life) in harmony with nature with an aggressive economic policy that prioritises the exploitation of fossil fuel, mineral, and other natural resources. The promotion of mega-projects within the Initiative for the Integration of Regional Infrastructure of South America has been accompanied by a watering down of environmental regulations and has led to a large number of social conflicts (for example, the massive protests against the proposed road through the *Territorio Indígena y Parque Nacional*

⁴⁶ Pedragosa, 2012.

⁴⁷ Vaz, 2012.

⁴⁸ Vukikomoala *et al.*, 2012.

Isiboro Secure, TIPNIS). Where Indigenous peoples stand up to such projects, their rights are often simply ignored and sometimes they are even accused of creating the conflicts.⁴⁹

75. In Canada, the federal and provincial governments have seized lands from First Nations reserves or leased these lands to non-Indigenous people on numerous occasions. For example, the 1996 Report of the Royal Commission on Aboriginal Peoples found that the federal government issued an Order in Council in 1919 that allowed them to expropriate any reserve lands that were not being cultivated 'or otherwise properly used'. Approximately 85,000 acres of reserve lands were taken under these provisions, some of which was given to non-Indigenous veterans returning from the First World War for homesteading. Conversely, Indigenous veterans were not eligible for that designated land, as it was illegal for them to homestead. Other lands have been expropriated for military bases and national parks, among other things.⁵⁰
76. Even the most progressive provisions are still subject to poor or **inappropriate implementation**, particularly through the **imposition or standardisation of rules, institutions, and procedures** that effectively contradict the initial intention of the law. This is often due to lack of understanding of the complexity and diversity of customary laws and practices amongst the administrators or government officials tasked with implementation of related statutory laws.
77. In Sabah (Malaysia), Section 35 of the Inland Fisheries and Aquaculture Enactment 2003 specifically allows for the declaration and recognition of the Indigenous system of river and fisheries management (*tagal*). *Tagal* systems have broad similarities, but they are also diverse, varying according to different geographic, biological, and cultural settings. The strength and adaptability of each system lies in long-standing resource management practices and ongoing observations in specific localities. The state Department of Fisheries supports, facilitates, and promotes *tagal* by serving as a technical advisor to elected *Tagal* Committees, carrying out research to further improve the system, conducting training and public education, and providing material assistances such as signboards to the *Tagal* Committees. Enforcement of prohibitions is through customary laws backed by the Native Court.
78. However, there are concerns that the institutionalisation and standardisation of *tagal* rules through the formation of a state-wide *Tagal* Committee weakens local governance which is based on *adat* and generations of traditional ecological knowledge. By definition, this cannot possibly reflect the traditional and localised nature of customary laws. More needs to be done to document (rather than codify) the highly localised nature of customary laws and different *tagal* systems so that the traditional values inherent in the practice are not lost in the enthusiasm to 'scale-up' the approach through standardisation and commercialisation.⁵¹
79. In India, the provision of Community Reserves in Section 36 C (1) of the Wild Life (Protection) Act 1972 (amended in 2002) recognises local people's conservation efforts. However, the Act does not entrust them with the responsibility of continuing their practices and institutions and instead has imposed a new uniform institutional structure. Again, the standardisation of rules, institutions, and procedures undermines otherwise highly localised customary laws and practices that are specifically attuned to respective places and contexts.
80. In addition to these structural and institutional challenges, implementation and compliance are further hindered by **lack of awareness and capacity** of Indigenous peoples and supporting civil society organisations **to engage in legal and judicial systems**. Key contributing factors include

⁴⁹ Vadillo and Miranda, 2012.

⁵⁰ Wilson *et al.*, 2012.

