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. 1

International Law and Jurisprudence

Stockholm Resilience Centre
Research for Governance of Social-Ecological Systems

Stockholm University

NATURAL JUSTICE

KALPAVRIKSH
कल्पवृक्ष
Environmental Action Group

The ICCA Consortium

"Land is the foundation of the lives and cultures of Indigenous peoples all over the world… Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples' particular distinct cultures is threatened."

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Cover Photo: Samburu herder protecting his flock in northern Kenya.

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EXECUTIVE SUMMARY

This report is part of a larger study conducted by the ICCA Consortium (www.iccaconsortium.org) between 2011-2012, which also includes 15 national level legal reviews. Taken together, these reports collectively provide the basis for an analysis of the interaction between a) international law, national legislation, judgements, institutional frameworks, and b) Indigenous peoples' and local communities' conserved territories and areas (ICCAs).

The national level research illustrates that, in many countries, Indigenous peoples and local communities continue to face a lack of recognition of their customary land rights, traditional collective governance institutions, and/or rights over natural resources in their territories. At the same time, legislation and policies are developed without the full and effective participation of Indigenous peoples and local communities, legal frameworks fragment otherwise connected cultural and ecological landscapes, and justice systems remain largely inaccessible. Together these factors are significantly hindering the ability of Indigenous peoples and local communities to maintain the holistic integrity of their territories and areas

In this context, this report seeks to understand why legal recognition is lacking at the national level with recourse to international law and jurisprudence. Towards this end, it adopts an integrated rights approach to review the full extent of international law and jurisprudence that relates – broadly put – to the rights of Indigenous peoples and local communities to maintain the integrity of their ICCAs.

Part I introduces the report and provides the theoretical framework. **Part II** of the report systematically works through the following broad heads of laws, setting out the ways in which they support ICCAs:

- Human Rights
- Cultural Heritage
- Biodiversity
- Agriculture
- Climate Change
- Desertification
- Wetlands
- Intellectual Property
- Biocultural Diversity
- Sustainable Development
- Endangered Species

To contextualize this analysis, **Part III** provides commentary on the discussion about the legal weight of international law, with specific focus on the Convention on Biological Diversity (CBD). **Part IV** focuses on jurisprudence, exploring the evolving body of case law from, *inter alia*, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights and the growing body of internationally relevant case law from common law countries. **Part V** concludes with an analysis of the normative trajectory of this body of law and sets out a number of important recommendations.

AUTHORS' NOTE

This report is intended to contribute to an ongoing conversation between Indigenous peoples, local communities and a range of other interested parties, including practicing environmental and human rights lawyers. We acknowledge that, even in the context of a report that exceeds 130 pages, there is much more analysis required of the issues. In this light, we look forward to hearing from anyone interested in discussing the approach or any particular aspect of the content. We thank Louisa Denier and Thomas Greiber from the IUCN Environmental Law Centre for conceptual inputs and comments on an earlier version of this report. All errors and omissions remain those of the authors alone.

PART I

CONCEPTUAL AND THEORETICAL FRAMEWORK

1. INTRODUCTION TO THE OVERALL STUDY AND THIS REPORT

Across the world, areas with high or important biodiversity are often located within Indigenous peoples' and local communities' conserved territories and areas (ICCAs). Traditional and contemporary systems of stewardship embedded within cultural practices enable the conservation, restoration and connectivity of ecosystems, habitats, and specific species in accordance with indigenous and local worldviews. In spite of the benefits ICCAs have for maintaining the integrity of ecosystems, cultures and human wellbeing, they are under increasing threat. These threats are compounded because very few states adequately and appropriately value, support or recognize ICCAs and the crucial contribution made by Indigenous peoples and local communities to their stewardship, governance and maintenance.

In this context, the ICCA Consortium conducted research between 2011-2012 on the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. It also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The following reports constitute the full study:

- This study, being an analysis of international law and jurisprudence relevant to ICCAs.
- Regional overviews and 15 country level reports:
    - *Africa*: Kenya, Namibia and Senegal;
    - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname;
    - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan; and
    - *Pacific*: Australia and Fiji.[1]

The study's synthesis report[2] sets out the key findings. The research highlights three major categories of threats to ICCAs. The first consists of systemic pressures on the environment and biodiversity worldwide, including habitat loss, overexploitation of resources, pollution, invasive species, and climate change (as identified in Global Biodiversity Outlook 3). In general, these are driven by the predominant market economy's unsustainable patterns of production and consumption. The mainstream economic and governmental systems also promote rapid urbanization, loss of traditional languages and knowledge systems, dependence on imported and mass-produced foods and material goods, accumulation of capital, and elite capture. Due to the inextricable links between Indigenous peoples and local communities and the territories and resources upon which they depend, the loss of biological diversity is fueling the loss of cultural and linguistic diversity and inter-generational transmission of knowledge and practices. This in turn undermines social and cultural cohesion and sophisticated customary systems of caring for territories and resources.

[1] The full collection of reports is available at: www.iccaconsortium.org.

[2] Jonas H., A. Kothari and H. Shrumm (2012). *Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities: An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*. Natural Justice and Kalpavriksh: Bangalore and Pune.

The second category consists of the direct pressures on Indigenous peoples and local communities and their territories and resources. This includes, on the one hand, threats from large-scale, industrial methods of extractive, production and development (for example, monoculture plantations, industrial fishing and logging, and large-scale mines and dams) and, on the other hand, threats from exclusionary environmental and conservation frameworks that undermine the rights of Indigenous peoples and local communities.

The third category of threats – the focus of the study – is the legal order that enables the first two categories. The research highlights the widespread lack of effective legal recognition *at the national level* of a range of Indigenous peoples' and local communities' inherent rights, including to self-determination and self-governance, customary laws and traditional institutions, and customary rights to their territories and the lands, waters and natural resources therein. Indigenous peoples suffer the continued marginalization from legislative and judicial systems and decision-making processes at all levels, as well as the impacts of discriminatory and fragmented legal and institutional frameworks. Together, these factors actively undermine Indigenous peoples' and local communities' ability to respond to the first two categories of external pressures.

In this context, this report seeks to understand why legal recognition is lacking at the national level with recourse to international law and jurisprudence. Towards this end, it reviews the full extent of international law and jurisprudence relating relevant to the rights of Indigenous peoples and local communities to maintain the integrity of their ICCAs. Notably, the report focuses on supportive provisions and does not engage with legal frameworks or judgements that undermine or have gone against Indigenous peoples and local communities who aim to steward their ICCAs.

2. INTRODUCTION TO ICCAS

Territories and areas that have been governed and managed by Indigenous peoples and local communities are increasingly gaining recognition as being crucial for both the survival and well-being of such peoples as well as the biological diversity they contain and the ecological functions they provide. While these sites can be considered the world's oldest conservation areas (though not necessarily considered in such terms by the peoples governing and managing them), recognition of their value in formal conservation circles is relatively new. The World Parks Congress in 2003 and subsequent global meetings relating to wildlife and biodiversity conservation have consolidated this recognition. Such sites have come to be known as "Indigenous peoples' and community conserved territories and areas", or in short, ICCAs.[3]

[3] The meaning of the acronym "ICCAs" is an evolving one, having started as Community Conserved Areas or CCAs, evolved to Indigenous and Community Conserved Areas or ICCAs, and has been further developed to its current form, while retaining the acronym as it is already in widespread use. However,

2.1 Features of ICCAs

Three general features characterize an ICCA[4]:

- A well-defined people or community possesses a close and profound relation with an equally well-defined site (such as territory, area or habitat) and/or species. This relation is embedded in local culture, sense of identity, and/or dependence for livelihood and wellbeing.

- The people or community is the primary player in decision-making and implementation regarding the management of the site and/or species. Community-level institutions thus have the capacity to develop and enforce decisions, *de facto* and/or *de jure* (including according to both customary and state law). Other stakeholders may collaborate as partners, especially when the land is owned by the state, but decisions and management efforts are predominantly by the people or community.

- The people's or community's management decisions and efforts lead to the conservation of habitats, species, genetic diversity, ecological processes, and associated cultural values, whether or not the conscious objective of management is conservation *per se*. For example, primary objectives may be livelihoods, security, religious piety, safeguarding cultural and spiritual places, etc., with conservation being an additional outcome.

2.2 Diversity of ICCAs

Some ICCAs are of ancient origin; some include cases of continuation, revival, or modification of traditional practices; some are new initiatives such as restoration and innovative uses of resources taken up by Indigenous peoples and local communities in the face of new threats or opportunities. Some conserve remote ecosystems that have had minimum human influence, while others manage various kinds of regulated uses in areas ranging from very small to large stretches of landscapes and water bodies.

ICCAs are governed by Indigenous peoples, local and mobile communities, and combinations thereof in a great number of countries around the world, including in the global North. Importantly, the diversity of peoples and communities who utilize a wide range of strategies, both customary and recently established, for various reasons and motivations, is the foundation of the diversity of the ICCAs themselves.

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it is not intended to subsume the very many local names by which these territories and areas are known.

[4] Excerpted from the companion document to IUCN-CEESP Briefing Note 10: *Strengthening What Works – Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities*.

3. THEORETICAL FRAMEWORK

Human rights and environmental laws have largely developed in isolation of each other. While they have both shown significant development in the last 50 years, they have remained distinct bodies of laws and been considered as separate disciplines by practitioners and academics alike. Yet the freedom of Indigenous peoples and local communities to govern their territories and natural resources is contingent on both human rights[5] and environmental law (among other legal frameworks). At the local level, both frameworks are directly relevant to the everyday lives of Indigenous peoples and local communities.

High-profile examples of this dichotomy and corresponding symbiosis are provided by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention on Biological Diversity (CBD).

Specifically, the UNDRIP sets out the follow articles, among others, relevant to Indigenous peoples and their lands or territories:

- Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture; and States shall provide effective mechanisms for prevention of, and redress for: (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; **(Article 8, 1 and 2 (b))**.
- 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 10)**;
- Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature **(Article 11)**;
- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas[6] and other resources and to uphold their

[5] Notably, human rights have developed to protect the individual, a tendency that can be at odds with Indigenous peoples' communal approach to each other and land.

[6] The United Nations Convention on the Law of the Sea (Jamaica 10 December 1982, in force 16 November 1994) (UNCLOS) is the globally recognized regime dealing with the law of the sea. While the UNCLOS does address communities in certain provisions, these generally focus on ensuring that fishing communities are not harmed rather than on recognizing that such communities might have legitimate ownership over coastal areas. Importantly, several regional seas conventions and protocols are currently in force that may affect the rights of indigenous peoples and local communities in regard to coastal areas. See United Nations Environment Programme, Regional Seas Programme. Last accessed 23 July 2012, at http://www.unep.ch/regionalseas/legal/conlist.htm.

responsibilities to future generations in this regard **(Article 25)**; and

- Under **Article 26**:
    - Indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.
    - Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
    - 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.
- Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination **(Article 29)**.
- Under **Article 32**:
    - 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.
    - 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 ….[7]

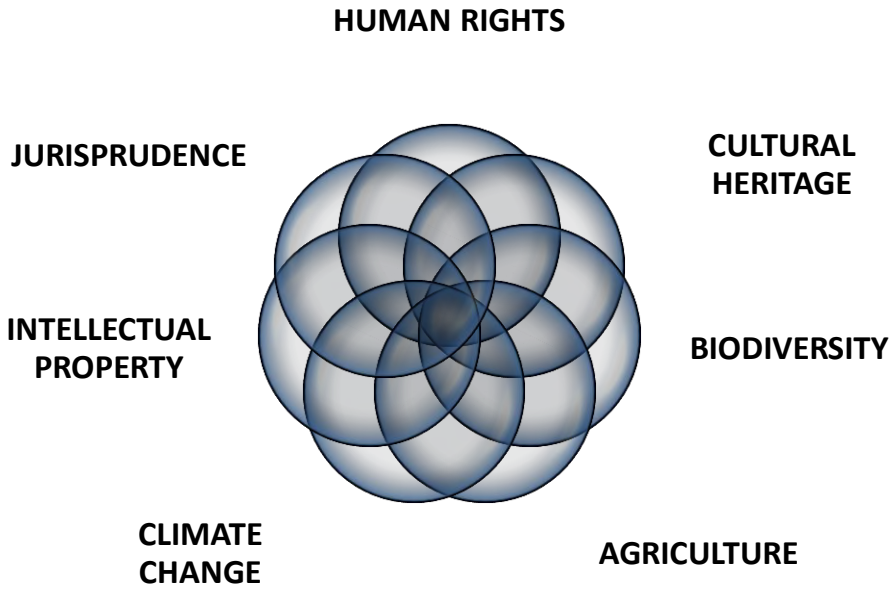
The CBD also recognizes the close relationship between communities, their territories and their traditional knowledge. Under 'In-situ Conservation', **Article 8(j)** states: "Subject to its national legislation, [state parties shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

Furthermore, under **Article 10(c)**, the CBD calls on parties to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements." In light of this convergence and overlap between human rights and environmental law, among other areas of law, this report adopts an integrated rights approach.

[7] Additionally, the Preamble states: "Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".

3.1 Integrated Rights Approach

In the context of indigenous peoples and local communities who are intent on, among other things, governing their lands, territories and waters, continuing their customary uses of natural resources and protecting their traditional knowledge therefore, both human rights and environmental law frameworks are directly relevant. This point has not been lost on Indigenous peoples' representatives at the UN level who have worked to ensure that their views are well articulated in both streams.[8] Yet at present, there has been a lack of integrated analyses of the full range of laws (including human rights and biodiversity) from the context of communities who are striving to preserve the connections between their biodiversity and their ways of life, culture and spirituality. This study aims to fill this gap by using an integrated rights approach, to look more holistically at a range of laws and policies that support such peoples and communities.



Several existing multilateral environmental agreements and other international instruments directly or indirectly contain provisions that support the rights of Indigenous peoples and local communities to maintain the integrity of their territories and areas (as per the diagram above).[9] Accordingly, this report sets out to compile a comprehensive list of such instruments and highlighting important provisions where appropriate, in order to determine the state of

[8] See for example the work of the International Indigenous Forum on Biodiversity (IIFB) under the auspices of the CBD, the International Indigenous Peoples' Forum on Climate Change (IIPFCC) and other groupings in the human rights processes.

[9] Throughout each section of this Report discussing a particular instrument, the terminology used in that instrument to describe Indigenous peoples, tribal or local communities will be utilized. For example, ILO Convention No. 169 refers to "indigenous and tribal peoples," and the Convention on Biological Diversity and its subsidiary instruments refer to "indigenous and local communities."

international law regarding the rights of Indigenous peoples and local communities *vis-à-vis* their territories and conserved areas. It augments this with a review of emerging jurisprudence from the international, regional and national levels. It concludes by focusing in on the national level implementation of international law in the context of the wealth of international law, on the one hand, and the continued loss of biocultural diversity on the other.

PART II

INTERNATIONAL LEGAL REVIEW

4. HUMAN RIGHTS

The recognition and protection of ICCAs is dependent upon recognizing the human rights of Indigenous peoples. One of the broadest and most important of these human rights is the right of self-determination.[10] According to the UN Human Rights Committee, "[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[11] The right of self-determination undergirds many provisions in international instruments applicable to Indigenous peoples and ICCAs. The following sub-sections highlight the most relevant provisions from the main human rights instruments, addressing them in chronological order.

4.1 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination[12] condemns racial discrimination and seeks the elimination of laws and policies which create or perpetuate racial discrimination. It notes that the UN "has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist[.]"[13]

Under Article 2(2), State Parties are required to take measure to ensure protection of certain racial groups:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

Article 5 sets forth several examples of rights to which all people are entitled, including "[t]he right to equal participation in cultural activities".

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[10] One of the purposes of the Charter of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945) 1 UNTS XVI (UN Charter).

[11] UN Human Rights Committee, "CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples", 13 March 1984, at ¶1.

[12] International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, in force 4 January 1969) I-9464 (CERD).

[13] CERD, at 1.

4.2 International Covenant on Economic, Social and Cultural Rights

As discussed above, the right of self-determination is an important aspect of ICCAs. Article 1 of the International Covenant on Economic, Social and Cultural Rights[14] explicitly recognizes peoples' right of self-determination, prevents the deprivation of a peoples' means of subsistence, and calls on State Parties to promote and respect the right of self-determination:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 2 of the ICESCR calls on State Parties to recognize and protect rights set forth in the ICESCR, and under Article 3 "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

Additionally, the ICESCR addresses the right to work (Article 6) and working conditions (Article 7), the right to form unions (Article 8), protection of families (Article 10), the right to an adequate standard of living (Article 11), the right to physical and mental health (Article 12), the right to education (Articles 13-14), and the right to, among other things, "take part in cultural life" (Article 15(1)). Like the ICCPR, any infringement of any of these rights has the potential to undermine communities' abilities to govern their territories, areas and natural resources.

4.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[15] is described as a "landmark in the efforts of the international community to promote human rights". [16] It defends the right to life

[14] International Covenant on Economic, Social and Cultural Rights (16 December 1966, in force 3 January 1976) I-14531 (ICESCR). There are 175 parties to ICESCR.

[15] International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976) I-14668 (ICCPR).

and stipulates that no individual can be subjected to torture, enslavement, forced labour and arbitrary detention or be restricted from such freedoms as movement, expression and association.

Article 1 of the ICCPR is identical to Article 1 of the ICESCR. Under Article 2, State Parties undertake to: respect the rights of individuals without discrimination, take steps to adopt measures necessary to give effect to the ICCPR, and provide and enforce remedies where rights under the ICCPR are violated. Further underscoring the right to be free from discrimination, Article 3 provides: "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 27 provides that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." As Indigenous peoples and local communities often make up ethnic, religious or linguistic minorities, Article 27 is important in situations in which access to traditionally occupied lands is required in order to enjoy their culture, practice their own religion, or use their own language.

Other articles in the ICCPR deal with the right to life (Article 6), the right to be free of inhuman treatment (Article 7), the right to be free of slavery (Article 8), the right to liberty and security (Articles 9-12), and various other rights generally associated with promoting freedom without harming others. As a body of fundamental rights, any infringement of any of these rights has the potential to undermine communities' aspirations to govern their territories, areas and natural resources.

4.4 ILO Convention No. 169

The Indigenous and Tribal Peoples Convention[17] (Convention No. 169) adopted new international standards relating to "indigenous and tribal peoples"[18] in all regions of the world and is a critical instrument in the recognition and promotion of the rights of Indigenous peoples. According to the International Labor Organization (ILO), Convention No. 169:

> stipulates that governments shall have the responsibility for developing coordinated and systematic action to protect the rights of indigenous and tribal

[16] UN, "International Covenant on Civil and Political Rights". Last accessed 24 February 2012, at http://www.un.org/millennium/law/iv-4.htm.
[17] Indigenous and Tribal Peoples Convention (Geneva, 27 June 1989, in force 5 September 1991) UNTS I-28383 (Convention No. 169).
[18] Importantly, Article 1(3) provides that "[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

> peoples (Article 3) and ensure that appropriate mechanisms and means are available (Article 33). With its focus on consultation and participation, Convention No. 169 is a tool to stimulate dialogue between governments and indigenous and tribal peoples and has been used as a tool for development processes, as well as conflict prevention and resolution.[19]

4.4.1 Provisions Dealing with Land

Several provisions of Convention No. 169 directly support Indigenous peoples' and local communities' rights over their ICCAs. The key provisions are set forth in Article 7, and in Part II, which contains Convention No. 169's land rights provisions (Articles 13-19).

Two subsections of Article 7 provide that:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
>
> 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Under Article 7(1), "indigenous and tribal peoples" have the right to participate in the formulation and implementation of national and regional development which may directly affect them. While this is an important right, it does not address development at the local level, nor does it address development that might have indirect effects on indigenous and tribal peoples.

Part II of the Convention No. 169 contains several important land rights provisions. Specifically, Article 13(1) dictates the manner in which governments are to apply Part II, noting that they must "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." Article 13(2) provides "[t]he use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."

[19] International Labor Organization Website. "Convention No. 169". Last accessed 10 February 2012, at http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm.

Article 14 deals with rights of ownership and possession of traditionally occupied lands. Article 14(1) requires the recognition of "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy ….", and Article 14(2) requires governments to protect those rights. Article 14(2) also requires governments "to identify the lands which the peoples concerned traditionally occupy …."

Article 15 governs natural resources pertaining to the lands of indigenous and tribal peoples and requires governments to share benefits where governments retain ownership or rights to such resources. It provides that the rights of indigenous and tribal peoples to such natural resources "shall be specially safeguarded" and establishes that "[t]hese rights include the right of these peoples to participate in the use, management and conservation of these resources."[20] James Anaya, Special Rapporteur on the Rights of Indigenous Peoples suggests that the convention "falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources."[21] Nevertheless, under Article 15(2), governments must consult with indigenous and tribal peoples "before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands". Further: "[t]he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

Article 16 provides that "[s]ubject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy." Article 16 states that "[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent". However, it goes beyond this to allow for relocation even without consent: "Where their consent [i.e. of indigenous and tribal peoples] cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."[22]

Article 17 recognizes that indigenous and tribal peoples may have their own procedures for transmission of their land rights and requires these procedures to be respected. Article 17 also sets forth guidelines in regard to the alienation of the lands of indigenous and tribal peoples. Importantly, Article 18 calls for the establishment of adequate legal penalties for unauthorized intrusion upon or use of the lands of indigenous and tribal peoples. Finally, Article 19 sets forth guidelines for national agrarian programmes as they relate to indigenous and tribal peoples.

4.4.2 Other Relevant Provisions

[20] Convention No. 169 Article 15(1).
[21] Anaya, S.J., 2004. *Indigenous Peoples in International Law*, at 143.
[22] Convention No. 169 Article 16(2). This is in contrast to Article 10 of the UN Declaration on the Rights of Indigenous Peoples (discussed below) which does not allow for relocation unless the consent of indigenous peoples is obtained.

There are several other provisions of Convention No. 169 that can be used by indigenous and tribal peoples to support ICCAs. These fall into several general principles as set out below.

a. Self-identification and Self-governance[23]

The principles of self-identification and self-governance run throughout the entirety of Convention No. 169. Article 1(2) states that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."[24] It recognizes "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live …"[25] Self-identification and self-governance are also supported in Article 6 (governments shall establish means for full development of indigenous and tribal peoples' institutions and initiatives), Article 7 (affirming right of indigenous and tribal peoples to decide their own priorities for development), Article 25 (governments shall either make health services available or allow indigenous and tribal peoples to provide health services under their own control) and Article 27 (governments shall recognise the right of indigenous and tribal peoples to establish their own educational institutions and facilities).

b. Participation in Decision-making Processes, FPIC and Impact Assessments)

Like the principles of self-identification and self-governance, Convention No. 169 also broadly supports the right of Indigenous peoples to participate in decision-making processes that affect them. Pursuant to Article 2(1), "[g]overnments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity." Additionally, the following Articles all call for the participation of indigenous and tribal peoples: Article 5 and Article 6 (guidelines for applying ILO Convention No. 169, including good faith, appropriate consultation with the peoples concerned); Article 7 (development affecting indigenous and tribal peoples); Article 15(2) (consultation with indigenous and tribal peoples to ascertain whether their interest would be prejudiced prior to undertaking programs related to mineral or sub-surface resources); Article 16 (obtaining free and informed consent of indigenous and tribabl peoples prior to their relocation); Article 23 (strengthening and promoting indigenous and tribal peoples' traditional activities); Article 25 (planning and administration of health services); Article 27 (development and implementation of education programmes); Article 30 (governments shall make the rights and duties of indigenous and tribal peoples known to them); and Article 33 (programmes implementing ILO Convention No. 169 and proposed legislative and other measures).

[23] It is important to note that Convention No. 169 does not use the term "self-determination."
[24] Convention No. 169 Article 1(2).
[25] Convention No. 169 Preamble.

c. Traditional Livelihoods and Resource Use Practices

Article 4 calls for special measures to "be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned." Additionally, Article 8 (application of national laws and regulations), Article 9 (customs for dealing with offenses by their members), and Article 23 (traditional activities) all call for respect of indigenous and tribal peoples' traditional and resource use practices.

d. Language and Culturally Appropriate Education and Healthcare

Convention No. 169 recognizes the importance of language, education, and healthcare to "indigenous and tribal peoples". In regard to language, "[m]easures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned."[26] Article 28(1) also calls for children to be taught their own indigenous language.[27]

In regard to education, under Article 26 "[m]easures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community." Article 22 calls for measures to promote the voluntary participation of "indigenous and tribal peoples" in vocational training programs.

Pursuant to Article 7(2), "[t]he improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit." Article 20 requires governments to do anything possible to prevent discrimination between workers from indigenous populations and other workers, particularly in regard to medical assistance and social security benefits. Article 25 deals specifically with health services, and requires governments to "ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control …"

e. Safeguards Against Discrimination and Abuses

Convention No. 169 also proscribes discrimination against and abuse of indigenous and tribal peoples. Notably, Article 3(1) states that: "Indigenous and tribal peoples shall enjoy the full

[26] Convention No. 169 Article 28(3).

[27] Children are also afforded other rights under the Convention on the Rights of the Child. (New York, 20 November 1989, in force 2 September 1990) I-27531. Under Article 8.1, "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." Additionally, under Article 8.2, "Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

measure of human rights and fundamental freedoms without hindrance or discrimination."[28] This non-discrimination principle is also embodied in Article 2 (protection of rights), Article 5 (recognition and protection of values), Article 8 (application of national laws and regulations), Article 10 (taking into account economic, social and cultural characteristics in imposing penalties) Article 12 (safeguards against the abuse of rights), Article 20 (workers' rights), Article 21 (vocational training measures), Article 26, Article 27, Article 29, and Article 31 (education).

4.5 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[29] is considered to be the main point of reference for the international community regarding the rights of minorities.[30] It contains a list of the rights to which persons belonging to minorities are entitled, including the following:

> Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.[31]
>
> Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.[32]
>
> Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.[33]

The Declaration on the Rights of Minorities also includes provisions setting forth measures States should take to protect the rights of minorities, such as:

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[28] ILO Convention No. 169 Article 3(1). The Article further states that "The provisions of the Convention shall be applied without discrimination to male and female members of these peoples."

[29] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992) A/RES/47/135 (Declaration on the Rights of Minorities).

[30] United Nations, "More Than Meets the Eye". Last accessed 5 June 2012, at http://www.un.org/en/letsfightracism/minorities.shtml.

[31] Declaration on the Rights of Minorities Article 2(1).

[32] Declaration on the Rights of Minorities Article 2(2).

[33] Declaration on the Rights of Minorities Article 2(3).

States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.[34]

States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.[35]

States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.[36]

States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.[37]

States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.[38]

States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.[39]

4.6 United Nations Declaration of the Rights of Indigenous Peoples

The United Nations Declaration of the Rights of Indigenous Peoples[40] is an international human rights instrument that sets out the fundamental rights of Indigenous peoples around the world. The UNDRIP sets out in one document the collective and individual human rights of Indigenous peoples. While the UNDRIP is not legally binding (unlike international conventions), it reflects emerging customary international law and the principles are pre-existing human rights standards, already recognised in a number of human rights instruments but with specific reference to the situation of Indigenous peoples. The rights set out in the UNDRIP are regarded

[34] Declaration on the Rights of Minorities Article 1(1).
[35] Declaration on the Rights of Minorities Article 4(1).
[36] Declaration on the Rights of Minorities Article 4(2).
[37] Declaration on the Rights of Minorities Article 4(3).
[38] Declaration on the Rights of Minorities Article 4(4).
[39] Declaration on the Rights of Minorities Article 4(5).
[40] United Nations Declaration on the Rights of Indigenous Peoples (New York, 13 September 2007) A/RES/61/295 (UNDRIP).

as "the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world."[41]

Like ILO Convention No. 169, UNDRIP contains several provisions that can be used to support ICCAs. ICCAs have been called "cultural expressions *par excellence*."[42] In that vein, "[r]ights to cultural integrity are affirmed in multiple articles of UNDRIP."[43]

4.6.1 Provisions Dealing with Land

Article 11(1) provides Indigenous peoples with "the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites …." Under Article 12, "[i]ndigenous peoples have … the right to maintain, protect, and have access in privacy to their religious and cultural sites …."[44]

More specifically related to land, Article 8(2) requires States to "provide effective mechanisms for prevention of, and redress for: … (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources …."

Article 10 prevents the forced removal of Indigenous peoples 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."[45]

Articles 25 to 32 of UNDRIP deal directly with the rights of Indigenous peoples to their "traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources …."[46] Article 25 establishes the right of Indigenous peoples to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used" lands, territories and/or resources .

Article 26 also deals with the rights of Indigenous peoples regarding their lands, territories and/or resources. Article 26(1) provides Indigenous peoples with a right "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26(2) provides Indigenous peoples with "the right to own, use, develop and

[41] UNDRIP Article 43.

[42] Stevens, S., 2010. "Implementing the UN Declaration on the Rights of Indigenous Peoples and International Human Rights Law through the Recognition of ICCAs", pages 181-194, in Shrumm, S. (ed.) *Policy Matters 17*. IUCN.

[43] Stevens, *Policy Matters* at 187.

[44] Articles 5, 15, 31 and 34 also protect indigenous peoples' right to cultural integrity

[45] As noted above, unlike Article 16 of Convention No. 169, Article 10 of the UNDRIP does not allow for relocation unless the consent of indigenous peoples has been obtained.

[46] Such lands will be referred to collectively in this section as lands, territories and/or resources.

control" their LTR. And Article 26(3) requires states to "give legal recognition and protection to these lands, territories and resources."

