

# **THE LIVING CONVENTION ON BIOCULTURAL DIVERSITY**

**A COMPENDIUM OF INDIGENOUS PEOPLES' AND LOCAL  
COMMUNITIES' RIGHTS RELEVANT TO MAINTAINING THE  
INTEGRITY OF TERRITORIES AND OTHER BIOCULTURAL SYSTEMS**

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# DEDICATION

*The Living Convention on Biocultural Diversity* is dedicated to all Indigenous peoples and local communities striving to realize the right to self-determination and to maintain the integrity of their territories, areas and ways of life. It is also in memory of Dr. Darrell Addison Posey, whose collaborative work on traditional resource rights inspired the methodological approach to this publication.

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# PREFACE

*The Living Convention on Biocultural Diversity: A Compendium of Indigenous Peoples' and Local Communities' Rights Relevant to Maintaining the Integrity of Territories and other Biocultural Systems* has emerged from Natural Justice's work with Indigenous peoples, local communities and their local organizations. It is a response to an important and often-asked question, namely: "What are our rights at the international level?" For reasons that are more fully discussed below, that question is a difficult one to answer. The inaccessibility of international law amounts to a procedural injustice, denying Indigenous peoples and local communities absolute clarity about their rights and responsibilities, as well as those of other actors, under international law.

This publication aims to help address that deficiency by serving as an easy-to-use resource on the full spectrum of international law relating – broadly put – to biological and cultural diversity. The Compendium, contained in Part I, is the result of the application of an integrated rights approach to provisions in international law that support Indigenous peoples and local communities to maintain the integrity and resilience of their lands, natural resources and cultures. It is designed to democratize international law by better enabling Indigenous peoples and local communities to assert and affirm their international rights and responsibilities.

This first edition should be read as a work in progress. It will benefit greatly from rigorous debate, including about the overall conceptual framework and methodology, the structure and content of the Compendium in particular, and how best to increase the accessibility and implementation of international law in order to protect the planet's biological and cultural diversity.

As the first peer review process, we plan to distribute this edition to interested individuals in person at the 11<sup>th</sup> Meeting of the Conference of the Parties to the Convention on Biological Diversity and by email to a range of other people whose views we highly respect. We greatly value your constructive criticism and welcome your ideas on how to improve upon this work. Many thanks in advance.

We would like to thank the Indigenous peoples, local communities and supporting organisations with whom Natural Justice has had the privilege of working. Our partnerships have spurred us to think about how international law can be made more accessible and therefore more useful to the stewards of biocultural diversity. We are also grateful to the many practitioners who have given their time to discuss these issues. Just as your ideas have helped us in our work, we hope this publication is useful in yours. Notwithstanding the invaluable support we have received from so many people, any errors or omissions remain those of the authors alone.

Harry Jonas, J. Eli Makagon and Holly Shrumm

1 October, 2012

# OVERVIEW

## INTRODUCTION

Indigenous peoples have fought hard for the rights they have secured at the international level. Decades of commitment, tenacity, personal sacrifices, and well-executed negotiating strategies have led to important rights gains and legal recognition, perhaps most significantly in the United Nations Declaration on the Rights of Indigenous Peoples (2007). In addition to this landmark instrument, Indigenous peoples have also engaged in a wide range of international negotiations and processes to secure rights in other instruments such as the UN Convention on Biological Diversity. Local communities have also successfully advocated for the development of a significant body of rights relating to their role in protecting and conserving biological and cultural (biocultural) diversity. Today, Indigenous peoples' rights and local communities' biocultural rights are enshrined in a wide range of international instruments, and the distinct bodies of rights continue to grow as new instruments are negotiated and adopted and new jurisprudence is developed through regional and national courts.<sup>1</sup>

Forty years after the UN Conference on the Human Environment and in the wake of the 'Rio+ 20' Conference on Sustainable Development, this publication takes stock of the breadth and depth of the provisions at the international level that support Indigenous peoples' and local communities' rights to maintain the integrity of their biocultural diversity.<sup>2</sup> *The Living Convention on Biocultural Diversity: A Compendium of Indigenous Peoples' and Local Communities' Rights Relevant to Maintaining the Integrity of Territories and Biocultural Systems* is directed primarily towards Indigenous peoples and local communities, as well as their supporting organisations and other stakeholders and interested parties. It constitutes an easily accessible resource for exploring the full range of provisions in international law that address the interrelationships between, among other things: individuals, communities and peoples; territories, lands, waters, and areas; natural resources; knowledge,

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<sup>1</sup> See Part II for further discussion about the distinction this publication makes between Indigenous peoples' rights and local communities' biocultural rights.

<sup>2</sup> Throughout the document, a number of different formulations are used to refer to, among other things, territories, land, landscapes and seascapes, natural and biological resources, traditional knowledge, biocultural diversity, integrity, and resilience. We cannot and do not attempt to fully encapsulate the myriad of ways in which specific Indigenous peoples or local communities define their unique biological and cultural heritage. Rather than potentially restricting the scope by setting out specific definitions or terms, this publication attempts to focus instead on enabling a range of peoples and communities to engage with international law on their own terms and in pursuit of their self-determined priorities.

innovations and practices; agricultural systems, including crops and livestock; climate change; and legislative and judicial systems.

It aims to further empower Indigenous peoples and local communities to articulate, affirm and assert their roles, responsibilities and rights in maintaining the integrity of their biocultural systems.<sup>3</sup> It underscores the legal and ethical obligations of governments, the private sector and other actors to uphold the substantive and procedural standards that are clearly elaborated in internationally agreed instruments. It is also hoped that this publication will invigorate debate about why, despite the wealth of supportive international law, the degradation and loss of biological and cultural diversity continue unabated, and how this can be effectively addressed.

## CONTENT

**Part I** consists of *A Compendium of Indigenous Peoples' and Local Communities' Rights Relevant to Maintaining the Integrity of Territories and Biocultural Systems* (the Compendium).

**Part II** sets out the rationale and methodology of the research undertaken to develop the Compendium. Using an integrated rights approach,<sup>4</sup> we carried out the following tasks:

- Critiqued international law from a biocultural perspective;
- Reconsidered the current international legal framework in the context of the interconnectedness of territories and ways of life;
- Comprehensively reviewed the full spectrum of international law potentially relevant to biocultural diversity;<sup>5</sup>
- Selected specific types of instruments, guidelines, decisions, or resolutions for inclusion in the Compendium;
- Identified the most relevant provisions within each selected instrument;

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<sup>3</sup> For a fuller discussion of biocultural diversity and biocultural systems, see Part II and <http://biocultural.iied.org/>. It is noted that some people may prefer the term 'ecocultural', as 'biocultural' may be perceived as referring only to biological diversity (the variety of life at the genetic, species and ecosystem levels), rather than the full extent of ecological diversity (which includes both biotic and abiotic components).

<sup>4</sup> The methodology is further discussed in Part II.

<sup>5</sup> See Annex I for the full list of instruments that were considered, as well as which ones have been included in the Compendium. Each instrument will be applicable to a different set of countries, depending upon which countries have signed, adopted, acceded to, or otherwise agreed to be bound by a particular instrument. Subsequent editions of this publication will include a list of countries that have agreed to be so bound for each instrument addressed in the Compendium.

- Reviewed these provisions to distil their essence to a number of core rights that would (at this stage) adequately encompass all of the provisions;
- Grouped or ‘bundled’ the provisions under the relevant core rights; and
- Listed the rights in the Compendium in accordance with a generalized territory or landscape.

As an example, all provisions that deal with free, prior and informed consent, regardless of whether they are located in human rights instruments or multilateral environmental agreements, were grouped under that heading. The same exercise was undertaken for provisions relating to a range of relevant rights, including cultural traditions, land tenure, customary and sustainable uses of biodiversity, farming and livestock keeping, public participation in decision-making, and access to justice.

This process has rendered a comprehensive and integrated body of international legal provisions that are supportive of Indigenous peoples’ and local communities’ rights to protect their physical, cultural and spiritual relationships with their territories, areas, and various resources therein. Because the Compendium is a snapshot of international law relevant to maintaining the integrity of biological and cultural diversity and is subject to change as the law evolves, it constitutes a *de facto* and living ‘Convention on Biological Diversity’, thus the publication’s title.<sup>6</sup>

**Part III** sets out a number of key questions raised by the Compendium, concerning, for example, the utility of integrated rights approaches, how international law can be reformed, and how national governments can better uphold their international commitments. It then suggests initial activities that could further deepen the analysis and ways to address the current weaknesses in the development and implementation of international law so as to better support the resilience of biocultural diversity.

In this light, *The Living Convention on Biocultural Diversity* aspires to build awareness around the different international instruments, help identify gaps and provide a basis for initiating legal reform. It also aims to spur renewed interest in the question

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<sup>6</sup> It is important to note that there is a wide range of provisions supportive of the rights of Indigenous peoples and local communities within numerous instruments, including, for example, in decisions of the Conference of the Parties to the Convention on Biological Diversity. While not all of these provisions could be covered in this first edition, the scope of the Compendium is intended to expand in subsequent editions to include more provisions. This scope will include provisions of a “soft law” nature that nevertheless inform legally binding international norms regarding the rights of Indigenous peoples and local communities.

of national implementation of international obligations and initiate an urgent reengagement with the question of the legal weight of international law.

## USING THE COMPENDIUM

The Compendium provides a comprehensive and approachable guide to international legal provisions that support Indigenous peoples' and local communities' stewardship of biological and cultural diversity.

Indigenous peoples and local communities can use the Compendium for various purposes, for example, when:

- Framing a local development plan or '*plan de vida*' and proposing new self-defined initiatives;
- Engaging a range of governmental and non-governmental proponents of projects proposed to take place on or that will affect their territories, community conserved areas, waters, and/or natural resources, among other things;
- Negotiating with government agencies or the private sector; and
- Drafting petitions and advocacy strategies or articulating community protocols.<sup>7</sup>

Government agencies, the private sector and NGOs, among others, can use the Compendium to determine their obligations in international law that establish substantive and procedural standards for engaging with Indigenous peoples and local communities and the territories, areas and resources upon which their cultures and ways of life depend.

Before reading the Compendium, it is important to note three things. First, notwithstanding the discussion in Parts II and Annex V, the reader should always consult the original instrument from which specific provisions were sourced in order to contextualize them and access more information on the source's legal weight. Second, where the specific provision referenced is from an instrument dedicated to Indigenous peoples only, those paragraphs are identified with an asterisk for the avoidance of doubt. Third, notwithstanding minor amendments, all of the provisions are directly quoted from the international instruments in which they are found.<sup>8</sup>

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<sup>7</sup> For more information on community protocols, see: [www.community-protocols.org](http://www.community-protocols.org).

<sup>8</sup> In some instances, the direct quotes are clarified by including the full name of the instrument referenced in the provision (in italics) or with footnotes where provisions refer directly to other provisions in the instrument.

# **PART I**

**A COMPENDIUM OF INDIGENOUS PEOPLES' AND  
LOCAL COMMUNITIES' RIGHTS RELEVANT TO  
MAINTAINING THE INTEGRITY OF TERRITORIES  
AND BIOCULTURAL SYSTEMS**

# PREAMBLE

## ***Human Rights***

*We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.*<sup>9</sup>

*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>10</sup>

*Considering that*, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>11</sup>

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.<sup>12\*</sup>

*Recognising* 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.<sup>13\*</sup>

*Celebrating* the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments.<sup>14</sup>

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<sup>9</sup> Charter of the United Nations Preamble.

<sup>10</sup> Universal Declaration of Human Rights (UDHR).

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) Preamble.

<sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Preamble.

<sup>13</sup> Indigenous and Tribal Peoples Convention No. 169 (ILO Convention No. 169) Preamble. The use of the phrase “these peoples” in this provision of ILO Convention No. 169 is a reference to “indigenous and tribal peoples in all regions of the world.”

<sup>14</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Convention on Cultural Expressions) Preamble.

*Recognizing* that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.<sup>15</sup>

### ***Right to a Healthy Environment***

*Recognizing also* that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.<sup>16</sup>

### ***Cultural and Natural Heritage***

*Considering* that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.<sup>17</sup>

*Considering* that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto.<sup>18</sup>

*Being aware* that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations.<sup>19</sup>

*Being aware* of the universal will and the common concern to safeguard the intangible cultural heritage of humanity.<sup>20</sup>

*Recognizing* that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding,

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<sup>15</sup> Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice In Environmental Matters (Aarhus Convention) Preamble.

<sup>16</sup> Aarhus Convention Preamble.

<sup>17</sup> UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) Preamble.

<sup>18</sup> World Heritage Convention Preamble.

<sup>19</sup> Convention on Cultural Expressions Preamble.

<sup>20</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Convention on Intangible Cultural Heritage) Preamble.

maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.<sup>21</sup>

*Affirming* also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.<sup>22</sup>

*Taking 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.<sup>23</sup>

### ***Education and Languages***

*Recalling* that linguistic diversity is a fundamental element of cultural diversity, and reaffirming the fundamental role that education plays in the protection and promotion of cultural expressions.<sup>24</sup>

### ***Knowledge, Innovations and Practices***

*Recognizing* 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.<sup>25</sup>

*Recognizing* the importance of intellectual property rights in sustaining those involved in cultural creativity.<sup>26</sup>

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.<sup>27\*</sup>

### ***Development***

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen

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<sup>21</sup> Convention on Intangible Cultural Heritage Preamble.

<sup>22</sup> UNDRIP Preamble.

<sup>23</sup> Convention on Cultural Expressions Preamble.

<sup>24</sup> Convention on Cultural Expressions Preamble.

<sup>25</sup> Convention on Cultural Expressions Preamble.

<sup>26</sup> Convention on Cultural Expressions Preamble.

<sup>27</sup> UNDRIP Preamble.

their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs ...<sup>28\*</sup>

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.<sup>29\*</sup>

### ***Land, Natural Resources, Customary Uses and Conservation***

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.<sup>30\*</sup>

*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.<sup>31\*</sup>

### ***Agriculture***

*Aware* of their responsibility to past and future generations to conserve the World's diversity of plant genetic resources for food and agriculture.<sup>32</sup>

### ***Climate Change***

*Concerned* that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.<sup>33</sup>

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<sup>28</sup> UNDRIP Preamble.

<sup>29</sup> UNDRIP Preamble.

<sup>30</sup> UNDRIP Preamble.

<sup>31</sup> The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (Code of Ethical Conduct) Preamble.

<sup>32</sup> International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) Preamble.

<sup>33</sup> United Nations Framework Convention on Climate Change (UNFCCC) Preamble.