⁵¹ Vaz, 2012.

geographic isolation and **lack of access to information, communication technology, and free press.**

81. In Suriname, basic awareness of the existence of international standards and rights is limited to people who follow international processes *ex officio* and is not at all prevalent among Indigenous peoples themselves. Indigenous organisations and NGOs also have limited human and operational capacity due to insufficient funding and opportunities to access information about such standards and important developments such as regional judgments.
82. Despite the rapid pace of change experienced in the state, the majority of Indigenous peoples in Sabah (Malaysia) are relatively isolated from mainstream communications because they are scattered in remote rural areas. Access to modern and independent print and digital media is limited or sporadic. Information enters villages mainly via extension activities of government agencies, word-of-mouth from neighbours or visitors from urban centres, and to some extent, the radio. Organisations working to empower communities are also hampered by insufficient resources to achieve wider coverage amidst such communication and geographic barriers.⁵² These factors have hampered the development of a more coordinated and vocal Indigenous political movement and communities have tended to be preoccupied with their own concerns despite there being a broad similarity of problems facing Indigenous peoples across Sabah.
83. There is also a strong correlation between a community's level of education, experience, and networks with their ability to assert their rights. For example, Indigenous minorities like the Bonggi of Pulau Banggi who do not have educated spokespersons and leaders have been less successful in preventing large-scale land development, which has significantly impacted their lives and lands, including damaging sacred burial sites. Such groups also feel more defenceless against partnerships of state bodies and their corporate partners that are able to facilitate access to resources on customary lands despite local protests.

VIII. RECOMMENDATIONS FROM THE LEGAL REVIEWS

84. The following recommendations (drawn from the legal reviews referenced in Paragraph 2 above) are directed towards government officials and legislators, judiciaries and lawyers, and Indigenous peoples' and civil society organisations.

Recommendations for Government Officials and Legislators:

85. **Respect the rule of law and uphold all human rights.** States should ratify and ensure effective compliance with international human rights instruments, recognising and formalising the rights of Indigenous peoples and major groups like women in accordance with international standards and obligations. States should also ensure transparency and accountability in all matters relating specifically to Indigenous peoples' rights, including allowing UN Special Rapporteurs and other international investigation and monitoring mechanisms to enter their countries, and ensure the rights to freedom of speech, assembly, information, and independent media. This may also necessitate constitutional reform to create a more enabling legal framework for Indigenous peoples' rights.
86. **Recognise and respect Indigenous peoples' rights to self-determination and customary and collective land and resources.**

⁵² Vaz, 2012.

87. **Recognise Indigenous peoples' customary laws, decision-making processes, and representative institutions** and treat them as **equally valid and legitimate** as (if not more so than) their statutory counterparts.
88. **Ensure that any legal recognition of customary laws and practices does not codify or standardise them** but creates a flexible system that truly responds to and is shaped by the diversity of cultures and systems it aims to protect and support.
89. **Improve implementation of existing legislation by harmonising laws and undertaking institutional reform.** This includes harmonising the full range of relevant laws as a cohesive framework, eradicating conflicts between laws and implementing agencies (such as between environmental and economic development), and ensuring that they are implemented in an integrated manner, rather than undermining each other's mandates and jurisdictions for the benefit of the few. Ensure that Indigenous peoples' rights are prioritised rather than first disregarded when harmonising with more powerful laws, agencies, or interests.
90. **Government agencies with mandates or jurisdictions related to Indigenous peoples' rights should be strengthened and supported** (where appropriate) **and closely monitored to ensure compliance with the full extent of Indigenous peoples' rights under UNDRIP and customary international law**, even if not nationally legislated for. In situations where such agencies have been complicit in or directly contributed to rights violations, they should be reformed (for example, enabling Indigenous peoples to fill top positions through a transparent and inclusive process) and should utilise customary mechanisms for dispute resolution, reconciliation, and redress with the aggrieved Indigenous peoples.
91. **Establish and support independent positions, bodies, and mechanisms** such as commissioners, monitors, national inquiries, tribunals, and truth and reconciliation commissions. **Recommendations and reports** of these and other existing bodies such as national human rights institutions **should be openly discussed with the intention to have them approved and adopted** by the highest levels of government in order to give them legal weight and to bestow responsibility and mandates upon specific agencies or officials.
92. **Recognise and support decentralised approaches to legal aid and legal empowerment** such as paralegals, public hearings, and biocultural community protocols.