Article 27 requires states to "establish and implement" a process "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." Article 27 establishes the manner in which such a process is to be implemented and provides Indigenous peoples a right to participate in that process.

Article 28 deals with redress and restitution for Indigenous peoples' where their lands, territories and/or resources have been adversely affected. Under Article 28(1), "[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation," for lands, territories and/or resources which have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent." Article 28(2) sets forth the form of compensation as "lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

Article 29(1) provides Indigenous peoples with the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." Accordingly, "States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."[47]

Article 32 deals with the development of lands, territories and/or resources. Under Article 32(1), "[i]ndigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." Article 32(2) requires States to consult with Indigenous peoples "prior to the approval of any project affecting their" lands, territories and/or resources. And under Article 32(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 36 recognizes that Indigenous peoples may be divided by international borders. Therefore, "[i]ndigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders."

4.6.2 Other Relevant Provisions

[47] Article 29 also prevents states from storing or disposing of hazardous materials on indigenous peoples' lands or territories, and requires states to implement measures to mitigate the effects of hazardous materials on indigenous peoples.

The UNDRIP begins with several preambular paragraphs related to the UNDRIP's support of the recognition, promotion and protection of the rights and freedoms of Indigenous peoples. Pursuant to the preamble:

- Indigenous individuals are entitled without discrimination to all human rights recognized in international law;
- Respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment; and
- Control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions.

a. Self-determination

Indigenous peoples' right of self-determination is embodied in UNDRIP as a whole.[48] Articles 3-5 explicitly address this right. UNDRIP unequivocally affirms that "[i]ndigenous peoples have the right to self-determination."[49] "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs".[50] Several other articles support this right, including: Article 14 (right to establish and control their own education system); Article 16 (right to establish their own media in their own language); Article 20 (right to maintain and develop their political, economic and social systems or institutions); Article 23 (right to determine and develop priorities and strategies for exercising their right to development); Article 31 (right to maintain and control cultural heritage); Article 32(1) (right to develop strategies for their development); Article 33 (Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions and to determine the structure of their institutions); Article 34 (right to promote, develop and maintain institutional structures and distinctive customs); and Article 35 (right to determine the responsibilities of individuals to their communities).

b. Participation in decision-making processes

Closely related to the right of self-determination is Indigenous peoples' right to participate in the decisions that affect them. Like the right of self-determination, the right to participate is an underlying concept of the UNDRIP, and is set forth in a variety of articles, most explicitly in Articles 18 and 19:

[48] To prevent the use of the right of self-determination under UNDRIP for purposes of secession, Article 46(1) provides that the UNDRIP may not be interpreted to imply "any right to engage in … any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."
[49] UNDRIP Article 3.
[50] UNDRIP Article 4.

- Article 18: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights”;

- 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.”

Several other articles also address the right to participate, including: Article 11(2) (mechanisms for redress shall be developed in conjunction with Indigenous peoples); Article 17 (protection of indigenous children from economic exploitation shall take place in cooperation with Indigenous peoples); Article 27 (process to recognize and adjudicate rights of Indigenous peoples pertaining to their lands shall be established in conjunction with the peoples concerned); Article 32 (2) (Indigenous peoples shall be consulted prior to implementations of projects affecting them); and Article 38 (States shall cooperate with Indigenous peoples in implementing the UNDRIP).

c. Free, prior and informed consent

Several articles support Indigenous peoples’ right of free, prior and informed consent in relation to relocation from their lands or territories (Article 10); redress where their cultural, intellectual, religious and spiritual property has been taken without such consent (Article 11(2)); the adoption or implementation of legislative or administrative measures that may affect Indigenous peoples (Article 19); redress where their lands, territories and/or resources have been confiscated, taken, occupied, used or damages without such consent (Article 28(1)); disposal of hazardous waste on their lands, territories and/or resources (Article 29(2)); and approval of projects affecting their lands, territories and/or resources (Article 32(2)).

d. Safeguards Against Discrimination and Abuses

ILO Convention No. 169 also protects against discrimination and abuses in Article 2 (ensuring indigenous and tribal peoples enjoy equal rights under the law as other members of the population), Article 6 (free participation, to at least the same level as other members of the population, at all levels of decision making), and Article 9 (consideration of customs of indigenous and tribal peoples in regard to penal matters.

4.7 United Nations Bodies Dealing With Indigenous Issues

4.7.1. United Nations Permanent Forum on Indigenous Issues

The United Nations Permanent Forum on Indigenous Issues (Permanent Forum) advises the Economic and Social Council[51] on Indigenous issues related to social development, culture, the environment, education, health and human rights. The Permanent Forum[52] was established in 2000 with a mandate to provide expert advice and recommendations on Indigenous issues to the Council, promote the integration and coordination of activities related to Indigenous issues within the UN system, and prepare and disseminate information on Indigenous issues.[53] To promote the integration and coordination of activities related to Indigenous issues within the UN system, an inter-agency support group on Indigenous issues was created to link the work of the UNPFII to other UN agencies.

The Permanent Forum meets annually in two-week Sessions. After each Session, a Session Report is created, in which the Permanent Forum identifies matters calling for action by ECOSOC. The theme for the Permanent Forum's Sixth Session, held in 2007, was Territories, Lands, and Natural Resources. Many of the matters identified in the Permanent Forum's Report on the Sixth Session support ICCAs. Broadly, the Permanent Forum recognized that "[l]and is the foundation of the lives and cultures of Indigenous peoples all over the world. . . . Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples' particular distinct cultures is threatened."[54] Several of the recommendations made in the Report of the Sixth Session echo the principles set forth in Convention No. 169 and the UNDRIP. For example, the Permanent Forum supports the right of Indigenous peoples to be involved in decision making related to their territories, lands, and natural resources[55] and "to own, conserve and manage their territories, lands and resources."[56]

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[51] The Economic and Social Council, known as ECOSOC, is "the principal organ to coordinate economic, social, and related work of the 14 UN specialized agencies, functional commissions and five regional commissions." ECOSOC, "Background Information". Last accessed 24 February 2012, at http://www.un.org/en/ecosoc/about/index.shtml.

[52] The Permanent Forum is made up of sixteen independent experts, functioning in their personal capacity, who serve for a term of three years as Members and may be re-elected or re-appointed for one additional term. Eight of the Members are nominated by governments and eight are nominated directly by indigenous organizations in their regions. Permanent Forum, "Structure Within ECOSOC". Last accessed 27 February 2012, at http://social.un.org/index/IndigenousPeoples/AboutUs/StructurewithinECOSOC.aspx.

[53] Permanent Forum, "Permanent Forum: Origin and Development". Last accessed 27 February 2012, at http://social.un.org/index/IndigenousPeoples/AboutUs/Mandate.aspx.

[54] "Permanent Forum on Indigenous Issues, Report on the sixth session" (25 May 2007) E/2007/43-E/C.19/2007/12 (Sixth Session Report), at 2.

[55] *See* Sixth Session Report, at 3, ¶¶9(a)-(c).

[56] *See* Sixth Session Report, at 3, ¶6.

Additionally, the Permanent Forum called on States to identify and protect the lands, territories, and natural resources of Indigenous peoples.[57]

In its most recent report, the Permanent Forum addressed several issues relevant to ICCAs, including calling attention to Indigenous peoples' right of self-determination. It stated that "OHCHR,[[58]] the secretariat of the Permanent Forum, ILO, the World Bank Group and other relevant United Nations entities, including United Nations country teams, should focus on increasing the understanding of Indigenous peoples' underlying material rights to land and the need to give material rights priority over process rights."[59] The Tenth Session Report also underscores the right of Indigenous peoples to participate in decision-making and the importance of mechanisms and procedures for the full and effective participation of Indigenous peoples in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.[60]

The Permanent Forum also focused on Indigenous peoples' right to free, prior and informed consent, which it called "a crucial dimension of the right of self-determination".[61] Noting concerns related to the implementation of free, prior and informed consent, the Permanent Forum will explore the potential for the development of guidelines on the implementation of free, prior and informed consent.[62]

And crucially, the Permanent Forum voiced its support for recognition of Indigenous peoples as "peoples" and called for change in the terminology used by the Convention on Biological Diversity to reflect this recognition:

> Affirmation of the status of indigenous peoples as "peoples" is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43-E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago.[63]

[57] *See* Sixth Session Report, at 3, ¶¶9(d), (e).
[58] "OHCHR" stands for the Office of the High Commissioner of Human Rights.
[59] "Permanent Forum on Indigenous Issues, Report on the tenth session" (27 May 2011) E/2011/43-E/C.19/2011/14 (Tenth Session Report), at 5 ¶20.
[60] Tenth Session Report, at 7 ¶31.
[61] Tenth Session Report, at 8 ¶36.
[62] Tenth Session Report, at 8 ¶37.
[63] Tenth Session Report, at 6 ¶26.

4.7.2 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples

The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples (commonly referred to as the Special Rapporteur on the Rights of Indigenous Peoples, or Special Rapporteur) was established in 2001 by UN Human Rights Committee Resolution 6/12. The position was held by Rodolfo Stavenhagen (Mexico) from 2001-2008 and has since been held by James Anaya (USA).[64]

The Human Rights Council requests and authorizes the Special Rapporteur to "examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, in conformity with his/her mandate, and to identify, exchange and promote best practices … [to] gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms … [and to] formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations."[65] These areas of work fall within four overall activities: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations.

The Special Rapporteur fulfils these requests in part by preparing annual reports regarding issues involving Indigenous peoples, which are submitted to the Human Rights Council. In 2010, the Special Rapporteur reported on the situation of human rights and fundamental freedoms of Indigenous people.[66] The 2010 Report focused on corporate responsibility related to Indigenous peoples, concluding that "[t]he absence of clarity with respect to corporate responsibility, especially transnational corporate responsibility, in relation to indigenous rights is the source of numerous abuses worldwide."[67] The Special Rapporteur called for implementation of an adequate consulting process to allow Indigenous peoples to participate in decisions affecting them.[68]

In 2011, the Special Rapporteur reported on extractive industries operating within or near indigenous territories.[69] The Special Rapporteur obtained data for the 2011 Report by sending

[64] Anaya is a Regents Professor and the James J. Lenoir Professor of Human Rights Law and Policy at the University of Arizona, where he has a small team of lawyers and academics to support his work as Special Rapporteur.

[65] Human Rights Council, "Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people" (adopted 28 September 2007).

[66] "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya" (19 July 2010) A/HRC/15/37 (2010 Report).

[67] 2010 Report at 18 ¶81.

[68] 2010 Report, at 18 ¶¶89-90.

[69] "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories" (11 July 2011) A/HRC/18/35 (2011 Report).

questionnaires to Governments, Indigenous peoples, corporations and members of civil society.[70]

Extractive industries that affect Indigenous peoples raise issues regarding Indigenous peoples' right to self-determination, including their right to participate and affect decision-making.[71] The Special Rapporteur noted that extractive industries have a significant impact on Indigenous peoples' lands and resources, and identified "[t]he gradual loss of control over indigenous lands, territories and natural resources … as a key concern, an issue that is seen as stemming from deficient protective measures for indigenous communal lands."[72] He identified "natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide."[73] The Special Rapporteur concluded by suggesting the development of a set of guidelines regarding the rights of Indigenous peoples in the context of natural resource extraction.[74]

4.7.3 Expert Mechanism on the Rights of Indigenous Peoples

In 2007, the UN Human Rights Council (Council) established the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) "to provide the Council with thematic expertise on the rights of indigenous peoples in the manner and form requested by the Council."[75]

The EMRIP provides thematic advice, as directed by the Council, on the rights of Indigenous peoples in the form of studies and research. It may also suggest proposals to the Council for its

[70] 2011 Report, at 9 ¶27.
[71] *See* 2011 Report, at 8 ¶22.
[72] 2011 Report, at 9 ¶30.
[73] 2011 Report, at 18 ¶82.
[74] 2011 Report, at 19 ¶89. The Special Rappoteur has called on the United States to secure "the rights of indigenous peoples to their lands [which] is of central importance to indigenous peoples' socio-economic development, self-determination, and cultural integrity." United Nations Human Rights, UN expert calls for stronger action to address serious issues affecting indigenous peoples in the USA. Last accessed 12 June 2012 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12115&LangID=E.
[75] OHCHR, "EMRIP: Nomination, Selection and Appointment of the independent experts". Last accessed 24 February 2012, at http://www2.ohchr.org/english/bodies/hrcouncil/expertmechanism/nominations.htm. The EMRIP's annual meetings are open to States, UN agencies, and other interested parties, as well as Indigenous peoples' organizations and non-governmental organizations. Participation takes place through an accreditation process that requires preparing a letter requesting accreditation, completing an online registration form, and bringing a Conference Registration Form to the meeting. Participation of representatives of Indigenous peoples' organizations is supported by the UN Voluntary Fund for Indigenous Populations. The Special Rapporteur on the Rights of Indigenous Peoples and a member of the Permanent Forum on Indigenous Issues are also invited to attend the annual session of EMRIP in order to enhance coordination and cooperation between the mechanisms.

consideration and approval. The EMRIP is made up of five independent experts on the rights of Indigenous peoples who are appointed by the Council.[76]

Since its establishment, the EMRIP has completed a study on Indigenous peoples and the right to participate in decision-making.[77] Recognizing that "it is difficult to define what actually constitutes a 'good' practice" of Indigenous peoples' participation in different levels of decision-making,[78] the EMRIP concluded that "[t]he most significant indicator of good practice is likely to be the extent to which indigenous peoples were involved in the design of the practice and their agreement to it."[79]

The EMRIP Final Report "focus[ed] on examples of good practices of indigenous peoples' participation in different levels of decision-making."[80] Additionally, it included advice associated with the corresponding study on Indigenous peoples' right to participate in decision-making.[81] Importantly, the EMRIP advised that "[d]ecision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages and their lands, territories and resources."[82] It notes that "a number of United Nations human rights treaty bodies have established that States have a duty, within the framework of their treaty obligations, to effectively consult indigenous peoples on matters affecting their interests and rights and, in some cases, to seek to obtain the consent of indigenous peoples."[83] Indeed, "[t]he duty to consult indigenous peoples applies whenever a measure or decision specifically affecting indigenous peoples is being considered (for example, affecting their lands or livelihood)."[84]

Based on Article 3 of the Declaration on the Rights of Indigenous Peoples and Article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the EMRIP concluded that "indigenous peoples have the right to determine their own economic, social and cultural development and

[76] As of February 2012 the experts are Mr. Vital Bambanze (Burundi), Ms. Anastasia Chukhman (Russian Federation), Ms. Jannie Lasimbang (Malaysia), Mr. Wilton Littlechild (Canada), and Mr. José Carlos Morales (Costa Rica).

[77] "Final report of the study on indigenous peoples and the right to participate in decision-making" (17 August 2011) A/HRC/18/42 (EMRIP Final Report).

[78] EMRIP Final Report, at 4 ¶9.

[79] EMRIP Final Report, at 4 ¶14.

[80] EMRIP Final Report, at 3 ¶4.

[81] This advice, which is included in the EMRIP Final Report, is entitled "Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision- making" (Advice to EMRIP Final Report).

[82] Advice to EMRIP Final Report, at ¶1.

[83] Advice to EMRIP Final Report, at ¶12 (citing various treaties, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination).

[84] Advice to EMRIP Final Report, at ¶16.

to manage, for their own benefit, their own natural resources."[85] The EMRIP determined that not only must Indigenous peoples be allowed to participate in the decision-making processes that affect them, they must also be able to affect the outcome of those decisions.[86] "Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights."[87]

Finally, the EMRIP called on (1) States to undertake a variety of actions related to promoting Indigenous peoples' right to self determination; (2) the UN, in accordance with UNDRIP, to establish a permanent mechanism or system for consultations with Indigenous peoples' governance bodies; and (3) the ILO and UNESCO to enable effective representation by Indigenous peoples in its decision-making.[88]

Between October 2011 and September 2012, the EMRIP is also engaging in a number of activities related to gathering information about indigenous peoples, including preparing a study on the role of languages and culture in the promotion of the rights and identity of Indigenous peoples and analysing best practices regarding appropriate measures and implementation strategies in order to attain the goals of the UNDRIP.[89]

5. CULTURAL HERITAGE

5.1 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage

In 1972, the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage.[90] The World Heritage Convention focuses on the dual purposes of preserving cultural sites and conserving nature. Pursuant to Article 2, natural heritage includes "geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation" and "natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

[85] Advice to EMRIP Final Report, at ¶18.
[86] Advice to EMRIP Final Report, at ¶21. This right flows from the duty of States to obtain indigenous peoples' free, prior and informed consent. *See id.*
[87] Advice to EMRIP Final Report, at ¶21.
[88] Advice to EMRIP Final Report, at ¶¶26-38.
[89] United Nations Human Rights, "The Expert Mechanism on the Rights of Indigenous Peoples." Last accessed 12 June 2012 at http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx.
[90] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972) (World Heritage Convention).

The World Heritage Committee is the main body in charge of implementing the World Heritage Convention. In its Operational Guidelines for the Implementation of the World Heritage Convention (Operational Guidelines), the World Heritage Committee recognizes that local communities have a role to play in decisions regarding the World Heritage Convention:

- One of the current strategic objectives of the World Heritage Committee is to enhance the role of communities in the implementation of the World Heritage Convention[91];
- In preparing an inventory of properties that State Parties consider suitable for inscription on the World Heritage List, State Parties are encouraged to involve a wide variety of stakeholders, including local communities[92];
- The Operational Guidelines recognize that "no area is totally pristine," but while "[h]uman activities, including those of traditional societies and local communities, often occur in natural areas", such "activities may be consistent with the Outstanding Universal Value of the area where they are ecologically sustainable."[93]

5.2 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage recognizes that "communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity".[94] "The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[95] The intangible cultural heritage is manifested in several domains, including "knowledge and practices concerning nature and the universe".[96]

The Convention on Cultural Heritage calls on State Parties to draw up "one or more inventories of the intangible cultural heritage present in its territory".[97] In addition to creating an inventory, State Parties shall also endeavour to:

[91] Operational Guidelines at 7.
[92] Operational Guidelines at 18.
[93] Operational Guidelines at 23. Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. Operational Guidelines at 14.
[94] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003, in force 20 April 2006) MISC/2003/CLT/CH/14 (Convention on Cultural Heritage), at 1.
[95] Convention on Cultural Heritage Article 2(1).
[96] Convention on Cultural Heritage Article 2(2).
[97] Convention on Cultural Heritage Article 12(1).

- Promote the function of the intangible cultural heritage in society;
- Ensure a competent body exists to safeguard the intangible cultural heritage present in its territory;
- Foster studies related to safeguarding the intangible cultural heritage;
- Adopt measures to (1) support institutions for training in and management of the intangible cultural heritage; (2) ensure access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; and (3) establish documentation institutions for the intangible cultural heritage.[98]

The Convention on Cultural Heritage also calls for education, awareness-raising, and capacity building regarding the intangible cultural heritage.[99] Additionally, it encourages participation of communities, groups and individuals: "Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."[100]

Articles 19 to 24 encourage broad international cooperation regarding the intangible cultural heritage, and an Intangible Cultural Heritage Fund is also established that is funded in part by contributions from State Parties.[101]

5.3 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions[102] attempts to address the challenge posed to today's local, national and international communities to ensure the diversity of cultural expressions. The Parties to the Convention on Cultural Expressions recognized "the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion".[103] The Parties took "into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development".[104]

[98] Convention on Cultural Heritage Article 13.
[99] Convention on Cultural Heritage Article 14.
[100] Convention on Cultural Heritage Article 15.
[101] Convention on Cultural Heritage Articles 25-28.
[102] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, adopted 20 October 2005, in force 18 March 2007) I-43977 (Convention on Cultural Expressions).
[103] Convention on Cultural Expressions, at 1.
[104] Convention on Cultural Expressions, at 1.

One of the principles of the Convention on Cultural Expressions is the principle of sustainable development, which provides that "[c]ultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations."[105] Another principle is the principle of equal dignity of and respect for all cultures. This principle provides that "[t]he protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples."[106]

Article 7 of the Convention on Cultural Expressions requires Parties to

> endeavour to create in their territory an environment which encourages individuals and social groups . . . to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.

Article 11 instructs Parties to "encourage the active participation of civil society in their efforts to achieve the objectives of this Convention."

6. BIODIVERSITY

6.1 Convention on Biological Diversity

The Convention on Biological Diversity[107] entered into force on 29 December 1993 and currently has 193 Contracting Parties.[108] The CBD has three main objectives: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[109]

The preamble of the CBD notes that "the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings …."[110] It also states that Parties recognize "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the

[105] Convention on Cultural Expressions, at 4.
[106] Convention on Cultural Expressions, at 3.
[107] Convention on Biological Diversity (Rio, 5 June 1992, in force 29 December 1993) UNTS I-30619 (CBD).
[108] CBD, "List of Parties". Last accessed 24 February 2012, at http://www.cbd.int/convention/parties/list/.
[109] CBD Article 1.
[110] CBD Preamble.

desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."[111]

The most important provisions in the CBD relating to ICCAs are set forth in Articles 8 and 10. Article 8(j) requires Contracting Parties to support indigenous and local communities whose traditional lifestyles are relevant to the CBD's objectives. It calls on Parties, subject to national legislation, to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities[112] embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

Article 10(c) requires Contracting Parties to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."

In addition, Article 15, entitled "Access to Genetic Resources," requires Contracting Parties to "facilitate access to genetic resources for environmentally sound uses by other Contracting Parties", Article 17 requires Contracting Parties to exchange public information relevant to the objectives of the CBD, including "indigenous and traditional knowledge", and under Article 18(4), Contracting Parties shall "encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention."

Overall, although the CBD entered into force prior to the emergence of the ICCA concept, its fundamental nature supports ICCAs.[113] Article 8(j) instructs Parties to support the knowledge and practices of indigenous and local communities that promote biological diversity, while Article 10(c) calls on parties to protect and encourage customary use of biological resources in

[111] CBD Preamble.

[112] It should be noted that the CBD and its corresponding programs and instruments refer to "indigenous and local communities", eschewing use of the word "peoples." In contrast, the UNDRIP employs the word "peoples" throughout its text, including the title. The lack of reference to "peoples" in the CBD has been criticized by Indigenous organizations such as the International Indigenous Forum on Biodiversity. In this review, we use the term "Indigenous peoples" where appropriate. In discussing the CBD and its corresponding programs and instruments, however, we use the term "indigenous and local communities," in quotation marks, to remain consistent with the language employed therein.

[113] It is interesting to note, however, that the Principle of the CBD is that "States have, in accordance with the Charter of the United Nations and the principles of international law, **the sovereign right to exploit their own resources pursuant to their own environmental policies** . . . ." CBD Article 3 (emphasis added.) Although the right of States to exploit their own resources must be exercised in accordance with principles of international law, the Principle could conceivably be used by States to exploit resources in a manner that undermines the ICCA concept.

accordance with traditional cultural practices. These practices are to be compatible with sustainable use requirements. Taken together, Articles 8(j) and 10(c) support indigenous peoples and local communities that sustainably manage territories and areas. One issue to note regarding the CBD is that its provisions "apply, in relation to each Contracting Party: [] In the case of components of biological diversity, in areas within the limits of its national jurisdiction[.]"[114] Of course, some ICCAs may extend beyond the limits of a State's national jurisdiction.

6.2 Binding Subsidiary Instruments to the CBD

6.2.1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization

On 30 October 2010, the Conference of the Parties to the Convention on Biological Diversity (CBD) adopted the Nagoya Protocol.[115] The Nagoya Protocol is an international agreement which "aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components."[116]

Several paragraphs in the Nagoya Protocol's Preamble support the rights of Indigenous peoples and local communities. These paragraphs, among other things: recognize the importance of traditional knowledge to "indigenous and local communities"; affirm "that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities"; and take note of UNDRIP.

Article 5 addresses Fair and Equitable Benefit Sharing. Article 5(2) instructs Parties to the Nagoya Protocol (Parties) to take appropriate measures to ensure "that benefits arising from the utilization of genetic resources that are held by indigenous and local communities . . . are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms." Pursuant to Article 5(5), parties are instructed to take the same measures to ensure that "benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge" based upon mutually agreed terms.

[114] CBD Article 4(a).

[115] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, 30 October 2010) NEW-30619 (Nagoya Protocol).

[116] "The Nagoya Protocol on Access and Benefit Sharing". Last accessed on 8 February 2012, at http://www.cbd.int/abs.

Article 6 deals with Access to Genetic Resources. In Article 6(2), the Parties are instructed to obtain the prior informed consent of "indigenous and local communities" as follows:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

In Article 6 (3), "each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to: … (f) Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources."

Article 7, entitled Access to Traditional Knowledge Associated with Genetic Resources, instructs Parties to ensure that the traditional knowledge of "indigenous and local communities" is accessed with their prior informed consent:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

Article 10 directs parties to consider the need for "a global multilateral benefit-sharing mechanism" to address benefit sharing in the context of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. Such benefits are to be used to support biological diversity and its sustainable use.

Article 11 recognizes that the same genetic resources and traditional knowledge associated with those resources can be found within the territory of more than one Party, and instructs Parties to cooperate with "indigenous and local communities" in such circumstances. Under Article 11(1), "[i]n instances where the same genetic resources are found *in situ* within the territory of more than one Party, those Parties shall endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned …." Article 11(2) requires Parties to cooperate with indigenous and local communities "[w]here the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties …."

Article 12 contains several provisions regarding indigenous and local communities and traditional knowledge associated with genetic resources. Under Article 12(1), Parties shall take the customary laws, community protocols and procedures of indigenous and local communities

into consideration in implementing their obligations under the Nagoya Protocol. Under Article 12(2), Parties, with participation from "indigenous and local communities," shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations. And pursuant to Article 12(3), Parties shall support "indigenous and local communities'" development of community protocols, minimum requirements to secure fair and equitable sharing of benefits, and model contractual clauses for benefit-sharing related to traditional knowledge associated with genetic resources.

Under Article 16, Parties are to take appropriate measures to ensure that traditional knowledge associated with genetic resources "has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities".

Article 21 calls on Parties to "take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues." It sets forth several examples of such measures, including "[o]rganization of meetings of indigenous and local communities and relevant stakeholders", "[p]romotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders", and "[i]nvolvement of indigenous and local communities and relevant stakeholders in the implementation of this Protocol".

6.2.2 Cartagena Protocol on Biosafety

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity[117] governs the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. Article 26 of the Biosafety Protocol contains aspirational provisions related to taking socio-economic conditions of indigenous and local communities into account when reaching decisions:

> 1. The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.
> 2. The Parties are encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities.

Article 27 of the Biosafety Protocol required the Conference of the Parties to the Biosafety Protocol to "adopt a process with respect to the appropriate elaboration of international rules

[117] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000, in force 11 September 2003) A-30619 (Biosafety Protocol).

and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms ….” Pursuant to this requirement, on 15 October 2010 the Parties adopted the Nagoya-Kuala Lumpur Supplementary Protocol On Liability and Redress to the Cartagena Protocol on Biosafety (N-KL Supplementary Protocol). The N-KL Supplementary Protocol sets forth a framework for liability and redress for damage caused by LMOs that find their origin in a transboundary movement. However, much of the implementation of procedures and remedies has been left to Parties to implement at the domestic level. The N-KL Supplementary Protocol does not refer to indigenous and local communities, and domestic law adopted under the Supplementary Protocol will likely dictate their ability to obtain redress for damage caused by LMOs.

6.3 Non-Binding Instruments

6.3.1 Akwé: Kon Guidelines

The Akwé: Kon Guidelines[118] explicitly recognize principles underlying the ICCA concept, including the fact that “indigenous and local communities are guardians of a significant part of the planet's terrestrial biodiversity”.[119] “The international community has recognized the close and traditional dependence of many indigenous and local communities on biological resources, notably in the preamble to the Convention on Biological Diversity.”[120]

The Akwé: Kon Guidelines acknowledge that “indigenous and local communities” often live in particular areas in a sustainable manner:

> Most indigenous and local communities live in areas where the vast majority of the world's genetic resources are found. They have used biological diversity in a sustainable way for thousands of years and their cultures and knowledge are deeply rooted in the environment on which they depend. As a result, developments proposed to take place on lands and waters traditionally occupied by indigenous and local communities[[121]] have been a source of concern to these communities because of the potential long-term negative impacts on their livelihoods and traditional knowledge.[[122]]

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[118] “Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities” (2004) (Akwé: Kon Guidelines). The Akwé: Kon Guidelines were developed pursuant to task 9 of Decision V/16, *discussed supra* note **113**.

[119] Akwé: Kon Guidelines, at 2.

[120] Akwé: Kon Guidelines, at 1.

[121] The phrase “lands and waters traditionally occupied by indigenous and local communities” will be referred to in this section as “traditionally occupied lands.” Traditionally occupied lands fulfill the first feature of ICCAs, namely that a well-defined people or community possesses a close and profound relation with an equally well-defined site (such as territory, area, or habitat) and/or species.

[122] Akwé: Kon Guidelines, at 1.