*Recognizing further* that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change.<sup>34</sup>

### ***Desertification***

*Acknowledging* that desertification and drought are problems of global dimension in that they affect all regions of the world and that joint action of the international community is needed to combat desertification and/or mitigate the effects of drought.<sup>35</sup>

### ***Free, Prior and Informed Consent***

*Recalling* that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the *Convention on Biological Diversity*, and recognizing that this *Nagoya Protocol* pursues the implementation of this objective within the *Convention on Biological Diversity*.<sup>36</sup>

*Recalling* the relevance of Article 8(j) of the *Convention on Biological Diversity* as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge.<sup>37</sup>

*Noting* the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities.<sup>38</sup>

*Recognizing* the diversity of circumstances in which traditional knowledge associated with genetic resources is held or owned by indigenous and local communities.<sup>39</sup>

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<sup>34</sup> UNFCCC Preamble.

<sup>35</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Convention on Desertification) Preamble.

<sup>36</sup> 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 Protocol) Preamble.

<sup>37</sup> Nagoya Protocol Preamble.

<sup>38</sup> Nagoya Protocol Preamble.

<sup>39</sup> Nagoya Protocol Preamble.

*Mindful* that it is the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities.<sup>40</sup>

### ***Information, Decision Making, Implementation, and Access to Justice***

*Aiming* ... to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment.<sup>41</sup>

*Recognizing* the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.<sup>42</sup>

*Considering that*, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.<sup>43</sup>

*Recognizing* that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.<sup>44</sup>

*Recognizing also* that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.<sup>45</sup>

### ***Capacity Building and Awareness***

*Considering* the need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding.<sup>46</sup>

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<sup>40</sup> Nagoya Protocol Preamble.

<sup>41</sup> Aarhus Convention Preamble.

<sup>42</sup> Aarhus Convention Preamble.

<sup>43</sup> Aarhus Convention Preamble.

<sup>44</sup> Aarhus Convention Preamble.

<sup>45</sup> Aarhus Convention Preamble.

<sup>46</sup> Convention on Intangible Cultural Heritage Preamble.

# OPERATIVE PROVISIONS

## I. SUBSTANTIVE RIGHTS

### OVERARCHING HUMAN RIGHTS

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.<sup>47</sup>

All human being are afforded human rights, civil and political rights, economic social and cultural rights, and to be free from all forms of racial discrimination.<sup>48</sup>

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.<sup>49</sup>

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.<sup>50</sup>

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<sup>47</sup> International Covenant on Civil and Political Rights (ICCPR), ICESCR, UNDRIP. This provision is explicitly reaffirmed in UNDRIP Article 3 that states: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

<sup>48</sup> Charter of the United Nations, UDHR, ICCPR, ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

<sup>49</sup> FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines) No. 9(3).

<sup>50</sup> United Nations Declaration on the Right to Development (Declaration on the Right to Development) Article 5.

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.<sup>51</sup>

### **WOMEN'S RIGHTS**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>52</sup>

### **CHILDREN'S RIGHTS**

1.<sup>[53]</sup> 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. 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.<sup>54</sup>

### **INDIGENOUS PEOPLES' RIGHTS**

#### **Overarching Rights**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.<sup>55\*</sup>

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.<sup>56\*</sup>

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<sup>51</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Declaration on the Rights of Minorities) Article 4(1).

<sup>52</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Article 3.

<sup>53</sup> In certain instances, numbering from provisions has been included for purposes of clarity.

<sup>54</sup> Convention on the Rights of the Child Article 8.

<sup>55</sup> UNDRIP Article 1.

<sup>56</sup> UNDRIP Article 2.

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, as well as ways and means for financing their autonomous functions.<sup>57\*</sup>

Every indigenous individual has the right to a nationality.<sup>58\*</sup>

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.<sup>59\*</sup>

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.<sup>60\*</sup>

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.<sup>61\*</sup>

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.<sup>62\*</sup>

1. Indigenous 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. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.<sup>63\*</sup>

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<sup>57</sup> UNDRIP Article 4.

<sup>58</sup> UNDRIP Article 6.

<sup>59</sup> UNDRIP Article 7.

<sup>60</sup> UNDRIP Article 20(1).

<sup>61</sup> UNDRIP Article 21(1).

<sup>62</sup> UNDRIP Article 35.

<sup>63</sup> UNDRIP Article 36.

The rights recognized herein *in the UN Declaration on the Rights of Indigenous Peoples* constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.<sup>64\*</sup>

1. Governments 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. 2. Such action shall include measures for: (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.<sup>65\*</sup>

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples. 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.<sup>66\*</sup>

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned. 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.<sup>67\*</sup>

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.<sup>68\*</sup>

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<sup>64</sup> UNDRIP Article 43. As discussed below in Part II, Clarifications, the full names of instruments have been inserted into provisions in italics in order to improve readability.

<sup>65</sup> ILO Convention No. 169 Article 2.

<sup>66</sup> ILO Convention No. 169 Article 3.

<sup>67</sup> ILO Convention No. 169 Article 4.

<sup>68</sup> ILO Convention No. 169 Article 32.

## **Recognition and Observance of Treaties**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. 2. Nothing in this *UN Declaration on the Rights of Indigenous Peoples* may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.<sup>69\*</sup>

## **Labour and Employment**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.<sup>70\*</sup>

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.<sup>71\*</sup>

Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.<sup>72\*</sup>

Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards: (a) admission to employment, including skilled employment, as well as measures for promotion and advancement; (b) equal remuneration for work of

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<sup>69</sup> UNDRIP Article 37.

<sup>70</sup> UNDRIP Article 17. For other rights related to labour and employment see ILO Convention No. 169 Articles 11 and 20.

<sup>71</sup> ILO Convention No. 169 Article 11.

<sup>72</sup> ILO Convention No. 169 Article 20(1).

equal value; (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing; (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.<sup>73\*</sup>

3. The measures taken shall include measures to ensure: (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them; (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances; (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude; (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.<sup>74\*</sup>

Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this *ILO Convention No. 169*.<sup>75\*</sup>

### **Social and Health Services**

Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.<sup>76\*</sup>

Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.<sup>77\*</sup>

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.<sup>78\*</sup>

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<sup>73</sup> ILO Convention No. 169 Article 20(2).

<sup>74</sup> ILO Convention No. 169 Article 20(3).

<sup>75</sup> ILO Convention No. 169 Article 20(4).

<sup>76</sup> UNDRIP Article 24(1).

<sup>77</sup> UNDRIP Article 24(2).

1. Governments shall 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, so that they may enjoy the highest attainable standard of physical and mental health. 2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines. 3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services. 4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.<sup>79\*</sup>

### **Freedom from Discrimination**

States shall provide effective mechanisms for prevention of, and redress for: ... Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.<sup>80\*</sup>

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.<sup>81\*</sup>

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.<sup>82\*</sup>

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.<sup>83\*</sup>

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination. 2. States shall take effective measures to ensure that State-owned

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<sup>78</sup> ILO Convention No. 169 Article 24.

<sup>79</sup> ILO Convention No. 169 Article 25.

<sup>80</sup> UNDRIP Article 8(2)(e).

<sup>81</sup> UNDRIP Article 9.

<sup>82</sup> UNDRIP Article 12(2).

<sup>83</sup> UNDRIP Article 15(2).

media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.<sup>84\*</sup>

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this *UN Declaration on the Rights of Indigenous Peoples*. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.<sup>85\*</sup>

All the rights and freedoms recognized herein the *UN Declaration on the Rights of Indigenous Peoples* are equally guaranteed to male and female indigenous individuals.<sup>86\*</sup>

### **Implementation of Rights**

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this *UN Declaration on the Rights of Indigenous Peoples*.<sup>87\*</sup>

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this *UN Declaration on the Rights of Indigenous Peoples*.<sup>88\*</sup>

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this *UN Declaration on the Rights of Indigenous Peoples* through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.<sup>89\*</sup>

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote

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<sup>84</sup> UNDRIP Article 16.

<sup>85</sup> UNDRIP Article 22.

<sup>86</sup> UNDRIP Article 44.

<sup>87</sup> UNDRIP Article 38.

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<sup>89</sup> UNDRIP Article 41.

respect for and full application of the provisions of this *UNDRIP* and follow up the effectiveness of this *UN Declaration on the Rights of Indigenous Peoples*.<sup>90\*</sup>

Nothing in this *UN Declaration on the Rights of Indigenous Peoples* may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.<sup>91\*</sup>

1. Nothing in this *UN Declaration on the Rights of Indigenous Peoples* may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.<sup>92\*</sup>

1. The governmental authority responsible for the matters covered in this *ILO Convention No. 169* shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them. 2. These programmes shall include: (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention; (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.<sup>93\*</sup>

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<sup>90</sup> UNDRIP Article 42.

<sup>91</sup> UNDRIP Article 45.

<sup>92</sup> UNDRIP Article 46.

<sup>93</sup> ILO Convention No. 169 Article 33. Article 34 provides that “[t]he nature and scope of the measures to be taken to give effect to this *ILO Convention No. 169* shall be determined in a flexible manner, having regard to the conditions characteristic of each country” and Article 35 states that “[t]he application of the provisions of this *ILO Convention No. 169* shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.”

## **TRADITIONAL GOVERNANCE SYSTEMS AND CUSTOMARY LAWS**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>94\*</sup>

In applying the provisions of this *ILO Convention No. 169*: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.<sup>95\*</sup>

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle. 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.<sup>96\*</sup>

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.<sup>97\*</sup>

## **CULTURAL, SPIRITUAL AND RELIGIOUS INTEGRITY**

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to

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<sup>94</sup> UNDRIP, Article 5.

<sup>95</sup> ILO Convention No. 169 Article 5.

<sup>96</sup> ILO Convention No. 169 Article 8.

<sup>97</sup> ILO Convention No. 169 Article 9.

the use and control of their ceremonial objects; and the right to the repatriation of their human remains.<sup>98\*</sup>

Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.<sup>99\*</sup>

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 and other resources and to uphold their responsibilities to future generations in this regard.<sup>100\*</sup>

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.<sup>101\*</sup>

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.<sup>102\*</sup>

In applying the provisions of this Part of the *ILO Convention No. 169* governments shall 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.<sup>103\*</sup>

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.<sup>104</sup>

In 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

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<sup>98</sup> UNDRIP Article 12(1).

<sup>99</sup> UNDRIP Article 15(1).

<sup>100</sup> UNDRIP Article 25.

<sup>101</sup> UNDRIP Article 33.

<sup>102</sup> UNDRIP Article 34.

<sup>103</sup> ILO Convention No. 169 Article 13(1).

<sup>104</sup> UDHR Article 27(1).

other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>105</sup>

1. The States Parties to the *International Covenant on Civil and Political Rights* recognize the right of everyone: (a) To take part in cultural life; ... 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.<sup>106</sup>

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.<sup>107</sup>

The States Parties to the *International Covenant on Civil and Political Rights* recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>108</sup>

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>109</sup>

States Parties shall respect the right of the child to freedom of thought, conscience and religion.<sup>110</sup>

## **NO FORCED ASSIMILATION**

Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.<sup>111\*</sup>

States shall provide effective mechanisms for prevention of, and redress for: ... Any form of forced assimilation or integration ...<sup>112\*</sup>

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<sup>105</sup> ICCPR Article 27.

<sup>106</sup> ICESCR Article 15.

<sup>107</sup> Declaration on the Rights of Minorities Article 1.

<sup>108</sup> ICESCR Article 15(1).

<sup>109</sup> ICCPR Article 18.

<sup>110</sup> Convention on the Rights of the Child Article 14(1).

<sup>111</sup> UNDRIP Article 8(1).

<sup>112</sup> UNDRIP Article 8(2)(d).

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.<sup>113</sup>

## **CULTURAL TRADITIONS**

1. Indigenous peoples have the right to practise 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. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.<sup>114\*</sup>

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.<sup>115\*</sup>

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.<sup>116</sup>

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.<sup>117</sup>

In compliance with the fundamental obligations laid down in article 2 of this *International Convention on the Elimination of All Forms of Racial Discrimination*, States Parties undertake to prohibit and to eliminate racial discrimination in all its

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<sup>113</sup> Convention on the Rights of the Child Article 8(1).

<sup>114</sup> UNDRIP Article 11.

<sup>115</sup> UNDRIP Article 13.

<sup>116</sup> Declaration on the Rights of Minorities Article 2(1).

<sup>117</sup> Declaration on the Rights of Minorities Article 4(2).

forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (d) Other civil rights, in particular: ... (vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression; ... (e) ... (vi) The right to equal participation in cultural activities; ...<sup>118</sup>

## **DIVERSITY OF CULTURAL EXPRESSIONS**

The 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.<sup>119</sup>

Cultural 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.<sup>120</sup>

The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this *Convention on Cultural Expressions*.<sup>121</sup>

Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.<sup>122</sup>

Parties shall endeavour to create in their territory an environment which encourages individuals and social groups: (a) 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; (b) to have access to

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<sup>118</sup> CERD Article 5. For ease of reference: Article 2 of the CERD states that “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races ...” and sets forth several specific duties on the part of the States Parties.

<sup>119</sup> Convention on Cultural Expressions Article 2(3).

<sup>120</sup> Convention on Cultural Expressions Article 2(6).

<sup>121</sup> Convention on Cultural Expressions Article 5(1).

<sup>122</sup> Convention on Cultural Expressions Article 6(1).

diverse cultural expressions from within their territory as well as from other countries of the world.<sup>123</sup>

... [A] Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.<sup>124</sup>

Parties may take all appropriate measures to protect and preserve cultural expressions ... in a manner consistent with the provisions of this *Convention on Cultural Expressions*.<sup>125</sup>

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this *Convention on Cultural Expressions*.<sup>126</sup>

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.<sup>127</sup>

## **KNOWLEDGE, INNOVATIONS AND PRACTICES**

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 on Biological Diversity* with the full and effective participation of indigenous and local communities, at all relevant levels.<sup>128</sup>

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<sup>123</sup> Convention on Cultural Expressions Article 7(1).

<sup>124</sup> Convention on Cultural Expressions Article 8(1). This provision is without prejudice to Articles 5 and 6.

<sup>125</sup> Convention on Cultural Expressions Article 8(2). This provision relates to situations referred to in paragraph 1, that states "where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding ..."

<sup>126</sup> Convention on Cultural Expressions Article 11.

<sup>127</sup> Convention on Cultural Expressions Article 13.

<sup>128</sup> Aichi Biodiversity Target 18. This provision is contained in The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets. The Strategic Plan includes 20 headline targets for 2015 or 2020 (the "Aichi Biodiversity Targets"), organized under five strategic goals. The goals and targets comprise both: (i) aspirations for achievement at the global level; and (ii) a flexible framework for the establishment of national or regional targets.