Recommendations for Judiciaries and Lawyers:

93. **Ensure the independence of the judiciary**, particularly from political and business interests.
94. Undergo training and capacity-building programmes to **increase cultural understanding and sensitivity** towards Indigenous peoples.
95. **Organise exchanges and collaborative activities** (such as conferences or trainings) **with judiciaries and lawyers from other jurisdictions** to share landmark cases, new developments in international, regional and national law and jurisprudence, and key issues in other areas of law (such as environmental) that also relate to Indigenous peoples.
96. Ensure that all **proceedings** and interactions are conducted **in a language fully understood by Indigenous plaintiffs or defendants** and that additional time and aid is afforded where required for interpretation and translation.

97. **Accept different sources of information**, including oral histories, community maps, and traditional languages and worldviews, **as legitimate evidence**.
98. When issuing judgments, draw on customary laws and dispute resolution mechanisms from the Indigenous plaintiffs' or defendants' communities to help identify **culturally appropriate and effective** forms of **redress, compensation, or punishment**.
99. **Promote native courts** and other judicial systems rooted in customary law to ensure that they are granted at least the same level of importance and respect as their statutory counterparts.
100. **Support** and participate in **legal empowerment** and capacity building initiatives with Indigenous peoples and civil society organisations.

Recommendations for Indigenous Peoples' and Civil Society Organisations

101. **Revitalise and strengthen customary institutions** (or elements thereof) **and decision-making processes**. Support exchanges between communities to share and learn from positive experiences. It is also important to keep in mind that not all customary laws necessarily ensure equity or social justice, such as traditional rules that exclude women from decision making. Issues of equity and fairness, where they arise, will need to be resolved case by case, in consultation with the communities concerned.
102. Support Indigenous peoples to **document, develop, and use biocultural community protocols** to communicate self-determined plans and priorities, and terms for engaging with external actors based on customary, state and international rights and responsibilities.⁵³
103. **Support legal empowerment and legal aid** to enable Indigenous peoples to learn about and engage effectively with legal systems at all levels. A series of legal empowerment and capacity building programmes, including research, development of educational resources and tools, paralegal training, translation services, and financial and network support, should be developed with diverse peoples to respond to their unique situations and priorities.
104. Undertake a **review of how Indigenous peoples** in different jurisdictions can and do **challenge legislation and administrative actions and seek remedies** for rights violations both within and outside of courts. Clarifying the issue of legal standing of Indigenous peoples and their representative institutions is of central importance. Involving academics and lawyers and co-producing the research may help validate findings in the eyes of decision-makers.
105. **Support** Indigenous peoples' **mobilisation, networking, peer learning and capacity-building, and advocacy** efforts at all levels. This includes enabling their effective participation in national consultation processes, international negotiations, independent media, etc.
106. **Establish, register, and strengthen** Indigenous peoples' **federations, coalitions, networks,** and other organisations.
107. Pursue and support **territory-based Indigenous enterprises** that accord with customary values and priorities and involve youth in livelihood generation and knowledge transfer.

⁵³ Part II below discusses biocultural community protocols further.

108. Acknowledge and **valorise positive experiences** of Indigenous peoples **and collaborations** with government agencies, companies, and other external actors with whom there are often conflicts.
109. **Support champions** for Indigenous peoples' rights **within the government and judiciary** and encourage greater commitment, political will, and innovation amongst elected leaders in efforts to reconcile customary and statutory law.
110. **Utilise customary mechanisms and innovative approaches** such as multi-stakeholder dialogues **to resolve disputes** with external actors and reach mutually agreeable outcomes.
111. Increase **public awareness and social recognition of Indigenous peoples' rights and the contributions** of their territories and resources to the broader environment, natural and cultural heritage, and well-being.
112. **Promote Indigenous peoples' rights** and related concerns and good practices **within environmental, human rights and other networks**.