To address this concern, the Akwé: Kon Guidelines were developed by the Parties to the CBD, "in cooperation with indigenous and local communities" and "are intended to provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments."[123] The Akwé: Kon Guidelines "should be taken into consideration whenever developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities."[124]

Part III[125] of the Akwé: Kon Guidelines sets forth procedural considerations in drafting an integrated assessment, Part IV calls for the integration of cultural, environmental and social impact statements as a single process, Part V provides general considerations to be taken into account in drafting impact statements, and Part VI, entitled "ways and means," sets forth several suggestions for ways to implement impact assessments.

a. Part III: Procedural Considerations

Part III instructs that an impact assessment should involve four main steps: a preparatory stage, a main stage (during which impact analysis and assessment takes place, as well as consideration of mitigating measures), a reporting and decision-making stage, and a monitoring and auditing stage. Part III then sets forth steps which "may also be considered in carrying out an impact assessment for a development proposed to take place on, or which is likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities".[126] Some of the important steps include:

- Identification of "indigenous and local communities" and relevant stakeholders likely to be affected by the proposed development;
- Establishment of effective mechanisms for "indigenous and local community" participation . . . in the impact assessment process;
- Establishment of a process whereby "local and indigenous communities" may have the option to accept or oppose a proposed development that may impact on their community;
- Identification of actors responsible for liability, redress, insurance and compensation;
- Establishment of a review and appeals process.[127]

[123] Akwé: Kon Guidelines, at 1-2.
[124] Akwé: Kon Guidelines, at 5 ¶1.
[125] Part I sets forth the purpose and Part II defines terms used in the Akwé: Kon Guidelines.
[126] Akwé: Kon Guidelines, at 8 ¶8. In this respect, the Akwé: Kon Guidelines are somewhat unclear. Part III appears to draw a distinction between impact assessments involving situations where development may impact traditionally occupied lands and those where traditionally occupied lands may not be involved.
[127] Akwé: Kon Guidelines, at 8-9 ¶8

b. Part IV: Integration of Cultural, Environmental and Social Impact Assessments as a Single Process

(i) Cultural impact assessments

Part IV notes that "[t]he conduct of impact assessments should meet the requirements of the Convention on Biological Diversity as defined in its Articles 14 and 8(j), and take into account the general principles guiding the programme of work on Article 8(j) and related provisions."[128] In regard to cultural assessments, "the issues that are of particular cultural concern should be identified, such as . . . systems of natural resource use, including patterns of land use, places of cultural significance, economic valuation of cultural resources, [and] sacred sites".[129]

Part IV calls for developers to respect traditionally occupied lands and to consider alternate sites where traditionally occupied lands may be impacted:

> 31. When developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, personnel associated with such developments should recognize that many sacred sites, and areas or places of other cultural significance may have important functions with respect to the conservation and sustainable use of biological diversity and, by extension, the maintenance of the natural resources upon which such communities rely for their well-being.
>
> 32. If it is necessary to assess the potential impact of a proposed development on a sacred site, the assessment process should also include the selection of an alternate site for development in consultation with the site custodians and the affected community as a whole. Where a sacred site is to be affected by a proposed development, and in cases where no law exists to protect the site, the concerned indigenous and local community may wish to develop protocols regarding the site in the context of the proposed development.[[130]]

Additionally, Part IV recognizes that "[i]f a development requires the introduction of an outside work-force, or requires changes in local customary systems (e.g. regarding land tenure, distribution of resources and benefits) conflicts may result." Therefore, it may be "necessary to codify certain parts of customary law, clarify matters of jurisdiction, and negotiate ways to minimize breaches of local laws."[131]

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[128] Akwé: Kon Guidelines, at at 13 ¶23.
[129] Akwé: Kon Guidelines, at at 13 ¶24.
[130] Akwé: Kon Guidelines, at at 15 ¶¶31-32.
[131] Akwé: Kon Guidelines, at at 15 ¶34.

(ii) Environmental impact assessments

As information gathering processes, "environmental impact assessments can contribute to the protection of the rights of indigenous and local communities by recognizing the distinct activities, customs and beliefs of the affected indigenous and local communities."[132] In undertaking an environmental impact statement, Part IV states that conducting a baseline study is desirable. The baseline study should include "[i]dentification of sites of religious, spiritual, ceremonial and sacred significance (such as sacred groves and totemic sites)."[133] Part IV also calls for traditional knowledge "of those who have a long association with the particular area for which the development is proposed" to be considered in preparing a baseline study.[134]

(iii) Social impact assessments

In conducting social impact assessments, "social development indicators consistent with the views of indigenous and local communities should be developed and should include gender, generational considerations, health, safety, food and livelihood security aspects and the possible effects on social cohesion and mobilization."[135] Additionally, "[d]evelopments involving changes to traditional practices for food production, or involving the introduction of commercial cultivation and harvesting of a particular wild species, should have those changes and introductions assessed."[136]

c. Part V: General Considerations

Part V sets forth general considerations to be taken into account when carrying out an impact assessment. These considerations include:

- Prior informed consent of the affected "indigenous and local communities";
- Impact assessments and community development plans;
- Legal considerations;
- Ownership, protection and control of traditional knowledge, innovations and practices and technologies used in cultural, environmental and social impact assessment processes;
- Need for transparency; and
- Establishment of review and dispute resolution procedures.[137]

[132] Akwé: Kon Guidelines, at at 16 ¶35.
[133] Akwé: Kon Guidelines, at at 17 ¶37.
[134] Akwé: Kon Guidelines, at at 17 ¶38.
[135] Akwé: Kon Guidelines, at at 18 ¶42.
[136] Akwé: Kon Guidelines, at at 18 ¶41.
[137] Akwé: Kon Guidelines, at at 21 ¶52.

In regard to impact assessments and community development plans, Part V calls for striking a balance between social and cultural concerns on the one hand and maximizing conservation, among other things, on the other hand:

> Any developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should maintain a balance between economic, social, cultural and environmental concerns, on the one hand, while, on the other hand, maximizing opportunities for the conservation and sustainable use of biological diversity, the access and equitable sharing of benefits and the recognition of traditional knowledge, innovations and practices in accordance with Article 8(j) of the Convention, and should seek to minimize risks to biological diversity. The cultural, environmental and social impact assessment processes should reflect this.[138]

In regard to legal considerations, "Governments, their agencies and development proponents should take into account the rights of indigenous and local communities over lands and waters traditionally occupied or used by them and the associated biological diversity."[139]

d. Part VI: Ways and Means

Part VI sets forth several aspirational goals, including that "[g]overnments should encourage and support indigenous and local communities . . . to formulate their own community-development plans",[140] "cultural, environmental and social impact assessment processes relevant to indigenous and local communities" should be incorporated into legislation,[141] and "[r]esources, including financial, technical and legal support, should be made available to indigenous and local communities and relevant national organizations to enable them to participate fully in all aspects of national impact assessments."[142]

6.3.2 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity

In the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, the Executive Secretary of the CBD recognized that "[s]ustainable use of the components of biological diversity is one of the three objectives of the Convention and is addressed in Article 10, which requires Parties to adopt measures relating to the use of biodiversity to avoid or minimize impacts on biological diversity."[143] In order to operationalize the concept [of

[138] Akwé: Kon Guidelines, at 22 ¶56.
[139] Akwé: Kon Guidelines, at 22 ¶57.
[140] Akwé: Kon Guidelines, at 24 ¶66.
[141] Akwé: Kon Guidelines, at 24 ¶67.
[142] Akwé: Kon Guidelines, at 24 ¶70.
[143] "Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity" (2004) (CBD Guidelines), at 1.

sustainable use], the Conference of the Parties requested the Executive Secretary to "assemble practical principles and operational guidelines to advise Parties and other Governments in their efforts to achieve the sustainable use of biological diversity, within the framework of the ecosystem approach."[144]

The CBD Guidelines are broken into three main parts. Part 1, consisting of the preamble, sets out, among other things, general goals related to preserving biological diversity. The second part lists underlying conditions for sustainable use. The third part contains fourteen practical principles for the sustainable use of biological diversity. Each principle is accompanied by its underlying rationale and operational guidelines for its implementation.

The CBD Guidelines explicitly recognize that "indigenous and local communities" play an important role in the sustainable use of biological diversity. One condition set out in the CBD Guidelines is that relevant provisions of the CBD be applied in matters involving indigenous and local communities. Specifically: "In considering individual guidelines …, it is necessary to refer to and apply the provisions of Article 8(j), Article 10(c) and other related provisions and their development in relevant decisions of the Conference of the Parties in all matters that relate to indigenous and local communities."[145]

As its title indicates, the preservation of biological diversity is the principle purpose of the CBD Guidelines. The CBD Guidelines recognize that "indigenous and local communities and their cultures often depend directly on the uses of biological diversity for their livelihoods" and "governments should have adequate policies and capacities in place to ensure that such uses are sustainable".[146] By definition, an ICCA is an area where "the people's or community's decisions and efforts lead to the conservation of biodiversity".[147] Echoing this requirement is the following condition in the CBD Guidelines: "To ameliorate any potential negative long-term effects of uses it is incumbent on all resource users, to apply precaution in their management decisions and to opt for sustainable use management strategies and policies that favour uses that provide increased sustainable benefits while not adversely affecting biodiversity."[148]

Practical Principles

As noted above, the CBD Guidelines contain fourteen practical principles for the sustainable use of biological diversity. Some of the most relevant to the concept of ICCAs are set forth below.

Practical principle 1: *Supportive policies, laws, and institutions are in place at all levels of governance and there are effective linkages between these levels*. The operational guidelines for

[144] CBD Guidelines, at 2.
[145] CBD Guidelines, at 8 ¶8(g).
[146] CBD Guidelines, at 7 ¶8(d).
[147] "Strengthening what works: Recognising and supporting the conservation achievements of indigenous peoples and local communities" (10 May 2010) IUCN/CEESP Briefing Note, at 1.
[148] CBD Guidelines, at 7-8 ¶8(f).

this principle call for consideration of "local customs and traditions (and customary law where recognized) when drafting new legislation and regulations".[149]

Practical principle 2: *Recognizing the need for a governing framework consistent with international national laws, local users of biodiversity components should be sufficiently empowered and supported by rights to be responsible and accountable for use of the resources concerned.*

The rationale behind this principle is that "sustainability is generally enhanced if Governments recognize and respect the 'rights' or 'stewardship' authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities, private landowners, conservation organizations and the business sector." Additionally, the CBD Guidelines provide that "to reinforce local rights or stewardship of biological diversity and responsibility for its conservation, resource users should participate in making decisions about the resource use and have the authority to carry out any actions arising from those decisions."

The operational guidelines for Practical principle 2 set forth specific actions for including "local users of biodiversity components," which may include "indigenous and local communities," in the decision-making process:

> Review existing regulations to see if they can be used for delegating rights; amend regulations where needed and possible; and/or draft new regulations where needed. Throughout local custom and traditions (including customary law where recognized) should be considered;
>
> Refer to the programme of work related to the implementation of Article 8(j) with regard to indigenous and local community issues (decision V/16), implement and integrate tasks relevant for the sustainable use of biodiversity components, in particular element 3, tasks 6, 13 and 14; …
>
> Protect and encourage customary use of biological resources that is sustainable, in accordance with traditional and cultural practices (Article 10(c)).[150]

Practical principle 4: *Adaptive management should be practiced, based on: (a) science and traditional and local knowledge; (b) iterative, timely and transparent feedback derived from*

[149] CBD Guidelines, at 8.

[150] This operational guideline refers to "Article 8(j) and related provisions" (22 June 2000) UNEP/CBD/COP/DEC/V/16 (Decision V/16). Decision V/16, among other things, emphasizes "the fundamental importance of ensuring the full and effective participation of indigenous and local communities in the implementation of Article 8(j) and related provisions". Decision V/16 contains several specific tasks geared toward involving "indigenous and local communities" in the decision-making process regarding the implementation of CBD Article 8(j).

monitoring the use, environmental, socio-economic impacts, and the status of the resource being used; and (c) adjusting management based on timely feedback from the monitoring procedures.

The rationale behind practical principle 4 recognizes that "[i]n many societies traditional and local knowledge has led to much use of biological diversity being sustainable over long time-periods without detriment to the environment or the resource." Accordingly, "[i]ncorporation of such knowledge into modern use systems can do much to avoid inappropriate use and enhance sustainable use of components of biodiversity."[151]

Practical principle 6: *Interdisciplinary research into all aspects of the use and conservation of biological diversity should be promoted and supported.*

The operational guidelines for this principle "[e]ncourage active collaboration between scientific researchers and people with local and traditional knowledge" and seek the development of "cooperation between researchers and biodiversity users (private or local communities), in particular, involve indigenous and local communities as research partners and use their expertise to assess management methods and technologies".[152]

Practical principle 9: *An interdisciplinary, participatory approach should be applied at the appropriate levels of management and governance related to the use.*

Practical principle 9 notes that is "necessary to take [social, cultural, political and economic] factors into consideration and involve indigenous and local communities and stakeholders, including and the private sector, and the people experienced in these different fields, at all levels of the decision making process."[153] Under this principle, communication and exchange of information should be facilitated "between all levels of decision-making", relevant stakeholders should be identified, and "their participation in planning and executing of management activities" sought, and "guidance from local, traditional and technical specialists in designing the management plan" should also be sought.[154]

Practical principle 12: *The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources.*

Practical principle 12 recognizes that the involvement of "local people . . . as stakeholders" generally reduces violations that take place when regulations protecting resources are ignored and not enforced. The operational guidelines for this principle call for inclusion of "indigenous

[151] CBD Guidelines, at 11.
[152] CBD Guidelines, at 14.
[153] CBD Guidelines, at 16.
[154] CBD Guidelines, at 16.

and local communities" in the management of resources as well as for equal sharing of benefits with them:

> Promote economic incentives that will guarantee additional benefits to indigenous and local communities and stakeholders who are involved in the management of any biodiversity components, e.g., job opportunities for local peoples, equal distribution of returns amongst locals and outside investors/co-management;
>
> Adopt policies and regulations that ensure that indigenous and local communities and local stakeholders who are engaged in the management of a resource for sustainable use receive an equitable share of any benefits derived from that use; …
>
> Involve local stakeholders, including indigenous and local communities, in the management of any natural resource and provide those involved with equitable compensation for their efforts, taking into account monetary and non-monetary benefits[.][155]

6.3.3 Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (Decision X/42)

The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities is set forth in Decision X/42 of the COP 10 Decisions.[156]

The Code of Ethical Conduct focuses mainly on the cultural heritage and intellectual property of "indigenous and local communities." In that context, the Parties recognized the importance of lands traditionally occupied by "indigenous and local communities":

> Recalling that access by indigenous and local communities to lands and waters traditionally occupied or used by indigenous and local communities, together with the opportunity to practice traditional knowledge on those lands and waters, is paramount for the retention of traditional knowledge, and the development of innovations and practices relevant for the conservation and sustainable use of biological diversity.[157]

[155] CBD Guidelines, at 19.

[156] "The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities" (29 October 2010) UNEP/CBD/COP/DEC/X/42 (Code of Ethical Conduct).

[157] Code of Ethical Conduct, at 2.

The Code of Ethical Conduct strongly supports the ICCA concept, specifically calling for recognition of lands traditionally occupied by "indigenous and local communities":

> ***Recognition of sacred sites, culturally significant sites and lands and waters traditionally occupied or used by indigenous and local communities***
>
> 17. This principle recognizes the integral connection of indigenous and local communities to their sacred sites, culturally significant sites and lands and waters traditionally occupied or used by them and associated traditional knowledge, and that their cultures, lands and waters are interrelated. In accordance with national domestic law and international obligations, in this context, traditional land tenure of indigenous and local communities should be recognized, as access to traditional lands and waters and sacred sites is fundamental to the retention of traditional knowledge and associated biological diversity. Sparsely populated lands and waters ought not to be presumed to be empty or unoccupied but may be occupied or used by indigenous or local communities.[158]

Additionally, under the Code of Ethical Conduct "indigenous and local communities" should be informed and involved in decisions when their traditionally occupied lands may be impacted by activities involving the use of their traditional knowledge:

> ***Transparency/full disclosure***: Indigenous and local communities should be adequately informed in advance, about the nature, scope and purpose of any proposed activities/interactions carried out by others that may involve the use of their traditional knowledge, innovations and practices related to the conservation and sustainable use of biodiversity, occurring on or likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. This information should be provided in a manner that takes into consideration and actively engages with the body of knowledge and cultural practices of indigenous and local communities.[159]
>
> ***Prior informed consent and/or approval and involvement:*** Any activities/ interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Such consent or approval should not be coerced, forced or manipulated.[160]

[158] Code of Ethical Conduct, at 6 ¶17.
[159] Code of Ethical Conduct, at 4 ¶10.
[160] Code of Ethical Conduct, at 4-5 ¶¶10-11.

Several other provisions of the Code of Ethical Conduct support ICCAs as well. For example, "indigenous and local communities should, where relevant, be actively involved in the management of lands and waters traditionally occupied or used by them, including sacred sites and protected areas."[161] Additionally, the Code of Ethical Conduct supports "indigenous and local communities'" right to have access to their traditional resources[162] and proscribes the removal of "indigenous and local communities" from their lands and waters or lands and waters traditionally occupied or used by them without their consent.[163]

6.4 CBD COP Decisions

To date the Conference of the Parties (COP) has held 10 ordinary meetings, and one extraordinary meeting.[164] The following sub-sections highlight decisions of most relevance to the rights of Indigenous Peoples and local communities in relation to their ICCAs.

6.4.1 COP 7

In 2004, at the seventh COP (COP 7), the COP adopted the programme of work on protected areas. In Decision VII/28, the COP referred to "indigenous and local community conserved areas" as one of several "innovative types of governance for protected areas that need to be recognized and promoted through legal, policy, financial institutional and community mechanisms".[165]

6.4.2 COP 8

At the eighth COP (COP 8), held in 2006, the COP continued to support ICCAs in the context of protected areas, inviting parties to consider "[f]unding mechanisms to support indigenous and local communities conserved areas" in designing plans to finance protected areas.[166] The COP also invited the Global Environment Facility to "support community conserved areas, ensuring the immediate, full and effective participation of indigenous peoples and local communities in the development of relevant activities".[167]

[161] Code of Ethical Conduct, at 6 ¶20.
[162] Code of Ethical Conduct, at 6 ¶18.
[163] Code of Ethical Conduct, at 6 ¶19.
[164] COP, "Background and status". Last accessed 29 February 2012, at http://www.cbd.int/cop/.
[165] "Protected areas (Articles 8 (a) to (e))" (13 April 2004) UNEP/CBD/COP/DEC/VII/28 (Decision VII/28), at 9. The programme of work on protected areas is discussed in more detail below in section 6.5.
[166] "Protected areas" (15 June 2006) UNEP/CBD/COP/DEC/VIII/24 (Decision VIII/24), at 3-4.
[167] Decision VIII/24, at 5.

6.4.3 COP 9

The ninth COP (COP 9) was held in 2008. Again in the context of protected areas, the COP invited parties to "[r]ecognize the contribution of, where appropriate, … indigenous and local community conserved areas within the national protected area system through acknowledgement in national legislation or other effective means".[168] Additionally, the COP urged funding organizations to make funding available in developing countries "to allow for the designation and effective management of new protected areas …, and for improving management of existing protected areas, including, as appropriate, … indigenous and local community conserved areas".[169]

6.4.4 COP 10

At the tenth COP (COP 10), held in 2010, the COP adopted 47 Decisions, several of which are relevant to the ICCA concept.

6.4.4.1 Aichi Biodiversity Targets (Decision X/2)

At COP 10, the COP noted "with concern the conclusions of the third edition of the Global Biodiversity Outlook, which confirm that the 2010 biodiversity target has not been met in full".[170] In Decision X/2, the COP adopted "the Strategic Plan for Biodiversity 2011-2020, with its Aichi Targets, annexed to the present decision".[171] The rational for the Strategic Plan for Biodiversity 2011-2020 (Strategic Plan) is that biodiversity is an essential aspect of ecosystem functioning:

> The rationale for the new plan is that biological diversity underpins ecosystem functioning and the provision of ecosystem services essential for human well-being. It provides for food security, human health, the provision of clean air and water; it contributes to local livelihoods, and economic development, and is essential for the achievement of the Millennium Development Goals, including poverty reduction.[172]

The Strategic Plan consists of five strategic goals encompassing twenty Aichi Biodiversity Targets. Strategic Goal E is to "[e]nhance implementation through participatory planning, knowledge management and capacity building". Relevant to ICCAs, Target 11 calls for land and water areas to be conserved through "effective area-based conservation measures":

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[168] "Protected areas" (9 October 2008) UNEP/CBD/COP/DEC/IX/18 (Decision IX/18), at 3.
[169] Decision IX/18, at 8-9.
[170] "Strategic Plan for Biodiversity 2011-2020" (29 October 2010) UNEP/CBD/COP/DEC/X/2 (Decision X/2), at 1.
[171] Decision X/2, at 1 ¶1.
[172] "Key Elements of the Strategic Plan 2011-2020, including Aichi Biodiversity Targets". Last accessed on 9 February 2012 at: http://www.cbd.int/sp/elements.

> By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.

Target 18 calls for "indigenous and local communities'" customary use of biological resources to be respected, and integrated in the implementation of the CBD:

> By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.

6.4.4.2 Consolidated update of the Global Strategy for Plant Conservation 2011-2020 (Decision X/17)

In Decision X/17, the COP recognized "the critical role of plants in supporting ecosystem resilience, provision of ecosystem services; adapting to and mitigating environmental challenges inter alia, climate change, and for supporting human well-being".[173] The COP also recognized that "indigenous and local communities . . . have a vital role to play in addressing the loss of plant diversity."[174] To this end, Decision X/17 provides "[i]f efforts are made at all levels to fully implement [the Global Strategy for Plant Conservation]: . . . (v) the knowledge, innovations and practices of indigenous and local human communities that depend on plant diversity will be recognized, respected, preserved and maintained".[175]

6.4.4.3 Protected areas (Decision X/31)

In Decision X/31, the COP explicitly recognizes "indigenous and local community conserved areas" and calls for including "indigenous and local communities" in decision making related to protected areas.[176]

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[173] "Consolidated update of the Global Strategy for Plant Conservation 2011-2020" (29 October 2010) UNEP/CBD/COP/DEC/X/17 (Decision X/17), at 4.

[174] Decision X/17, at 5.

[175] Decision X/17, at 5.

[176] See "Protected Areas" (29 October 2010) UNEP/CBD/COP/DEC/X/31 (Decision X/31), at 1 (inviting Parties to "[d]evelop a long-term action plan or reorient, as appropriate, relevant existing plans, . . . involving all relevant stakeholders including indigenous and local communities, for the implementation

Section 9 of Decision X/31 deals with Element 2 of the PoWPA (Governance, Participation, Equity and Benefit Sharing). Importantly, Decision X/31

> 31. *Invites* Parties to:
> ….
>
> (b) Recognize the role of indigenous and local community conserved areas and conserved areas of other stakeholders in biodiversity conservation, collaborative management and diversification of governance types[177];
>
> 32. *Recalling* paragraph 6 of decision IX/18 A, further invites Parties to:
>
> (a) Improve and, where necessary, diversify and strengthen protected-area governance types, leading to or in accordance with appropriate national legislation including recognizing and taking into account, where appropriate, indigenous, local and other community-based organizations;
>
> (b) Recognize the contribution of, where appropriate, co-managed protected areas, private protected areas and indigenous and local community conserved areas within the national protected area system through acknowledgement in national legislation or other effective means; [and]
>
> (c) Establish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations.[178]

Under Section 9, Parties are also invited to "[e]stablish clear mechanisms and processes for equitable cost and benefit-sharing and for full and effective participation of indigenous and local communities, related to protected areas", "[f]urther develop and implement measures for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas", "[i]nclude indigenous and local communities in multi-stakeholder advisory committees" in relevant consultations and reviews", and "[c]onduct, where appropriate, assessments of governance of protected areas using toolkits prepared by the Secretariat and other organizations, and conduct capacity-building activities for protected area institutions and relevant stakeholders ….'"[179]

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of the programme of work on protected areas . . . ."). *See also* Decision X/31, at 6 ¶27 (requesting the Executive Secretary to collaborate with "indigenous and local communities" in evaluating methods for measuring the values, costs and benefits of protected areas).

[177] Decision X/31, at 7 ¶31.

[178] Decision X/31, at 7-8 ¶32.

[179] Decision X/31, at 8 ¶32.

6.4.4.4 Sustainable use of biodiversity (Decision X/32)

In Decision X/32, the COP also set forth policies supporting ICCAs. The COP invited Parties and other government to:

> (e) Address obstacles and devise solutions to protect and encourage customary sustainable use of biodiversity by indigenous and local communities, for example by incorporating customary sustainable use of biological diversity by indigenous and local communities into national biodiversity strategies, policies, and actions plans, with the full and effective participation of indigenous and local communities in decision-making and management of biological resources;
>
> (f) Recognize the value of human-influenced natural environments, such as farmlands and secondary forests, including those that have been created and maintained by indigenous and local communities, and promote efforts in such areas that contribute to the achievement of all objectives of the Convention, in particular the sustainable use and conservation of biodiversity and traditional knowledge[.[180]]

Additionally, in Decision X/32 the COP stated that it recognizes and supports ICCAs in the context of Article 10(c) of the CBD as follows:

> *Recognizes* and *supports* further discussion, analysis and understanding of the *Satoyama* Initiative[[181]] to further disseminate knowledge, build capacity and promote projects and programmes for the sustainable use of biological resources, and promote synergy of the Satoyama Initiative with other initiatives or activities including the Man and the Biosphere Programme of the United Nations Educational, Scientific and Cultural Organization, the International Model Forest Network, and other initiatives that include community-conserved areas that are developed and managed by local and indigenous communities to advance understanding and implementation of customary use in accordance with Article 10(c) of the Convention on Biological Diversity[.[182]]

[180] "Sustainable Use of Biodiversity" (29 October 2010) UNEP/CBD/COP/DEC/X/32 (Decision X/32), at 2 ¶2.

[181] The Satoyama Initiative is a joint initiative between the Ministry of the Environment of Japan and the United Nations University Institute of Advanced Studies (UNU-IAS). "This international effort promotes activities consistent with existing fundamental principles including the Ecosystem Approach. Our core vision is to realise societies in harmony with nature, that is, built on positive human-nature relationships." "Satoyama Initiative". Last accessed 9 February 2012 at: http://satoyama-initiative.org/en/about-2.

[182] Decision X/32, at 3 ¶7.

6.4.4.5 Biodiversity and climate change (Decision X/33)

In Decision X/33, the COP invited:

> Parties and other Governments, according to national circumstances and priorities, as well as relevant organizations and processes, to consider the guidance below on ways to conserve, sustainably use and restore biodiversity and ecosystem services while contributing to climate-change mitigation and adaptation:
>
> (i) Recognize the role of indigenous and local community conserved areas in strengthening ecosystem connectivity and resilience across the sea and landscape thereby maintaining essential ecosystem services and supporting biodiversity–based livelihoods in the face of climate change.[183]

6.4.4.6 Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity (Decision X/43)

Decision X/43 contains several provisions that support the participation of "indigenous and local communities" in decision making and that further the purposes of Articles 8(j) and 10(c) of the CBD. In Decision X/43, the COP adopted several proposed indicators, including "[s]tatus and trends in land-use change and land tenure in the traditional territories of indigenous and local communities".[184]

6.5 Programme of Work on Protected Areas

The Programme of Work on Protected Areas (PoWPA) was adopted by the CBD Parties in February 2004 at the 7th CBD Conference of Parties (COP 7 Decision VII/28).

> The PoWPA enshrines development of participatory, ecologically representative and effectively managed national and regional systems of protected areas, where necessary stretching across national boundaries. From designation to management, the PoWPA can be considered as a defining framework or "blueprint" for protected areas for the coming decades. It is a framework for cooperation between Governments, donors, NGOs and local communities, for

[183] "Biodiversity and climate change" (29 October 2010) UNEP/CBD/COP/DEC/X/33 (Decision X/33), at 3 ¶8.

[184] "Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity" (29 October 2010) UNEP/CBD/COP/DEC/X/43 (Decision X/43), at 3 ¶14.

without such collaboration, programmes cannot be successful and sustainable over the long-term.[185]

The PoWPA consists of four elements. Most relevant to ICCAs is Element 2, which is entitled "Governance, Participation, Equity and Benefit Sharing." The two main goals of Element 2 are to promote equity and benefit-sharing (Goal 2.1), and "enhance and secure involvement of indigenous and local communities and relevant stakeholders" (Goal 2.2). To achieve Goals 2.1 and 2.2, several activities are suggested to the CBD Parties.

Under Goal 2.1, it is suggested that CBD Parties:

- "2.1.1. Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities …." This is particularly important in light of the fact that the establishment of protected areas without consideration of Indigenous peoples' needs and interests often adversely impacts ICCAs when, for example, they prevent Indigenous peoples from accessing their ICCAs.

- "2.1.2. Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves." This suggestion is critical to ICCAs as it explicitly recognizes them as a valid governance type.

- "2.1.3. Establish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities."

Additionally, it is suggested that CBD Parties use benefits generated by protected areas to reduce poverty (Suggestion 2.1.4), include "indigenous and local communities and relevant stakeholders" in planning and governance (Suggestion 2.1.5) and establish policies to deal with access and benefits sharing (Suggestion 2.1.6).

The target of Goal 2.2 is to achieve full and effective participation of "indigenous and local communities . . . in the management of existing, and the establishment and management of new, protected areas."[186]

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[185] "Protected Areas – An Overview". Last accessed 7 February 2012, at http://www.cbd.int/protected/overview.

[186] "Programme Element 2: Governance, Participation, Equity and Benefit Sharing". Last Accessed 8 February 2012, at: http://www.cbd.int/protected/pow/learnmore/element2.