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>129\*</sup>

Each Contracting Party *to the Convention on Biological Diversity* shall, as far as possible and as appropriate: ... Subject to its national legislation, 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.<sup>130</sup>

Appropriate indigenous capacity and local knowledge regarding the conservation and sustainable development of forests should, through institutional and financial support and in collaboration with the people in the local communities concerned, be recognized, respected, recorded, developed and, as appropriate, introduced in the implementation of programmes. Benefits arising from the utilization of indigenous knowledge should therefore be equitably shared with such people.<sup>131</sup>

To achieve the purpose of the *UNFF Instrument on Forests*, and taking into account national policies, priorities, conditions and available resources, Member States should: ... (f) Support the protection and use of traditional forest-related knowledge and practices in sustainable forest management with the approval and involvement of the holders of such knowledge, and promote fair and equitable sharing of benefits from their utilization, according to national legislation and relevant international agreements; ... (h) Create enabling environments to encourage private sector investment, as well as investment by and involvement of local and indigenous communities, other forest users and forest owners and other relevant stakeholders, in sustainable forest management, through a framework of policies, incentives and regulations; ... (y) Enhance access by households, small-scale forest owners, forest-

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<sup>129</sup> UNDRIP Article 31(1).

<sup>130</sup> CBD Article 8(j).

<sup>131</sup> United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (UNCED Forest Principles) Paragraph 12(d).

dependent local and indigenous communities, living in and outside forest areas, to forest resources and relevant markets in order to support livelihoods and income diversification from forest management, consistent with sustainable forest management...<sup>132</sup>

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted. 2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.<sup>133\*</sup>

Consistent with the ecosystem approach, proponents of development proposals should recognize the importance of understanding and applying the values and knowledge, where relevant, of use of biological diversity held by indigenous and local communities and their application for sustainable development.<sup>134</sup>

## **EDUCATION AND LANGUAGES**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.<sup>135\*</sup>

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<sup>132</sup> United Nations Forum on Forests Non-legally Binding Instrument on All Types of Forests (UNFF Instrument on Forests) Provision 6(f). The term “Member States” in the UNFF Instrument on Forests refers to Member States of the United Nations.

<sup>133</sup> ILO Convention No. 169 Article 23.

<sup>134</sup> 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 (Akwé: Kon Guidelines) No. 59.

<sup>135</sup> UNDRIP Article 14.

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.<sup>136\*</sup>

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application. 2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities. 3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.<sup>137\*</sup>

Measures 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.<sup>138\*</sup>

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations. 2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate. 3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.<sup>139\*</sup>

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view

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<sup>136</sup> ILO Convention No. 169 Article 21.

<sup>137</sup> ILO Convention No. 169 Article 22.

<sup>138</sup> ILO Convention No. 169 Article 26.

<sup>139</sup> ILO Convention No. 169 Article 27.

to the adoption of measures to achieve this objective. 2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country. 3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.<sup>140\*</sup>

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.<sup>141\*</sup>

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this *ILO Convention No. 169*. 2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.<sup>142\*</sup>

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.<sup>143\*</sup>

3. 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. 4. 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.<sup>144</sup>

The States Parties to the present *Covenant on Economic, Social and Cultural Rights* recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental

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<sup>140</sup> ILO Convention No. 169 Article 28.

<sup>141</sup> ILO Convention No. 169 Article 29.

<sup>142</sup> ILO Convention No. 169 Article 30.

<sup>143</sup> ILO Convention No. 169 Article 31.

<sup>144</sup> Declaration on the Rights of Minorities Article 4(3)-(4).

freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>145</sup>

To achieve the purpose of the instrument, and taking into account national policies, priorities, conditions and available resources, Member States should: ... (v) Support education, training and extension programmes involving local and indigenous communities, forest workers and forest owners, in order to develop resource management approaches that will reduce the pressure on forests, particularly fragile ecosystems ...<sup>146</sup>

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (e) Economic, social and cultural rights, in particular: ... (v) The right to education and training ...<sup>147</sup>

## **DEVELOPMENT**

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. 2. The 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. Special projects for development of the areas in question shall also be so designed as to promote such improvement. 3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. 4. Governments shall take measures, in co-operation with the

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<sup>145</sup> ICESCR Article 13(1).

<sup>146</sup> UNFF Instrument on Forests Provision 6(v).

<sup>147</sup> CERD Article 5.

peoples concerned, to protect and preserve the environment of the territories they inhabit.<sup>148\*</sup>

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.<sup>149\*</sup>

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.<sup>150\*</sup>

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.<sup>151</sup>

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development. 3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.<sup>152</sup>

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of

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<sup>148</sup> ILO Convention No. 169 Article 7.

<sup>149</sup> UNDRIP Article 21(2).

<sup>150</sup> UNDRIP Article 23.

<sup>151</sup> Declaration on the Right to Development Article 1.

<sup>152</sup> Declaration on the Right to Development Article 2.

opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. 2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.<sup>153</sup>

Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector ...<sup>154</sup>

States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.<sup>155</sup>

## **CULTURAL AND NATURAL HERITAGE**

Each State Party to this *World Heritage Convention* recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1<sup>156</sup> and 2<sup>157</sup> and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.<sup>158</sup>

The States Parties to this *World Heritage Convention* shall endeavor by all appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage defined in Articles 1 and 2 of the *World Heritage Convention*.<sup>159</sup>

Each State Party shall: (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; (b) among the safeguarding

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<sup>153</sup> Declaration on the Right to Development Article 8.

<sup>154</sup> Convention on Cultural Expressions Article 14.

<sup>155</sup> Declaration on the Rights of Minorities Article 4(5).

<sup>156</sup> Article 1 of the World Heritage Convention defines “cultural heritage” as certain monuments, groups of buildings, and sites.

<sup>157</sup> Article 2 of the World Heritage Convention defines “natural heritage” as certain natural features, geological and physiographical formations and precisely delineated areas, and natural sites or precisely delineated natural areas.

<sup>158</sup> World Heritage Convention Article 4.

<sup>159</sup> World Heritage Convention Article 27(1). The definitions in Articles 1 and 2 of the World Heritage Convention are given above.

measures referred to in Article 2, paragraph 3,<sup>160</sup> identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.<sup>161</sup>

To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.<sup>162</sup>

Each State Party shall endeavour, by all appropriate means, to: (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society ... (b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this *Convention on Intangible Cultural Heritage*; (c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.<sup>163</sup>

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.<sup>164</sup>

Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.<sup>165</sup>

Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations,

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<sup>160</sup> Article 2, Paragraph 3 of the Convention on Intangible Cultural Heritage provides as follows: “‘Safeguarding’ means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.”

<sup>161</sup> Convention on Intangible Cultural Heritage Article 11.

<sup>162</sup> Convention on Intangible Cultural Heritage Article 12.

<sup>163</sup> Convention on Intangible Cultural Heritage Article 14.

<sup>164</sup> Convention on Intangible Cultural Heritage Article 15.

<sup>165</sup> Convention on Intangible Cultural Heritage Article 19(2).

so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.<sup>166</sup>

## **LAND TENURE**

States should: 1. Recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights. 2. Safeguard legitimate tenure rights against threats and infringements. They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law. 3. Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all. 4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes. 5. Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels, and in all settings.<sup>167</sup>

States should strive to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth.<sup>168</sup>

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. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance. Information on

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<sup>166</sup> UNESCO Universal Declaration on Cultural Diversity Article 7.

<sup>167</sup> FAO Tenure Guidelines No. 3(1).

<sup>168</sup> FAO Tenure Guidelines No. 4(1).

any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.<sup>169</sup>

Where 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.<sup>170</sup>

States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.<sup>171</sup>

States should, in drafting tenure policies and laws, 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. There 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.<sup>172</sup>

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.<sup>173</sup>

States should take measures to promote and protect the security of land tenure, especially with respect to women, and poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit. As appropriate, States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women. Such mechanisms should also

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<sup>169</sup> FAO Tenure Guidelines No. 9(4).

<sup>170</sup> FAO Tenure Guidelines No. 9(5).

<sup>171</sup> FAO Tenure Guidelines No. 9(6).

<sup>172</sup> FAO Tenure Guidelines No. 9(7)

<sup>173</sup> FAO Tenure Guidelines No. 9(11)

promote conservation and sustainable use of land. Special consideration should be given to the situation of indigenous communities.<sup>174</sup>

Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights.<sup>175</sup>

## **NON-REMOVAL FROM LANDS OR TERRITORIES**

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; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights ...<sup>176\*</sup>

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.<sup>177\*</sup>

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent 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. 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.<sup>178\*</sup>

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<sup>174</sup> FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FAO Food Security Guidelines) No. 8.10.

<sup>175</sup> FAO Tenure Guidelines No. 3(2).

<sup>176</sup> UNDRIP Article 8(2).

<sup>177</sup> UNDRIP Article 10.

<sup>178</sup> ILO Convention No. 169 Article 16.

Where 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.<sup>179</sup>

Activities/interactions related to biological diversity, and the objectives of the *Convention on Biological Diversity*, such as conservation, ought not to cause indigenous and local communities to be removed from their lands and/or lands and waters traditionally occupied or used by them, as applicable, by force or coercion and without their consent. Where they consent to removal they should be compensated. Whenever possible, these indigenous and local communities should have the right to return to their traditional lands. Such activities/interactions should not cause indigenous and local community members, especially the elderly, the disabled and children to be removed from their families by force or coercion.<sup>180</sup>

States should protect legitimate tenure rights, and ensure that people are not arbitrarily evicted and that their legitimate tenure rights are not otherwise extinguished or infringed.<sup>181</sup>

## **STEWARDSHIP, GOVERNANCE, MANAGEMENT, AND USE OF TERRITORIES, LANDS AND NATURAL RESOURCES**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. 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. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>182\*</sup>

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

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<sup>179</sup> FAO Tenure Guidelines No. 9(5).

<sup>180</sup> Code of Ethical Conduct Section 2(19).

<sup>181</sup> FAO Tenure Guidelines No. 4(5).

<sup>182</sup> UNDRIP Article 26.

otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.<sup>183\*</sup>

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.<sup>184\*</sup>

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.<sup>185\*</sup>

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.<sup>186\*</sup>

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part

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<sup>183</sup> UNDRIP Article 27.

<sup>184</sup> UNDRIP Article 32.

<sup>185</sup> ILO Convention No. 169 Article 14.

<sup>186</sup> ILO Convention No. 169 Article 15(1). In this Article “[t]he use of the term lands ... shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” ILO Convention No. 169 Article 13(2).

of their members to secure the ownership, possession or use of land belonging to them.<sup>187\*</sup>

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.<sup>188\*</sup>

Traditional guardianship/custodianship recognizes the holistic interconnectedness of humanity with ecosystems and obligations and responsibilities of indigenous and local communities, to preserve and maintain their traditional role as traditional guardians and custodians of these ecosystems through the maintenance of their cultures, spiritual beliefs and customary practices. Because of this, cultural diversity, including linguistic diversity, ought to be recognized as keys to the conservation and sustainable use of biological diversity. Therefore, 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. Indigenous and local communities may also view certain species of plants and animals as sacred and, as custodians of biological diversity, have responsibilities for their well-being and sustainability, and this should be respected and taken into account in all activities/interactions.<sup>189</sup>

States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people's livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen pro-poor growth. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources.<sup>190</sup>

Given that all human rights are universal, indivisible, interdependent and interrelated, 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. In doing so, States should respect and protect the civil and political rights of defenders of

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<sup>187</sup> ILO Convention No. 169 Article 17.

<sup>188</sup> ILO Convention No. 169 Article 18.

<sup>189</sup> Code of Ethical Conduct Section 2(20).

<sup>190</sup> FAO Food Security Guidelines No. 8.1.

human rights, including the human rights of peasants, indigenous peoples, fishers, pastoralists and rural workers, and should observe their human rights obligations when dealing with individuals and associations acting in defence of land, fisheries and forests.<sup>191</sup>

States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others. Where a community does not object, States should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community. Where tenure rights of indigenous peoples and other communities with customary tenure systems are formally documented, they should be recorded with other public, private and communal tenure rights to prevent competing claims.<sup>192</sup>

The representatives of the Contracting Parties at such Conferences should include persons who are experts on wetlands or waterfowl by reason of knowledge and experience gained in scientific, administrative or other appropriate capacities.<sup>193</sup>

#### **CUSTOMARY USE**

Each Contracting Party shall, as far as possible and as appropriate; ... protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.<sup>194</sup>

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.<sup>195</sup>

Parties, in their implementation of this *Nagoya Protocol*, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated

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<sup>191</sup> FAO Tenure Guidelines No. 4(8).

<sup>192</sup> FAO Tenure Guidelines No. 9(8).

<sup>193</sup> Convention on Wetlands of International Importance (Ramsar Convention) Article 7(1). The “Conferences” referred to in this Article are ordinary meetings of the Conference of the Contracting Parties (COP) to the Ramsar Convention convened at intervals of not more than three years. Although the Ramsar Convention itself does not mention Indigenous peoples or local communities, the COP has increasingly recognized their role in its Resolutions.

<sup>194</sup> CBD Article 10(c).

<sup>195</sup> FAO Tenure Guidelines No. 9(1).

traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the *Convention on Biological Diversity*.<sup>196</sup>

Traditional resource rights are collective in nature but may include other interests and obligations and apply to traditional resources occurring on lands and waters traditionally occupied or used by indigenous and local communities. Access of indigenous and local communities to traditional resources is crucial for the sustainable use of biological diversity and cultural survival. Activities/interactions should not interfere with access to traditional resources except with the approval of the community concerned. Activities/interactions should respect customary rules governing access to resources where this is required by the community concerned.<sup>197</sup>

### **SUSTAINABLE USE**<sup>198</sup>

Sustainability of use of biodiversity components will be enhanced if the following practical principles and related operational guidelines are applied:

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

#### *Operational guidelines*

- Consider local customs and traditions (and customary law where recognized) when drafting new legislation and regulations.

*Practical Principle 2:* Recognizing the need for a governing framework consistent with international<sup>199</sup>/national laws, local users of biodiversity components should be

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<sup>196</sup> Nagoya Protocol Article 12(4).

<sup>197</sup> Code of Ethical Conduct Section 2(18).

<sup>198</sup> The provisions in the following section are excerpted from the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (Addis Ababa Principles and Guidelines). Specifically, they are taken from Section B., entitled “practical principles, rationale and operational guidelines for the sustainable use of biodiversity”. The purpose of the Addis Ababa Principles and Guidelines is to assist Parties in achieving sustainable use of biological diversity, one of the three objectives of the Convention on Biological Diversity. Specifically, Article 10 of the Convention on Biological Diversity sets the agenda for sustainable use of the components of biological diversity.

<sup>199</sup> The Addis Ababa Principles and Guidelines note in Practical Principle 2 that “[w]here consistency with international law is referred to this recognizes: (i) that there are cases where a country will not be a party to a specific international convention and accordingly that law will not apply directly to them; and (ii) that from time to time countries are not able to achieve full compliance with the conventions to which they are a party and may need assistance.”

sufficiently empowered and supported by rights to be responsible and accountable for use of the resources concerned.