PART II

IX: INNOVATING ON ACCESS TO JUSTICE: BIOCULTURAL COMMUNITY PROTOCOLS

113. One of the main lessons that has emerged from Natural Justice's and our partners' work with Indigenous peoples and local communities is how the interrelationships between factors at the local level (such as between traditional knowledge, management of natural resources, land tenure, and resilience of crop varieties and livestock) dictates that any access to justice is contingent on meaningful legal empowerment of the individual peoples and communities and that the legal empowerment should be *integrated*.
114. As illustrated by the above legal review, Indigenous peoples are compelled to engage with a range of laws and institutions in the process of protecting their ways of life and fostering new developments and initiatives. Livestock keepers, for example, engage laws and institutions addressing land, biodiversity, agriculture, traditional knowledge, access and benefit sharing, trade, and potentially protected areas, among others.
115. Figure 1 below illustrates this concept of, on the one hand, the living components of a landscape or territory and, on the other hand, how the legal landscape overlays Indigenous peoples' everyday lives, providing them both opportunities and challenges.
116. In this light, Natural Justice and our partners have found that rights-based approaches are improved by focusing on a) participatory methodologies, and b) adopting a landscape or territory approach to the law, necessitating an integrated approach to local rights and responsibilities. Biocultural community protocols are one example of an integrated rights approach that speaks directly to the transformative nature of participatory methodologies.
117. Biocultural community protocols may be referred to by a range of different localised names and have been developed and used for many years by peoples and communities around the world. Although they are inherently diverse, some common elements can be suggested. In general, they articulate community-determined values, procedures, and priorities, and they set out rights and responsibilities under customary, state, and international law as the basis for engaging with external actors such as governments, companies, academics, and NGOs. They can be used as catalysts for constructive and proactive responses to threats and opportunities posed by land and resource development, conservation, research, and other legal and policy frameworks.
118. Every process of developing and using a biocultural community protocol is as unique and diverse as the peoples and communities who undertake them. Whilst there is no template or way to "do" a community protocol, there are lessons learned and guidance on good practices and core principles, particularly concerning facilitation of the process according to the community's objectives, priorities, timelines, and approaches. There are also several locally adaptable methods and tools that can assist with different aspects of a community protocol process, including self-determination, endogenous development, documentation and communication, social mobilisation, integrated legal empowerment, strategic advocacy, and reflective monitoring and evaluation.
119. The process of developing and using a biocultural community protocol should be endogenous, inclusive, empowering, and based primarily on the community's own resources and diversity of knowledge, skills, and experiences. It should promote intra- and inter-

community dialogue and intergenerational sharing, and increase the community's agency and capacity to ensure that engagements with external actors take place with honesty, transparency, respect, social and cultural sensitivity, and integrity.

120. These points are illustrated through the Raika pastoralists' biocultural protocol (see box below).

RAIKA BIOCULTURAL PROTOCOL⁵⁴

Biocultural community protocols are being used as a tool for advocating for livestock keepers' rights at the local level by making the link between pastoralist communities, their breeds, and the ecosystems of which they are an integral part. The Raika pastoralists in Rajasthan, northwestern India, have developed a protocol to call for appropriate recognition of their role as stewards of endemic biological and cultural diversity.

In response to their exclusion from the Kumbalgarh Forest, the Raika pastoralists developed a protocol to communicate the fullness of the forest's meaning to their lives and the implications of their exclusion to their livelihoods, traditional knowledge, and the surrounding biodiversity and genetic resources. Specifically, they set out:

- *Values*: their biocultural values and explain how they have developed and preserved unique breeds of livestock and the traditional knowledge associated with them, and how their pastoral lifestyle has co-evolved with the forest ecosystem that they have traditionally conserved and sustainably used;
- *Customary laws*: The Raika detail the customary decision-making process that underpins the provision of free, prior and informed consent to any actions that might impact their grazing rights, animal genetic resources, and associated traditional knowledge;
- *National laws*: They draw on their description of their ways of life to detail their rights under Indian law⁵⁵ and call upon the National Biodiversity Authority to recognise and ensure the *in situ* conservation of their local breeds and associated traditional knowledge, and ensure that their free, prior and informed consent is obtained according to customary law before any decisions are taken relating to their genetic resources or associated traditional knowledge; and
- *International laws*: They conclude by calling on the Parties to the Convention on Biological Diversity and the Food and Agriculture Organization of the United Nations to recognize the contributions of their knowledge, innovations, and practices to the conservation and sustainable use of plant and animal genetic diversity in Rajasthan.

Overall, the Raika's protocol is a holistic response to what they see as a singular and fragmentary act of government that was undertaken without recourse to the integrated reality of their biocultural heritage.