Under Goal 2.2, it is suggested that CBD Parties review the status and mechanisms of involving stakeholders in protected areas policy and management (Suggestion 2.2.1), involve "indigenous and local communities" and stakeholders "at all levels of protected areas planning, establishment, governance and management" (Suggestion 2.2.2), and "[p]romote an enabling environment … for the involvement of indigenous and local communities and relevant stakeholders / in decision making, and the development of their capacities and opportunities to establish and manage protected areas, including community-conserved and private protected areas" (Suggestion 2.2.4).

Additionally, it is suggested that CBD Parties support participatory assessment exercises to identify societal knowledge, skills, resources and institutions of importance for conservation (Suggestion 2.2.3) and ensure that "indigenous communities" are resettled only after their prior and informed consent (Suggestion 2.2.5).

6.6 IUCN Resolutions and Recommendations

Every four years the IUCN holds a World Conservation Congress which results in a series of Resolutions and ⌜Recommendations. Such Resolutions and Recommendations are tabled for adoption by the IUCN membership and give the IUCN and its members their mandate for action.[187]

6.6.1 IUCN Congresses

6.6.1.1 First World Conservation Congress, 1996

Since at least 1996, the IUCN has recognized the importance of land to Indigenous peoples:

Resolution 1.49 on Indigenous Peoples[[188]] and IUCN, among other things:

> [Acknowledges] that the present biodiversity in the regions inhabited by indigenous peoples has been maintained by those peoples through management

[187] There were also relevant Resolutions adopted prior to the 1st World Conservation Congress. For example, Resolution 12.5 Protection of Traditional Ways of Life (12th IUCN General Assembly, Kinshasa 1975) calls on governments to recognise indigenous peoples' rights to land particularly in the context of preventing displacement in conservation areas. Resolution 19.22 Indigenous People (19th IUCN General Assembly, Buenos Aires, 1994) urges governments to guarantee respect of the rights of local and indigenous peoples in protected areas.

[188] Similar to the qualification in Convention No. 169 regarding the use of the term "peoples," the 1996 IUCN Resolutions discussed here provided that "[t]he use of the term 'indigenous peoples' in this Resolution shall not be construed as having any implications as regards the rights which may attach to that term in international law."

> that was generally wise and sustainable, and that ensured sources of food and other basic resources for the survival of indigenous peoples;
>
> [Recalls] that nature constitutes an important part of the societies, cultures and history of indigenous peoples; and
>
> [Recalls] that indigenous peoples continue to claim the control of their lands or territories and the right to use their natural resources in accordance with their own cultures and development processes.

Resolution 1.50 on Indigenous Peoples, Intellectual Property Rights and Biological Diversity, among other things:

> Requests the Director General, Commissions, members and Councillors of IUCN, within available resources, to participate actively in and support the development of appropriate mechanisms at the national and international level, so as to ensure:
>
> a) effective participation of indigenous peoples in planning and decision-making processes, particularly in relation to the Convention on Biological Diversity concerning their role and collective interests; and
>
> b) recognition of the rights of indigenous peoples over their lands or territories and natural resources, as well as their role in management, use and conservation, as a requirement for the effective implementation of the Convention on Biological Diversity and the achievement of its objectives[.[189]]

In its 1996 Resolutions and Recommendations, the IUCN expressed concern regarding the effect of protected areas on Indigenous peoples, and called for the development and implementation of a clear policy in relation to protected areas established in indigenous lands and territories, based on the following principles:

- Recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas;
- Recognition of the necessity of reaching agreements with indigenous peoples prior to the establishment of protected areas in their lands or territories; and
- Recognition of the rights of the indigenous peoples concerned to participate effectively in the management of the protected areas established on their lands

[189] IUCN—World Conservation Union, Resolutions and Recommendations, 1997 (1996 Resolutions and Recommendations), Resolution 1.49. According to the IUCN, "[d]raft motions, once adopted by the World Conservation Congress, are termed Resolutions if they are directed principally at IUCN broadly or at one of its components, and Recommendations if they are directed principally at third parties."

or territories, and to be consulted on the adoption of any decision that affects their rights and interests over those lands or territories[.[190]]

Generally, the IUCN called for effective participation of Indigenous peoples in decisions affecting them and for recognition of the rights of Indigenous peoples over their land.

6.6.1.2 Second World Conservation Congress

In 2000, the IUCN acknowledged "that most, if not all, indigenous peoples define themselves as inseparable from the land and see the land's resources as gifts provided by the Creator for their use",[191] and in regard to its work in the Arctic, the IUCN noted the "establishment of home rule and land claim organizations for indigenous peoples as a distinct level of democratic governance."[192]

Notably, in its 2000 Resolutions and Recommendations, the IUCN did not include language qualifying the definition of the term "peoples" as it had in its 1996 Resolutions and Recommendations.

Also in 2000, the IUCN adopted a Policy on Social Equity in Conservation and Sustainable Use of Natural Resources.[193] In its Social Equity Policy, the IUCN addressed six major areas within its mission, including "indigenous and traditional peoples." The IUCN noted that "indigenous and traditional peoples have often been unfairly affected by conservation polices and practices, which have failed to fully understand the rights and roles of indigenous peoples in the management, use and conservation of biodiversity."[194] Accordingly, the IUCN aimed to:

- Respect indigenous people's knowledge and innovations, and their social, cultural, religious and spiritual values and practices.
- Recognise the social, economic and cultural rights of indigenous peoples such as their right to lands and territories and natural resources, respecting their social and cultural identity, their customs, traditions and institutions. Ensure full and just participation of indigenous peoples in all conservation activities supported and implemented by IUCN.

[190] 1996 Resolutions and Recommendations, Resolution 1.53. Resolution 1.53 led to the adoption of guidelines by the IUCN, the World Commission on Protected Areas, and the World Wildlife Fund in 1999 entitled Principles and Guidelines On Indigenous And Traditional Peoples And Protected Areas (Joint Principles and Guidelines). The Joint Principles and Guidelines consist of five principles and accompanying guidelines that recognize the connection between indigenous and other traditional peoples and their land.

[191] IUCN—World Conservation Union, Resolutions and Recommendations, 2000 (2000 Resolutions and Recommendations), Recommendation 2.92.

[192] 2000 Resolutions and Recommendations, Recommendation 2.22.

[193] IUCN—World Conservation Union, Policy on Social Equity in Conservation and Sustainable Use of Natural Resources, 2000 (IUCN Social Equity Policy).

[194] IUCN Social Equity Policy, at 4.

- Support indigenous peoples' right to make their own decisions affecting their lands, territories and resources, by assuring their rights to manage natural resources, such as wildlife, on which their livelihoods and ways of life depend, provided they make sustainable use of natural resources.
- Strengthen the rights and full and equal participation of traditional institutions and to strengthen the capacity of indigenous people to ensure that they benefit from any utilisation of their knowledge.[195]

6.6.1.3 Third World Conservation Congress

In 2004 the IUCN again focused on Indigenous peoples and land, using language particularly relevant to the ICCA concept in Resolution 3.017 which states:

- […] that it is essential to recognize and protect indigenous peoples' and/or local communities' control of their lands, territories and natural heritage, and their traditional collective land tenure systems, as necessary for their survival and continued ability to conserve biological resources; and
- […] that security of tenure for traditional and local communities is also necessary for their survival and ability to conserve biological resources[.[196]]

In regard to extractive industries, the IUCN called upon the World Bank to "pay special attention to ensure that the rights of indigenous peoples to their lands, territories and resources are respected when choosing and designing an off-set area" and to "agree to respect the right of free, prior, and informed consent of indigenous peoples and local communities affected by extractive industry development".[197]

6.6.1.4 Fourth World Conservation Congress

In 2008, the IUCN continued with its pattern of recognizing that Indigenous peoples often live in an environmentally sustainable manner. For example, Resolution 4.084 states that: "one of the oldest forms of culture- based conservation has been the protection of the sacred natural sites of indigenous communities and mainstream faiths, and that these sacred natural sites often harbour rich biodiversity and safeguard valuable landscapes and ecosystems".[198] The IUCN welcomed the adoption of the UNDRIP and underlined "that the use of the term 'indigenous peoples' is consistent with the [UNDRIP]".[199]

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[195] IUCN Social Equity Policy, at 4.

[196] IUCN—World Conservation Union, Resolutions and Recommendations, 2005 (2004 Resolutions and Recommendations), Resolution 3.017.

[197] 2004 Resolutions and Recommendations, Recommendation 3.082.

[198] IUCN—World Conservation Union, Resolutions and Recommendations, 2009 (2008 Resolutions and Recommendations), Resolution 4.038.

[199] 2008 Resolutions and Recommendations, Resolution 4.048. In 2008 Resolutions and Recommendations, Resolution 4.502, entitled "Implementing the [UNDRIP]," the IUCN endorsed

Importantly, in Resolution 4.049(1), the World Conservation Congress called on IUCN's members to:

> (a) fully acknowledge the conservation significance of Indigenous Conservation Territories [ICTs] and other Indigenous Peoples' and Community Conserved Areas [IPCCAs] - comprising conserved sites, territories, landscapes/seascapes and sacred places–governed and managed by indigenous peoples and local communities, including mobile peoples;
>
> (b) support the fair restitution of territorial, land and natural resource rights, consistent with conservation and social objectives as considered appropriate by the indigenous peoples and local communities governing existing ICTs and IPC-CAs and/or interested in establishing new ones;
>
> (c) ensure that any inclusion of ICTs and IPCCAs within national systems is made with indigenous peoples' free prior and informed consent and after full consultation with local communities and proper consideration of their concerns; and
>
> (d) support indigenous peoples and local communities to protect ICTs and IPCCAs against external threats by applying the principles of free prior and informed consent, participatory social, environmental and cultural impact assessments, and other measures as elaborated in CBD decision VII/28 or other international agreements with reference to new development and conservation initiatives[.][200]

In Resolution 4.056, the IUCN focused on rights-based approaches to conservation. It called on the IUCN's governmental and non-governmental members as well as non-member states and non-state actors, to develop and/or work towards application of rights-based approaches to ensure respect for, and where possible further fulfilment of human rights, tenure and resource access rights, and/or customary rights of indigenous peoples and local communities in conservation policies, programmes, projects and related activities.[201]

6.6.1.5 Fifth World Parks Congress

The IUCN Vth World Parks Congress was held in Durban in 2003. The Vth World Parks Congress issued 32 recommendations related to protected areas, including several regarding

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UNDRIP and formed "a task force to examine the application of the Declaration to every aspect of the IUCN Programme".

[200] 2008 Resolutions and Recommendations, Resolution 4.049(1).

[201] 2008 Resoulitions and Recommendations, Resolution 4.056.

"Community Conserved Areas."[202] Recommendation V.13 explicitly acknowledges "indigenous peoples' internationally guaranteed rights to … own and control their sacred places …" Recommendation V.13 recommended that governments "Promote and adopt laws and policies, which recognise the effectiveness of innovative governance models such as Community Conserved Areas of indigenous peoples and local communities to ensure control and adequate protection over sacred areas …."

Recommendation V.24, entitled Indigenous Peoples and Protected Areas, noted that many protected areas encroach upon the lands of indigenous peoples. It made several recommendations, including the following:

- Ensure the establishment of protected areas is based on the free, prior informed consent of indigenous peoples, and of prior social, economic, cultural and environmental impact assessment, undertaken with the full participation of indigenous peoples;
- Establish and enforce appropriate laws and policies to protect the intellectual property of indigenous peoples with regards to their traditional knowledge, innovation systems and cultural and biological resources and penalise all biopiracy activities;
- Enact laws and policies that recognise and guarantee indigenous peoples' rights over their ancestral lands and waters; and
- Ensure respect for indigenous peoples' decision-making authority and support their local, sustainable management and conservation of natural resources in protected areas, recognising the central role of traditional authorities, wherever appropriate, and institutions and representative organizations.

Recommendation V.26 - developed by the Cross-cutting Theme on Communities and Equity - deals specifically with Community Conserved Areas. It notes that "[a] considerable part of the Earth's biodiversity survives on territories under the ownership, control, or management of indigenous peoples and local (including mobile) communities" and sets forth two primary characteristics of Community Conserved Areas (CCAs).[203] Recommendation V.26 states that "CCAs as they exist today serve the management objectives of different protected area categories" and "that national and international recognition of such areas is an urgent necessity."

In Recommendation V.26, the Cross-cutting Theme on Communities and Equity then set forth several recommendations for: governments; communities; conservation agencies and other non-governmental organisations, donor agencies, private sector, and other actors; and international organizations. In regard to governments, the recommendations include the following:

[202] Vth IUCN WPC Recommendations (24 March 2005).

[203] These are: 1) "[p]redominant or exclusive control and management by communities, and … [2)] commitment to conservation of biodiversity, and/or its achievement through various means …." Vth IUCN WPC Recommendations, at 202.

- Recognize and promote CCAs as a legitimate form of biodiversity conservation;
- Facilitate the maintenance of existing CCAs, and the establishment of CCAs at other sites, through a range of actions, (including financial, technical, human, informational, research, public endorsement, and capacity-building measures, resources or incentives) that are considered appropriate by the communities concerned, as well as through the restitution of traditional and customary rights;
- Provide protection to CCAs against external threats they face, including those mentioned in the preamble to this Recommendation;

In regard to communities, the recommendations include the following:

- Commit to conserving the biodiversity of CCAs, to maintaining ecological services, and to protecting associated cultural values; and
- Commit to strengthening or developing effective mechanisms for internal accountability.

In regard to conservation agencies and other actors, the recommendations include the following:

- Respect the sanctity and importance of CCAs in all their operations that could affect such sites or the relevant communities, and in particular activities that could adversely affect them; and
- Provide support of various kinds to CCAs, where considered appropriate by the concerned community, including to help build capacity.

In regard to international organisations, the recommendations include the following:

- Recognise CCAs in all relevant instruments and databases, including in the United Nations List of Protected Areas, and the World Protected Areas Database;
- Provide adequate space for consideration of CCAs in relevant documents, such as the State of the World's Protected Areas report, and Protected Areas in the 21st Century;
- Promote CCAs through appropriate programmes of work, in particular the Programme of Work of the CBD on protected areas; and
- Integrate CCAs into the IUCN Protected Area Management Categories.

7. AGRICULTURE

7.1 The International Treaty on Plant Genetic Resources for Food and Agriculture

The objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture "are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security."[204]

Article 5 deals with, among other things, conservation of plant genetic resources, and provides that

> 5.1 Each Contracting Party shall, subject to national legislation, and in cooperation with other Contracting Parties where appropriate, promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture and shall in particular, as appropriate:
>
> … c) Promote or support, as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture;
>
> d) Promote in situ conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, inter alia, the efforts of indigenous and local communities[.]

Article 6 is entitled "Sustainable Use of Plant Genetic Resources." Under Article 6.1, "[t]he Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture." Article 6.2 provides that "[t]he sustainable use of plant genetic resources for food and agriculture may include such measures as: a) pursuing fair agricultural policies that promote, as appropriate, the development and maintenance of diverse farming systems that enhance the sustainable use of agricultural biological diversity and other natural resources".

Article 7 addresses national commitments and international cooperation. Under Article 7.2, international cooperation shall be directed to:

[204] International Treaty on Plant Genetic Resources for Food and Agriculture (Rome 3 November 2001, in force 29 June 2004) I-43345 (ITPGRFA).

> a) establishing or strengthening the capabilities of developing countries and countries with economies in transition with respect to conservation and sustainable use of plant genetic resources for food and agriculture;
>
> b) enhancing international activities to promote conservation, evaluation, documentation, genetic enhancement, plant breeding, seed multiplication; and sharing, providing access to, and exchanging, in conformity with Part IV, plant genetic resources for food and agriculture and appropriate information and technology[.]

Article 9 addresses farmers' rights, and recognizes that "indigenous communities" contribute to conservation:

> 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

Under Article 9.2, Contracting Parties "should take measures . . . to protect and promote Farmers' Rights". These measures include:

> a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
>
> b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
>
> c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Part IV of the ITPGRFA sets out a multilateral system of access and benefits sharing for plant genetic resources. Article 13.3 calls for sharing of benefits with farmers who conserve plant genetic resources:

> The Contracting Parties agree that benefits arising from the use of plant genetic resources for food and agriculture that are shared under the Multilateral System should flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.

7.2 International Convention for the Protection of New Varieties of Plants

Unlike the ITPGRFA, which seeks the conservation and sustainable use of plant genetic resources, the purpose of the International Convention for the Protection of New Varieties of Plants (the Paris Convention)[205] was developed to provide an intellectual property regime for new plant varieties. The Paris Convention does not refer to indigenous peoples or local communities or to access and benefit sharing. Instead, it grants exclusive enumerated rights—such as control over sale, export, and import of plants—to breeders where their plant varieties satisfy certain criteria.[206]

Some see the Paris Convention as creating "obstacles in the way of farmers wishing to reproduce plants they cultivate in their fields."[207] The Paris Convention is one of several international instruments affecting farmers' rights. It has been argued that the interaction among these instruments has had negative effects on the management of plant genetic resources in agriculture. Further, this trend could be positively altered by the ITPGRFA if its Contracting Parties are politically willing.[208]

7.3 FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

The Food and Agriculture Organization of the United Nations (FAO) is mandated to achieve food security for all people by, among other things, raising levels of nutrition and improving agricultural productivity. In 2012, the FAO issued Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.[209] The purpose of the FAO Tenure Guidelines is to improve governance of tenure in furtherance of the FAO's mandate. Crucially, the FAO acknowledges that "the sustainable use of the environment, depend[s] in large measure on how people, communities and others gain access to land, fisheries and forests."[210] "The governance of tenure is a crucial element in determining if and how people, communities and others are able to acquire rights, and associated duties, to use and control land, fisheries and forests."[211]

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[205] International Convention for the Protection of New Varieties of Plants (Paris, 2 December 1961, in force as amended 24 April 1998).
[206] See Paris Convention, Article 5 and 14.
[207] Seeds and Farmers' Rights: How international regulations affect farmer seeds (Robert Ali Brac de la Perrière and Guy Kastler, eds.) 2011.
[208] Farmer's Rights, "Governing Agrobiodiversity: Plant Genetics and Developing Countries." Last accessed 2 August 2012, at http://www.farmersrights.org/resources/global_works_12.html.
[209] Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (11 May 2012) (FAO Tenure Guidelines).
[210] FAO Tenure Guidelines, at v.
[211] FAO Tenure Guidelines, at v.

The FAO Tenure Guidelines cover a wide range of tenure issues, from legal recognition and allocation of tenure rights and duties, to transfers and other changes to tenure rights and duties, to responses to climate change and emergencies. They recognize the importance of land tenure, urging states "to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights … ."[212] The Guidelines also focus on the tenure rights of indigenous peoples and local communities, both generally and explicitly.

In general, the FAO Tenure Guidelines suggest that "[b]ased on an examination of tenure rights in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law."[213] The Guidelines are holistic, noting in Article 4.8 that because all human rights are universal and interdependent, "the governance of tenure of land, fisheries and forests should not only take into account rights that are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights." The Guidelines also address conflict resolution, providing in Article 4.9 that "States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes … ."

Specifically, the FAO Tenure Guidelines address several aspects of tenure of indigenous peoples and local communities. For example, the Article 7.3 instructs States to identify all existing holders of tenure, whether recorded or not:

> Where States intend to recognize or allocate tenure rights, they should first identify all existing tenure rights and right holders, whether recorded or not. Indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected should be included in the consultation process […]. States should provide access to justice, […] if people believe their tenure rights are not recognized.

In regard to land owned or controlled by States, Article 8.4 urges States to ensure, where possible, "that the publicly-held tenure rights are recorded together with tenure rights of indigenous peoples and other communities with customary tenure systems and the private sector in a single recording system, or are linked to them by a common framework." Where tenure rights are to be reallocated, "[l]ocal communities that have traditionally used the land, fisheries and forests should receive due consideration in the reallocation of tenure rights."[214] Furthermore, under Article 8.9 "States should allocate tenure rights and delegate tenure governance in transparent, participatory ways, using simple procedures that are clear, accessible and understandable to all, especially to indigenous peoples and other communities with customary tenure systems."

[212] FAO Tenure Guidelines, Article 4.1.
[213] FAO Tenure Guidelines, Artile 4.4.
[214] FAO Tenure Guidelines, Article 8.7.

Section 9 of the FAO Tenure Guidelines deals with Indigenous peoples and other communities with customary tenure systems. Under Article 9.1, "State and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems." Article 9.2 is directed toward indigenous peoples and other communities with customary tenure systems that exercise self-governance. It instructs them to promote equitable and sustainable rights to land, fisheries and forests, as well as effective participation of all members in decisions regarding their tenure systems.

Article 9.3 references ILO Convention No. 169, the CBD, and UNDRIP. It directs states to ensure that their actions are consistent with obligations arising under these instruments:

> States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. In the case of indigenous peoples, States should meet their relevant obligations and voluntary commitments to protect, promote and implement human rights, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous Peoples.

Articles 9.4 to 9.6 promote recognition by States of tenure rights of indigenous peoples and other communities. Under Article 9.4, "States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments." Article 9.5 provides that "[w]here indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights. Indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from such ancestral lands." And Article 9.6 urges States to "consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems."

Articles 9.7 to 9.9 encourage consultation with and protection of indigenous peoples and other communities with customary tenure systems. Article 9.7 instructs states to "take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems" when drafting tenure policies and laws. Further, "[t]here should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems."

Article 9.8 calls on States to "protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others." Article 9.9 references UNDRIP and calls for obtaining the free, prior and informed consent of indigenous peoples before initiating projects or adopting legislation affecting a community's rights to resources:

> States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. Consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust. The principles of consultation and participation […] should be applied in the case of other communities described in this section.

Article 9.11 asks States to respect the approaches used by indigenous peoples to resolve tenure conflicts:

> States should respect and promote customary approaches used by indigenous peoples and other communities with customary tenure systems to resolving tenure conflicts within communities consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. For land, fisheries and forests that are used by more than one community, means of resolving conflict between communities should be strengthened or developed.

Section 10 of the FAO Tenure Guidelines addresses informal tenure. Importantly, Article 10.1 states that "[w]here informal tenure to land, fisheries and forests exists, States should acknowledge it in a manner that respects existing formal rights under national law and in ways that recognize the reality of the situation and promote social, economic and environmental well-being."

The FAO Tenure Guidelines are a broad approach to dealing with land tenure issues. The Guidelines also address transfers and other changes to tenure rights and duties, restitution, redistributive reforms, expropriation, and administration of tenure. In general these provisions call for consultation with affected parties, including indigenous peoples, and for respect for their rights under relevant national and international instruments.

7.4 Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration

In 2007, 109 country delegations adopted the Global Plan of Action for Animal Genetic Resources (GPA).[215] These countries recognized the need to develop an effective framework to manage the world's livestock genetic resources and to address the threat of genetic erosion.

The GPA aims to promote the sustainable use and development of animal genetic resources and ensure the conservation of the important animal genetic resource diversity. Additionally, it seeks "to promote a fair and equitable sharing of the benefits arising from the use of animal genetic resources for food and agriculture, and recognize the role of traditional knowledge, innovations and practices relevant to the conservation of animal genetic resources and their sustainable use, and, where appropriate, put in place effective policies and legislative measures."[216] The GPA recognizes that "[p]astoralists, farmers and breeders, individually and collectively, and indigenous and local communities, play a crucial role in in situ conservation and development of animal genetic resources."[217]

The GPA consists of twenty-three strategic priorities grouped under four strategic priority areas. One of the GPA's strategic priorities is to "[s]upport indigenous and local production systems and associated knowledge systems of importance to the maintenance and sustainable use of animal genetic resources".[218] Countries will "[s]upport indigenous and local livestock systems of importance to animal genetic resources, including through the … provision of … appropriate access to natural resources and to the market, resolving land tenure issues, the recognition of cultural practices and values, and adding value to their specialist products."[219]

Under the third strategic priority area of Conservation, the GPA notes that "[t]he loss of local breeds may have negative environmental impacts in some production environments," and that "[m]any Country Reports indicated the importance of local breeds in contributing to landscape management, vegetation control, and rangeland ecosystem sustainability, preventing the erosion of associated biodiversity."[220]

Along with the GPA, countries also adopted the Interlaken Declaration on Animal Genetic Resources (Interlaken Declaration). They "confirmed their common and individual responsibilities for the conservation, sustainable use and development of animal genetic resources for food and agriculture; for world food security; for improving human nutritional

[215] Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration (Interlaken, September 2007).
[216] GPA at 10 ¶15. Throughout its text, the GPA recognizes the value and needs of farmers and pastoralists.
[217] GPA at 12 ¶16.
[218] GPA at 20.
[219] GPA at 20.
[220] GPA at 21.

status; and for rural development" and "committed themselves to facilitating access to these resources, and ensuring the fair and equitable sharing of the benefits from their use."[221] The Interlaken Declaration recognizes "that the genetic resources of animal species most critical to food security, sustainable livelihoods and human well-being are the result of both natural selection, and directed selection by smallholders, farmers, pastoralists and breeders, throughout the world, over generations."[222]

Additionally, the Interlaken Declaration recognizes "the enormous contribution that the local and indigenous communities and farmers, pastoralists and animal breeders of all regions of the world have made, and will continue to make for the sustainable use, development and conservation of animal genetic resources for food and agriculture."[223] It affirms "the desirability, as appropriate, subject to national legislation, of respecting, preserving and maintaining traditional knowledge relevant to animal breeding and production as a contribution to sustainable livelihoods, and the need for the participation of all stakeholders in making decisions, at the national level, on matters related to the sustainable use, development and conservation of animal genetic resources."[224]

8. CLIMATE CHANGE

8.1 The United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change[225] "sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change. It recognizes that the climate system is a shared resource whose stability can be affected by industrial and other emissions of carbon dioxide and other greenhouse gases."[226] "The Conference of the Parties (COP) is the ultimate decision-making body of the Convention which adopts COP decisions and resolutions, published in reports of the COP. Successive decisions taken by the COP make up a detailed set of rules for practical and effective implementation of the Convention.[227]

The objective of the UNFCCC is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the

[221] GPA at iii.
[222] GPA at 2.
[223] GPA at 2.
[224] GPA at 2.
[225] United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992, in force 21 March 1994) I-30822 (UNFCCC).
[226] UNFCCC, "UNFCCC Homepage". Last accessed 24 February 2012, at http://unfccc.int/essential_background/convention/items/2627.php.
[227] UNFCCC, "Search Decisions of the COP and the CMP". Last accessed 24 February 2012, at http://unfccc.int/documentation/decisions/items/3597.php.

climate system. It aims to achieve such a level within a time frame sufficient to allow ecosystems to adapt naturally to climate change.[228] This latter point - the natural adaptation of ecosystems - is important to the UNFCCC because adaptation to the adverse effects of climate change is crucial in order to reduce the impacts of climate change. The parties to the UNFCCC made several commitments to combat climate change. One of those commitments is to "[p]romote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems[.]"[229]

8.2 Kyoto Protocol

In 1997, the COP adopted the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[230] The Kyoto Protocol contains legally binding emission targets for developed country (Annex I) Parties for the six major greenhouse gases, which are to be reached by the period 2008-2012. The COP to the UNFCCC serves as the meeting of the parties to the Kyoto Protocol, referred to as Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). The CMP meets annually during the same period as the COP.

8.3 Cancun Agreements

At its sixteenth meeting, held in Cancun in 2010 (COP 16), the COP adopted a decision addressing long-term cooperative action among the parties, noting that "climate change is one of the greatest challenges of our time and that all Parties share a vision for long-term cooperative action in order to achieve the objective of the Convention under its Article 2 … ."[231] Among the issues addressed in the Cancun Agreements was policy approaches on issues relating to reducing emissions from deforestation and forest degradation in developing countries. Reducing emissions from deforestation and forest degradation (REDD) "is an effort to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development."[232]

The COP requested developing countries to develop national strategies or action plans related to the implementation of REDD activities, as well as to conservation, sustainable management,

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[228] UNFCCC Article 2.

[229] UNFCCC Article 4(1)(d).

[230] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto 11 December 1997, in force 16 February 2005) A-30822 (Kyoto Protocol).

[231] UNFCCC COP, "Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention" (Cancun, 29 November – 10 December 2010) FCCC/CP/2010/7/Add.1 (Cancun Agreements, Add. 1), at 2.