*Operational guidelines*

- Where possible adopt means that aim toward delegating rights, responsibility, and accountability to those who use and/or manage biological resources; ...
- 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 ...

*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 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.

*Operational guidelines*

- Require adaptive management plans to incorporate systems to generate sustainable revenue, where the benefits go to indigenous and local communities and local stakeholders to support successful implementation ...

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

*Operational guidelines*

- Encourage active collaboration between scientific researchers and people with local and traditional knowledge; ...
- Develop 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; ...
- Investigate and develop means of ensuring rights of access and methods for helping to ensure that the benefits derived from using components of biodiversity are equitably shared; ...

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

*Rationale:* Sustainability of use depends on biological parameters of the resources being utilized. However, it is recognized that social, cultural, political and economic factors are equally important. It is therefore necessary to take such 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.

*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.

*Rationale:* Indigenous and local communities and local stakeholders often shoulder significant costs or forgo benefits of potential use of biological diversity, in order to ensure or enhance benefits accruing to others. Many resources (e.g., timber, fisheries) are over-exploited because regulations are ignored and not enforced. When local people are involved as stakeholders such violations are generally reduced. Management regimes are enhanced when constructive programmes that benefit local communities are implemented, such as capacity training that can provide income alternatives, or assistance in diversifying their management capacities.

#### *Operational guidelines*

- 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; ...
- Ensure that an equitable share of the benefits remain with the local people in those cases where foreign investment is involved;
- 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;
- In the event that management dictates a reduction in harvest levels, to the extent practicable assistance should be provided for local stakeholders, including indigenous and local communities, who are directly dependent on the resource to have access to alternatives.

## WATER RIGHTS

The States Parties to the present *Covenant on Economic, Social and Cultural Rights* recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.<sup>200</sup>

The States Parties to the present *Covenant on Economic, Social and Cultural Rights* recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>201</sup>

Bearing in mind that access to water in sufficient quantity and quality for all is fundamental for life and health, States should strive to improve access to, and promote sustainable use of, water resources and their allocation among users giving due regard to efficiency and the satisfaction of basic human needs in an equitable manner and that balances the requirement of preserving or restoring the functioning of ecosystems with domestic, industrial and agricultural needs, including safeguarding drinking-water quality.<sup>202</sup>

States Parties ... shall ensure to such women the right: ... To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.<sup>203</sup>

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: ... (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; ...<sup>204</sup>

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<sup>200</sup> ICESCR Article 11(1). The United Nations Committee on Economic, Social and Cultural Rights has concluded that the right to water emanates from and is inextricably linked to ICESCR Article 11(1) and Article 12(1), referenced below. Committee on Economic, Social and Cultural Rights General Comment No. 15 (2002).

<sup>201</sup> ICESCR Article 12(1).

<sup>202</sup> FAO Food Security Guidelines No. 8.11.

<sup>203</sup> CEDAW Article 14(2)(h).

<sup>204</sup> Convention on the Rights of the Child Article 24(2)(c).

Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.<sup>205</sup>

Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including: ... (c) The population dependent on the watercourse in each watercourse State; ... (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect ...<sup>206</sup>

### **EQUITABLE CONSERVATION**

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.<sup>207\*</sup>

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.<sup>208</sup>

By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of women, indigenous and local communities, and the poor and vulnerable.<sup>209</sup>

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<sup>205</sup> Convention on the Law of the Non-navigational Uses of International Watercourses (Convention on Non-navigational Water Courses) Article 5(1).

<sup>206</sup> Convention on Non-navigational Water Courses Article 6(1).

<sup>207</sup> UNDRIP Article 29(1).

<sup>208</sup> Aichi Biodiversity Target 11.

<sup>209</sup> Aichi Biodiversity Target 14.

The Parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.<sup>210</sup>

### **Protected Areas**<sup>211</sup>

*Goal 1.1 of the Convention on Biological Diversity's Programme of Work on Protected Areas:* To establish and strengthen national and regional systems of protected areas integrated into a global network as a contribution to globally agreed goals.

*Under Goal 1.1, Parties to the Convention on Biological Diversity are called on to:*<sup>212</sup>

By 2006, conduct, with the full and effective participation of indigenous and local communities and relevant stakeholders, national-level reviews of existing and potential forms of conservation, and their suitability for achieving biodiversity conservation goals, including innovative types of governance for protected areas that need to be recognized and promoted through legal, policy, financial institutional and community mechanisms, such as protected areas run by Government agencies at various levels, co-managed protected areas, private protected areas, indigenous and local community conserved areas.<sup>213</sup>

1.1.7 Encourage the establishment of protected areas that benefit indigenous and local communities, including by respecting, preserving, and maintaining their traditional knowledge in accordance with article 8(j) and related provisions.<sup>214</sup>

*Goal 1.4 of the Convention on Biological Diversity's Programme of Work on Protected Areas:* To substantially improve site-based protected area planning and management.

*Under Goal 1.4, Parties to the Convention on Biological Diversity are called on to:*<sup>215</sup>

Create a highly participatory process, involving indigenous and local communities and relevant stakeholders, as part of site-based planning in accordance with the

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<sup>210</sup> Nagoya Protocol Article 9.

<sup>211</sup> This section is taken from Elements 1 and 2 of the CBD Program of Work on Protected Areas (PoWPA). Element 1 is entitled "Direct actions for planning, selecting, establishing, strengthening, and managing, protected area systems and sites." Element 2 is entitled "Governance, Participation, Equity and Benefit Sharing."

<sup>212</sup> This text does not appear in the CBD PoWPA. It is inserted to introduce the following paragraphs that contain suggested activities for Parties to the CBD and contained within the Goals of the CBD PoWPA listed here. This text is duplicated in this section for PoWPA Goals 1.4, 1.5, 2.1, and 2.2.

<sup>213</sup> CBD PoWPA 1.1.4.

<sup>214</sup> CBD PoWPA 1.1.7.

<sup>215</sup> As noted above, this text does not appear in the CBD PoWPA.

ecosystem approach, and use relevant ecological and socio-economic data required to develop effective planning processes.<sup>216</sup>

*Goal 1.5 of the Convention on Biological Diversity's Programme of Work on Protected Areas:* To prevent and mitigate the negative impacts of key threats to protected areas.

*Under Goal 1.5, Parties to the Convention on Biological Diversity are called on to:*

Apply, as appropriate, timely environmental impact assessments to any plan or project with the potential to have effects on protected areas, and ensure timely information flow among all concerned parties to that end, taking into account decision VI/7 A of the Conference of the Parties on guidelines for incorporating biodiversity related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessments.<sup>217</sup>

Develop policies, improve governance, and ensure enforcement of urgent measures that can halt the illegal exploitation of resources from protected areas, and strengthen international and regional cooperation to eliminate illegal trade in such resources taking into account sustainable customary resource use of indigenous and local communities in accordance with article 10(c) of the Convention.<sup>218</sup>

*Goal 2.1 of the Convention on Biological Diversity's Programme of Work on Protected Areas:* To promote equity and benefit sharing [e]stablish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.<sup>219</sup>

*Under Goal 2.1, Parties to the Convention on Biological Diversity are called on to:*<sup>220</sup>

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, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation.<sup>221</sup>

Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the

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<sup>216</sup> CBD PoWPA 1.4.1.

<sup>217</sup> CBD PoWPA 1.5.1.

<sup>218</sup> CBD PoWPA 1.5.6.

<sup>219</sup> CBD PoWPA Element 2.

<sup>220</sup> As noted above, this text does not appear in the CBD PoWPA.

<sup>221</sup> CBD PoWPA 2.1.1.

Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms.<sup>222</sup>

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.<sup>223</sup>

Use social and economic benefits generated by protected areas for poverty reduction, consistent with protected-area management objectives.<sup>224</sup>

Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principles of the ecosystem approach.<sup>225</sup>

*Goal 2.2 of the Convention on Biological Diversity's Programme of Work on Protected Areas:* To enhance and secure involvement of indigenous and local communities and relevant stakeholders. Target: Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas.

*Under Goal 2.2, Parties to the Convention on Biological Diversity are called on to:*<sup>226</sup>

Carry out participatory national reviews of the status, needs and context-specific mechanisms for involving stakeholders, ensuring gender and social equity, in protected areas policy and management, at the level of national policy, protected area systems and individual sites.<sup>227</sup>

Implement specific plans and initiatives to effectively involve indigenous and local communities, with respect for their rights consistent with national legislation and applicable international obligations, and stakeholders at all levels of protected areas

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<sup>222</sup> CBD PoWPA 2.1.2.

<sup>223</sup> CBD PoWPA 2.1.3.

<sup>224</sup> CBD PoWPA 2.1.4.

<sup>225</sup> CBD PoWPA 2.1.5.

<sup>226</sup> As noted above, this text does not appear in the CBD PoWPA.

<sup>227</sup> CBD PoWPA 2.2.1.

planning, establishment, governance and management, with particular emphasis on identifying and removing barriers preventing adequate participation.<sup>228</sup>

Support participatory assessment exercises among stakeholders to identify and harness the wealth of knowledge, skills, resources and institutions of importance for conservation that are available in society.<sup>229</sup>

Promote an enabling environment (legislation, policies, capacities, and resources) 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.<sup>230</sup>

Ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations.<sup>231</sup>

## **SACRED NATURAL SITES**

Recognition of sacred sites, culturally significant sites and lands and waters traditionally occupied or used by indigenous and local communities: ... 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.<sup>232</sup>

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

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<sup>228</sup> CBD PoWPA 2.2.2.

<sup>229</sup> CBD PoWPA 2.2.3.

<sup>230</sup> CBD PoWPA 2.2.4. It should be noted that a footnote link in the PoWPA website following the word “stakeholders” in this activity does not work.

<sup>231</sup> CBD PoWPA 2.2.5.

<sup>232</sup> Code of Ethical Conduct Section 2(17).

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.<sup>233</sup>

## **FOOD AND AGRICULTURE**

The States Parties to the present *Covenant on Economic, Social and Cultural Rights*, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources ...<sup>234</sup>

Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are availability, stability of supply, access and utilization.<sup>235</sup>

States should promote and safeguard a free, democratic and just society in order to provide a peaceful, stable and enabling economic, social, political and cultural environment in which individuals can feed themselves and their families in freedom and dignity.

Recognizing the primary responsibility of States for the progressive realization of the right to adequate food, States are encouraged to apply a multistakeholder approach to national food security to identify the roles of and involve all relevant stakeholders, encompassing civil society and the private sector, drawing together their know-how with a view to facilitating the efficient use of resources.<sup>236</sup>

### **Local Agricultural Systems**

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to: (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their

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<sup>233</sup> Akwé: Kon Guidelines No. 31.

<sup>234</sup> ICESCR Article 11(2).

<sup>235</sup> FAO Food Security Guidelines Introduction, Paragraph 15.

<sup>236</sup> FAO Food Security Guidelines No. 6.1.

numbers; (b) the provision of the means required to promote the development of the lands which these peoples already possess.<sup>237\*</sup>

States, taking into account the importance of biodiversity, and consistent with their obligations under relevant international agreements, should consider specific national policies, legal instruments and supporting mechanisms to prevent the erosion of and ensure the conservation and sustainable use of genetic resources for food and agriculture, including, as appropriate, for the protection of relevant traditional knowledge and equitable participation in sharing benefits arising from the use of these resources, and by encouraging, as appropriate, the participation of local and indigenous communities and farmers in making national decisions on matters related to the conservation and sustainable use of genetic resources for food and agriculture.<sup>238</sup>

### **Farmers and Crop Diversity**

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 ...<sup>239</sup>

The Contracting Parties shall, as appropriate, take steps to minimize or, if possible, eliminate threats to plant genetic resources for food and agriculture.<sup>240</sup>

The Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.<sup>241</sup>

The 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; b)

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<sup>237</sup> ILO Convention No. 169 Article 19.

<sup>238</sup> FAO Food Security Guidelines No. 8.12.

<sup>239</sup> ITPGRFA Article 5(1).

<sup>240</sup> ITPGRFA Article 5(2).

<sup>241</sup> ITPGRFA Article 6(1).

strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests; c) promoting, as appropriate, plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas; d) broadening the genetic base of crops and increasing the range of genetic diversity available to farmers; e) promoting, as appropriate, the expanded use of local and locally adapted crops, varieties and underutilized species; f) supporting, as appropriate, the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development ...<sup>242</sup>

States should promote agricultural research and development, in particular to promote basic food production with its positive effects on basic incomes and its benefits to small and women farmers, as well as poor consumers.<sup>243</sup>

### **Sui Generis Plant Variety Protection**

[P]atents 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 are capable of industrial application.<sup>244</sup> ... 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. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.<sup>245</sup>

### **Livestock Keepers**

The main aims of the Global Plan of Action for Animal Genetic Resources are: ... to promote the sustainable use and development of animal genetic resources, for food security, sustainable agriculture, and human well-being in all countries; to ensure the conservation of the important animal genetic resource diversity, for present and

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<sup>242</sup> ITPGRFA Article 6(2).

<sup>243</sup> FAO Food Security Guidelines No. 8.4.

<sup>244</sup> Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) Article 27(1).

<sup>245</sup> TRIPS Article 27(3).

future generations, and to halt the random loss of these crucial resources; 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; to meet the needs of pastoralists and farmers, individually and collectively, within the framework of national law, to have non-discriminatory access to genetic material, information, technologies, financial resources, research results, marketing systems, and natural resources, so that they may continue to manage and improve animal genetic resources, and benefit from economic development ...<sup>246</sup>

A diversity of animal genetic resources will ensure the ability of the livestock sector to meet changing market demands and environmental circumstances, including climate change and emerging diseases. Farmers and pastoralists require animal breeds that meet local needs and provide employment within rural communities, and that are resilient to a variety of biotic and abiotic factors, including extreme climatic conditions, feed availability, parasites and other disease factors. Furthermore, livestock provide a direct food source in times of crop failure.<sup>247</sup>

Pastoralists, 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. It is important to better understand and support their roles in a context of rapid economic and social change, so that they can play an effective function in in situ management, and share fairly and equitably in the benefits arising from the utilization of these resources. A number of actors and stakeholders can assist livestock keepers and their communities in playing this role: researchers, extension agencies, the private sector, non-governmental organizations and local cooperatives.<sup>248</sup>

Establish national species and breed development strategies and programmes ...  
Provide information to farmers and livestock keepers to assist in facilitating access to animal genetic resources from various sources.<sup>249</sup>

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<sup>246</sup> Global Plan of Action for Animal Genetic Resources (GPA) No. 15.

<sup>247</sup> GPA No. 16.

<sup>248</sup> GPA No. 16.