For more information, please see: www.community-protocols.org or contact Holly Shrumm at holly@naturaljustice.org.

⁵⁴ To download the Raika Biocultural Protocol (2009) and other community protocols, see: www.community-protocols.org/community-protocols.

⁵⁵ This includes the Biological Diversity Act 2002, Biological Diversity Rules 2004, Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, and the National Policy for Farmers 2007.

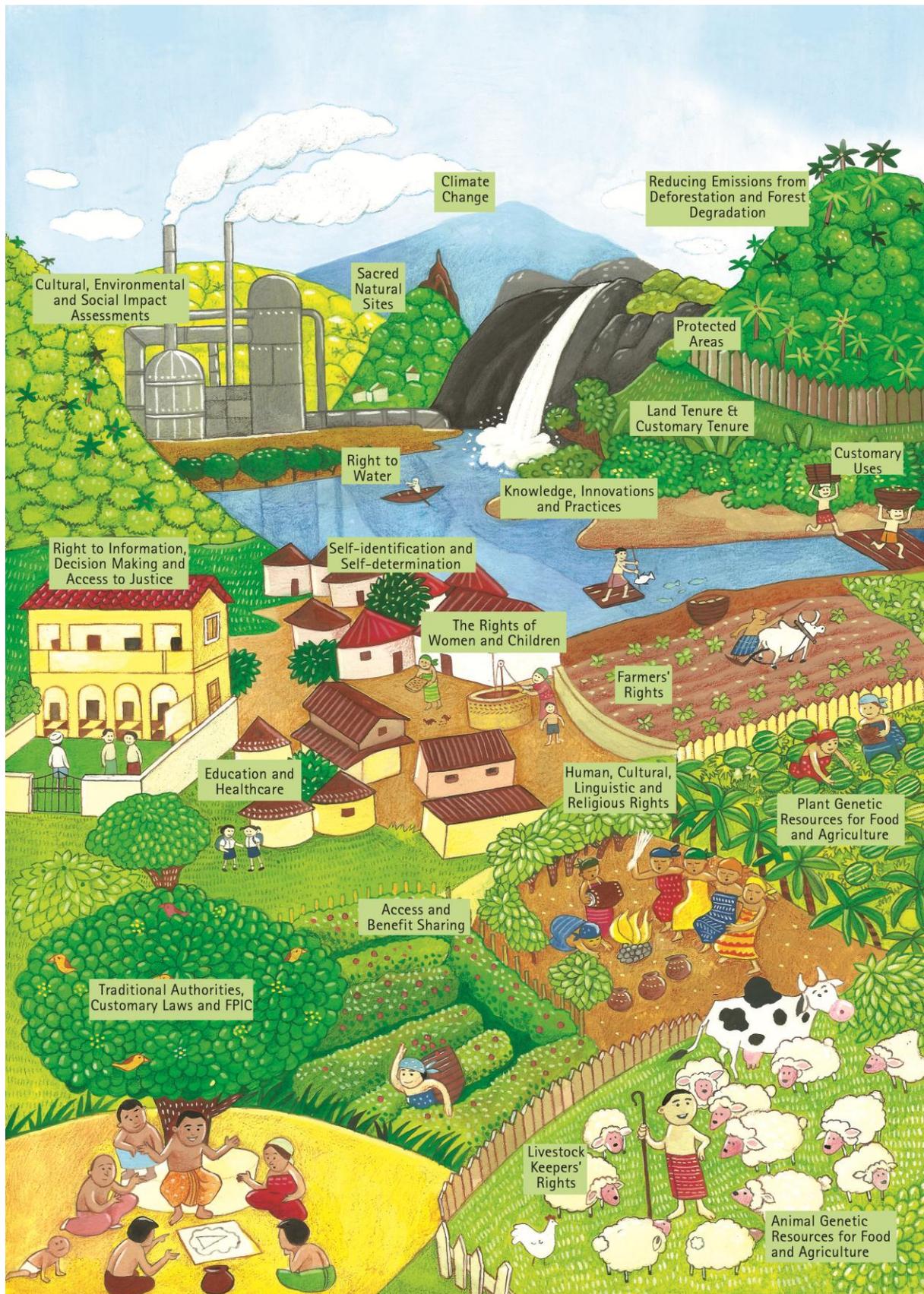


Figure 1: A depiction of the legal landscape, which has been used in legal empowerment activities in community protocol processes.