[232] UN-REDD Programme, "About REDD+". Last accessed 19 June 2012 at http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx.

and enhancement of forest carbon stocks.[233] The COP requested "developing country Parties, when developing and implementing their national strategies or action plans, to . . . [ensure] the full and effective participation of relevant stakeholders, inter alia indigenous peoples and local communities".[234] The COP set forth seven categories of safeguards to be promoted and supported by developing countries during the implementation of REDD+ activities, some of which call for respect for and participation of indigenous peoples, as follows:

> When undertaking the activities referred to in paragraph 70[[235]] of this decision, the following safeguards should be promoted and supported:
> …
> (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;
>
> (d) The full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities, in the actions referred to in paragraphs 70 and 72 of this decision;
>
> (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits … .[236]

The COP emphasized that REDD+ activities should take "into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries, reflected in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the International Mother Earth Day."[237]

Also at COP 16, the parties, believing that enhanced action on adaptation was necessary, established the Cancun Adaptation Framework, which includes provisions regarding undertaking assessments, encouraging research of new technologies, and strengthening capacity to deal with climate change.[238] Additionally, the parties decided to "establish a process to enable least developed country Parties to formulate and implement national adaptation

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[233] Cancun Agreements, Add. 1 at 12. When activities go beyond REDD to the conservation, sustainable management, and enhancement of forest carbon stocks, they are known by the term "REDD+".
[234] Cancun Agreements, Add. 1 at 13.
[235] Paragraph 70 is the paragraph in the Cancun Agreements setting forth the REDD+ activities encouraged by the COP.
[236] Cancun Agreements, Add. 1 at 26-27.
[237] Cancun Agreements, Add. 1 at 27 n.1.
[238] Cancun Agreements, Add. 1 at 4.

plans … as a means of identifying medium- and long-term adaptation needs and developing and implementing strategies and programmes to address those needs".[239]

8.4 Green Climate Fund and REDD

In 2011, the seventeenth meeting of the COP was held, along with the seventh meeting of the CMP. One important issue addressed by the COP involved establishing the Green Climate Fund (GCF). The GCF's purpose "is to make a significant and ambitious contribution to the global efforts towards attaining the goals set by the international community to combat climate change."[240] The Board of the GCF is tasked with developing "mechanisms to promote the input and participation of stakeholders, including private-sector actors, civil society organizations, vulnerable groups, women and indigenous peoples, in the design, development and implementation of the strategies and activities to be financed by the [GCF]."[241]

Additionally, the parties further addressed adaptation as a vital component of dealing with climate change. They recognized that action on implementation should take place under a transparent and inclusive process that is based on traditional knowledge, as follows:

> [E]nhanced action on adaptation should be undertaken in accordance with the Convention, should follow a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional and indigenous knowledge, and by gender-sensitive approaches, with a view to integrating adaptation into relevant social, economic and environmental policies and actions, where appropriate … .[242]

The COP also addressed the safeguards established in the Cancun Agreements for implementation of REDD+ activities. Among other things, the COP agreed that systems for providing information on how the safeguards are implemented should be timely, "[p]rovide transparent and consistent information that is accessible by all relevant stakeholders", and "[p]rovide information on how all of the safeguards … are being addressed and respected".[243] However, it is important to note that these reporting requirements are heavily qualified and must take "into account national circumstances and respective capabilities," and recognize

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[239] Cancun Agreements, Add. 1 at 5.

[240] UNFCCC COP, "Decision 3/CP.17, Launching the Green Climate Fund, Annex" (Durban, 28 November-11 December 2011) FCCC/CP/2011/9/Add.1 (UNFCCC COP 17 Decision 3 Annex), at 58.

[241] UNFCCC COP 17 Decision 3 Annex at 66.

[242] UNFCCC COP, "Decision 5/CP.17, National Adaptation Plans" (Durban, 28 November-11 December 2011) FCCC/CP/2011/9/Add.1 (UNFCCC COP 17 Decision 5), at 80.

[243] UNFCCC COP, "Decision 12/CP.17, Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16" (Durban, 28 November-11 December 2011) FCCC/CP/2011/Add.2 (UNFCCC COP 17 Decision 12), at 16.

"national sovereignty and legislation, and relevant international obligations and agreements".[244] Nevertheless, "developing country Parties undertaking [REDD+ activities], should provide a summary of information on how all of the safeguards … are being addressed and respected throughout the implementation of the activities".[245]

In conjunction with REDD+ safeguards addressed in the Cancun Agreements, the REDD+ Social and Environmental Standards Initiative (REDD+ SES Initiative) was developed by multiple stakeholders who recognize the need for effective social and environmental safeguards in the implementation of REDD+.[246] The REDD+ SES Initiative is currently developing REDD+ Social and Environmental Standards to "be used by governments, NGOs, financing agencies and other stakeholders to support the design and implementation of REDD+ programs that respect the rights of Indigenous Peoples and local communities and generate significant social and biodiversity benefits."[247] A primary role for REDD+ SES is to provide a "mechanism for country-led, multi-stakeholder assessment of REDD+ program design, implementation and outcomes to enable countries to show how internationally- and nationally-defined safeguards are being addressed and respected."[248]

The REDD+ SES consists of several principles, which provide the key objectives that define high social and environmental performance of REDD+ programs. These principles are accompanied by criteria, which define the conditions that must be met related to processes, impacts and policies in order to deliver the principles. Each criteria contains one or more indicators designed to define quantitative or qualitative information needed to show progress achieving a criterion.

Additionally, the CBD is developing REDD+ Biodiversity Safeguards pursuant to Decision X-33 issued at CBD COP 10. In Decision X-33, the COP invited Parties, governments, and other organizations to consider biodiversity in implementing REDD activities, "taking into account the need to ensure the full and effective participation of indigenous and local communities in relevant policy-making and implementation processes, where appropriate; and to consider land ownership and land tenure, in accordance with national legislation".[249] Additionally, with regard to REDD activities, the COP requested the Executive Secretary to collaborate with multiple stakeholders to provide advice for approval by the COP at its eleventh meeting on the application of relevant safeguards for biodiversity.[250]

[244] UNFCCC COP 17 Decision 12 at 16.
[245] UNFCCC COP 17 Decision 12 at 17.
[246] See REDD+ SES Initiative. Last accessed 23 July 2012, at http://www.redd-standards.org/the-initiative.
[247] Draft REDD+ SES Version 2 (22nd June 2012), at 2
[248] Draft Redd + SES Version 2, at 3.
[249] Decision X-33, at 4.
[250] Decision X-33, at 6.

9. DESERTIFICATION

United Nations Convention to Combat Desertification

The United Nations Convention to Combat Desertification[251] was drafted as a result of the fact that "[t]he international community has long recognized that desertification is a major economic, social and environmental problem of concern to many countries in all regions of the world."[252] The Report of the Conference of the Parties on its tenth session, held in Changwon from 10 to 21 October 2011[253] included a declaration by civil society organizations which specifically called for recognition of ICCAs:

> We CSOs also demand special attention and strong support of the UNCCD for Indigenous and Community Conserved Areas (ICCAs). ICCAs provide major benefits for conservation and livelihoods and have significant potential for responding to global changes, including climate change, combating desertification, conservation of biodiversity, maintaining ecosystem functions and providing ecological connectivity across the landscape. ICCAs are an approved part of the CBD Programme of Work on Protected Areas, which in our opinion can provide a significant opportunity for cooperation among the Multilateral Environmental Conventions.

10. WETLANDS

Convention on Wetlands of International Importance

The Convention on Wetlands of International Importance,[254] adopted in 1971, is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. Although "[c]ommunity involvement and participation in management decision-making for sites included in the List of Wetlands of International Importance (Ramsar sites) and other wetlands have been recognised as essential throughout the history of the Ramsar Convention, […] very little

[251] United Nations Convention to Combat Desertification in Those Countries Experience Serious Drought And/Or Desertification, Particularly in Africa (Paris 17 June 1994, in force 26 December 1996) A/AC.241/27 (UNCCD).

[252] UNCCD, "About the Convention". Last accessed 24 February 2012, at http://www.unccd.int/convention/menu.php.

[253] UNCCD, "Report of the Conference of the Parties on its tenth session, held in Changwon from 10 to 21 October 2011 (Advance Copy)", at 28. Last accessed 24 February 2012, at http://www.unccd.int/php/document2.php?ref=ICCD/COP%2810%29/31.

[254] Convention on Wetlands of International Importance (Ramsar, 1971, in force 1975) (Ramsar Convention).

guidance on this topic is available to the Contracting Parties."[255] To address this issue the parties adopted Ramsar Convention COP Resolution VII.8, which is based on "the premise that local and indigenous people's involvement in wetland management can substantially contribute to effective management practices that further Ramsar's wise use objectives."[256]

Resolution VII.8 notes that "it is advisable to involve local and indigenous people in a management partnership when … the active commitment and collaboration of stakeholders are essential for the management of a wetland (e.g., when the wetland is inhabited or privately owned) … ." Further, "[t]he case for local and indigenous people's involvement is even stronger when … local stakeholders have historically enjoyed customary/legal rights over the wetland … ." Resolution VII.8 lists some of the benefits of participatory management for local and indigenous people, which include: maintaining spiritual and cultural values associated with a wetland; more equitable access to wetland resources; increased local capacity and empowerment; reduced conflicts among stakeholders; and maintaining ecosystem functions (e.g., flood control, improved water quality, etc.).[257]

In general, the guidelines set forth in Resolution VII.8 call for involvement of local and indigenous people, development of local capacity, and support fort "the application of traditional knowledge to wetland management including, where possible, the establishment of centres to conserve indigenous and traditional knowledge systems."[258]

In 2002, the COP adopted Resolution VIII.19, which sets forth guiding principles for taking into account the cultural values of wetlands for the effective management of sites.[259] Resolution VIII.19 acknowledges "that the ancient and intimate links of traditional societies to wetlands and water have given rise to important cultural values relevant to wetland conservation and wise use". It also notes the Ramsar COP's awareness "that most of the knowledge about practices, and practices themselves, of traditional wetland management in the diverse cultures have contributed to wetland conservation and wise use over millennia, and continue to contribute to it".

Resolution VIII.19 sets forth 27 guiding principles for identifying, preserving and reinforcing the cultural values of wetlands. These include:

- Guiding principle 4 - To learn from traditional approaches;

[255] Ramsar Convention COP, "Resolution VII.8, Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands" (Costa Rica, 10-18 May 1999) (Ramsar Convention COP Resolution VII.8) at 1.
[256] Ramsar Convention COP Resolution VII.8, at 1.
[257] Ramsar Convention COP Resolution VII.8, at 3.
[258] Ramsar Convention COP Resolution VII.8, at 5-6.
[259] Ramsar Convention COP, "Resolution VIII.19, Guiding principles for taking into account the cultural values of wetlands for the effective management of sites" (Spain, 18-26 November 2002) (Ramsar Convention COP Resolution VIII.19).

- Guiding principle 5 – To maintain traditional sustainable self-management practices;
- Guiding principle 11 – To safeguard wetland-related traditional production systems;
- Guiding principle 15 – To maintain traditional sustainable practices used in and around wetlands, and value the products resulting from these practices;
- Guiding principle 16 – To safeguard wetland-related oral traditions;
- Guiding principle 17 – To keep traditional knowledge alive; and
- Guiding principle 18 – To respect wetland-related religious and spiritual beliefs and mythological aspects in the efforts to conserve wetlands.[260]

11. INTELLECTUAL PROPERTY

In 1995, the Special Rapporteur of the United Nations Working Group on Indigenous Populations produced Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples.[261] These Principles included that "Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future" and that "Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people".[262] Relevant to ICCAs, the Special Rapporteur set forth the following Principle: "[t]he discovery, use and teaching of indigenous peoples' knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection."[263] Since the creation of the Daes Final Report, stakeholders at all levels have continued to recognize that Indigenous peoples' heritage deserves recognition by and protection under intellectual property law.

11.1 World Intellectual Property Organization

"The World Intellectual Property Organization (WIPO) is the United Nations agency dedicated to the use of intellectual property (patents, copyright, trademarks, designs, etc.) as a means of stimulating innovation and creativity."[264] In October 2000, WIPO established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[265] Currently, the IGC "is undertaking text-based negotiations

[260] Ramsar Convention COP Resolution VIII.19, at 5-6.
[261] "Protection of the heritage of indigenous people: Final report of the Special Rapporteur, Mrs. Erica-Irene Daes" (21 June 1995) E/CN.4/Sub.2/1995/26 (Daes Final Report).
[262] Daes Final Report, at 9.
[263] Daes Final Report, at 9.
[264] WIPO, "What is WIPO?". Last accessed 24 February 2012, at http://www.wipo.int/about-wipo/en/.
[265] WIPO, "Intergovernmental Committee". Last accessed 24 February 2012, at http://www.wipo.int/tk/en/igc/.

with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs)/folklore and genetic resources."[266]

From 14-22 February 2012, the IGC met to conduct negotiations regarding this agreement. Current rules of procedure provide that "Indigenous Peoples have observer status at the IGC. They can make proposals to the negotiations but those proposals have to be endorsed by at least one delegation to be taken into account."[267] On February 21, 2012, the International Indigenous Forum (IIF), in what was described as "an unprecedented collective move", decided to withdraw from the IGC discussions.[268] However, the IIF subsequently reconsidered that decision and resumed participation in the discussions.

On 22 February 2012, the IGC issued the latest version of a single negotiating text that will be transmitted to the WIPO General Assemblies. The latest version "includes a list of objectives, followed by a list or articles, both with several options and a number of bracketed text. Systematically bracketed are the mentions of 'intellectual property' versus 'patent', and derivatives. A main hurdle remaining is the mandatory disclosure of origin in patent applications."[269]

11.2 Agreement on Trade Related Aspects of Intellectual Property Law

The Agreement on Trade Related Aspects of Intellectual Property Law[270] is a multilateral agreement on intellectual property administered by the World Trade Organization (WTO). It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. Article 27 entitled Patentable Subject Matter provides in subparagraph (1) that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and

[266] WIPO, "Intergovernmental Committee". Last accessed 24 February 2012, at http://www.wipo.int/tk/en/igc/.

[267] Saez, C., 2012, "Indigenous Peoples Walk Out Of WIPO Committee On Genetic Resources". Intellectual Property Watch. Last accessed 24 February 2012, at http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources/?utm_source=post&utm_medium=email&utm_campaign=alerts.

[268] Saez, C., 2012, "Indigenous Peoples Walk Out Of WIPO Committee On Genetic Resources". Intellectual Property Watch. Last accessed 24 February 2012, at http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources/?utm_source=post&utm_medium=email&utm_campaign=alerts

[269] Saez, C., 2012. "WIPO Achieves Single Legal Text On Genetic Resources; Indigenous Peoples Back". Intellectual Property Watch. Last accessed 27 February 2012, at http://www.ip-watch.org/2012/02/23/wipo-delegates-reach-single-legal-text-on-genetic-resources-indigenous-peoples-back/?utm_source=post&utm_medium=email&utm_campaign=alerts.

[270] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994, in force 1 January 1995) (TRIPS Agreement).

are capable of industrial application." This provision is qualified, however, by Article 27(3)(b), which addresses the patentability of plants and animals:

> Members may also exclude from patentability:
>
> (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. … .

As noted by the Farmers' Rights Project, neither the meaning of the term "effective *sui generis* system" nor the limits of such a system are defined in the TRIPS Agreement.[271] One existing model is set forth in the Paris Convention, which grants plant breeders comprehensive rights over plant varieties, potentially hindering the rights of farmers to save and exchange seeds. However, the minimum standard set forth in Article 27(3)(b) of the TRIPS Agreement leaves wide latitude for other models to be implemented.

12. BIOLOGICAL AND CULTURAL DIVERSITY

12.1 UNESCO-CBD Joint Programme of Work on Biocultural Diversity

In 2010, UNESCO and the Secretariat to the CBD (SCBD) co-organized the International Conference on Cultural and Biological Diversity for Development (Conference) where they pressed for biological and cultural diversity to be genuinely integrated into development cooperation strategies and programmes. At the Conference, the draft Joint Programme Between UNESCO and the SCBD (Joint Programme) was developed, under which the two organizations would seek to enhance links between initiatives supporting biological and cultural diversity.[272] The Joint Programme extends until 2020 and contains the following general principles for implementation:

- Full and effective participation of all relevant actors, and in particular indigenous and local communities in the establishment and implementation of the joint programme;
- Collaborative engagement of policy and decision makers, governmental and non-governmental organizations, academia, private sector and civil society in both rural and urban contexts; and

[271] Farmers' Rights, "Best Practices". Last accessed 7 August 2012 at http://www.farmersrights.org/bestpractices/what_is_success_1.html.

[272] *See* Report of the International Conference on Biological and Cultural Diversity for Development, 20 June 2010 (ICBCD Report).

- A holistic approach consistent with cultural and spiritual values, worldviews and knowledge systems and livelihoods that contribute to conservation and sustainable and equitable use of biodiversity.[273]

The Joint Programme's specific goals include:

- Building bridges between ongoing work on biodiversity and cultural diversity;
- Exploring issues related to the links between biological and cultural diversity and the role of indigenous peoples and other communities in enhancing those links;
- Promoting the collection, compilation and analysis of information from on-the ground activities linking biological and cultural diversity from, among others, the experiences provided by indigenous and local communities; and
- Supporting and fostering learning networks on bio-cultural approaches, linking grassroots and community initiatives with local, national, regional and global policy processes.[274]

Importantly, one of the Joint Programme's key action points is to "advance knowledge on the ways in which cultures have shaped and continue to shape biodiversity in sustainable way (e.g. cultural landscapes, traditional agricultural systems, sacred sites, culturally significant species and urban biodiversity)."[275] Additionally, the Joint Programme will "support indigenous and local communities to assess the possible challenges relating to implementation of the interlinked provisions of the CBD and UNESCO culture related Conventions and make recommendations for improving their full and effective participation in the implementation of these provisions."[276]

Also at the Conference, the participants adopted the 2010 Declaration on Bio-cultural Diversity. The Declaration recognizes the value of and linkages between biological and cultural diversity and called on all relevant sectors of society to support the Joint Programme.

12.2 Earth Charter

In 2000, the Earth Charter Commission finalized the Earth Charter,[277] which "is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century" that "began as a United Nations initiative, but […] was carried forward and completed by a global civil society initiative."[278] The Earth Charter consists of four major principles, which are:

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[273] ICBCD Report at 6.
[274] ICBCD Report at 6.
[275] ICBCD Report at 7.
[276] ICBCD Report at 7.
[277] Earth Charter (2000). Last accessed 23 July 2012, at http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html.
[278] The Earth Charter Initiative, "What is the Earth Charter?" Last accessed 23 July 2012, at http://www.earthcharterinaction.org/content/pages/What-is-the-Earth-Charter%3F.html.

I. Respect and care for the community of life;
II. Ecological integrity;
III. Social and economic justice; and
IV. Democracy, nonviolence, and peace.

Principle III is particularly relevant to ICCAs. Principle III(12) calls on individuals and entities to "[u]phold the right of all, without discrimination, to a natural and social environment supportive of human dignity, bodily health, and spiritual well-being, with special attention to the rights of indigenous peoples and minorities." More specifically, they should "[a]ffirm the right of indigenous peoples to their spirituality, knowledge, lands and resources and to their related practice of sustainable livelihoods"[279] and "protect and restore outstanding places of cultural and spiritual significance."[280] Additionally, under Principle III(9)(a), poverty is to be eradicated and human beings are guaranteed "the right to potable water, clean air, food security, uncontaminated soil, shelter, and safe sanitation, allocating the national and international resources required."

Under Principle I(2)(a), individuals and entities are to "[a]ccept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people." Pursuant to Principle II(5), individuals and entities should "[a]dopt at all levels sustainable development plans and regulations that make environmental conservation and rehabilitation integral to all development initiatives" and "[e]stablish and safeguard viable nature and biosphere reserves, including wild lands and marine areas, to protect Earth's life support systems, maintain biodiversity, and preserve our natural heritage." Finally, Principle II(8)(b) calls on individuals and entities to "[r]ecognize and preserve the traditional knowledge and spiritual wisdom in all cultures that contribute to environmental protection and human well-being."

13. SUSTAINABLE DEVELOPMENT

13.1 Declaration of the United Nations Conference on the Human Environment

In 1972, governments gathered in Stockholm to participate in one of the first meetings to examine humanity's global impact on the environment. The result was the Declaration of the United Nations Conference on the Human Environment,[281] which consists of several broad principles related to preserving and enhancing the human environment. Principle 1 of the Stockholm Declaration provides that "[m]an has the fundamental right to freedom, equality and

[279] Earth Charter Principle III(12)(b).
[280] Earth Charter Principle III(12)(d).
[281] Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972) (Stockholm Declaration).

adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." Principle 19 calls for education in environmental matters: "Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension."

13.2 UN Conference on Environment and Development

In 1992, representatives from over 170 countries met in Rio de Janeiro to address global environmental concerns. The meeting, known widely as the Rio Earth Summit, resulted in several key instruments, including the CBD and the United Nations Framework Convention on Climate Change, discussed below. Additionally, the Rio Earth Summit produced an action agenda known as Agenda 21 and a statement of principles known as The Rio Declaration on Environment and Development.

13.2.1 Agenda 21

Agenda 21 is a "comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment."[282] Agenda 21 deals extensively with Indigenous peoples and devotes a chapter to recognizing and strengthening the role of Indigenous people and their communities. Agenda 21 states that: "Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands."[283]

13.2.2 Rio Declaration on Environment and Development

The Rio Declaration on Environment and Development[284] consists of 27 principles that describe the rights of the people to be involved in the sustainable development of their economies and support the integrity of the global environmental and developmental system. The Rio Declaration supports citizens' participation in environmental issues, access to information and access to judicial remedies, as set forth in Principle 10. Under Principle 17, "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

[282] Agenda 21: Earth Summit - The United Nations Programme of Action from Rio (1992) (Agenda 21).
[283] Agenda 21 ¶26.1.
[284] Rio Declaration on Environment and Development (1992) (Rio Declaration), last accessed 20 June 2012 at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78.

Principle 22 explicitly recognizes the importance of indigenous peoples in environmental management: "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." Additionally, "[t]he environment and natural resources of people under oppression, domination and occupation shall be protected."[285]

13.3 Programme for the Further Implementation of Agenda 21

In 1997, stakeholders met to review progress achieved over the five years that had passed since the United Nations Conference on Environment and Development and to "re-energize [their] commitment to further action on goals and objectives set out by the Earth Summit."[286] The focus behind the PFIA 21 was to reaffirm Agenda 21 and comprehensively accelerate its implementation, rather than renegotiating its provisions or implementing it selectively.[287]

The PFIA 21 addresses indigenous peoples throughout its text. It recognizes that "Indigenous people have played an increasing role in addressing issues affecting their interests and particularly concerning their traditional knowledge and practices."[288] It calls for the participation of indigenous peoples and their communities in development and implementation of policy,[289] such as sustainable development strategies.[290] The PFIA 21 recognizes that "[t]here remains an urgent need for the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the utilization of components of genetic resources."[291] Thus, it calls on governments and the international community to respect indigenous and local communities and encourage equitable sharing of benefits with them:

> To respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles, and encourage the equitable sharing of the benefits arising from traditional knowledge so that those communities are adequately protected and rewarded, consistent with the provisions of the Convention on Biological Diversity and in accordance with the decisions of the Conference of the Parties.[292]

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[285] Rio Declaration Principle 23.
[286] Programme for the Further Implementation of Agenda 21 (19 September 1997) A/RES/S-19/2 (PFIA 21) at ¶1.
[287] PFIA 21 at ¶3.
[288] PFIA 21 at ¶12.
[289] PFIA 21 at ¶69.
[290] PFIA 21 at ¶24(b).
[291] PFIA 21 at ¶66.
[292] PFIA 21 at ¶66(f). In terms of capacity building, the PFIA 21 notes that "[t]he special needs, culture, traditions expertise of indigenous people must be recognized. PFIA 21 at ¶100.

13.4 Plan of Implementation of the World Summit on Sustainable Development

The Plan of Implementation of the World Summit on Sustainable Development was designed to "further build on the achievements made since the United Nations Conference on Environment and Development and expedite the realization of the remaining goals."[293] The Johannesburg Plan states that the CBD "is the key instrument for the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from use of genetic resources."[294] It contains provisions regarding recognizing the rights of "indigenous and local communities" and promoting their participation in decision-making:

> (j) Subject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit -sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices; and
>
> (l) Promote the effective participation of indigenous and local communities in decision and policy-making concerning the use of their traditional knowledge[.][295]

The Johannesburg Plan also acknowledges that "[a]griculture plays a crucial role in addressing the needs of a growing global population and is inextricably linked to poverty eradication, especially in developing countries."[296] Thus, it calls for action to "[p]romote the conservation, and sustainable use and management of traditional and indigenous agricultural systems and strengthen indigenous models of agricultural production."[297]

13.5 Programme of Action for the Sustainable Development of Small Island Developing States

In 1992 at the UNCED, Small Island Developing States (SIDS) were recognized as a distinct group of developing countries facing specific social, economic and environmental vulnerabilities.[298] "SIDS tend to confront similar constraints in their sustainable development efforts, such as a narrow resource base depriving them of the benefits of economies of scale; small domestic

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[293] Plan of Implementation of the World Summit on Sustainable Development (Johannesburg 2002) (Johannesburg Plan).
[294] Johannesburg Plan, at 26 ¶44.
[295] Johannesburg Plan, at 27 ¶44.
[296] Johannesburg Plan, at 24 ¶40.
[297] Johannesburg Plan, at 24 ¶40(r).
[298] UN-OHRLLS, "Small Island Developing States". Last accessed August 1, 2012 at http://www.unohrlls.org/en/sids/43/.

markets and heavy dependence on a few external and remote markets … .”[299] In response to these issues, the Programme of Action for the Sustainable Development of Small Island Developing States (BPOA)[300] was developed.

The BPOA seeks to ensure that knowledge and customary and traditional practices of local and indigenous people are protected and that they benefit directly, equitably and on mutually agreed terms from any utilization thereof.[301] It also supports “the involvement of non-governmental organizations, women, indigenous people and other major groups, as well as fishing communities and farmers, in the conservation and sustainable use of biodiversity and biotechnology.”[302] Like other instruments noted above, the BPOA calls for the engagement and active participation of indigenous people and their communities in its implementation.[303]

13.6 Mauritius Strategy for Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States

In 2005, the BPOA was reviewed and revamped in Mauritius, resulting in the Mauritius Strategy for Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States.[304] The Mauritius Strategy continues the BPOA’s support for indigenous peoples, calling on SIDS to develop “local capacities for protecting and developing the traditional knowledge of indigenous groups for the fair and equitable sharing of the benefits arising from the use of genetic resources … .”[305]

13.7 The Future We Want

In June 2012, the UN held the United Nations Conference on Sustainable Development (Rio+20). Rio+20 resulted in an outcome document entitled “The Future We Want” (TFWW).[306] TFWW underscores that sustainable development requires the meaningful involvement and participation of a wide variety of stakeholders, including indigenous peoples.[307] Importantly, it

[299] UN-OHRLLS, “Small Island Developing States”. Last accessed August 1, 2012 at http://www.unohrlls.org/en/sids/43/.
[300] Programme of Action for the Sustainable Development of Small Island Developing States (Barbados, 1994).
[301] BPOA ¶45(A)(vii).
[302] BPOA ¶45(A)(viii).
[303] BPOA ¶68.
[304] Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (Mauritius, 14 January 2005) A/CONF.207/11 (Mauritius Strategy).
[305] Mauritius Strategy ¶54(g).
[306] UN General Assembly, the Future We Want (24 July 2012) A/66/L.56 (TFWW).
[307] TFWW ¶43.

recognizes the importance of the UNDRIP "in the context of global, regional, national and subnational implementation of sustainable development strategies."[308]

TFWW notes that green economy policies should "[e]nhance the welfare of indigenous peoples and their communities, other local and traditional communities and ethnic minorities, recognizing and supporting their identity, culture and interests … ." It recognizes "the importance of traditional sustainable agricultural practices, including traditional seed supply systems, including for many indigenous peoples and local communities."[309] TFWW also recognizes the important role that indigenous peoples play in conserving and sustainably using biodiversity:

> We recognize that the traditional knowledge, innovations and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity, and their wider application can support social well-being and sustainable livelihoods. We further recognize that indigenous peoples and local communities are often the most directly dependent on biodiversity and ecosystems and thus are often the most immediately affected by their loss and degradation.[310]

14. ENDANGERED SPECIES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora[311] seeks to ensure that international trade in specimens of wild animals and plants does not threaten their survival. It recognizes "that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come".[312] Additionally, "peoples and States are and should be the best protectors of their own wild fauna and flora".[313]

[308] TFWW ¶49.
[309] TFWW ¶109.
[310] TFWW ¶197. TFWW recognizes that indigenous peoples and local communities have developed sustainable uses of mountain resources. TFWW ¶211.
[311] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington DC., 3 March 1973, in force 1 July 1975) (CITES).
[312] CITES Preamble.
[313] CITES Preamble.

PART III

THE RELEVANCE OF LEGAL WEIGHT

15. THE RELEVANCE OF LEGAL WEIGHT

The scope of this Review encompasses several multilateral environmental agreements and subsidiary instruments (collectively, MEAs), including conventions, declarations, protocols and guidelines. Whether or not these MEAs are binding on parties - i.e., whether they constitute 'hard law'[314] - depends upon a number of factors, including the specific language of the MEA in question. Often, there is uncertainty or debate as to whether a particular MEA or its subsidiary instruments constitute hard law or 'soft law.'[315]

This section recognizes that definitive answers regarding the binding nature of MEAs often do not exist. Rather than attempting to categorize the binding nature of each MEA addressed in this Review, this section will instead provide a general overview of the landscape regarding hard and soft law as it relates to MEAs. This section focuses on the CBD to address the complexity of this issue because the CBD "has emerged as the 'primary instrument' and the preferred international forum for indigenous and local communities to express their interests and demands for the protection of their traditional knowledge[.]"[316]

15.1 Traditional International Law

Traditionally, binding[317] international law, including international environmental law, is created pursuant to the Vienna Convention on the Law of Treaties (VCLT).[318] Under the VCLT, parties consent to be bound by a treaty at an international conference, with the treaty entering into force once it has been ratified by a minimum number of parties.[319] This is the "traditional process of lawmaking, [where] states protect their individual interests by exercising their

[314] Abbot, K.W. and Snidal, D., *Hard and Soft Law In International Governance* (2000) International Organization 54(3), 421 (defining hard law as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law") (Hard and Soft Law).

[315] "The realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation." Hard and Soft Law at 422.

[316] E. Morgera and E. Tsioumani, *Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity* (2011) University of Edinburgh School of Law Working Paper 2011/21, at 17 (Looking Afresh at the CBD).