<sup>249</sup> Strategic Priority 4. GPA at 19. The GPA contains twenty-three Strategic Priorities grouped within four Strategic Priority Areas. The four Strategic Priority Areas are: (1) Characterization, Inventory and Monitoring of Trends and Associated Risks; (2) Sustainable Use and Development; (3) Conservation; and (4) Policies, Institutions and Capacity-building. Each Strategic Priority contains a Rationale and Actions for its implementation. The GPA

Support indigenous and local production systems and associated knowledge systems of importance to the maintenance and sustainable use of animal genetic resources ... The historic contribution of indigenous and local communities to animal genetic diversity, and the knowledge systems that manage these resources, needs to be recognized, and their continuity supported. Today, the adaptive animal genetic resources management strategies of these communities continue to have economic, social and cultural significance, and to be highly relevant to food security in many rural subsistence societies, particularly, though not exclusively, in dry lands and mountainous regions. Measures to support such systems should take their specific ecological and socio-economic and cultural features into consideration.<sup>250</sup>

Support indigenous and local livestock systems of importance to animal genetic resources, including through the removal of factors contributing to genetic erosion. Support may include the provision of veterinary and extension services, delivery of microcredit for women in rural areas, 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.<sup>251</sup>

Promote and enable relevant exchange, interaction and dialogue among indigenous and rural communities and scientists and government officials and other stakeholders, in order to integrate traditional knowledge with scientific approaches.<sup>252</sup>

Loss of local breeds will cause cultural erosion and diminish the ability of communities to maintain their cultures and livelihoods. Structural changes in the livestock sector may result in a situation where the previous keepers of a breed are no longer in a position to maintain it: in such circumstances, other ways need to be identified to preserve the breed, as part of the global heritage of animal genetic resources.<sup>253</sup>

Loss of animal genetic resources reduces opportunities to develop rural economies in some countries. It may also have negative social and cultural impacts, given the

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does not specify who is responsible for implementing each action, although presumably primary responsibility would fall to the governments who adopted the GPA. As stated in the Foreword: "Governments must now demonstrate sustained political will and mobilize the considerable resources needed to implement the Global Plan of Action successfully. This will require wide regional and international cooperation. FAO, other relevant international organizations, the countries, the scientific community, donors, civil society organizations and the private sector all have important roles to play."

<sup>250</sup> Strategic Priority 6. GPA at 20.

<sup>251</sup> GPA at 20.

<sup>252</sup> GPA at 20.

<sup>253</sup> GPA No. 33.

long history of domestication and the resulting incorporation of domestic animals into community culture. Replacement of indigenous breeds could result in the loss of products and services preferred by local people, and the conservation of local breeds must therefore be considered within the broader context of sustaining rural communities and their existing economic foundations. Moreover, such losses now may limit future development options, based on animal products and services from specific breeds, that otherwise could have added considerable economic value as consumer demands become more varied.<sup>254</sup>

The loss of local breeds may have negative environmental impacts in some production environments, especially in dry lands and mountainous areas. Many 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.<sup>255</sup>

Appropriate conservation measures should ensure that farmers and researchers have access to a diverse gene pool for further breeding and research ...<sup>256</sup>

Establish or strengthen national educational and research facilities ... Review the national educational needs of livestock keepers, while respecting traditional knowledge and indigenous practices.<sup>257</sup>

We [the representatives of one hundred and nine States, and the European Community and forty-two Organizations] recognize 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. ...<sup>258</sup>

We acknowledge that maintaining the diversity of animal genetic resources for food and agriculture is essential to enable farmers, pastoralists and animal breeders to meet current and future production challenges resulting from changes in the environment, including climate change; to enhance resistance to disease and parasites; and to respond to changes in consumer demand for animal products. We also recognize the intrinsic value of biological diversity and the environmental, genetic, social, economic, medicinal, scientific, educational, cultural and spiritual

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<sup>254</sup> GPA No. 34.

<sup>255</sup> GPA No. 35.

<sup>256</sup> GPA No. 37.

<sup>257</sup> Strategic Priority 13. GPA at 28.

<sup>258</sup> Interlaken Declaration on Animal Genetic Resources (Interlaken Declaration) Article 9. The Interlaken Declaration was adopted along with the GPA.

importance of breeds of livestock, and our ethical responsibility to ensure genetic resources are available to future human generations.<sup>259</sup>

We recognize 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 ... We affirm 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.<sup>260</sup>

### **Living Modified Organisms**

The Parties to the *Cartagena Protocol on Biosafety* shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.<sup>261</sup>

The Parties shall, taking into account Article 8(g) of the *Convention on Biological Diversity*, establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk assessment provisions of this *Cartagena Protocol on Biosafety* associated with the use, handling and transboundary movement of living modified organisms.<sup>262</sup>

In order to avoid adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, each Party shall take necessary measures to require that living modified organisms that are subject to intentional transboundary movement within the scope of this Protocol are handled, packaged and transported under conditions of safety, taking into consideration relevant international rules and standards.<sup>263</sup>

The Parties shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and

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<sup>259</sup> Interlaken Declaration Article 10.

<sup>260</sup> Interlaken Declaration Article 12.

<sup>261</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol on Biosafety) Article 2(2).

<sup>262</sup> Cartagena Protocol on Biosafety Article 16(1).

<sup>263</sup> Cartagena Protocol on Biosafety Article 18(1).

shall make the results of such decisions available to the public, while respecting confidential information in accordance with Article 21.<sup>264</sup>

The Parties, in reaching a decision on import under this *Cartagena Protocol on Biosafety* 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.<sup>265</sup>

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.<sup>266</sup>

Parties shall require the appropriate operator or operators, in the event of damage, subject to any requirements of the competent authority, to: (a) Immediately inform the competent authority; (b) Evaluate the damage; and (c) Take appropriate response measures.<sup>267</sup>

## **CLIMATE CHANGE**

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.<sup>268</sup>

All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: ... Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and

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<sup>264</sup> Cartagena Protocol on Biosafety Article 23(2).

<sup>265</sup> Cartagena Protocol on Biosafety Article 26(1).

<sup>266</sup> Cartagena Protocol on Biosafety Article 26(2).

<sup>267</sup> Nagoya-Kuala Lumpur Supplementary Protocol On Liability and Redress to the Cartagena Protocol on Biosafety (N-KL Supplementary Protocol) Article 5(1). Pursuant to Article 3, the N-KL Supplementary Protocol applies to “damage resulting from living modified organisms which find their origin in a transboundary movement.”

<sup>268</sup> UNFCCC Article 3(1).

rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods.<sup>269</sup>

All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: ... Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations.<sup>270</sup>

States should ensure that the legitimate tenure rights to land, fisheries and forests of all individuals, communities or peoples likely to be affected, with an emphasis on farmers, small-scale food producers, and vulnerable and marginalized people, are respected and protected by laws, policies, strategies and actions with the aim to prevent and respond to the effects of climate change consistent with their respective obligations, as applicable, in terms of relevant climate change framework agreements.<sup>271</sup>

Where appropriate, States should strive to prepare and implement strategies and actions in consultation and with the participation of all people, women and men, who may be displaced due to climate change. Any provision of alternative land, fisheries, forests and livelihoods for displaced persons should not jeopardize the livelihoods of others. States may also consider offering special assistance to small island and other developing states.<sup>272</sup>

States should facilitate the participation, consistent with the principles of consultation and participation of these Guidelines, of all individuals, communities or peoples, with an emphasis on farmers, small-scale food producers, and vulnerable and marginalized people, who hold legitimate tenure rights, in the negotiations and implementation of mitigation and adaptation programmes.<sup>273</sup>

## **FORESTS AND EMISSIONS REDUCTIONS**

The vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich

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<sup>269</sup> UNFCCC Article 4(1)(e).

<sup>270</sup> UNFCCC Article 4(1)(i).

<sup>271</sup> FAO Tenure Guidelines No. 23(1).

<sup>272</sup> FAO Tenure Guidelines No. 23(2).

<sup>273</sup> FAO Tenure Guidelines No. 23(3).

storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognized.<sup>274</sup>

Member States should respect the following principles ... : (c) Major groups as identified in Agenda 21, local communities, forest owners and other relevant stakeholders contribute to achieving sustainable forest management and should be involved in a transparent and participatory way in forest decision-making processes that affect them, as well as in implementing sustainable forest management, in accordance with national legislation ...<sup>275</sup>

Governments should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.<sup>276</sup>

(a) National forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests. (b) The full participation of women in all aspects of the management, conservation and sustainable development of forests should be actively promoted.<sup>277</sup>

The problems that hinder efforts to attain the conservation and sustainable use of forest resources and that stem from the lack of alternative options available to local communities, in particular the urban poor and poor rural populations who are economically and socially dependent on forests and forest resources, should be addressed by Governments and the international community.<sup>278</sup>

[The Conference of the Parties to the UN Framework Convention on Climate Change e]ncourages developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each

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<sup>274</sup> UNCED Forest Principles Paragraph 4.

<sup>275</sup> UNFF Instrument on Forests Provision 2(c). "The major groups identified in Agenda 21 are women, children and youth, indigenous people and their communities, non-governmental organizations, local authorities, workers and trade unions, business and industry, scientific and technological communities, and farmers." UNFF Instrument on Forests Provision 2 note 7.

<sup>276</sup> UNCED Forest Principles) Paragraph 2(d).

<sup>277</sup> UNCED Forest Principles Paragraph 5.

<sup>278</sup> UNCED Forest Principles Paragraph 9(b).

Party and in accordance with their respective capabilities and national circumstances: (a) Reducing emissions from deforestation; (b) Reducing emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forests; (e) Enhancement of forest carbon stocks ...<sup>279</sup>

When undertaking the activities referred to in paragraph 70 of this decision,<sup>280</sup> 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;<sup>281</sup>

(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; ...<sup>282</sup>

## **DESERTIFICATION**

In order to achieve the objective of this *Convention on Desertification* and to implement its provisions, the Parties shall be guided, inter alia, by the following: (a)

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<sup>279</sup> 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 (UNFCCC Cancun Agreements) Paragraph 70.

<sup>280</sup> In this case, the paragraph directly above this one.

<sup>281</sup> Paragraph 72 of the UNFCCC Cancun Agreements reads as follows: “Also requests developing country Parties, when developing and implementing their national strategies or action plans, to address, inter alia, the drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and the safeguards identified in paragraph 2 of appendix I to this decision, ensuring the full and effective participation of relevant stakeholders, inter alia indigenous peoples and local communities; ... ”

<sup>282</sup> *Paragraph 2 of Appendix I of the UNFCCC Cancun Agreements*. A footnote following the semicolon in Subparagraph (e) reads as follows: “Taking 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.”

the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels.<sup>283</sup>

National action programmes shall specify the respective roles of government, local communities and land users and the resources available and needed. They shall, inter alia: ... provide for effective participation at the local, national and regional levels of non-governmental organizations and local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision-making, and implementation and review of national action programmes.<sup>284</sup>

The Parties agree, according to their respective capabilities, to integrate and coordinate the collection, analysis and exchange of relevant short term and long term data and information to ensure systematic observation of land degradation in affected areas and to understand better and assess the processes and effects of drought and desertification. This would help accomplish, inter alia, early warning and advance planning for periods of adverse climatic variation in a form suited for practical application by users at all levels, including especially local populations. To this end, they shall, as appropriate: ... (b) ensure that the collection, analysis and exchange of information address the needs of local communities and those of decision makers, with a view to resolving specific problems, and that local communities are involved in these activities.<sup>285</sup>

The Parties undertake, according to their respective capabilities, to promote technical and scientific cooperation in the fields of combating desertification and mitigating the effects of drought through appropriate national, subregional, regional and international institutions. To this end, they shall support research activities that: ... (c) protect, integrate, enhance and validate traditional and local knowledge, know-how and practices, ensuring, subject to their respective national legislation and/or policies, that the owners of that knowledge will directly benefit on an equitable basis and on mutually agreed terms from any commercial utilization of it or from any technological development derived from that knowledge.<sup>286</sup>

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<sup>283</sup> Convention on Desertification Article 3.

<sup>284</sup> Convention on Desertification Article 10(2)(f).

<sup>285</sup> Convention on Desertification Article 16(b).

<sup>286</sup> Convention on Desertification Article 17(1)(c).

The Parties shall, according to their respective capabilities, and subject to their respective national legislation and/or policies, protect, promote and use in particular relevant traditional and local technology, knowledge, know-how and practices and, to that end, they undertake to ... (a) make inventories of such technology, knowledge, know-how and practices and their potential uses with the participation of local populations, and disseminate such information, where appropriate, in cooperation with relevant intergovernmental and non-governmental organizations; (b) ensure that such technology, knowledge, know-how and practices are adequately protected and that local populations benefit directly, on an equitable basis and as mutually agreed, from any commercial utilization of them or from any technological development derived therefrom.<sup>287</sup>

The Conference of the Parties *to the Convention on Desertification* shall establish and/or strengthen networks of regional education and training centres to combat desertification and mitigate the effects of drought ...<sup>288</sup>

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<sup>287</sup> Convention on Desertification Article 18(2)(a), (b).

<sup>288</sup> Convention on Desertification Article 19(4).

## II. PROCEDURAL RIGHTS

### PRECAUTIONARY APPROACH

This principle reaffirms the precautionary approach contained in principle 15 of the Rio Declaration on Environment and Development<sup>289</sup> and in the preamble to the Convention on Biological Diversity. The prediction and assessment of potential harms to biological diversity should include local criteria and indicators, and should fully involve the relevant indigenous and local communities.<sup>290</sup>

### FREE, PRIOR AND INFORMED CONSENT

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.<sup>291\*</sup>

### Lands, Waters and Natural Resources

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The 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.<sup>292\*</sup>

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and

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<sup>289</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I, Resolutions Adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

<sup>290</sup> Code of Ethical Conduct Section 2(16).

<sup>291</sup> UNDRIP Article 19.

<sup>292</sup> ILO Convention No. 169, Article 15(2). In this Article, “[t]he use of the term lands ... shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” ILO Convention No. 169 Article 13(2).

restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.<sup>293\*</sup>

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.<sup>294\*</sup>

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.<sup>295</sup>

### **Genetic Resources**

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.<sup>296</sup>

Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.<sup>297</sup>

### **Traditional Knowledge, Innovations and Practices**

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic

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<sup>293</sup> UNDRIP Article 29(2)-(3).

<sup>294</sup> UNDRIP Article 30.

<sup>295</sup> FAO Tenure Guidelines No. 9(9).

<sup>296</sup> Nagoya Protocol Article 6(2).

<sup>297</sup> Nagoya Protocol Article 15(1).

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.<sup>298</sup>

In implementing their obligations under this *Nagoya Protocol*, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.<sup>299</sup>

Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.<sup>300</sup>

Community and individual concerns over, and claims to, cultural and intellectual property relevant to traditional knowledge, innovations and practices related to the conservation and sustainable use of biodiversity should be acknowledged and addressed in the negotiation with indigenous and local communities, prior to starting activities/interactions.<sup>301</sup>

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.<sup>302</sup>

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

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<sup>298</sup> Nagoya Protocol Article 7.