Annex: Select 'Access to Justice' Provisions in International Law

A. Universal Declaration of Human Rights (adopted 1948)

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

B. International Covenant on Civil and Political Rights (entry into force 1976)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

C. International Convention on the Elimination of all Forms of Racial Discrimination (entry into force 1969)

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights...

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

D. ILO Convention No. 169 (entry into force 1991)

Article 10(1)

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. 2. Preference shall be given to methods of punishment other than confinement in prison.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

E. UN Declaration on the Rights of Indigenous Peoples (adopted 2007)

Preamble

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests, ...

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, ...

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8(2)

States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11(2)

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 15(2)

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 17(1)

Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20(2)

Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 26(3)

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 30(2)

States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 37(1)

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 46(3)

The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

F. Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters ('Aarhus Convention') (entry into force 2001)

Article 9

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the

establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

G. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted 2005)

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
- (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below...

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization...

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

H. Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (adopted 2010)

Section 2(22)

Every effort should be made to avoid any adverse consequences to indigenous and local communities and lands and waters traditionally occupied or used by them, their sacred sites and sacred species, and their traditional resources from all activities/interactions affecting or impacting on them related to biological diversity, conservation and sustainable use. Should any such adverse consequences occur, appropriate restitution or compensation should be provided, in accordance with domestic legislation, and relevant international obligations, as applicable, and through mutually agreed terms between indigenous and local communities and those undertaking such activities/interactions.

I. FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (adopted 2012)

General Principle 3.1

States should... 4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.

3B: Principles of Implementation

3. Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people, within the national context.

Principle 6: Delivery of Services

6.1 To the extent that resources permit, States should ensure that implementing agencies and judicial authorities have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner. Staff at all organizational levels should receive continuous training, and be recruited with due regard to ensuring gender and social equality.

6.2 States should ensure that the delivery of services related to tenure and its administration are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

6.3 States should provide prompt, accessible and non-discriminatory services to protect tenure rights, to promote and facilitate the enjoyment of those rights, and to resolve disputes. States should eliminate unnecessary legal and procedural requirements and strive to overcome barriers related to tenure rights. States should review services of implementing agencies and judicial authorities, and introduce improvements where required.

6.4 States should ensure that implementing agencies and judicial authorities serve the entire population, delivering services to all, including those in remote locations. Services should be provided promptly and efficiently using locally suitable technology to increase efficiency and accessibility. Internal guidelines should be established so that staff can implement policies and laws in a reliable and consistent manner. Procedures should be simplified without threatening tenure security or quality of justice. Explanatory materials should be widely publicized in applicable languages and inform users of their rights and responsibilities...

6.6 States and other parties should consider additional measures to support vulnerable or marginalized groups who could not otherwise access administrative and judicial services. These measures should include legal support, such as affordable legal aid, and may also include the provision of services of paralegals or parasurveyors, and mobile services for remote communities and mobile indigenous peoples.

6.7 States should encourage implementing agencies and judicial authorities to foster a culture based on service and ethical behaviour. Agencies and judicial authorities should seek regular feedback, such as through surveys and focus groups, to raise standards and improve delivery of services, to meet expectations, and to satisfy new needs. They should publish performance standards and report regularly on results. Users should have means of addressing complaints either within the implementing agency, such as by administrative review, or externally, such as by an independent review or through an ombudsman...

6.9 States and non-state actors should endeavour to prevent corruption with regard to tenure rights. States should do so particularly through consultation and participation, rule of law, transparency and accountability. States should adopt and enforce anti-corruption measures including applying checks and balances, limiting the arbitrary use of power, addressing conflicts of interest and adopting clear rules and regulations. States should provide for the administrative and/or judicial review of decisions of implementing agencies. Staff working on the administration of tenure should be held accountable for their actions. They should be provided with the means of conducting their duties effectively. They should be protected against interference in their duties and from retaliation for reporting acts of corruption.