[317] It should be noted that the usefulness of terms such as "binding" and "non-binding" have been questioned due to practical issues of enforcement—or lack thereof—regarding allegedly "binding" provisions of an international instrument. J Brunee, *COPing with Consent: Law Making Under Multilateral Environmental Agreements* (2002) 15 Leiden Journal of International Law 1, 32 (COPing With Consent). For purposes of this discussion however, they will be employed in order to provide an overview of the legal status of the MEAs discussed in this review. In-depth discussion regarding practical issues of enforcement can be addressed more fully at a later date.

[318] Vienna Convention on the Law of Treaties, Vienna 23 May 1969, entry into force 27 January 1980.

[319] VCLT Articles 9-18. Article 11 provides that "[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, **or by any other means if so agreed**." (Emphasis added.)

sovereign right to withhold their consent to be bound and their prerogative to demand reciprocal concessions of their bargaining partners."[320] This is the method under which framework conventions such as the CBD[321] and the United Nations Framework Convention on Climate Change (UNFCCC) entered into force.

While this process protects states' sovereign rights to withhold or grant consent to be bound by a treaty, in the context of MEAs it has been criticized as being inadequate to respond to the realities of environmental degradation and loss of biodiversity in a timely and effective manner.[322] This "has prompted calls for new approaches to international environmental law-making, including approaches that help overcome the constraints of the consent requirement."[323] The Conference of the Parties (COP) to MEAs is one avenue through which restraints imposed by the consent requirement is being addressed.

15.2 Conferences of the Parties to MEAs

MEAs generally consist of two stages: the treaty-making stage, where the text of the instrument is negotiated and adopted, and the implementation stage.[324] During the implementation stage, "the MEA is carried forward by the institutional structure established by the agreement's own terms, the Conference of the Parties."[325] "The COP is typically the plenary, 'supreme,' organ of the MEA."[326] Although generally tasked with implementing the MEA, the COP's role varies depending upon the MEA's underlying text. The role of COPs "ranges from the adoption of texts that are subsequently ratified by MEA parties to what appear to be more autonomous forms of law-making."[327]

Where parties ratify texts adopted by COPs, the COPs' role approximates the traditional, consent-based method of treaty law. On the other hand, where "more autonomous forms of law-making take place," such a role raises questions about the legitimacy and binding nature of

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[320] J. Werksman, *The Conference of Parties to Environmental Treaties* (1996) Greening International Institutions 55, 55-56. See also R. Churchill and G. Ulfstein, R. Churchill & G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law* (2000) 94 AJIL 623.

[321] Morgera and Tsioumani, at 3 (noting that the CBD is "[w]idely seen as a framework convention"); S. Harrop and D. Pritchard, *A hard instrument goes soft: The implications of the Convention on Biological Diversity's current trajectory* (2011) Global Environmental Change 21, 476; D. McGraw, *The CBD – Key Characteristics and Implications for Implementation* (2002) 11 R.E.C.I.E.L. 17, 18 n.10.

[322] *See* Werksman, at 56; Brunee, at 2.

[323] Brunee, at 2.

[324] Werksman, at 57.

[325] Werksman, at 57.

[326] Brunee, at 4 note 12.

[327] Brunee, at 4. As an example of the latter role, under Article 2.9 of the Montreal Protocol, adjustments to the ozone depleting potential of substances can be adopted by a two-thirds majority decision, which becomes binding on all parties. Id. at 21.

COP decisions under the traditional treaty-law theory.[328] One method then for determining the "hardness" of a particular COP action under a traditional treaty-law examination involves the manner in which the action entered into force. Because COPs are taking on a "growing role . . . in international environmental lawmaking[,]"[329] determining the binding nature of their actions becomes increasingly important.

15.3 The Conference 0f the Parties to the Convention on Biological Diversity

The CBD is a critical MEA that "has been hailed as the epitome of a new generation of multilateral environmental agreements[.]"[330] It was seen as "balanc[ing] the needs and concerns of developing countries against the goals of industrialized countries[.]"[331] The CBD entered into force pursuant to the traditional treaty-making process, and thus is binding upon its parties.[332] Despite its perceived progressive nature, the CBD has "attracted intense criticism for its vague and heavily qualified text, which is fraught with loopholes."[333] The responsibility for implementing this text falls to the COP established by the CBD.[334]

15.3.1 CBD Rules, Protocols, Annexes and Amendments

Along with adopting rules of procedure and financing,[335] the CBD sets forth three major activities for the COP: (1) adoption of protocols[336]; (2) amendment of the CBD or protocols[337]; and (3) adoption and amendment of annexes.[338] Additionally, the CBD instructs the COP to "[c]onsider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation."[339]

Adoption of protocols is governed by, among other articles, CBD Articles 28, 34, and 36. Article 28 provides as follows:

1. The Contracting Parties shall cooperate in the formulation and adoption of protocols to this Convention.
2. Protocols shall be adopted at a meeting of the Conference of the Parties.

[328] Brunee, at 5.
[329] Brunee, at 6. For a detailed discussion of the legitimacy of COP decisions, *see generally* Brunee.
[330] Morgera and Tsioumani, at 1.
[331] C. Tinker, *A New Breed of Treaty: The United Nations Convention on Biological Diversity* (1995) 12 Pace Envt'l L. Rev. 191, 192-93.
[332] Tinker, at 195 (noting that the CBD "becomes binding on all parties, rather than being mere 'soft law' or non-binding declaratory language"); S. Harrop and D. Pritchard, at 474.
[333] Morgera and Tsioumani, at 1.
[334] CBD Article 23(1).
[335] CBD Article 23(3).
[336] CBD Article 28.
[337] CBD Article 29.
[338] CBD Article 30.
[339] CBD Article 23(4)(i).

3. The text of any proposed protocol shall be communicated to the Contracting Parties by the Secretariat at least six months before such a meeting.

Pursuant to Article 34(1), "any protocol shall be subject to ratification, acceptance or approval by States[.]" Under Article 36(2), a protocol enters into force after a prescribed date once "the number of instruments of ratification, acceptance, approval or accession, specified in that protocol[] has been deposited." Where a protocol has entered into force without the ratification of a particular Party, the protocol will enter into force for that Party once the Party "ratifies, accepts or approves that protocol or accedes thereto[.]"[340]

Amendment of the CBD or protocols thereto is governed by CBD Article 29. CBD Article 29(3) instructs the Parties to "make every effort" to reach agreement on proposed amendments to the CBD or any protocol by consensus. If consensus is not possible, as a last resort the Parties shall "be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary[[341]] to all Parties for ratification, acceptance or approval."[342] Parties then notify the Depositary of their acceptance of the amendment. Amendments only enter into force with regard to a particular Party if that Party has accepted enforcement.[343]

Adoption and amendment of annexes to the CBD or any protocol is governed by CBD Article 30.[344] Annexes are to be proposed and adopted pursuant to the procedure set forth in Article 29. However, any Party that is unable to approve an annex must notify the Depositary within one year from the date it is notified of the annex's adoption.[345] If such notification is not provided within the prescribed time frame, "the annex shall enter into force for all Parties to this Convention or to any protocol concerned[.]"[346] Amendments to annexes follow the same procedure as proposal, adoption and entry into force of annexes.[347]

As these provisions demonstrate, different rules apply to different COP actions under the COP. In regard to protocols, the minimum amount of Parties required for a protocol to enter into force is set forth in the protocol itself, and conceivably could consist of only two parties. However, the protocol only enters into force as to those Parties that have agreed to be bound by it.

[340] CBD Article 36(4).
[341] The Depositary is the Secretary General of the United Nations. CBD Article 41.
[342] CBD Article 29(3).
[343] CBD Article 29(4).
[344] "[A]nnexes shall be restricted to procedural, scientific, technical and administrative matters." CBD Article 30(1).
[345] CBD Article 30(2)(b).
[346] CBD Article 30(2)(c).
[347] CBD Article 30(3).

In regard to amendments to the CBD or protocols, Parties must first seek to reach agreement by consensus. If consensus is not possible, amendments can be adopted by a two-third majority vote of the parties to the instrument in question. Amendments only enter into force as to those parties that have agreed to be bound by it.[348]

Annexes and amendments thereto are adopted pursuant to the same process as amendments, with one important distinction. Unlike amendments, where parties opt-in in order to be bound by them, Parties must opt-out of annexes or amendments thereto by notifying the Depositary that they do not want to be so bound. Failure to do so will mean that the annex will enter into force with regard to that Party.

The distinction between opting in and opting out is important, because it puts the onus on the Parties to the CBD to take action if they do not want to be bound by an annex or amendment thereto. Whereas inaction in the context of adopting a protocol or an amendment to the CBD or a protocol will mean that the Party will not be bound by the protocol or amendment, inaction in the context of an annex or amendment thereto will mean that the Party will be bound.

This distinction is also important because although the CBD states that "annexes shall be restricted to procedural, scientific, technical and administrative matters[,]"[349] "the lines between the 'technical' and the 'substantive' are often fluid."[350] Thus, where annexes and amendments thereto contain substantive matters, Parties may end up being bound by an obligation not in the text of the treaty itself, despite the fact that they did not expressly consent to such an obligation.[351]

15.3.2 CBD COP Decisions

After each meeting of the COP, "decisions" are issued addressing a variety of different subjects, from amending procedural rules to guidelines related to conducting social and environmental impact statements. The CBD is essentially silent in regard to COP decisions.[352] Presumably the issuance of COP decisions falls under the catchall provision in Article 23 which allows the CBD to

[348] Only two CBD protocols have been adopted since the CBD entered into force. These are the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the Protocol On Access To Genetic Resources And The Fair And Equitable Sharing Of Benefits Arising From Their Utilization To The Convention On Biological Diversity. Harrop and Pritchard, at 476.

[349] CBD Article 30(1).

[350] Brunee, at 20.

[351] *See* Brunee, at 20 (noting that under the Montreal Protocol, "additions to an annex can significantly increase the scope of the obligations contained in the protocol text itself").

[352] CBD Article 12 refers to "decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice[.]" Article 32(2) provides that "Decisions under any protocol shall be taken only by the Parties to the protocol concerned."

"[c]onsider and undertake any additional action that may be required for the achievement of the purposes of this Convention[.]"

Rule 40 of the CBD COP Rules of Procedure ("Rules of Procedure") addresses decision-making on matters of substance and provides in relevant part as follows:

> [1. The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the decision . . . shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting, unless otherwise provided by the Convention . . . or the present rules of procedure. . . . .][353]

Unlike provisions governing adoption of protocols and amendments to the CBD, reaching a decision under Rule 40 does not require ratification by Parties. It is also unclear under Rule 40 whether parties who were not present and voting or who voted against the decision are bound by it.

15.3.3 Legal Weight[354] of CBD COP Actions

Under traditional treaty-law analysis, the actions[355] of the COP which most closely approximate traditional treaty formation - adoption and ratification - will constitute hard law. Thus, amendments to the CBD, protocols, and amendments to protocols, which require express consent from Parties before they are bound, should constitute hard law.[356] Annexes and amendments thereto deviate from the traditional treaty-law formation in that they require opting out in order to avoid being bound. As set forth in VCLT Article 11 however, "[t]he consent of a State to be bound by a treaty may be expressed . . . by any other means if so agreed." It could be argued that the opt-out process in the CBD is another means by which Parties can express consent. Even if a literal interpretation of the term "express consent" is taken, Parties still have the opportunity to determine whether or not to be bound by an annex or amendment thereto.

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[353] Brackets in original. In a somewhat bitter twist of irony, the entirety of Rule 40 is bracketed "due to the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance." CBD, Report of the Tenth Meeting of the COP to the CBD, 20 January 2011 at ¶65. As of COP 10, "[t]he Conference of the Parties did not currently appear to be in a position to adopt those outstanding rules so the President suggested postponing discussion of the issue to the eleventh meeting of the Conference of the Parties." *Id.* It is hoped that by COP 11 the COP will be able to finally reach a consensus on its rules for reaching a consensus.

[354] The term "legal weight" is used here to refer to whether the CBD COP action is binding or non-binding.

[355] "Actions" encompasses all activities of the COP, including adoption of protocols and issuance of Decisions.

[356] *See* Churchill and Ulfstein, at 636 (noting that COP treaty amendment procedures "essentially reflect the general procedures for treaty amendment laid down in the Vienna Convention on the Law of Treaties, though in institutionalized and more streamlined form").

On the other hand, the legal weight of actions which take place outside of this context, such as certain COP decisions, are, "[f]rom a formal stand- point, . . . at best ambiguous."[357] In regard to COP decisions, "they do not appear to be binding in a formal sense."[358] According to Brunee, "[t]o the extent that parties understand some of the rules contained in the relevant decisions as 'mandatory' and agree to subject themselves to their terms, the distinction between COP decisions that are, technically speaking, legally binding and those that are not may well be more apparent than real."[359] From a traditional treaty-making perspective, where decisions are adopted outside of the consent process, they more closely approximate non-binding, or soft law.

It is important to note that some commentators argue that traditional treaty analysis is inadequate to address the scope of COP decision-making.[360] Brunee "argue[s] for an interactional understanding of international law"[361] where "international law arises from a mutually generative process," meaning that "actors come to understand themselves and their interests in light of their interaction with others and in light of the norms that frame the interaction."[362] The point here is that rather than focusing on whether or not a decision was made within the formal confines of traditional treaty law, decisions are analyzed according to general concepts of transparency, mutual understanding, and customary practice.

15.3.4 Other Issues

Some commentators have noted that by its nature, the CBD is a more in the realm of a soft law instrument. Because of the contentious issues addressed by the CBD, the instrument was drafted with a "broad remit," with much of the details to be implemented by individual parties.[363] Rather than implementing additional hard law instruments, however, the CBD COP "develop[ed] soft instruments which are not backed by obligations."[364]

Additionally, CBD COP decisions themselves, which are often long and poorly organized, may hamper the hard nature of the instrument.[365] One commentator has suggested that because "it

[357] Brunee, at 32.
[358] Brunee, at 32.
[359] Brunee, at 32-33.
[360] Brunee, at 6.
[361] Brunee, at 33.
[362] Brunee, at 34.
[363] Harris and Pritchard, at 476.
[364] Harris and Pritchard, at 479. Harris and Pritchard do acknowledge that "[t]he setting of global targets has addressed one of the foundational inadequacies of the CBD, by providing necessary timelines, rates and measures." *Id.* However, they note that "the convention's work on targets has not to-date provided instruments that facilitate their national implementation." *Id.*
[365] *See* E. Morgera, *Faraway, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law*, University of Edingburgh School of Law Working Paper Series 2011/05, at 2 (noting that "it is difficult to obtain a clear and comprehensive

is quite difficult to determine the legal strength of CBD COP decisions on the basis of their wording, it seems that the pragmatic way to determine whether these decisions actually contribute to addressing climate change and biodiversity in a mutually reinforcing manner is to assess state practice, both in relevant international negotiations outside the CBD framework and in implementing CBD COP decisions at the national and local level."[366]

15.4 Conclusion

Actions of COPs inhabit an ambiguous area in the binding/non-binding dichotomy of traditional international law. While some actions, such as amending the governing instrument take place in a manner akin to formal treaty-making, other actions such as the reaching agreement on decisions, occur under less formal circumstances. The status of this latter category of actions is unclear. Applying formal treaty law, such actions appear to be more akin to soft law.

Legal scholarship in regard to COP actions is still in its nascent stage, and in regard to actions of the COP CBD, essentially nonexistent.[367] As more actions are taken by COPs in the future, new approaches to analyzing the legal status of these actions, such as the "interactional understanding" posited by Brunee may gain wider use. These approaches may help to clarify the legal status of COP actions. More importantly, the effects of COP actions on Parties' behavior will help to determine whether or not they are binding. For the time being, however, there are no few definitive answers regarding the binding nature of COP actions.

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picture of the guidance given by the CBD's Conference of the Parties" regarding climate change and biodiversity due to COP decisions that are "generally long" and "not always well organized").

[366] Morgera, at 36.

[367] Morgera, at 36 n. 180 (noting that "of the authors that have discussed the legal significance of multilateral environmental agreements' COP decisions, none has referred to the specific case of the CBD").

PART III

INTERNATIONAL, REGIONAL AND NATIONAL JURISPRUDENCE

16. INTERNATIONAL JURISPRUDENCE

Western Sahara Advisory Opinion (ICJ, 1975)[368]

The International Court of Justice (ICJ) is the principle judicial organ of the United Nations. The ICJ exercises jurisdiction in two situations: (1) issuing binding opinions settling disputes submitted to it by States and (2) issuing non-binding advisory opinions on issues submitted to it by United Nations organs and specialized agencies.[369]

In its precedent-setting Western Sahara Advisory Opinion, the International Court of Justice addressed the question whether the "Western Sahara (Riode Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?"[370] The ICJ approached the question from the perspective that "[w]hatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*."[371] The ICJ determined that at the time of colonization, peoples in the Western Sahara were "socially and politically organized in tribes and under chiefs competent to represent them."[372] Accordingly, the ICJ concluded that the Western Sahara was not *terra nullius* at the time of Spain's colonization.

The Western Sahara Advisory Opinion rendered the concept of *terra nullius* illegitimate and "rejected the invocation of terra nullius to usurp native titles through occupation of territories already inhabited by indigenous peoples, such as the peoples of the Western Sahara."[373]

17. REGIONAL JURISPRUDENCE

17.1 Africa

The African Commission on Human and Peoples' Rights is the "primary regional institution for the promotion and protection of human rights in Africa".[374] The African Commission comprises

[368] Western Sahara, Advisory Opinion, 1.C.J. Reports 1975, p. 12.
[369] International Court of Justice, "The Court." Last accessed 8 August 2012 at http://www.icj-cij.org/jurisdiction/index.php?p1=5.
[370] Western Sahara Advisory Opinion at ¶75.
[371] Western Sahara Advisory Opinion at ¶80.
[372] Western Sahara Advisory Opinion at ¶81.
[373] Lynch, O. (2011), *Mandating Recognition: International Law and Aboriginal/Native Title*. RRI: Washington D.C. Pages 8-9.
[374] Forest People's Programme, (2011) *Indigenous Women's Rights and the African Human Rights System: A Toolkit for Mechanisms. Note #1: The African Commission on Human and Peoples' Rights*, 1 (A Toolkit for Mechanisms).

eleven human rights experts "of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights",[375] acting impartially in their own personal capacity.[376] The African Commission was established under Article 30 of the African Charter on Human and Peoples' Rights within the Organisation of African Unity *"to promote human and peoples' rights and ensure their protection in Africa"*[377] and was officially inaugurated on 2 November 1987.[378] Its functions are set out in Article 45 of the Charter and include the interpretation of provisions in the Charter and the promotion of Human and Peoples' Rights through, for example, research, field studies, dissemination of such information and cooperation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[379] The African Commission is also charged with the protection of Human and Peoples' Rights and this is fulfilled in part, through its communications and complaints mechanism, enabling States (who have reason to believe another State has violated the Charter)[380] or other interested parties such as individuals[381] claiming violations of the Charter to lodge a communication. Special mechanisms, such as Special Rapporteurs and Working Groups, have also been created by the Commission to assist in the promotion and protection of human rights through research on particular issues.[382]

The complaints mechanism of the African Commission has been instrumental in the recognition and support of Indigenous peoples and local communities' rights in Africa. In particular, the recent case of *Endorois Welfare Council v Kenya*[383] discussed indigenous land ownership and emphasised the intricate connections between indigenous peoples and their lands including the significance of cultural and spiritual links. The case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[384] also clarified important rights with respect to the right to participate in decision making, essential for indigenous peoples with respect to self determination. Specific Working Groups that have or are likely to support and recognise the rights of Indigenous peoples and local communities include the Working Group on Indigenous Populations/Communities in Africa and the Working Group on the Environment, Extractive Industries and Human Rights Violations in Africa.

[375] African Charter on Human and Peoples' Rights, Article 31(1).

[376] A Toolkit for Mechanisms, at 1.

[377] African Charter on Human and Peoples' Rights, Article 30.

[378] African Commission on Human and Peoples' Rights, "History". Last accessed 11 August 2012 at http://www.achpr.org/about/history/.

[379] African Charter on Human and People's Rights, Article 45.

[380] Through African Charter on Human and Peoples' Rights, Article 47.

[381] African Charter on Human and Peoples' Rights, Article 56.

[382] A Toolkit for Mechanisms, at 1.

[383] Endorois Welfare Council v Kenya, Communication No. 276/2003, Decision of the African Commission on Human and Peoples' Rights (ACHPR Communication No. 276/2003).

[384] Communication No. 155/96, African Commission on Human and Peoples' Rights (ACHPR Communication No. 155/96)

17.1.1 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (ACHPR, 2001)[385]

This case, lodged on behalf of the Ogoni people of Nigeria by two non-governmental organizations called the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights, was brought before the African Commission via a Communication on 14 March 1996. The complaints alleged that the oil extraction operations of the Nigerian government, through the Nigerian National Petroleum company and the Shell Petroleum Development Company, had caused environmental contamination, degradation and health problems among the Ogonis, in addition to acts of terror and insecurity perpetrated by the Nigerian military against members of the Ogoni people.[386] The complainants alleged a violation of the African Charter on Human and Peoples' Rights, including civil and political rights (Articles 2,4 and 14), socioeconomic rights (Articles 16 and 18(1)) and the collective rights of peoples (Articles 21 and 24).[387]

The Commission found that Federal Republic of Nigeria violated Articles 2, 4, 14, 16, 18(1), 21 and 24 of the Charter, including the Ogoni Peoples' right to free disposal of their wealth and natural resources (Article 21)[388] and the right to a healthy environment (Article 24).[389] This is significant as the Commission recognised the Ogoni's rights to its natural resources. In addition, the Commission found that the Nigerian Government "did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland"[390] and that "the destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21".[391] Interestingly, the Commission recommended that the Nigerian Government ensure that appropriate environmental and social impact assessment were prepared for future development, provide information on health and environment risks as well as "meaningful access to regulatory and decision making bodies to the communities likely to be affected by oil operations"[392] thus highlighting the procedural as well as substantive rights that the Ogoni were entitled to. This is an important case as the Commission's interpretation of Article 21 obliges States to engage relevant communities in meaningful participation concerning decisions that involve development in their territories; including benefits that derive therefrom.[393] The Commission also relevantly recognised the

[385] Communication No. 155/96, African Commission on Human and Peoples' Rights (ACHPR Communication No. 155/96).
[386] Dersso, S., "The Jurisprudence of the African Commission on Peoples' Rights of the African Charter", 14. Last accessed 11 August 2012 at http://www.saifac.org.za/docs/2006/September/JurisprudenceOfAC.pdf.
[387] ACHPR Communication No. 155/96, paragraph 10.
[388] ACHPR Communication No. 155/96, ¶58.
[389] ACHPR Communication No. 155/96, ¶54.
[390] ACHPR Communication No. 155/96 ¶55.
[391] ACHPR Communication No. 155/96 ¶58.
[392] ACHPR Communication No. 155/96 ¶70.
[393] Dersso, S., at 15.

importance of collective rights and the interconnectedness of these rights, environmental rights and economic and social rights to human rights in Africa.[394]

17.1.2 Endorois Welfare Council v. Kenya (ACHPR, 2010)[395]

The Endorois are a community of approximately 60,000 pastoralist peoples who traditionally lived around Lake Bogoria in the Rift Valley. The community were dispossessed of their traditional lands in 1973 and further in 1978 when game reserves were created by the Kenyan Government on their lands.[396] The Endorois claimed that they practised a sustainable way of life, inextricably linked to the ancestral lands they had inhabited.[397] The links included a reliance on the land for their traditional ways of life, their cultural and spiritual traditions, ceremonies and sites as well as reliance on their lands for the health and wellbeing of their cattle.[398] A conflict arose when local councils ignored presidential directives requiring them to respect the rights of the Endorois and pay compensation and tourist revenues. As a result, the Endorois initiated legal action against the relevant local councils but the High Court dismissed the case in 2002, stating that the community "had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and 1974".[399] In addition, the High Court refused to recognise the Endorois as a community with a right to communal property, stating "there is no proper identity of the people who were affected by the setting aside of the land... that has been shown to the Court".[400]

The Endorois peoples, supported by the Centre for Minority Rights and Development (CEMRIDE), approached the African Commission on Human and Peoples' Rights in 2003 for relief.[401] The African Commission waited for a response by the Kenyan Government on the Complaint for three years before admitting the Complaint and considering it on its merits.[402] The Endorois alleged violations resulting from their forced displacement from their traditional lands as well as failure to provide adequate compensation for the loss of their property, disruption of the community's pastoral enterprise and violations of the right to practise their religion, culture and development.[403] The Kenyan Government relied on colonial laws "that prevent some local communities from gaining legal recognition of their customary property rights, but allowed others, such as local authorities to obtain legally recognised rights over

[394] ACHPR Communication No. 155/96 ¶68.
[395] *Endorois Welfare Council v Kenya,* Communication No. 276/2003, Decision of the African Commission on Human and Peoples' Rights (ACHPR Communication No. 276/2003).
[396] ACHPR Communication No. 276/2003 ¶3.
[397] ACHPR Communication No. 276/2003 ¶3.
[398] Bavikatte, Kabir, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights*, a PhD thesis submitted to the University of Cape Town in December 2011, at 157. ACHPR Communication No. 276/2003 ¶6.
[399] ACHPR Communication No. 276/2003 ¶11.
[400] ACHPR Communication No. 276/2003 ¶12.
[401] Bavikatte, K., at 159.
[402] Bavikatte, K., at 159.
[403] ACHPR Communication No. 276/2003 ¶1.

indigenous areas, ostensibly in trust for the local communities".[404] The African Commission, in its decision dated 4 February 2010, condemned the expulsion of the Endorois from their traditional lands and ordered the Kenyan Government to compensate and restore the Endorois to their ancestral lands.[405]

The case is significant as it clarified the status of indigenous peoples including defining criteria and the significant links that exist between indigenous ways of life and access and rights to their traditional lands and natural resources.[406] The African Commission stated:

> *"What is clear is that all attempts to define the concept of indigenous peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people..."*[407]

> *"...The African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture"*[408]

In addition, the African Commission recognised that the acknowledgement of the rights, interests and benefits of African communities in their traditional lands constitutes "property" under the Charter and special measures may need to be taken to secure such rights, for the protection of African communities.[409] Traditional possession of lands by indigenous peoples was recognised as equivalent to state-granted full property title and entitled such peoples to recognition and official property title.[410] Those indigenous peoples who have lost possession of or unwittingly left their traditional lands maintain their property rights unless lands were lawfully transferred to a third party in good faith and in this case, indigenous peoples are entitled to restitution.[411] The African Commission also placed restrictions on the encroachment of indigenous lands for public interest. The Commission stated that few limitations on indigenous resource rights are appropriate given the links between indigenous resource ownership and fundamental human rights and only from the most urgent and compelling interests of the State.[412]

The African Commission recognised that indigenous cultures and ways of life are manifested in use of land resources and that positive legal measures may be required to ensure "protection

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[404] Lynch, O., at 11.
[405] The International Work Group on Indigenous Affairs, "The Indigenous World 2011", at 12. Last accessed 14 February 2012 at www.rightsandresources.org/documents/files/doc_2383.pdf.
[406] ACHPR Communication No. 276/2003 ¶150.
[407] ACHPR Communication No. 276/2003 ¶151.
[408] ACHPR Communication No. 276/2003 ¶154.
[409] ACHPR Communication No. 276/2003 ¶187.
[410] ACHPR Communication No. 276/2003 ¶209.
[411] ACHPR Communication No. 276/2003 ¶209.
[412] ACHPR Communication No. 276/2003 ¶212.

and measures to ensure the effective participation of members of minority communities in decisions which affect them."[413] The Commission specifically recognised the rights of the Endorois and indigenous peoples in general when it stated that: "the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems".[414]

17.2 Americas

The Inter-American Commission on Human Rights (IACHR) was created by the Organisation of American States (OAS), through Article 106 of the OAS Charter, in 1959 to promote and protect human rights within the Americas. Its principal function is to "promote the observance and protection of human rights and to serve as a consultative organ of the Organisation in these matters".[415] The American Convention on Human Rights elaborates further in Chapter VII - It is comprised of seven independent members, serving in their personal capacity,[416] and, together with the Inter-American Court of Human Rights (IACtHR), is one of the institutions integral in the Inter-American Human Rights System (IAHRS). The functions of the IACHR are set out in Article 41 of the American Convention on Human Rights and Articles 18-20 of its statute and include: act on petitions and communications alleging violations of human rights; make recommendations to OAS Member States, to implement domestic human rights measures; observation of human rights in member states and preparation of studies or reports where appropriate; submission of cases to and requests advisory opinions of the Inter-American Court of Human Rights, and; receipt and examination of communications where one State alleges human rights violations by another State.[417]The American Convention on Human Rights established the Inter-American Court of Human Rights in 1969 in Chapter VIII. It consists of seven judges, elected in their individual capacities as judges of highest moral authority and competence in human rights.[418] The objective of the IACtHR is to apply and interpret the American Convention through its judicial functions[419] and advisory functions.[420] Only those State Parties to the American Convention that have recognised the jurisdiction of the IACtHR can submit a case regarding interpretation or application of the American Convention, and only after the case has exhausted its rights at the IACHR.[421]

There is little doubt that the Court and Commission have been important tools in the recognition and support of indigenous peoples and local communities' rights in the Americas and worldwide. The cases described below have been important in regional jurisprudence and have also been influential internationally.