<sup>299</sup> Nagoya Protocol Article 12(1).

<sup>300</sup> Nagoya Protocol Article 16(1).

<sup>301</sup> Code of Ethical Conduct Section 2(8).

<sup>302</sup> Code of Ethical Conduct Section 2(10).

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.<sup>303</sup>

... [T]raditional knowledge, innovations and practices should be considered an important and integral component of baseline studies,<sup>304</sup> particularly the traditional knowledge, innovations and practices of those who have a long association with the particular area for which the development is proposed. Traditional knowledge, innovations and practices can be cross-referenced by old photographs, newspaper articles, known historical events, archaeological records, anthropological reports, and other records contained in archival collections.<sup>305</sup>

Where consent or authority of indigenous and local communities is required with respect to traditional knowledge associated with the conservation and sustainable use of biodiversity, it is the right of indigenous and local communities, according to their customary law and procedures, to identify the relevant holders of their knowledge.<sup>306</sup>

## **CULTURAL, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS**

National policies should ensure that environmental impact assessments should be carried out where actions are likely to have significant adverse impacts on important forest resources, and where such actions are subject to a decision of a competent national authority.<sup>307</sup>

The purpose of these *Akwé: Kon Guidelines* is to provide a collaborative framework within which Governments, indigenous and local communities, decision makers and managers of developments can: (a) Support the full and effective participation and involvement of indigenous and local communities in screening, scoping and development planning exercises; (b) Properly take into account the cultural, environmental and social concerns and interests of indigenous and local communities, especially of women who often bear a disproportionately large share of negative development impacts; Take into account the traditional knowledge, innovations and practices of indigenous and local communities as part of environmental, social and cultural impact-assessment processes, with due regard to

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<sup>303</sup> Code of Ethical Conduct Section 2(11).

<sup>304</sup> The purpose of a baseline study is “to ascertain those components of biological diversity of particular significance to the affected indigenous or local community” “in order to effectively undertake an environmental impact assessment for a proposed development”. *Akwé: Kon Guidelines* No. 37.

<sup>305</sup> *Akwé: Kon Guidelines* No. 38.

<sup>306</sup> Code of Ethical Conduct Section 1(4).

<sup>307</sup> UNCED Forest Principles Paragraph 8(h).

the ownership of and the need for the protection and safeguarding of traditional knowledge, innovations and practices; (d) Promote the use of appropriate technologies; (e) Identify and implement appropriate measures to prevent or mitigate any negative impacts of proposed developments; (f) Take into consideration the interrelationships among cultural, environmental and social elements.<sup>308</sup>

The proponent of a development proposal or the responsible government authority should engage in a process of notification and public consultation of intention to carry out a development.<sup>309</sup>

The development proposal and impact assessment should be made available to organizations representing affected indigenous and local communities and relevant stakeholders for the purposes of public scrutiny and consultation. It should include all details relevant to the proposal. Notification and public consultation of the proposed development should allow for sufficient time to allow the affected indigenous or local community to prepare its response. An opportunity to present its response should be allowed for full and fair consideration by the proponent.<sup>310</sup>

In any development proposed to take place on, or likely to have an impact on, sacred sites and lands and waters traditionally occupied or used by them, indigenous and local communities should be invited to participate in and are to be accorded full respect at all stages of the assessment and development process, including planning and implementation.<sup>311</sup>

Affected indigenous and local communities should be invited to participate on any body appointed to advise on the screening and scoping phases or should be consulted on an impact assessment process for a development proposal, and should be involved in the establishment of the terms of reference for the conduct of the impact assessments, subject to national legislation. The screening and scoping phases should also take into account any community development plans and any mechanisms for strategic environmental assessment that have been formulated by an affected community.<sup>312</sup>

In addition to representation on any body established to advise on the other impact assessment process phases, the full and effective participation and involvement of affected indigenous and local communities should contemplate using participatory models of community engagement during the conduct of the impact assessments,

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<sup>308</sup> Akwé: Kon Guidelines No. 3.

<sup>309</sup> Akwé: Kon Guidelines No. 10.

<sup>310</sup> Akwé: Kon Guidelines No. 11.

<sup>311</sup> Akwé: Kon Guidelines No. 12.

<sup>312</sup> Akwé: Kon Guidelines No. 14.

including in decision-making. The proponent should also provide regular feedback to the affected community throughout all stages of the impact assessment and development processes.<sup>313</sup>

In order to maintain the health, well being and security of affected indigenous and local communities and the ecosystems that sustain them, and, to the extent that it is possible, in order to prevent adverse cultural, environmental and social impacts of any proposed developments, actors that should bear the responsibility for liability, redress, insurance and compensation should be clearly identified.<sup>314</sup>

Bearing in mind the unique relationship between indigenous and local communities and the environment, the *Akwé: Kon Guidelines* allow for the consideration of the integration of cultural, environmental, social impact assessments as a single process.<sup>315</sup>

Through the cultural impact assessment process, and particularly during the screening and scoping phases, the issues that are of particular cultural concern should be identified, such as cultural heritage, religions, beliefs and sacred teachings, customary practices, forms of social organization, systems of natural resource use, including patterns of land use, places of cultural significance, economic valuation of cultural resources, sacred sites, ceremonies, languages, customary law systems, and political structures, roles and customs. The possible impacts on all aspects of culture, including sacred sites, should therefore be taken into consideration while developing cultural impact assessments.<sup>316</sup>

In the conduct of the environmental component of an impact assessment regarding 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, the guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or process and in strategic environmental assessment, should be taken into account.<sup>317</sup>

In order to effectively undertake a social impact assessment with respect to an indigenous or local community that is or is likely to be affected by a proposed development, the screening and scoping phases should take into account gender and demographic factors, housing and accommodation, employment, infrastructure and services, income and asset distribution, traditional systems and means of

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<sup>313</sup> Akwé: Kon Guidelines No. 15.

<sup>314</sup> Akwé: Kon Guidelines No. 20.

<sup>315</sup> Akwé: Kon Guidelines No. 23.

<sup>316</sup> Akwé: Kon Guidelines No. 24.

<sup>317</sup> Akwé: Kon Guidelines No. 35.

production, as well as educational needs, technical skills and financial implications.<sup>318</sup>

Where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained. Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information. Modifications to the initial development proposal will require the additional prior informed consent of the affected indigenous and local communities.<sup>319</sup>

Indigenous and local communities should be encouraged, and provided with the necessary support and capacity to formulate their own community development plans. Such plans should include and should develop mechanisms for strategic environmental assessment that are commensurate with the goals and objectives of the development plans and appropriate poverty eradication programmes as defined by the indigenous and local communities.<sup>320</sup>

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.<sup>321</sup>

In any assessment procedure, subject to national legislation consistent with international obligations, 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.<sup>322</sup>

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<sup>318</sup> Akwé: Kon Guidelines No. 39.

<sup>319</sup> Akwé: Kon Guidelines No. 53.

<sup>320</sup> Akwé: Kon Guidelines No. 55.

<sup>321</sup> Akwé: Kon Guidelines No. 56.

<sup>322</sup> Akwé: Kon Guidelines No. 57.

In all circumstances related to the proposed development, the customary laws and intellectual property rights of the indigenous and local communities with respect to their traditional knowledge, innovations and practices, should be respected. Such knowledge should only be used with the prior informed consent of the owners of that traditional knowledge. In order to safeguard their rights, indigenous and local communities should establish, or be assisted to establish, protocols consistent with relevant national legislation for access to and use of traditional knowledge, innovations and practices in the cultural, environmental and social impact assessment processes. Assistance in establishing such protocols should be provided if so requested.<sup>323</sup>

## **INFORMATION, DECISION MAKING AND ACCESS TO JUSTICE**

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this *Aarhus Convention*.<sup>324</sup>

Within the scope of the relevant provisions of this *Aarhus Convention*, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.<sup>325</sup>

### **Access to Information**

1. The Contracting Parties to the *Convention on Biological Diversity* shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries. 2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the

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<sup>323</sup> Akwé: Kon Guidelines No. 60.

<sup>324</sup> Aarhus Convention Article 1.

<sup>325</sup> Aarhus Convention Article 3(9).

technologies referred to in Article 16, paragraph 1.<sup>326</sup> It shall also, where feasible, include repatriation of information.<sup>327</sup>

Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information: (a) Without an interest having to be stated; (b) In the form requested unless: (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.<sup>328</sup>

Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible ...<sup>329</sup>

The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of: (a) The proposed activity and the application on which a decision will be taken; (b) The nature of possible decisions or the draft decision; (c) The public authority responsible for making the decision; (d) The envisaged procedure, including, as and when this information can be provided: ... (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.<sup>330</sup>

Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has

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<sup>326</sup> Article 16, paragraph 1 of the CBD provides as follows: "Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment."

<sup>327</sup> CBD Article 17.

<sup>328</sup> Aarhus Convention Article 4(1).

<sup>329</sup> Aarhus Convention Article 5(2).

<sup>330</sup> Aarhus Convention Article 6(2).

access to a review procedure before a court of law or another independent and impartial body established by law ...<sup>331</sup>

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.<sup>332</sup>

### **Participation and Decision Making**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.<sup>333\*</sup>

1. In applying the provisions of this *ILO Convention 169*, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.<sup>334\*</sup>

1. In applying the provisions of *ILO Convention No. 169*, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective

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<sup>331</sup> Aarhus Convention Article 9(1). Article 4 contains 8 subparagraphs. Article 4(1) is referenced above. The other subparagraphs address issues involving timing of disclosure of environmental information, grounds for refusal of such disclosure, and costs charged for such disclosure.

<sup>332</sup> Convention on the Rights of the Child Article 17.

<sup>333</sup> UNDRIP Article 18.

<sup>334</sup> ILO Convention No. 169 Article 6.

institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.<sup>335\*</sup>

Parties, if they have not already done so, should seek to ensure the full participation of affected indigenous and local communities, in accordance with national legislation, in the decision-making process for of any development proposal, including the review and appeal process, taking into account methods of mediation and dispute resolution, which may include customary methods.<sup>336</sup>

All decisions regarding activities/interactions with indigenous and local communities related to the objectives of the *Convention on Biological Diversity* should be developed and elaborated at the appropriate level to ensure indigenous and local community empowerment and effective participation, bearing in mind that such activities/interactions should respect indigenous and local community decision-making structures.<sup>337</sup>

Full and effective participation/participatory approach: This principle recognizes the crucial importance of indigenous and local communities fully and effectively participating in activities/interactions related to biological diversity and conservation that may impact on them, and of respecting their decision-making processes and time frames for such decision-making. Ethical conduct should acknowledge that there are some legitimate circumstances for indigenous and local communities to restrict access to their traditional knowledge.<sup>338</sup>

Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.<sup>339</sup>

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to

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<sup>335</sup> ILO Convention No. 169 Article 6.

<sup>336</sup> Akwé: Kon Guidelines No. 22.

<sup>337</sup> Code of Ethical Conduct Section 3(27).

<sup>338</sup> Code of Ethical Conduct Section 3(30).

<sup>339</sup> Declaration on the Rights of Minorities Article 2(2).

which they be long or the regions in which they live, in a manner not incompatible with national legislation.<sup>340</sup>

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; ...<sup>341</sup>

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; ...<sup>342</sup>

Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.<sup>343</sup>

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this *Aarhus Convention*. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.<sup>344</sup>

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<sup>340</sup> Declaration on the Rights of Minorities Article 2(3).

<sup>341</sup> ICCPR Article 25. The distinctions mentioned in Article 2 of the ICCPR are: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>342</sup> CERD Article 5.

<sup>343</sup> Aarhus Convention Article 6(7).

<sup>344</sup> Aarhus Convention Article 7. Article 6, Paragraphs 3, 4 and 8 provide as follows: “3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making. 4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place. ... 8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment ...<sup>345</sup>

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.<sup>346</sup>

Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.<sup>347</sup>

### **Equality Before the Law and Access To Justice**

States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ...<sup>348\*</sup>

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.<sup>349\*</sup>

Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.<sup>350\*</sup>

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

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<sup>345</sup> Aarhus Convention Article 8.

<sup>346</sup> Convention on Intangible Cultural Heritage Article 15.

<sup>347</sup> Nagoya Protocol Article 12(2).

<sup>348</sup> UNDRIP Article 8(2).

<sup>349</sup> UNDRIP Article 11(2).

<sup>350</sup> UNDRIP Article 20(2).

lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.<sup>351\*</sup>

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.<sup>352\*</sup>

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. 2. Preference shall be given to methods of punishment other than confinement in prison.<sup>353\*</sup>

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.<sup>354\*</sup>

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...<sup>355</sup>

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

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<sup>351</sup> UNDRIP Article 28(1).

<sup>352</sup> UNDRIP Article 40.

<sup>353</sup> ILO Convention No. 169 Article 10(1).

<sup>354</sup> ILO Convention No. 169 Article 12.

<sup>355</sup> ICCPR Article 14(1).

through mutually agreed terms between indigenous and local communities and those undertaking such activities/interactions.<sup>356</sup>

Each State Party to the present *Covenant on Civil and Political Rights* undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>357</sup>

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice ...<sup>358</sup>

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this *Convention on the Elimination of All Forms of Racial Discrimination*, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>359</sup>

Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law

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<sup>356</sup> Code of Ethical Conduct Section 2(22).

<sup>357</sup> ICCPR Article 2(3).

<sup>358</sup> CERD Article 5.

<sup>359</sup> CERD Article 6.

and without prejudice to paragraph 3 below, of other relevant provisions of this *Aarhus Convention*.<sup>360</sup>

In addition and without prejudice to the review procedures referred to in [Articles 9(1) and 9(2) of the *Aarhus Convention*], each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.<sup>361</sup>

States should ensure, in accordance with their international human rights obligations, that all individuals, including human rights defenders of the progressive realization of the right to adequate food, are accorded equal protection under the law and that due process is guaranteed in all legal proceedings.<sup>362</sup>

States should pursue inclusive, non-discriminatory and sound economic, agriculture, fisheries, forestry, land-use, and, as appropriate, land-reform policies, all of which will permit farmers, fishers, foresters and other food producers, particularly women, to earn a fair return from their labour, capital and management, and encourage conservation and sustainable management of natural resources, including in marginal areas.<sup>363</sup>

## **BENEFIT SHARING**

Indigenous and local communities ought to receive fair and equitable benefits for their contribution to activities/interactions related to biodiversity and associated traditional knowledge proposed to take place on, or which are likely to impact on, sacred sites and lands and waters traditionally occupied or used by indigenous and local communities. Benefit-sharing should be regarded as a way of strengthening indigenous and local communities and promoting the objectives of the Convention on Biological Diversity and ought to be equitable within and among relevant groups, taking into account relevant community-level procedures.<sup>364</sup>

Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic

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<sup>360</sup> Aarhus Convention Article 9(2). Article 6 deals with public participation in decisions on specific activities. The phrase “paragraph 3 below” refers to Article 9(3), which requires Parties, when certain criteria are met, to provide members of the public access to procedures to challenge violations of national law related to the environment.

<sup>361</sup> Aarhus Convention Article 9(3).

<sup>362</sup> FAO Food Security Guidelines No. 1.4.

<sup>363</sup> FAO Food Security Guidelines No. 2.5.

<sup>364</sup> Code of Ethical Conduct Section 2(14).

resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.<sup>365</sup>

Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the 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. Such sharing shall be upon mutually agreed terms.<sup>366</sup>

### **CAPACITY BUILDING & AWARENESS**

Indigenous and local communities should have the opportunity to actively participate in research that affects them or which makes use of their traditional knowledge related to the objectives of the *Convention on Biological Diversity*, and decide on their own research initiatives and priorities, conduct their own research, including building their own research institutions and promoting the building of cooperation, capacity and competence.<sup>367</sup>

Parties shall: (a) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, inter alia, through educational and greater public awareness programmes; (b) cooperate with other Parties and international and regional organizations in achieving the purpose of this article; (c) endeavour to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries. These measures should be implemented in a manner which does not have a negative impact on traditional forms of production.<sup>368</sup>

Each Party shall 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. Such measures may include, inter alia: ... (b) Organization of meetings of indigenous and local communities and relevant stakeholders; ... (e) Promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders; ... (g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations; (h) Involvement of indigenous and local

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<sup>365</sup> Nagoya Protocol Article 5(2).

<sup>366</sup> Nagoya Protocol Article 5(5).

<sup>367</sup> Code of Ethical Conduct Section 2(25).

<sup>368</sup> Convention on Cultural Expressions Article 10.

communities and relevant stakeholders in the implementation of this Protocol; and (i) Awareness-raising of community protocols and procedures of indigenous and local communities.<sup>369</sup>

The Parties shall cooperate in the capacity-building, capacity development and strengthening of human resources and institutional capacities to effectively implement this *Nagoya Protocol* in developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition, including through existing global, regional, subregional and national institutions and organizations. In this context, Parties should facilitate the involvement of indigenous and local communities and relevant stakeholders, including non-governmental organizations and the private sector.<sup>370</sup>

In addition to their obligations pursuant to article 4, affected country Parties undertake to: ... (d) promote awareness and facilitate the participation of local populations, particularly women and youth, with the support of non-governmental organizations, in efforts to combat desertification and mitigate the effects of drought.<sup>371</sup>

The Parties recognize the significance of capacity building – that is to say, institution building, training and development of relevant local and national capacities – in efforts to combat desertification and mitigate the effects of drought. They shall promote, as appropriate, capacity-building: (a) through the full participation at all levels of local people, particularly at the local level, especially women and youth, with the cooperation of non-governmental and local organizations.<sup>372</sup>

The Parties shall cooperate with each other and through competent intergovernmental organizations, as well as with non-governmental organizations, in undertaking and supporting public awareness and educational programmes in both affected and, where relevant, unaffected country Parties to promote understanding of the causes and effects of desertification and drought and of the importance of meeting the objective of this *Convention on Desertification*.<sup>373</sup>

1. The States Parties to the present *Covenant on Economic, Social and Cultural Rights* recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to

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<sup>369</sup> Nagoya Protocol Article 21.

<sup>370</sup> Nagoya Protocol Article 22.

<sup>371</sup> Convention on Desertification Article 5(d).

<sup>372</sup> Convention on Desertification Article 19(1)(a).

<sup>373</sup> Convention on Desertification Article 19(3).

the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.<sup>374</sup>

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<sup>374</sup> ICESCR Article 6.

## **PART II**

### **RATIONALE, METHODOLOGY AND A NOTE ON LEGAL WEIGHT**

## RATIONALE

Members of Indigenous peoples and local communities – and the community-based and non-governmental organizations that support them – often ask what their international rights are. It is a complex answer for at least three reasons:<sup>375</sup>

- The sources of the rights are diffuse. ‘Rights’ appear in specific provisions from across a range of instruments that are themselves located within distinct categories of laws such as human rights, environment, intellectual property, and culture;
- An individual’s or a group’s specific rights will depend on, among other things: a) whether they are Indigenous peoples or from other marginalised or minority groups; b) the uniqueness of their ways of life, for example, whether they are farmers, livestock keepers, forest-dependent, or fisher folk; and c) the nature of their self-defined territories and areas on which they depend, for example, whether they are coastal or marine areas, mountains, living in or near externally-defined protected areas; and
- International instruments are of differing legal weight and each is signed, adopted or ratified by a different list of countries, which has a direct bearing on the value of the rights they provide for at the national and local levels.

As one of the responses to this, Natural Justice recently undertook research on the full spectrum of international law and jurisprudence relating to Indigenous peoples and local communities who strive – broadly speaking – to protect the integrity of their biological diversity and cultural heritage.<sup>376</sup> That report’s section on international law is ordered according to categories of laws such as human rights, biodiversity and climate change. Under those broad headings, the report details the relevant provisions in each instrument.

Although it is an effective way to comprehensively identify the full spectrum of

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<sup>375</sup> This is a significant simplification, but highlights the point that as a group of lawyers, we are unable to provide a clear answer to an important question.

<sup>376</sup> Jonas, H., J. E. Makagon, S. Booker, and H. Shrumm, 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: International Law and Jurisprudence*. Natural Justice and Kalpavriksh, Bangalore and Pune. The report was produced as part of a larger project to explore the international, regional and national laws and jurisprudence that support or hinder the ability of Indigenous peoples and local communities to govern their territories, areas and natural resources. The report was developed in partnership with the ICCA Consortium with inputs from the IUCN Environmental Law Centre and is available at: <http://naturaljustice.org/library/our-publications/legal-analysis> and <http://www.iccaconsortium.org/>.

relevant law at the international level, its accessibility to non-lawyers is inherently weak. For example, an individual or a community or people who would like to know more about their rights to free, prior and informed consent (FPIC) over activities relating to, among other things, their lands, natural resources or knowledge would not find any easy answers in the report. Instead, they would be compelled to work through the whole document to pull together the provisions relevant to FPIC that, in this case, are contained in at least the following international instruments:

- UN Declaration on the Rights of Indigenous Peoples;
- ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (commonly referred to as ILO Convention No. 169);
- FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security;
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization;
- Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities; and
- Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

The answers are there, but the format is cumbersome and hinders the accessibility of the information to the very individuals, communities and peoples it is intended to support. It became apparent that a more innovative approach would be required.

## INTEGRATED RIGHTS APPROACHES

In the 1990s, together with Graham Dutfield, Alejandro Argumedo, and many others,<sup>377</sup> Darrell Posey<sup>378</sup> began to develop the concept of *traditional resource rights* (TRRs) as a political, juridical and ecological project to more accurately reflect Indigenous and traditional peoples' views and concerns in law.<sup>379</sup>

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<sup>377</sup> In respective works over the years, Posey and his co-authors acknowledge the inputs of a wide range of people who provided inspiration on which the theory is based.

<sup>378</sup> More information about the life and work of Darrell Posey is available online: [http://en.wikipedia.org/wiki/Darrell\\_A.\\_Posey](http://en.wikipedia.org/wiki/Darrell_A._Posey). The authors consider him, among other things, a pioneering political and *juridical* ecologist who combined empathy, intellectual rigour and innovation to challenge established approaches to the issues to which he committed his life's work.

<sup>379</sup> See, for example: Posey, D., and G. Dutfield, 1996. *Beyond Intellectual Property Rights: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*. IDRC: Ottawa. For an overview of the full literature on traditional resource rights, see: Jonas, H.,

In the seminal paper *Indigenous Peoples and Traditional Resource Rights*, Posey describes TRRs as constituting “bundles of rights” already widely recognized by legally and non-legally binding international agreements, which include human rights such as cultural rights, the right to self-determination, and land and territorial rights.<sup>380</sup> TRRs take into account the spiritual, aesthetic, cultural, and economic values of traditional resources, knowledge and technologies, and accordingly recognize the rights of Indigenous peoples and local communities to control their use. In this context, TRRs is an integrated rights concept that recognizes the “inextricable link between cultural and biological diversity and sees no contradiction between the human rights of Indigenous and local communities, including the right to development, and environmental conservation.”<sup>381</sup>

TRRs emerged as the result of an explicitly political legal project to more accurately reflect Indigenous peoples’ and local communities’ views and concerns, and focused on integrating otherwise disparate legal regimes, instruments and provisions. The framework is founded on four processes:

1. Identifying bundles of rights expressed in existing moral and ethical principles;
2. Recognizing rapidly evolving soft law influenced by the customary practice of states and legally non-binding agreements;
3. Harmonizing existing legally binding international agreements signed by States, whereby areas of conflict between different agreements should be resolved, giving priority to human rights concerns; and
4. “Equitizing” to provide marginalized Indigenous peoples and traditional and local communities with favourable conditions to influence all levels and aspects of policy planning and implementation.<sup>382</sup>

The first two processes required what might be referred to as *legal mapping* (‘lexography’), followed by what Posey *et al.* refer to as *bundling*. By finding individual provisions that support Indigenous peoples’ and local communities’ rights from across a range of legal instruments and reordering them in a locally relevant

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and H. Shrumm, 2012. *Recalling Traditional Resource Rights: An Integrated Rights Approach to Biocultural Diversity*. Natural Justice: Malaysia.

<sup>380</sup> Posey, D., 1995. *Indigenous Peoples and Traditional Resource Rights: a Basis for Equitable Relationships?* A paper prepared for a workshop on Indigenous Peoples and Traditional Resource Rights at the Green College Centre for Environmental Policy and Understanding, University of Oxford. Page 20.

<sup>381</sup> Posey, D., and G. Dutfield, 1996. Page 77.

<sup>382</sup> Posey, D., 1996. *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*. IUCN: Gland. Pages 16-18.

and comprehensive manner, TRRs integrate an otherwise fragmented<sup>383</sup> international framework of rights relating to biocultural diversity. Using this methodology, Posey sets out a range of relevant binding and non-binding instruments from across a broad spectrum, bundled under the basic principles upon which TRRs are based.<sup>384</sup> In effect, this approach attempts to counter the abovementioned inherent challenges that international law poses for Indigenous peoples and local communities. By reading and effectively reordering the pages of the legal landscape in an innovative way, like the cutting of an onion, Posey *et al.* reveal a novel formulation of an existing internal structure.

In effect, looking at existing laws from a new integrated perspective enables a paradigm shift towards more comprehensive assertions of Indigenous peoples' and local communities' rights, and provides a conceptual framework for proposing systemic changes to the way laws are developed and implemented. Posey also felt that TRRs could serve a useful purpose at the local level. Specifically, he argued that "[b]y prioritising Indigenous peoples' rights to say NO to exploitation"<sup>385</sup> and "by acknowledging communities' rights to control access to traditional resources and territories,"<sup>386</sup> TRRs could guide negotiations and legal processes towards new partnerships based on increased respect for traditional communities. TRRs could also guide governments in more effectively implementing their international obligations and responsibilities relating to human rights, trade, environment, and

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<sup>383</sup> An interesting future question relates to whether the notion of self-contained regimes and *lex specialis* has any application in this context. Koskenniemi, M. 2006. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. International Law Commission. UN Document A/CN.4/L.682.

<sup>384</sup> These bundles of rights and their location within international agreements, identified by the Working Group on Traditional Intellectual, Cultural and Scientific Resource Rights, include: basic human rights; right to development; rights to environmental integrity; religious freedom; land and territorial rights; right to privacy; prior informed consent and full disclosure; farmers' rights; intellectual property rights; neighbouring rights; cultural property rights; cultural heritage recognition; and rights of customary law and practice. Posey, 1995. Page 17. Also reproduced in Posey, D., 1997. *International Agreements Affecting Indigenous Local Knowledge: Conflict or Conciliation*, Working Paper of the Avenir des Peuples des Forêts Tropicales, Whitstable. Notably, the Working Group also carried out a survey of 63 statements and declarations made by Indigenous peoples from which they identified 80 common demands. From these, they elaborated six main topic areas, namely: self-determination; territory; free, prior and informed consent; human rights; cultural rights; and treaties. Posey, 1996. Page 16.

<sup>385</sup> Posey, 1997. Page 15, original emphasis.

<sup>386</sup> Posey, 1997. Page 15. Posey suggested that this requires proactive and practical approaches by communities that could include: self-demarcation of Indigenous peoples' territories; community databases of traditional knowledge; and community-controlled research. Posey, 1997. Page 14.

development.<sup>387</sup>

When looking into the future in the late 1990s, Posey surmised that proper development of TRRs would require “a process of dialogue” between Indigenous peoples, local communities and governmental and non-governmental institutions on a wide range of issues, including local economic interests, accountability, human rights, and environmental concerns for long-term sustainability.<sup>388</sup> That mantle has been carried by a number of organizations<sup>389</sup> and by practitioners and academics in various settings.<sup>390</sup> The approach has not, however, been applied to the international instruments that have been agreed in the meantime, including the watershed UN Declaration on the Rights of Indigenous Peoples. This publication undertakes that task, applying the TRR methodology to the full spectrum of contemporary international law of relevance to the protection of biocultural diversity.

## METHODOLOGY

Drawing on Posey *et al.*'s methodology, we undertook the following steps:

- Critiqued international law from a biocultural perspective;
- Reconsidered the current international legal framework in the context of the interconnectedness of territories and ways of life;
- Comprehensively reviewed the full spectrum of international law potentially relevant to biocultural diversity;<sup>391</sup>
- Selected specific types of instruments, guidelines and decisions (among other types of hard and soft international law) for inclusion in the Compendium;
- Identified the most relevant provisions within each selected instrument;
- Reviewed these provisions to distil their essence to a number of core rights that would (at this stage) adequately encompass all of the provisions;
- Grouped or ‘bundled’ the provisions under the relevant core rights; and

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<sup>387</sup> Posey, 1997. Page 14.

<sup>388</sup> Posey, 1995. Page 19.

<sup>389</sup> See, for example: Argumedo, A., and M. Pimbert, 2005, *Traditional Resource Rights and Indigenous Peoples in the Andes*. IIED, London; and Argumedo, A., and M. Pimbert, 2007, *Protecting Indigenous Knowledge Against Biopiracy in the Andes*. IIED, London.

<sup>390</sup> See, for example, Villalba, F., 2010, “Un-discovering Wilderness: Protecting Traditional Resource Rights in U.S. National Parks”. *IUCN-CEESP Policy Matters 17*: 126-134; and Union of BC Indian Chiefs, *Protecting Knowledge: Traditional Resource Rights in the New Millennium*. Session outlines available online at: <http://www.ubcic.bc.ca/Resources/conferences/PK.htm#axzz1IKtrnCl>.