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[413] ACHPR Communication No. 276/2003 ¶243-244.
[414] ACHPR Communication No. 276/2003 ¶235.
[415] Organisation of American States, "What is the IACHR" located at www.oas.org/en/iachr/mandate/what.asp
[416] American Convention on Human Rights, Article 34.
[417] American Convention on Human Rights, Article 41.
[418] American Convention on Human Rights, Article 52.
[419] American Convention on Human Rights, Articles 61 to 63.
[420] American Convention on Human Rights, Article 64.
[421] See http://www.oas.org/en/iachr/mandate/Basics/intro.asp for more information.

17.2.1 Mayagna Awas Tingni v. Nicaragua (IACHR, 2001)[422]

This case involved an Indigenous community within Nicaragua, the Awas Tingni, who fought against the Nicaraguan government's grant of concessions to foreign companies to log on their ancestral lands. The community had been without specific government recognition of ownership of their traditional lands and the Nicaraguan Government treated the land on which they lived as State land.[423] This case led to the "first ever legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a State's failure to do so".[424]

Having brought actions before the Nicaraguan courts without relief, the community petitioned the Inter-American Commission on Human Rights alleging violations of Articles 21 (the right to property), 12 (cultural integrity) and other relevant rights contained in the Inter-American Convention on Human rights.[425] Receiving an inadequate response from the Nicaraguan government, the case was brought before the Inter-American Court of Human Rights by the Inter-American Commission on Human Rights. The Court found in favour of the Awas Tingni, affirming the community's right to property even though the Nicaraguan Government had not officially recognised title.[426] On the issue of the violation of Article 21, the Court stated:

> "Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous people there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations''.[427]

The case not only set out the Awas Tingni's right to communal lands, but also established a link between the land and the community. The relationship between the Awas Tingni and its

[422] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court on Human Rights, No. 79, Ser. C (2001).
[423] Anaya, S. J., and Grossman, C., "The case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples", (2002) 19(1) *Arizona Journal of International and Comparative Law,* 1-15, 2.
[424] Anaya, S. J., and Grossman, C., at 2.
[425] Bavikatte, K., at 144.
[426] Bavikatte, K., at 145
[427] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court on Human Rights, No. 79, Ser. C (2001)at paragraph 149.

ancestral lands was acknowledged, as was the principle of stewardship that governs such relations with this indigenous group.[428]

The Court ordered Nicaragua to demarcate and title the traditional lands of the Awas Tingni in accordance with their customary land and resource tenure patterns, to stop actions undermining Community interest in their land and establish adequate mechanisms to secure land rights of indigenous communities in Nicaragua.[429] In 2008, Nicaraguan officials travelled to Awas Tingni to hand over title deeds for 73,000 hectares of their traditional lands.[430]

17.2.2 Moiwana Village v. Suriname (IACHR, 2005)[431]

This case was instigated by the 1986 massacre of 30 members of the N'djuka Maroon community, located in the Moiwana Village and brought to the Inter-American Commission on Human Rights after repeated requests for justice for the murders within the country failed.[432] The Commission found that Suriname had violated the Inter-American Convention on Human Rights, recommended a proper investigation of the event, prosecution of those responsible and compensation for the survivors of the massacre.[433] Despite the factual scenario being more about the state-sponsored massacre and less about land rights, in 2005, the Inter-American Court of Human Rights ruled that Suriname had violated the human rights of members of the village including, amongst other rights, the right to property under Article 21.[434] This included the right to use and enjoyment of property[435] and the right not to be deprived of property unless the following three criteria were fulfilled: just compensation has been paid; the reasons are for public use or social interest; and the process was undertaken according to law.[436] In concluding that Article 21 had been violated, the Court found that the members of the Moiwana community were considered the legitimate owners of their traditional lands, thus had the right to use and enjoy their territory.[437] Importantly, the judgement noted the integral cultural, spiritual connection that this indigenous community had with its territory contributing to the integrity and economic survival of this community. The Court stated:

> "...in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership. That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an

[428] Bavikatte, 146.
[429] Anaya, S. J., and Grossman, C., at 2.
[430] Lynch, D., at 15. Also see http://www.rightsandresources.org/blog.php?id=380.
[431] Inter-American Court of Human Rights (ser. C) No. 124 (15 June 2005) ¶131 (IACHR No. 124).
[432] Bavikatte, 147.
[433] Lynch, 9.
[434] IACHR, ¶153.
[435] Inter-American Convention on Human Rights, Article 21(1).
[436] Inter-American Convention on Human Rights, Article 21(2).
[437] Lynch, 10.

> indigenous community with its land must be recognised and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations."[438]

The Court, in this judgement, clearly identified the significant relationship between the people of the Moiwana Village and their ancestral lands, despite not being indigenous to the region. Stewardship of the land was a significant factor, binding the community to the land and thereby giving them property rights.[439] The Court stated:

> [The] N'djuka, like other indigenous and tribal peoples, have a profound and all encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement severed these fundamental ties... Their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of wellbeing. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions, further detracting from their personal and collective security and sense of wellbeing".[440]

The Court recognised that despite the N'djuka not being indigenous to the land, they had rights to their ancestral lands on account of their occupation and relationship with the lands. The Court ordered the Government of Suriname to "adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories".[441]

17.2.3 Saramaka v. Suriname (IACHR, 2006)[442]

This case involved the Maroons of Suriname – not identified as indigenous but considered to be tribal[443] and thus falling under protections in the International Labour Organisation Convention No. 169.[444] The Saramaka, a clan within the Maroons, were the traditional inhabitants of lands

[438] IACHR No. 124 ¶131.
[439] Bavikatte, 148.
[440] IACHR No. 124 ¶132-3.
[441] IACHR No. 124, ¶209.
[442] *Saramaka v Suriname,* Inter-American Court of Human Rights (Ser. C) No. 172 (28 November 2007) (IACHR No. 172).
[443] IACHR No. 172, ¶79.
[444] Lynch, 10.

that became the subject of logging operations by a Chinese company, given concessions by the Suriname Government against the wishes of the Saramaka community.[445] After mobilising seventy villages, the Saramaka filed a petition with the Inter-American Commission on Human Rights in 2000 and the government of Suriname were requested to suspend logging concessions and mineral explorations in 2002 and 2004.[446] The requests only partially slowed some activities so the case was referred to the Inter-American Court of Human Rights. The Saramaka were successful in Court, the Court deciding that their right to property under Article 21 of the Inter-American Convention on Human Rights had been violated.[447] Whilst not indigenous, the Court found that:

> "Their [Saramaka's] culture is also similar to that of tribal peoples insofar as the members of the Saramaka people maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied. Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people hunt, fish, and farm and they gather water, plants for medicinal purposes, oils, minerals and wood. Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them. In particular, the identity of the members of the Saramaka people with the land is inextricably linked to their historical fight for freedom from slavery, called the sacred "first time".[448]

This case clearly affirmed the principle in *Moiwana* that a community's claims of traditional ownership of ancestral lands should combine the elements of habitation with a cultural and spiritual connection with the land that cannot be separated and is not fungible or exchangeable in monetary terms. This case in particular secured the principle of stewardship by stating that the Saramaka community's communal rights to land included *"*a right to all the resources on and within the land necessary for the physical and cultural survival of the community... the Saramaka would have the right to exclude any activities on their lands that adversely affected the resources that the community relies upon".[449] This effectively meant that indigenous and tribal communities have the power to limit activities on their lands that are likely to have a negative effect on their natural resources and their stewardship relationship with their land.[450] The Court stated *"...the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and*

[445] Bavikatte, 150.
[446] Bavikatte, 151.
[447] IACHR No. 172, ¶214(1).
[448] IACHR No. 172 ¶83.
[449] Bavikatte, K., at 154.
[450] Bavikatte, 154.

use of the natural resources, which in turn maintains their very way of life,"[451] importantly linking land rights to natural resource use and traditional ways of life.

The Suriname Government was ordered to grant, amongst other things, collective title over territories to the Saramaka people after community consultations, grant legal recognition to the Saramaka people ensuring their full enjoyment to the right of communal property, remove or amend legal provisions that impede protection to the right of property by the Saramaka and adopt measures to give effect to the legal rights of the Saramaka.[452]

17.2.4 Sarayaku v. Ecuador (IACHR 2012)

The Sarayaku case has its genesis in the Ecuadorian government's decision to give oil concessions to the Argentinean General Fuel Company (CGC) which affected 60 percent of the Sarayaku people.[453] The government granted the oil concessions without informing or consulting the people of Sarayaku, and without obtaining their consent. After the concessions were granted, the CGC placed and subsequently abandoned more than 3,000 pounds of explosives in Sarayaku territory.[454]

In its ruling, the IACHR concluded that the government had violated the community's right to consultation, to their property and cultural identity, and to their safety because of the CGC's abandonment of explosives.[455] Amnesty International's Researcher on Economic, Social and Cultural Rights in the Americas believes that the ruling establishes "that states bear a responsibility to carry out special consultation processes before engaging in development projects affecting Indigenous Peoples and their rights".[456]

[451] IACHR, ¶121-122.
[452] IACHR 172, ¶214(5-8).
[453] The Pachamama Alliance, "Sarayaku: A Crucial Case for Indigenous Right". Last accessed 8 August 2012 at https://www.pachamama.org/sarayaku-old.
[454] The Pachamama Alliance, "Sarayaku: A Crucial Case for Indigenous Right". Last accessed 8 August 2012 at https://www.pachamama.org/sarayaku-old.
[455] Amnesty International News, "Ecuador: Inter-American Court ruling marks key victory for Indigenous Peoples" (27 July 2012). Last accessed 8 August 2012 at http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26 (Amnesty International News).
[456] Amnesty International News.

18. NATIONAL JURISPRUDENCE[457]

National level case law is included in this report, because in common law jurisdictions, national level courts can draw upon case law dealing with similar issues from other common law jurisdictions. In this light, national level cases are contributing to an internationally applicable corpus of jurisprudence on the rights of Indigenous peoples and local communities.

18.1 Africa

18.1.1 Botswana: San-Central Kalahari Game Reserve

In December 2006, members of the San (Basarwa and Khwe), were successful in challenging their eviction from their ancestral hunting grounds in the central Kalahari by the Botswana Government. The High Court in Botswana found that the evictions were unconstitutional and that the government had illegally forced the San from the reserve by depriving them of their subsistence.[458] Judge Mpaphi Phumaphi stated: "In my view, the simultaneous stoppage of the supply of food rations and the stoppage of hunting licenses is tantamount to condemning the remaining residents to death by starvation".[459] The judgement recognises the relationship between the San hunter-gatherers and the animals they traditionally used for food, and links land rights to cultural sustainability and the right to life.[460] Whilst it was a landmark decision in terms of recognising the legitimate and vital links between this indigenous community and its sustainable use of the land, the decision has not been implemented.[461]

Indeed, the High Court contradicted its earlier progressive approach in a decision of July 2010, when it found that the community members did not have the right to use an established well on their traditional land or excavate a new one.[462] The community lodged a petition in the African Commission on Human and Peoples' Rights who urged the Botswana government to recall its earlier decision.[463] In January 2011, the Botswana Court of Appeal unanimously

[457] For further information see W. Sunderlin, J. Hatcher and M. Liddle, 2008. From Exclusion to Ownership? Challenges and Opportunities in Advancing Forest Tenure Reform. Washington, DC: Rights and Resources Initiative; Alden Wily, Liz, 2011. "'The Law is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa". Development and Change. 42(3): 733-757; Alden Wily, Liz, and Sue Mbaya, 2001. "Land, Peoples and Forests in Eastern and Southern Africa at the Beginning of the 21st Century: The Impact of Land Relations on the Role of Communities in Forest Future". Natural Resources International and IUCN.

[458] Lynch, O., at 13.

[459] Lynch, O., at 13.

[460] Lynch, O., at 13.

[461] Lynch, O., at 13.

[462] Lynch, O., at 14.

[463] Lynch, O., 14

overruled the High Court, stating that the community had an "inherent right to drill for water".[464]

18.1.2 South Africa: Richtersveld Community v. Alexor Limited

The Richtersveld community consists of the Nama people, descendents of the Khoikhoi and San, whose traditional lands were subject to an annexation by the British Crown in 1847.[465] The community continued living on their lands until 1925 when diamonds were discovered and licenses to mine were given to third parties until community members were excluded entirely in 1957.[466] The community argued that they possessed a property right over their traditional lands based on aboriginal title, that this right survived subsequent annexation by the British Crown and that their dispossession was ethnically and culturally discriminatory, based on a notion that they were too uncivilised to possess land rights.[467] At first instance, the Land Claims Court found for Alexkor Limited (the South African, state-owned mining company) but this decision was appealed to the Supreme Court of Appeal who found in favour of the Richtersveld community, stating that they had a communal "customary law interest" at the time of annexation by the British Crown, the source being "the traditional laws and customs of the Richtersveld people".[468] Alexkor Limited and the South African Government then appealed this decision to the Constitutional Court of South Africa. The Constitutional Court of South Africa found in favour of the Richtersveld community, deciding that the community had a right to ownership of its traditional lands (including minerals) and to the exclusive and beneficial use of this land.[469] The Constitutional Court affirmed that indigenous title survived the British Crown's previous assertion of radical title over the traditional lands of the Richtersveld Community.[470] However, given dispossession of the Richtersveld community's lands were under the *Precious Stones Act (1927)*, the community's land could be proclaimed as unalienated Crown land.[471] The Richtersveld Community thus sought to make a claim for restitution of their land based on the limited retrospective provision of the *Restitution of Land Rights Act,* arguing that they were dispossessed of their lands after 19 June 1913 as a result of the racially discriminatory practice of not recognising indigenous title to land.[472] This case is significant for South African jurisprudence as it asserted that indigenous or customary law title is sufficient to establish beneficial ownership and rights over land and natural resources (above and below the soil).[473] The Court stated:

[464] Lynch, O., at 14.
[465] Lynch, O, 14.
[466] Lynch, O., at 14.
[467] Lynch, O., at 14.
[468] Lynch, O., at 14.
[469] *Alexkor Limited v The Richtersveld Community* (CCT19/03) [2003] ZACC 18 (Alexkor Limited), ¶103.
[470] Bavikatte, K., at 200.
[471] Bavikatte, K., at 200.
[472] Bavikatte, K., at 200.
[473] Bavikatte, K., at 200.

> we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.[474]

In addition, the Constitutional Court found that a State's lack of recognition of customary or indigenous land title amounted to racial discrimination if the actions affected particular communities disproportionately.[475] This case adds significantly to African jurisprudence regarding recognition of significant biocultural rights - customary land title and customary law of indigenous and local communities.

18.2 Americas

18.2.1 Belize: Cal v Attorney General (2007)[476]

The Supreme Court of Belize ruled in October 2007 that the national government of Belize must *"recognise indigenous Mayans' customary tenure to land and refrain from any act that might prejudice their use or enjoyment of their ancestral domain".*[477] The case arose when, in 2001, the Belize government gave away logging, mining and other resource exploitation rights on Mayan land.[478] The High Court ordered the government of Belize to *"determine, demarcate and provide official documentation of Santa Cruz's and Conejo's [two Mayan villages] title and rights in accordance with Maya customary law and practices"*[479] It also ordered the government to cease logging, mining or other resource exploitation projects on Mayan land.[480] This decision recognised that colonial and subsequent acquisition of Mayan land did not abrogate the Mayan people's ancestral rights to their land.[481] It stated that: *"a mere change in sovereignty does not extinguish native title to land... Extinguishment or rights to or interests in land is not to be lightly inferred".*[482]

The Court acknowledged the unique relationship between the Mayan people and their lands and natural resources, developed over a substantial period of time: *"the Maya people live,*

[474] Alexkor Limited ¶64.
[475] Alexkor Limited ¶95.
[476] Claims Nos. 171 and 172 (2007). See www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.
[477] Lynch, O., at 14.
[478] Lynch, O., at 14.
[479] Lynch, O., at 15.
[480] Lynch, O., at 15.
[481] Lynch, O., at 15.
[482] Lynch, O., at 15.

farm, hunt and fish; collect medicinal plants, construction materials and other forest resources; and engage in ceremonies and other activities within and around their communities; and that these practices have evolved over centuries from patterns of land use and occupancy of the Maya people."[483] The Court acknowledged the communal nature of the relationship between the Maya and their ancestral territories. This case is important in its recognition of ancestral rights to land, the collective nature of those rights and the relationship between the Maya and their land. The decision was the first to include reference to the 2007 UN Declaration on the Rights of Indigenous Peoples and the principles therein.[484]

18.2.2 Canada: Delgamuukw v. British Columbia[485]

Proceedings against the province of British Colombia commenced in 184 when the hereditary chiefs of the Gitksan and Wet'suwet'en First Nations claimed ownership and jurisdiction over separate portions of 58,000 square kilometres of land in British Colombia.[486] The province of British Colombia counterclaimed for a declaration that the Gitksan and Wet'suwet'en First Nations had no right to or interest in the territories claimed, or that their causes of action should be compensation from the Canadian Government.[487] The British Colombia Supreme Court found, in 1991, that aboriginal title was limited to aboriginal rights, did not recognise customary laws relating to land, and did not extend beyond occupation or use of land for sustenance in a traditional manner.[488] It held that the rights of these First Nations were extinguished when settlers were given unencumbered titles to settlers pre-Confederation, and that since entry into Confederation in 1871 and the Province of British Columbia had the right to dispose of Crown Lands unburdened by aboriginal title.[489] This decision was appealed to the British Columbia Court of Appeal. The Supreme Court's decision was overturned in 1993 with the Court of Appeal deciding that the rights of Gitksan and Wet'suwet'en First Nations had not been extinguished and were protected by common law and by the Constitution.[490] The matter was referred back to the Trial Judge to settle the differences of each party through negotiation and consultation, though a settlement did not eventuate and both parties proceeded with an appeal and cross-appeal of the decision of the Court of Appeal.[491] The Supreme Court ordered a new trial (on the basis that the trial judge had not given due weight to oral histories of the tribes) and, in the process, clarified the content of aboriginal title in Canada, the power of the state to extinguish or diminish aboriginal title and the evidentiary value of oral histories in establishing title.[492] The Supreme Court noted that if the Trial Judge had given the oral traditions of the Gitksan and Wet'suwet'en sufficient weight, the original conclusions may have

[483] Lynch, O., at 15.
[484] Lynch, O., at 15.
[485] *Delgamuukw v British Columbia* (1997) 3 S.C.R. 1010.
[486] Bavikatte, K., 189.
[487] Bavikatte, K., at 190.
[488] Bavikatte, K., at 190.
[489] Bavikatte, K., at 190.
[490] Bavikatte, K., at 191.
[491] Bavikatte, K., at 191.
[492] Bavikatte, K., at 191.

been different.[493] The Supreme Court held that "if the trial judge's understanding of oral evidence were upheld, then the oral histories of aboriginal peoples would be 'consistently and systematically undervalued by the Canadian legal system'[494]".[495] The recognition of the importance of oral traditions to aboriginal customary laws is a landmark in jurisprudence in this area, as it underscores the dynamic and permanent relationships indigenous peoples have with their lands, not through title deeds or even occupation, but through songs, stories, myths and legends.[496]

In addition, the particular judgement of Chief Justice Lamer extended aboriginal title beyond the right to carry on traditional activities on aboriginal lands and limits the use of activities on such lands to uses that would not be in direct conflict with the communities' values.[497] He said: "lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of attachment to the land which forms the basis of the group's claim to the aboriginal title".[498] This is important as it recognises the unique relationship between indigenous peoples to their lands and the weakening of aboriginal title if such uses of the land threatened their relationship with the land, acknowledging the important stewardship relationship between indigenous peoples to their lands.[499] Indeed, it can be argued that the Canadian Supreme Court based aboriginal title on the communities' relationship with the land, not just on the fact that tribes occupied the lands at a particular time.[500] The Court limited the power of the Government to infringe aboriginal title, stressing the duty to act in the interests of aboriginal peoples through consultation and compensation.[501]

18.2.3 Australia: Mabo v. Queensland (No. 2)

This case involved a declaration sought by the Meriam peoples in the Torres Strait Islands known as Murray Islands, on the basis of the community's traditional ownership and historical occupation of the islands prior to annexation by the British Crown. In 1982, several members of the Meriam community claimed ownership of their lands on the Murray Islands but while the Supreme Court of Queensland was considering the case, the State Government passed the *Torres Strait Islands Coastal Islands Act,* which extinguished, without compensation, all rights Torres Strait Islanders had to their lands after annexation by the British Crown in 1879.[502] The Act was challenged in the High Court of Australia and was found to be invalid as it conflicted with the *Commonwealth Racial Discrimination Act (1975).*[503] The later case of *Mabo v*

[493] Bavikatte, K., at, 192.
[494] *Delgamuukw*, above n.164, paragraph 98.
[495] Bavikatte, K., at 192.
[496] Bavikatte, K., at 193.
[497] Bavikatte, K, at 194.
[498] *Delgamuukw* ¶111.
[499] Bavikatte, K., at 195.
[500] Bavikatte, K., at, 196.
[501] *Delgamuukw* at ¶14.
[502] Bavikatte, K., at 175.
[503] Bavikatte, K., at 175.

Queensland (No. 2) was decided by the High Court of Australia in June 1992 and ultimately affirmed native title in Australia and the customary land rights of the Meriam people. The Queensland Government argued against the common law recognition of native title on the basis of the international law rule of *terra nullius* and the 1919 Privy Council ruling in the case of *In re Southern Rhodesia* that held that certain forms of aboriginal social organisation in relation to land were so backward that the land could be considered unoccupied.[504] The High Court majority found that, without a valid extinguishment of title, aboriginal peoples have a native title to land that they occupied prior to colonial sovereignty.[505] Instead, the High Court used the advisory opinion of the International Court of Justice in the case of *Western Sahara*, to clarify the meaning of *terra nullius*, the decision clarifying *"whatever differences there may have been among jurists, the state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terra nullius"*[506] The view of the majority judges was that common law native title entitling Indigenous peoples to beneficial ownership of their traditional lands[507] and that acquisition of sovereignty over land by the Crown resulted in acquisition of a "radical title", whereby radical title is subject to native title rights.[508] Whilst the case recognised customary land rights in common law, the lingering question that came out was regarding the limits to state power in the context of land rights of indigenous peoples and traditional communities.[509] As a result of the Mabo decision, the Australian government enacted the *Native Title Act* (1993), establishing a statutory definition of native title and providing for the Native Title Tribunal to determine and/or recognise native title and provide for compensation.[510]

[504] *Mabo v Queensland (No. 2)* ¶39.
[505] Lynch, O., at 17.
[506] *Western Sahara, Advisory Opinion,* I.C.J Reports, 1975, 12.
[507] Bavikatte, K., at 188.
[508] Lynch, O., at 18.
[509] Bavikatte, K., at 188.
[510] Lynch, O., at 24.

PART V

ANALYSIS AND RECOMMENDATIONS

19. ANALYSIS

19.1 International Law and Jurisprudence

The following analysis constitutes a rapid assessment of the research presented above. As per the comments in the introduction, it is acknowledged that this body of work warrants a deeper and more collective consideration than is possible here. This analysis aims to highlight the main trends, explore the incumbent questions, and chart a way forwards.

In *Indigenous Peoples in International Law*, James Anaya, the United Nations (UN) Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, suggests that an analysis of international law must move beyond an examination of treaties and customary international law to an analysis of processes and trajectories.[511] Based on such an analysis, Anaya concludes that international law is developing – albeit "imperfectly and grudgingly"[512] – in ways that supports Indigenous peoples' demands. This publication confirms his view, with a particular focus on Indigenous peoples' and local communities' rights to maintain the integrity of their territories and areas. A number of points emerge from the research presented in Parts II and III and from the discussion of legal weight in Part IV.

First, Part II illustrates the significant body of international law that supports a wide range of rights relevant to Indigenous peoples, local communities and ICCAs, including:

- Self-determination;
- Free, prior informed consent;
- Participation in decision-making;
- Non-removal from lands;
- Custodianship over lands;
- Recognition of legitimate tenure rights;
- Customary used of natural resources;
- Protection of plant genetic resources for food and agriculture;
- Protection of knowledge, innovation and practices;
- Equitable sharing of benefits from utilization of traditional knowledge and genetic resources;
- Promotion and maintenance of their own cultures, customs and practices;
- Opportunity to obtain an education;
- Active involvement in development; and
- Involvement in capacity building and awareness.

These rights emerge not solely from human rights or environment-related instruments, but from across the full spectrum of international law. Together, the following categories are represented:

[511] Anaya S., 2004. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2nd ed.
[512] Anaya S., at 4.

- Human Rights;
- Cultural Heritage;
- Biodiversity;
- Agriculture;
- Climate Change;
- Desertification;
- Wetlands;
- Intellectual Property;
- Biocultural and Cultural Diversity;
- Sustainable Development; and
- Endangered Species.

Interestingly, important new instruments and guidelines that support Indigenous peoples' and local communities' rights *vis-à-vis* their ICCAs are emerging from areas of law that might at first seem counterintuitive. For example, the Food and Agriculture Organization's recent Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012) recognizes the importance of land tenure, urging states "to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights … ."[513] The guidelines also focus on legal recognition and allocation of tenure rights and duties, transfers and other changes to tenure rights and duties, as well as responses to climate change and emergencies.

Moreover, as per the above mentioned FAO Guidelines, there is an increasing frequency with which new instruments reference a range of Indigenous peoples' and local communities' rights relevant to their territories and areas. Similarly, as demonstrated by the growing body of jurisprudence, including the recently handed down judgement in the Sarayaku case by the Inter-American Court of Human Rights (IACHR),[514] there is evidence that some courts are increasingly sensitized and sympathetic to the arguments put forward by Indigenous peoples and local communities. Thus, it is clear that a range of instruments that contain important rights for Indigenous peoples and local communities are emerging from a diversity of fora and that the body of law is now growing at an increasing rate.

Second, it is evident that the above trend has been driven in the first instance by Indigenous peoples. Indigenous peoples have run well-organized and strategic campaigns in human rights fora to promote their interests and secure rights. Consequently, since the adoption of ILO Convention No. 169 in 1989, the international community has adopted a proliferation of instruments that deal explicitly with the rights of Indigenous peoples (although they are

[513] FAO Tenure Guidelines, Article 4.1.

[514] The court ruled that Ecuador had, among other things, breached the villagers' rights to prior consultation, communal property and cultural identity by approving a project without their involvement. The Economist, "Indigenous Rights in South America". Last accessed 11 August 2012 at http://www.economist.com/node/21559653.

sometimes referenced in other terms such as "indigenous and local communities", as in the Convention on Biological Diversity). While the right of self-determination with regard to "peoples" has been codified in international law since at least 1966, with the adoption of the ICCPR, ILO 169 recognizes that "indigenous and tribal peoples" aspire to exercise control over their ways of life, and contains several provisions generally supporting rights of self-determination.[515] The UNDRIP marks a high point for the recognition of the rights of Indigenous peoples in international law. Unlike ILO 169, UNDRIP does not limit the definition of the term "peoples" and explicitly states that Indigenous peoples have the right of self-determination. It contains a broad spectrum of rights and is increasingly referenced in new international legal instruments. In addition, a number of national and regional judgements, as noted in Part IV, also support and uphold the rights set out in UNDRIP.

Beyond the human rights framework, since the UN (Rio) Convention on Environment and Development in 1992, Indigenous peoples have worked with a coalition of local communities, NGOs and others to critically engage in a range of different fora, including those convened by UN bodies dealing with environment, agriculture and intellectual property. Indigenous peoples' representatives have consistently argued that in order to exercise the right of self-determination, they must have access to and control over, among other things, their traditionally occupied lands, resources and knowledge. Successful lobbying and advocacy have led to the wide range of instruments noted in Part II that recognize the integral connection between Indigenous peoples and their traditionally occupied lands and resources.

Third, the increased recognition of Indigenous peoples' rights *per se*, particularly their rights over their territories, resources and knowledge, is also evident with regard to local communities. While the way they are described varies across the instruments, local communities whose ways of life are based on the conservation and sustainable use of biodiversity are also increasingly considered to have a range of rights to support them in this regard. The jurisprudence of the IACHR highlights the willingness of some courts to extend what are traditionally thought of as 'Indigenous' rights to non-Indigenous communities on the basis of being able to show a similar connection to their territories and natural resources.[516] The Saramaka case is a good example of this extension of Indigenous rights to non-indigenous communities. Similarly, rights such as 'farmers' rights' or 'livestock keepers' rights' acknowledge that regardless of whether the individual is or is not Indigenous, he or she should be afforded a certain bundle of rights because of the importance of the plant or animal genetic resources that their respective ways of life support, and vice versa.

In this light, the analysis supports the argument that local communities whose ways of life support biological and cultural diversity (biocultural diversity) are increasingly being acknowledged and provided rights in international law and jurisprudence. The increased recognition of Indigenous peoples' and local communities' rights vis-à-vis biocultural diversity

[515] Notably, Convention No. 169 explicitly states that the term "peoples" shall not have implications as regards the rights that may attach to the term under international law.
[516] As in the Saramaka v. Suriname case discussed above.

has led to some commentators proposing that we are witnessing the emergence of a body of "biocultural rights".[517] While there is an ongoing discussion as to whether the notion of 'biocultural rights' applies to the rights of both Indigenous peoples and local communities or only to local communities, it is suggested that the issue is worthy of more focused study and deliberation.

Fourth, as clearly demonstrated through ILO 169, the UNDRIP and the CBD, there is an increasing convergence between human rights and environmental law, as well as agricultural, intellectual property, and other legal frameworks. This convergence will likely continue as the relationship between Indigenous peoples, local communities, territories, lands, natural resources, and knowledge is further understood and recognized at the international level. Fifth, this broad movement is also feeding into the increasing support for ICCAs. The IUCN has recognized ICCAs since the 5th IUCN World Parks Congress in 2003 and in 2010, several CBD COP Decisions specifically addressed ICCAs (referenced as "indigenous and community conserved areas"), calling for their protection, study and support.

It is clear that Indigenous peoples and local communities are well-supported by international law and jurisprudence and as such are not merely stakeholders, but are in fact rights-holders. They should be treated according to their internationally recognized roles as the *bona fide* stewards of their territories, areas and the resources therein. Yet notwithstanding this fact, and to invoke Anaya's sentiment, international law and jurisprudence have not developed particularly graciously in the direction towards the full recognition of Indigenous peoples' and local communities' rights. The ongoing challenges of Indigenous peoples working within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is one such example.[518] Similar challenges have been faced in other international fora.[519] This underscores the point that while there have been advances in international law, those advances have been achieved against often extreme counterforces and

[517] To follow the unfolding discussion, see: Jonas H., H. Shrumm H. and K Bavikatte, 2011. "ABS and Biocultural Community Protocols", in Asian Biotechnology and Development Review, 12:3; Bavikatte, K. and D. Robinson, 2011; Bavikatte K., 2011. "Stewarding the Commons: Rethinking Property and the Emergence of Biocultural Rights" in Common Voices, Volume 7; Bavikatte K., Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights, thesis submitted for the Degree of Doctor of Philosophy, University of Cape Town, September 2011.

[518] The IGC is currently undertaking text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) towards the protection of traditional knowledge, traditional cultural expressions/folklore and genetic resources. Indigenous peoples walked out of the 20th session of the IGC to protest their lack of involvement. Intellectual Property Watch, "Indigenous Peoples Walk Out Of WIPO Committee On Genetic Resources". Last accessed 11 August 2012 at http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources.

[519] For example, in 2008 the International Indigenous Forum on Biodiversity decided to walk out of the CBD Working Group on Protected Areas because they felt they were not able to participate effectively.

are largely due to the tenacity of the individuals involved in the negotiations that often take a number of years to reach conclusion.[520]

Moreover, while there is clearly a large range of rights at the international level, they remain disconnected from one another. While this report highlights a 'body of law', in actuality, the body is a disconnected one, with instruments and provisions lacking any cohesion or integration. Drawing on the above point, this also leads to Indigenous peoples and local communities having to negotiate for rights agreed on an issue in one instrument again in new fora (such as between the Nagoya Protocol on ABS and the IGC process referenced above).

The analysis in Part III of the legal weight of international law also highlights the lack of consensus on this issue, and the resultant confusion of many government staff and civil society on what an 'international right' actually means at the national-to-local level. This state of affairs requires urgent reform and a concerted effort by a multi-stakeholder group to bring clarity to this issue is long overdue.

19.2 Cross-Scale Analysis: From the International and Regional to the National and Local

One might easily assume that the growing body of international law and jurisprudence supporting Indigenous peoples' and local communities' rights to maintain the integrity of their ICCAs is being implemented by willing governments at the national level, leading to direct support for vibrant ICCAs at the local level. The findings of the national level research undertaken in 15 countries, however, challenge this hypothesis.[521] While the reports do highlight a number of positive advances in state practice, they also underscore the continued reluctance by governments to undertake the kinds of structural reforms required to uphold the letter and the spirit of their international obligations.

Positive trends at the national level, as found in the research, include the following:

- An increasing number of government agencies are applying human rights standards in their dealings with Indigenous peoples and local communities, including to uphold substantive rights, respect procedural rights such as to free, prior and informed consent (FPIC), and recognize traditional authorities and customary laws;
- A number of countries are pursuing land reform programmes that have huge potential to contribute to Indigenous peoples' and local communities' rights and control over their territories and resources;
- Some new protected areas, wildlife, environmental, freshwater, and marine laws are more inclusive of Indigenous peoples' and local communities' organizations and

[520] Bavikatte K., and D. Robinson (2011). Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing, Law, Environment and Development Journal, 7:1. New Delhi and London.

[521] See: Jonas H., A. Kothari and H. Jonas, 2012. The country level reports are available at www.iccaconsortium.org under "ICCA Regional Reviews", and at www.naturaljustice.org under "Legal Analysis". Last accessed 11 September 2012.

customary resource use practices, providing greater and more appropriate rights over wildlife and tourism benefits; and

- There are examples of better coordination among government agencies, leading to more integrated implementation of otherwise disparate laws and policies.

The research highlights instances of national level policy, legislation and implementing agencies supportive of Indigenous peoples and local communities and their ICCAs. This improvement is not uniform, however. With a view to exploring more deeply this dynamic, the next section draws on the national level reports to explore why this increase in international law and jurisprudence is not necessarily delivering protections to Indigenous peoples and local communities at the local level. It highlights the wide range of factors that continue to undermine these otherwise positive advances in the legal recognition of Indigenous peoples' and local communities' rights.

19.3 Laws and State Institutions Continue to Undermine ICCAs

Despite gains in select legal frameworks, the research shows that in many countries, Indigenous peoples and local communities continue to lack recognition of customary land rights, local collective governance institutions, and/or rights over natural resources in their territories. At the same time, legislation and policies are developed without their full and effective participation, legal frameworks fragment otherwise connected cultural landscapes, implementing agencies often act without coherence, and the justice systems in many countries remain largely inaccessible. Together these factors are significantly hindering the ability of Indigenous peoples and local communities to maintain the integrity of their territories and areas.

19.3.1 The Development, Implementation and Enforcement of Laws is Discriminatory

In addition to the substantive provisions themselves, processes through which laws are developed, implemented and enforced by national governments discriminate structurally and consistently against Indigenous peoples and local communities in a number of ways. First, Indigenous peoples and local communities are seldom meaningfully involved in the drafting of legislation that will impact important aspects of their ways of life. Second, laws that do support the rights of Indigenous peoples and local communities on paper can be severely undermined where state agencies either inadequately implement them or implement them in ways that defeat the laws' original intent (willfully or by neglect).

Implementation Gap

The **Chilean** *Fishing and Aquaculture Law* of 1991 includes a provision to establish reserves for artisanal fishing. Its insufficiency to protect Indigenous peoples' traditional use of coastal areas motivated the Lafkenche Mapuche to undertake a campaign for the recognition of their rights over those areas, which resulted in the approval of a law on "Marine and Coastal Spaces of Aboriginal Peoples" (Ley No. 20.249). This law was adopted in 2008 and formally recognizes

Indigenous peoples' customary uses of coastal areas, including the foreshore and seabed, not only for artisanal fishing but also for cultural practices. It has raised many expectations, but until now, only one such reserve has been declared.

Third, few countries' governments provide effective means with which to hold them accountable for their actions, which enables varying degrees of corruption. Where these conditions exist, Indigenous peoples and local communities often have correspondingly low levels of knowledge about their rights and ways to use them to influence political processes and engage government agencies. Fourth, conventional sectoral approaches address singular and distinct elements (land, wildlife, water, protected areas, etc.) of otherwise interconnected socio-ecological systems. Fifth, laws favourable to Indigenous peoples and local communities are often disregarded where they are in conflict with laws such as those facilitating industrial resource extraction or production. Sixth, the content of legal provisions is often discriminatory, in the sense that Indigenous peoples' rights are often of a weaker value or made subject to other rights and interests in a way that is not done for the rights (for example, to property) of other collectivities or individuals in the law. Seventh and lastly, the effectiveness of the overall legal framework is further undermined by gaps and overlaps between laws and their implementing institutions.

Undermining ICCAs

The **Fiji** *Mining Act*, for example, 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 (even in a gazetted protected area) a mining site if it has importance to the nation. The Philippines and Suriname, among other countries, exhibit similar dynamics.

According to the Constitution and laws in **Chile**, mineral and geothermal resources, as well as water, can be ceded by the state to non-indigenous individuals or corporations, which can exploit or use them despite their location on Indigenous peoples' lands. Although legislation introduced in 1994 require large development projects to conduct environmental impact assessments (EIAs), which assess the impact on natural resources and human communities, these studies generally have not prevented the implementation of large development projects that in turn strongly impact Indigenous peoples.

The typical effect of the above factors is that many Indigenous peoples and local communities are legally deprived of their customary land and resource rights. Even where they are granted such rights constitutionally or legislatively, they are still often dispossessed in practice because of inhibitive administrative barriers and other factors related to lack of respect for the rule of law.

a. Respect for Human Rights is Severely Lacking

As noted above, a number of countries are moving towards greater inclusion of human rights (including Indigenous peoples' and cultural rights) in their legal frameworks, both as standalone laws and integrated into laws dealing predominantly with other issues such as protected areas. But many other countries fail to uphold these rights.

Perpetuating the injustices caused by the Doctrine of Discovery, many countries continue to ignore or undermine the most important principles, rights, and obligations enshrined in ILO 169, UNDRIP, and other fundamental international human rights covenants and declarations, and have failed to enact new legislation or adapt existing frameworks to ensure coherence and compliance. For example, exploitation of natural resources and the establishment of state protected areas on pre-existing ICCAs still take place without the FPIC of the respective peoples and communities. The participation of representatives of Indigenous peoples and local communities in national decision-making processes is extremely limited. Of the mechanisms that do exist, many fail to ensure genuine and meaningful processes of participation, including in particular of Indigenous women. Moreover, legitimate struggles of Indigenous and local leaders against the destruction of their territories, resources and cultures are routinely criminalized and faced with threats of militarization, extra-judicial killings, kidnappings and detentions. The denial of Indigenous peoples' and local communities' substantive and procedural human rights – through states' actions and inactions, often in cooperation with corporations or organizations driving the interventions – fuels conflict, degrades ecosystems, and significantly undermines community cohesion.

Human Rights Violations

Kawésqar, Puerto Edén, Aysén, Chile. © Lorena Arce

As many other countries in the region, **Chile** has ratified most international human rights treaties, including *ILO Convention 169*, and it has signed the *UN Declaration on the Rights of Indigenous Peoples*. However, it has ignored the most important principles of these instruments and failed to elaborate or adapt its legislation to ensure coherence. Exploitation of natural resources and the establishment of protected areas on Indigenous peoples' territories take place without FPIC. In northern Chile, mining is imposed on lands and territories ancestrally owned by Andean peoples. In the South, Eucalyptus mono-crops have devastated native forests traditionally conserved by the Mapuche. The participation of representatives of Indigenous peoples and local communities in decision-making processes is extremely limited.

As in other continents, struggles over ICCAs often constitute some of the more prominent

human rights conflicts taking place in African countries. One example is the conflict over pastoralist land rights (to land that has been managed as a customary grazing reserve, effectively constituting an ICCA) in relation to government protected areas management and a foreign hunting concession located in Loliondo, northern **Tanzania**. This conflict has existed since the early 1990s, but intensified in 2009 when at least 300 Maasai households were evicted from their own village land and a range of other alleged abuses and property losses took place. The root of the conflict is the government desire to control and lease out the communities' lands, which border Serengeti National Park and are home to abundant wildlife and outstanding scenery, ideal for tourism or in this case, high-paying recreational hunting activities.

b. Judicial Systems are Often a Barrier to Justice

A growing body of jurisprudence emerging from regional, national and sub-national courts supports the rights of Indigenous peoples and local communities, 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 local communities and their territories, which forms a fundamental basis for their cultures, spiritual life, economic survival, and the ecological integrity of their ICCAs.

Despite this, however, national and sub-national judicial systems are inherently challenging for Indigenous peoples and local communities. First, many cannot show standing before the law, negating the opportunity to defend their collective rights and interests in court. Second, 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 going against parties with seemingly limitless funds and political clout to challenge adverse decisions. Third, even when communities win cases, enforcing the judgements can be extremely challenging. Beyond these common issues, some countries suffer from particularly acute disrespect for the rule of law and corruption, which further undermine the integrity and effectiveness of the judicial system.

Lack of Standing

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 decision of the judge was to deny 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.

19.3.2 Many Communities and Supporting Civil Society Organizations Lack Knowledge of Legislative and Judicial Systems

Many Indigenous peoples and local communities and their supporters lack the awareness and capacity to make full use of their rights and the associated legislative and judicial systems. Some countries even lack a cadre of lawyers able to take on such cases. Conversely, governmental and private interests can be very effective at using the law to further their own interests, often at the expense of peoples and communities.

Unused Rights

In **India**, for instance, the *Forest Rights Act* has seen very inadequate use by communities to claim rights to and governance of forests. There are several reasons for this, including lack of awareness about the Act or how to make claims, lack of proactive assistance from government departments, deliberate obstruction by some government agencies or officials, difficulties in finding evidence to file with the claims, and superimposition of top-down boundaries related to government schemes rather than acceptance of customary boundaries of the community.

Members of the federation of community conserved areas in Nayagarh district, Orissa (India), meeting to discuss the 2006 Forest Rights Act. © Neema Pathak Broome

19.3.3 Inappropriate Legislation Undermines ICCAs

Across jurisdictions, similar types of laws (or lack thereof) are often framed in ways that are biased against Indigenous peoples and local communities, further hindering their ability to retain the integrity of their ICCAs.

a. Lack of Recognition of Customary Laws and Traditional Authorities, Institutions and Decision-making Processes Undermines Community Cohesion

Closely linked to human rights, many countries do not recognize or respect Indigenous peoples' and local communities' customary laws and traditional authorities, institutions and decision-making processes. Where these are not recognized, culturally embedded systems of caring for territories and resources and engaging with others are undermined, often leading to deterioration of traditional languages and sophisticated systems of knowledge and practice. Notably, the multifaceted role of women in ICCAs is often overlooked. Instead, peoples and communities are required to establish institutions that accord with the dominant national paradigm in order for their authorities to be recognized as representatives. This violates a number of international human rights instruments and can lead to outsiders 'consulting' with

and obtaining the agreement of imposed structures instead of the legitimate traditional authorities, which further undermines community cohesion and internal capacity to respond effectively to external threats.

Non-recognition of Community Structures

In countries like **Suriname** and **Chile**, the official administrative systems only recognize political representative structures, Western-style organizations and local government structures that do not necessarily represent the opinions and aspirations of Indigenous peoples and local communities. Often, as in Suriname, they are also affiliated with and influenced by political parties.

b. Lack of Recognition of Customary Land Rights is a Fundamental Issue

Although there have been a range of land tenure reforms worldwide to address historical injustices, many of these programmes have not placed sufficient emphasis on customary systems of tenure, stewardship or trusteeship. This issue is particularly acute in Africa, where hundreds of millions of rural Africans do not have secure land rights. Additionally, women often lack formal rights to land tenure. Common property resources such as forests and rangelands remain particularly vulnerable, usually considered unoccupied, unregistered and thus available for allocation by the state to individuals or corporations. This situation is a fundamental source of insecurity and actual or potential dispossession for up to half a billion people across Africa. Similar situations exist in many formerly colonized countries, such as those in South Asia.

Insecure land rights mean that Indigenous peoples and local communities are unable to legally enforce their customary ownership, rules and control, particularly when the government issues exploitative concessions and other permits in their territories. It also hinders communities' abilities to make long-term plans in accordance with their own visions and aspirations, compounding legal uncertainty with further marginalization.

Lack of Recognition

One Indigenous person from **Suriname** summed up the sentiment roused by the lack of recognition, stating that: "*It is as if we simply do not count and exist; the animals have more rights than us*."

The surge in land acquisition globally, and particularly in sub-Saharan Africa because of the weakness of local land rights, is rapidly intensifying pressure on the traditional territories of pastoralists, small-scale and subsistence farmers, hunter-gatherers, forest-dependent communities, and others in rural areas. The recognition of land rights, perhaps above all others, will determine the opportunities for ICCAs to contribute effectively to conservation and rural livelihoods.

Lack of Land Tenure

In **Cameroon**, as in many African countries, the state claims ownership over all unregistered (i.e. not formally titled) lands, including all lands claimed according to customary rights and held through common property regimes. Thus, while local communities throughout Cameroon depend integrally on the forests in which they live, their customary rights are not recognized or delineated by the law as real property interests. This situation extends to the entire forested landscape of the Congo Basin where statutory tenure regimes are almost uniformly centralized.

In **Namibia**, the most significant threat to conservancies and community forests is the lack of secure and exclusive group land tenure to underpin the legal rights to the use and management of natural resources. If communities cannot prevent other people from using the land they wish to set aside for wildlife and tourism, there remains little incentive to maintain wild habitats. This issue is compounded by the fact that the government continues to view communal land as state land, over which it can take decisions about how the land is used.

In **India**, the government owns much of the lands within Indigenous peoples' and local communities' conserved territories and areas. Not only do they not have ownership rights, but they also have very limited or no recognized access rights. The government can decide to change the land-use or lease the land for any other purpose without consulting or even informing the conserving communities. This is beginning to change with new legislation on forest rights, though very slowly.

c. No Rights Over Sub-soil Resources

Very few countries provide Indigenous peoples any rights over their sub-soil resources; in those that do, the rights are muted (such as in Bolivia and Canada). As previously discussed, where laws regulating access to natural resources (including sub-soil resources) are prejudicial to Indigenous peoples and local communities, laws that otherwise support their rights to retain the integrity of their ICCAs are significantly disabled. This is particularly evident in the context of laws relating to mining that are privileged by state agencies over the rights of Indigenous peoples and local communities.

Resource Rights

The Constitution of the State of **Panama** ignores the rights of Indigenous peoples to their natural resources. According to the Constitution, the State has national sovereignty over all natural resources in the country. Subsequent laws stipulate that subsoil resources and forests are all property of the State, disregarding Indigenous peoples' rights to the same resources. This has triggered many conflicts and cases of loss of natural resources due to both legal and illegal exploitation.

Guna boats, Panama. © Jorge Andreve

The Constitution of **Suriname** states in Article 41 that natural riches and resources are the property of the nation and that the nation has the inalienable right to take full possession of them for the economic, social and economic development of Suriname. The Constitution does not acknowledge the existence or rights of Indigenous or tribal peoples in Suriname.

All sub-soil resources, including petroleum, are the property of the **Fijian** State as provided by Section 3 of the Mining Act. The Director of Mineral Resources has broad powers to issue prospecting licenses over land areas without owner consent and to declare a site less than 250 ha a mining site if it has importance to the nation, even if it is in a gazetted protected area. Section 11 provides a narrow class of lands exempt from any prospector's rights or mining tenement, including Fijian villages, burial land and reserved forests, amongst others.

d. Marginal Rights-based Approach to Natural Resources and the Environment

In many cases, laws relating to natural resources and the environment make no special provision for Indigenous peoples or local communities. This effectively criminalizes their customary livelihoods and resource use practices. At the same time, the legal frameworks create sectoral approaches to agriculture, forests, fisheries, water, wildlife, and other natural resources. This not only fragments otherwise interconnected ecosystems, but it also tends to mandate their overexploitation for short-term economic gains. In this light, new and emerging financial and market-based incentive schemes, for example, access and benefit sharing (ABS) and reducing emissions from deforestation and forest degradation (REDD), remain heavily contested. Indigenous peoples and local communities fear they will cause further marginalization, in addition to turning nature and natural resources purely into tradable commodities in the eyes of the state.

Natural Resource Management

In **Suriname**, the *Hunting Law* 1954 (revised last in 1997), the *Fish Protection Law* 1965 (revised last in 1981) and the *Sea Fishing Law* 1980 (revised last in 2001) similarly make no reference to Indigenous and tribal peoples, thus making their customary livelihood practices illegal.

In **Senegal**, the marine realm is excluded from the ambit of the 1996 decentralization reforms, which has impeded local communities from gaining legal recognition of coastal ICCAs. Nevertheless, some pioneering communities have been able to extend the accepted purview of the decentralization laws and were among the first in the country to have their ICCAs formally recognized. Foremost amongst these is Kawawana, in Casamance Province, which obtained the approval of the Provincial Governor and Regional Council as a coastal ICCA. Despite this important local example, coastal ICCAs remain on questionable legal ground and will require additional reforms to fisheries or to decentralization statutes to provide coastal communities with clearer and more secure jurisdictional rights.

e. Protected Areas Laws are Falling Behind International Rights

There have been important advances in international protected area law and policy over the past 10 years, most notably, the Convention on Biological Diversity's Programme of Work on Protected Areas (particularly Element 2 on governance, participation, equity, and benefit sharing). Some countries boast successful examples of shared governance and co-management with Indigenous peoples and local communities or of recognition of ICCAs. However, most governments are struggling to enshrine these international standards within national protected area laws and policies. Notwithstanding salutary examples, the establishment, expansion, governance, and management of state and private protected areas often conflict or overlap with the customary territories, areas and practices of Indigenous peoples and local communities. Few countries' protected area frameworks recognize ICCAs or allow for devolution of governance to peoples or communities. In some that do, there is often an inappropriate imposition of top-down designations, institutional arrangements, or conservation requirements in order to fit them into existing state protected area frameworks. This undermines the diversity of ICCA arrangements and is a significant risk to Indigenous peoples' and local communities' rights and ways of life.

In formal protected areas that overlap with or subsume ICCAs, particularly those governed and managed by the state, Indigenous peoples and local communities generally bear a disproportionate amount of the costs and enjoy relatively few benefits other than menial employment in tourism facilities or as guides or rangers. The establishment or expansion of such protected areas is often a point of conflict with Indigenous peoples and local communities, particularly when the customary use of natural resources is prohibited and traditional knowledge systems are ignored, including those of rural and Indigenous women. This atmosphere of legal uncertainty and often harsh enforcement of top-down rules undermines customary systems of stewardship, governance and management. The subsequent

deterioration of traditional knowledge and customary laws, coupled with pressures from growing populations and migrants, make these protected areas prone to unsustainable use of resources.

Exclusionary Conservation

Even in **Panama**, where Indigenous peoples' territories have been recognized in the form of Comarcas, the law does not explicitly recognize or support the creation of community governed protected areas. Indigenous peoples and local communities generally gain little direct or immediate benefit from an area being declared protected, other than some possible employment as guides or enforcement officers. In the majority of protected areas the traditional use of natural resources is prohibited, which also has significant negative impacts on the traditional knowledge of the affected peoples. There are a number of ongoing disputes about the creation of parks on ICCAs.

Similarly, in **Namibia**, where provision has been made for conservancies, neither policies nor legislation recognize the land rights or basic human rights of people living within state protected areas. There are no legal provisions for involving people living within or around the parks in planning, governance or management processes.

Although many conservationists promote the strict protection of major predators without the presence of people, leopards and lions are also being conserved in ICCAs in North Western Namibia. © Brian Jones

19.3.4 Resilient Communities and ICCAs

Yet despite these factors, the national level research also provides a number of examples of thriving ICCAs in otherwise hostile legal environments. Similarly, where ICCAs have been directly threatened, Indigenous peoples and local communities are showing themselves to be highly adept at resisting egregious threats and engaging state and non-state actors to achieve their aims. In sum, most ICCAs have survived exclusively as a result of the strong will and dedication of the Indigenous peoples and local communities who govern them (whether *de facto* or *de jure*), rather than due to any legal recognition by governments of judiciaries. Nonetheless, appropriate legal recognition – coupled with reduction of both structural and systemic barriers to their rights and of external threats to their territories and resources – would further enable them to retain the integrity of their ICCAs for generations to come. Central to this is the recognition and appreciation of the role of ICCAs in realizing human rights, conserving and sustainably using biodiversity, eradicating poverty, securing livelihoods and food sovereignty, and mitigating and adapting to climate change, among other such goals.

20. RECOMMENDATIONS

In sum, even despite the 'grudging' nature of the way international law has come to recognize the rights of indigenous peoples' and local communities' rights, this report demonstrates that the normative trajectory of international law and jurisprudence is towards increased recognition of the rights of Indigenous peoples and local communities (broadly put) to maintain the integrity of their ICCAs. Yet despite this growing body of international law and supportive jurisprudence, Indigenous peoples and local communities continue to be discriminated against by their respective states. Denying Indigenous peoples and local communities the full realization of the rights they have fought for and won at the international level constitutes an ongoing injustice that urgently requires remedy.

In this context, this report raises a number of questions, including:

- What is the legal weight of international law, and thus what is the obligation on States to implement it? Is there an ongoing process or is there a new initiative required to clarify this important question. Can civil society seek a legal opinion by an international court or tribunal?
- Is there a need for more international law, or more thorough enactment and better implementation at the national level?
- Is there a need for an international mechanism to monitor implementation of / compliance with non-human rights-based international instruments such as the Convention on Biological Diversity?
- How can civil society assist governments to uphold their international commitments, including monitoring and evaluating states' performance?
- Is International law in this area in need of reform to better reflect local realities?
- What are effective strategies for ensuring national implementation of international commitments?
- Is there a need for an international body or consortium to a) synthesise best practice relating to a range of procedural rights including FPIC, and b) to provide independent assessments of states adherence to procedural justice, including FPIC processes?
- Considering the limitations of international law as it stands, how can future international negotiations be more inclusive to Indigenous peoples, local communities and civil society?
- Are integrated rights approaches an innovative and useful way of looking at the law, to augment more traditional understandings of "human rights", "environmental" and "cultural" legal frameworks?
- How can international law be based on more holistic visions of socio-ecological systems?
- How to ensure the mutual reinforcement and flourishing of different kinds of law (i.e. legal pluralism) in support of biocultural diversity?
- How are Indigenous peoples, local communities, networks, and broader social movements using international provisions at the national / local level?

- What kind of legal empowerment can assist a range of individuals and communities to better affirm their responsibilities and assert their rights.

In light of these questions, the overarching recommendation is to convene a multi-stakeholder group, including individuals from Indigenous peoples, local communities, and practicing human rights and environmental lawyers (from within and beyond the current membership of the ICCA Consortium), to consider this research, deepen the analysis and develop proactive ways forwards. The group is suggested to consider the following preliminary proposals:

1. Further develop the legal research to identify overlaps, conflicts and gaps in the law. Drawing on Darrell Posey et al.'s work on traditional resource rights, there could be a concerted effort to bring about legal reform at the international level to "harmonize and equitize"[522] the overall framework.

2. Directly engage the issue of the legal weight of international law at the local level, beginning with the CBD. It is clear that the lack of consensus on this critical issue undermines the CBD as a multilateral instrument and requires urgent and critical attention.

3. Laws are being developed at the international level with Indigenous peoples and local communities in mind, but very few of these individuals know of their rights. It is critical to improve the accessibility of international law to the peoples and communities it affects, including enabling them to better understand their rights and how they can be used at the local-to-national level. This can involve engaging with legal empowerment practitioners as well as developing capacity building materials and training programmes. A recent review of the implementation of the CBD highlighted that even the CBD Alliance (the NGO coordinating civil society engagement with the CBD) does not have an easy-to-use guide to the CBD.[523]

Beyond this overarching recommendation and preliminary proposals, the following broader recommendations are made:

1. Parties to instruments dealing with human rights, Indigenous peoples and local communities, the environment and natural resources, cultural heritage, sustainable development, and human welfare (among others) should take responsibility for understanding and upholding the wealth of commitments and obligations enshrined in international law and regional jurisprudence that support Indigenous peoples' and local communities' rights, including to retain the integrity of their ICCAs. Treaty Secretariats, intergovernmental organizations, NGOs, and others should assist with raising awareness and building capacity within governments.

[522] Posey, D. and G. Dutfield, 1996. *Beyond Intellectual Property Rights: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*, IDRC: Ottawa. Page 7.

[523] Jonas, H., S. Booker, J. E. Makagon, and H. Shrumm (2012). Implementing the Convention on Biological Diversity: A Rapid Assessment for the CBD Alliance. Natural Justice: Cape Town.

2. UN treaty monitoring bodies and secretariats, the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples, and the UN Special Rapporteurs on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, on Cultural Rights, on Minority Issues, and on the Right to Food, among others, should examine and promote recognition and respect for ICCAs as means to realize a range of human rights instruments.

3. The Secretariat of the Convention on Biological Diversity should continue to increasingly facilitate the implementation and monitoring of various COP decisions, programmes of work, and cross-cutting themes related to ICCAs, including through training programmes and capacity building workshops, dissemination of information, and encouraging Parties to take up the recommendations of this study in their National Biodiversity Strategies and Action Plans and national reports. The Secretariat should also encourage appropriate recognition of ICCAs in all other relevant global treaties and regional fora in which it has informal or formal status.

4. The International Union for Conservation of Nature (IUCN) should facilitate awareness and appreciation of ICCAs through its volunteer Commissions, regional offices, and global programmes, including by diffusing information about related policies, agreements, resolutions, and recommendations, and providing technical assistance to its members and partners to develop appropriate legal and policy measures to recognize ICCAs in collaboration with Indigenous peoples and local communities.

5. Conservation and environmental organizations (including NGOs, policy and research institutes, parastatal agencies, intergovernmental organizations, and networks, among others) need to fully respect and uphold international human rights and embrace new paradigms of governance diversity and good governance, including a greater focus on Indigenous peoples' and local communities' rights and their ICCAs. Similarly, human rights and development organizations should mainstream the environment into their approaches and programmes as a fundamental aspect of securing human rights.

6. Courts and other legal bodies should consider and apply the wide range of international agreements and instruments that support ICCAs. They should draw from and build on the dispute mechanisms of the Indigenous peoples or local communities involved.

This report is intended to shed light on the existence and continued emergence of a broad array of international instruments, as well as the growing body of jurisprudence associated with the rights of Indigenous peoples and local communities to retain the integrity of their ICCAs. By doing so, and contrasting it with the continued lack of rights granted and respected at the national level, it is hoped that this will feed into and invigorate work at the international-to-local levels, particularly towards making international law and jurisprudence increasingly relevant for and useful to Indigenous peoples and local communities who want to defend their rights to and responsibilities in relation to their ICCAs.