<sup>391</sup> See Annex I for the full list of instruments that were considered, as well as those included in the Compendium.

- Listed the rights in the Compendium in accordance with a generalized territory or landscape.

The next sub-sections set out these steps in more detail to provide clarity about what is and is not included in the Compendium and how the information is presented. It is hoped that this will better enable others to engage critically with the methodology and in doing so, lead to the improvement and effective use of the Compendium.

## **A. Biocultural Critique of International Law**

Many laws directly undermine Indigenous peoples and local communities.<sup>392</sup> However, even where laws are *prima facie* supportive, they can still be inherently challenging to Indigenous peoples and local communities intent on using them to protect their ways of life. These challenges manifest themselves in at least three ways.

First, laws have a tendency to compartmentalize otherwise interdependent aspects of biocultural diversity. While communities manage integrated territories and land- and seascapes, States tend to view each type of resource and associated traditional knowledge through a narrow lens, drawing legislative borders around them and addressing them in isolation.

Second, the fragmentary nature of the law is compounded by the fact that they are implemented by state agencies focusing on particular issues such as biodiversity, forests, agriculture, or Indigenous knowledge systems.<sup>393</sup> The result is that communities' lives are disaggregated in law and policy, forcing their claims to self-determination into issue-specific sites of struggle.

Third, positive law (both international and State) often conflicts with the customary laws that govern communities' stewardship of natural resources.<sup>394</sup> For example, the understanding of 'property' under positive law is based on the private rights of a person (human or corporate) to appropriate and alienate physical and intellectual property. In contrast, communities' property systems tend to emphasize relational

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<sup>392</sup> For example, the Philippine Mining Act (1995) is shown to be in direct opposition to Indigenous peoples' and local communities' interests. Pedragosa, S., 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: The Philippines*. Natural Justice and Kalpavriksh, Bangalore and Pune.

<sup>393</sup> For example, in some countries, genetic resources are dealt with by separate departments from traditional knowledge.

<sup>394</sup> Cotula and Mathieu, 2008, page 11.

and collective values of resources.<sup>395</sup> Furthermore, the implementation of positive law tends to overpower and contravene customary law. A system that denies legal pluralism<sup>396</sup> has direct impacts on communities' lives, for example, by undermining the cultural practices and institutions that underpin sustainable ecosystem management.<sup>397</sup>



**Figure 1:** The fragmentary nature of State law contrasts starkly with the integrated nature of customary law.

These three challenges, among others,<sup>398</sup> highlight the fact that the imposition of international and national laws, which are inherently fragmentary and based on

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<sup>395</sup> Tobin, B., and E. Taylor 2009. "Across the Great Divide: A Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru". *Initiative for the Prevention of Biopiracy*, Year IV: 11, page 10. Such systems have been described as "...commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)." See Tsosie, R., 2007. "Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm". *Journal of Law, Medicine & Ethics*, 35: 396, cited in Tobin and Taylor, 2009, page 36.

<sup>396</sup> This type of system could be referred to as a 'legal monoculture'.

<sup>397</sup> Sheleef, L., 2000. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. Frank Cass: London, England, and Portland, Oregon.

<sup>398</sup> Others include the fact that for many Indigenous peoples and local communities, legislative and judicial processes can be particularly disempowering. With regard to international law, many communities simply do not know (or know how to find out) what rights and responsibilities are being agreed at the international, regional or national levels, or what precedents are being handed down by a range of courts.

static misperceptions of local realities, is likely to undermine the interconnected and adaptive systems that underpin biocultural diversity. The implementation of such laws compounds these challenges by requiring communities to engage with disparate stakeholders<sup>399</sup> according to a variety of disconnected regulatory frameworks, many of which may conflict with their customary laws, institutions and decision-making processes.

## **B. Reimagining the Law**

In this light, the existing international legal system requires reconstitution in order to support the integrity of biocultural systems, not *vice versa*. By rejecting the orthodox and fragmentary approach to biological and cultural diversity and replacing it with a framework modeled on the way Indigenous peoples and local communities interact with their territories, natural resources and knowledge, integration – not fragmentation – becomes the new organizing principle.

While this study cannot change the deep structure of the international legal framework, it can *reimagine* the shape of those laws and the relationships between provisions that address similar issues, albeit in separate international instruments. Developing a new reading of the current legal landscape fundamentally changes people’s perceptions of the law and opens up new legal and political possibilities therein.

As Figure 2 below illustrates, this exercise can be thought of as ‘counter-mapping the law’. Just as participatory mapping practitioners have enabled Indigenous peoples and local communities to map areas from their own perspectives,<sup>400</sup> this approach counter-maps the law to make it more relevant to the localities to which it is intended to apply. Thus, while the actual topography of the international legal landscape remains unchanged, it is hoped that the Compendium illustrates a novel way of reading the ‘lay of the law’. In this light, the law is divested of its current shape and reapplied to living territories and biocultural systems.

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<sup>399</sup> Examples include government agencies and officials, conservation and development NGOs, private sector companies, the media, and researchers.

<sup>400</sup> Taylor, J., 2008. “Naming the Land, San Counter-mapping in Namibia’s West Caprivi”. *Geoforum*, 39: 1766-1775.



Climate Change

Reducing Emissions from Deforestation and Forest Degradation

Cultural, Environmental and Social Impact Assessments

Sacred Natural Sites

Protected Areas

Land Tenure & Customary Tenure

Right to Water

Knowledge, Innovations and Practices

Customary Uses

Right to Information, Decision Making and Access to Justice

Self-identification and Self-determination

The Rights of Women and Children

Farmers' Rights

Education and Healthcare

Human, Cultural, Linguistic and Religious Rights

Plant Genetic Resources for Food and Agriculture

Access and Benefit Sharing

Traditional Authorities, Customary Laws and FPIC

Livestock Keepers' Rights

Animal Genetic Resources for Food and Agriculture

Figure 2: The legal landscape.

## C. Comprehensive Review of International Law

The following areas of international law and policy were exhaustively researched for any references to Indigenous peoples' and local communities' rights and biocultural diversity (writ large):

- Human rights, including Indigenous peoples' rights;
- Rio Conventions, their subsidiary protocols, and important decisions of the Conferences of the Parties, including guidelines and codes of ethical conduct;
- Intellectual property;
- Cultural heritage under the auspices of UNESCO;
- Spiritual and religious integrity;
- Education and languages;
- Development;
- Land rights, including tenure, non-removal, governance, customary and sustainable use;
- Water rights;
- Food sovereignty;
- Agriculture and other relevant instruments under the FAO;
- Climate change, forests and desertification;
- Other biodiversity-related conventions related to wetlands and endangered species;
- IUCN Resolutions and Recommendations from the first four World Conservation Congresses and the Fifth World Parks Congress;
- Emerging joint work on biocultural diversity; and
- Procedural rights, including free, prior and informed consent, impact assessments, access to justice, and benefit sharing.

Annexes I-IV set out the full list of instruments and other documents reviewed. As mentioned above, the research findings, which highlight the significant volume of rights that Indigenous peoples and local communities have at the international level, were written up in a report on international law and jurisprudence.<sup>401</sup> As noted, however, the report does not present the information in a particularly accessible format.

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<sup>401</sup> Jonas, *et al.*, 2012. Available at [www.iccaconsortium.org](http://www.iccaconsortium.org) and [www.naturaljustice.org/library/our-publications/legal-analysis](http://www.naturaljustice.org/library/our-publications/legal-analysis).

## **D. Selecting Elements of International Law**

### ***Inclusions***

The Compendium could have been developed to contain every possible reference from the full body of hard and soft law. However, this was considered too broad an approach. Instead, criteria were developed to decide which instruments qualified for inclusion in the Compendium. The overriding criterion applied to each international instrument, subsidiary protocol, guideline, or decision (etc.) was whether it was negotiated within the UN system and confers legal, moral or voluntary responsibilities on States with regard to the rights of Indigenous peoples and local communities. As per the TRR approach, both hard and soft law instruments are included in the Compendium. Annex I illustrates which of the reviewed instruments are included in this first edition of the Compendium.

The Compendium also contains rights related to issues such as labour, employment and social and health services. While these issues could be considered peripheral to the focus of this work, they are in fact critical to Indigenous peoples' futures and are included for this reason.

### ***Exclusions***

Notably, while instruments such as the Tkarihwaí:ri Code of Ethical Conduct and the Akwé: Kon Guidelines were included, the Compendium does not yet contain decisions of the Conference of the Parties to the Convention on Biological Diversity that are not standalone documents.<sup>402</sup> It was also decided that while this first edition of the Compendium would not include all of the Rio Conventions' programmes of work, the CBD Programme of Work on Protected Areas (PoWPA) would be included in this first edition to garner feedback on how such an exercise would work in practice. Similarly, while it excludes a range of voluntary guidelines developed under the auspices of the Food and Agriculture Organization, for example, on fire management<sup>403</sup> and responsible management of planted forests,<sup>404</sup> it does include the Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the context of National Food Security, for the same reason as PoWPA. It also omits IUCN

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<sup>402</sup> One exception to this is to include 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.

<sup>403</sup> FAO Voluntary Guidelines on Fire Management: Principles and Strategic Actions, 2006. Available at: <http://www.fao.org/docrep/009/j9255e/j9255e00.htm>

<sup>404</sup> FAO Voluntary Guidelines on Responsible Management of Planted Forests, 2006. Available at: <http://www.fao.org/docrep/009/j9256e/j9256e00.htm>

Resolutions and Recommendations from World Conservation Congresses and World Parks Congresses because IUCN does not operate within the UN system of international law-making.<sup>405</sup>

Although the authors are aware of the critical developments and interpretations of soft law relating to Indigenous peoples' rights, the Compendium does not yet include reports issued by the following mechanisms, primarily because such reports are directed towards UN bodies,<sup>406</sup> international organizations or States and do not confer rights:

- UN Permanent Forum on Indigenous Issues;
- Expert Mechanism on the Rights of Indigenous Peoples;
- Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples; and
- Other relevant Special Rapporteurs such as those on Adequate Housing, on Right to Food, on Cultural Rights, on Minority Issues, on Human Rights Defenders, and on Human Rights of Internally Displaced Persons.<sup>407</sup>

Equally, because of the non-binding nature of declarations and plans of implementation, the Compendium also omits references to any sustainable development-related documents such as the Stockholm Declaration (1972), the Rio Declaration on Environment and Development (1992), Agenda 21 (1992), and the recent outcome document of Rio+20, *The Future We Want* (2012).<sup>408</sup>

Similarly, important Indigenous peoples' declarations such as the (Rio+20) Indigenous Peoples International Declaration on Self-Determination and Sustainable Development are not included because they do not hold any legal weight at the international level.<sup>409</sup> The Compendium also omits otherwise important judgements from regional courts such as the Inter-American Court of Human Rights<sup>410</sup> because

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<sup>405</sup> However, they remain important for their contributions to international policy and discussion about their inclusion is warranted.

<sup>406</sup> For example, at its Tenth Session in 2011, the Permanent Forum voiced its support for recognition of Indigenous peoples as "peoples" and called for a change in the terminology used by the Convention on Biological Diversity to reflect this recognition. Tenth Session Report, at Paragraph 26.

<sup>407</sup> See Annex I.

<sup>408</sup> See Annex I. For more on the UN conferences on sustainable development, see Doran, P., D. Paul, K. Ripley, N. Risse, J. Van Alstine, and L. Wagner (2012). Summary of the UN Conference on Sustainable Development, 13-22 June 2012. Available at: <http://www.iisd.ca/download/pdf/enb2751e.pdf>

<sup>409</sup> See Annex III.

<sup>410</sup> See Annex II. For a recent example, see the recent Inter-American Court of Human Rights Case (No. 12,465) *Kichwa Indigenous People of Sarayaku and its Members*.

their mandates are restricted to their respective regions. It can be argued that their judgements contribute to a normative international framework,<sup>411</sup> but they are not included at this stage.

The Compendium does not include any reference to regional human rights conventions<sup>412</sup> because they are necessarily not internationally applicable. It also excludes the operational policies and guidance documents of multilateral development banks and financial institutions such as the World Bank because they were not adopted through international negotiations.<sup>413</sup> Although the abovementioned bodies, declarations, reports, and judgements (among other instruments) may fall outside of this publication's current purview, they are referenced in the annexes because they remain integral elements of an evolving political and legal landscape and should be consulted when considering the incumbent issues.

## **E. Identifying Relevant Provisions**

The provisions of most relevance to the protection to biocultural diversity were chosen from the selected instruments and subsidiary protocols, guidelines and decisions. This process could be described as 'mapping' or 'harvesting' relevant rights from across a legal landscape.

While the Compendium tends to err on the side of inclusivity, the list of provisions it contains is not exhaustive. The selection of instruments and provisions therein requires an inherently subjective interpretation of the types of rights that are relevant for the stewardship of biocultural diversity. Secondly, even the most inclusive of approaches has to set a limit at some point. For example, while the whole Convention on Biological Diversity (CBD) can be argued to be of relevance to biocultural diversity, some provisions such as Articles 8(j) and 10(c) are more directly relevant than others to Indigenous peoples and local communities.

With reference to the selection of instruments (Step D) and within those the selection of provisions (Step E), it is not the intention of the Compendium to draw a stark line across swathes of law, forever including some instruments of provisions and excluding others. Instead, by bringing attention to the volumes of relevant instruments and supportive provisions and presenting the body of law in an integrated manner, this publication promotes a process of legal exploration beyond

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<sup>411</sup> Lynch, O., 2011. *Mandating Recognition: International Law and Aboriginal/Native Title*. Rights and Resources Initiative: Washington D.C.

<sup>412</sup> See Annex I.

<sup>413</sup> See Annex IV.

any perceived boundaries drawn either by an orthodox understanding of the law or by the Compendium (as currently articulated). In this way, dialogue about the key issues is promoted between Indigenous peoples, local communities and other interested parties, and the body of work can continue to be developed over time.

## **F. Developing the Core Rights**

Through careful review and deliberation of the full extent of the provisions, it was possible to identify a number of core rights. These rights were judged to adequately encompass the provisions identified in the mapping process. For example, the following core procedural rights were identified:

- Precautionary approach;
- Free, prior and informed consent in the context of:
  - Land, waters and natural resources;
  - Genetic resources; and
  - Traditional knowledge, innovations and practices;
- Cultural, environmental and social impact assessments;
- Access to information;
- Public participation in decision making;
- Equality before the law and access to justice;
- Benefit sharing; and
- Capacity building and awareness.

Nevertheless, these rights are intended neither to be crystallized nor to represent an exhaustive list and would benefit greatly from further refinement.

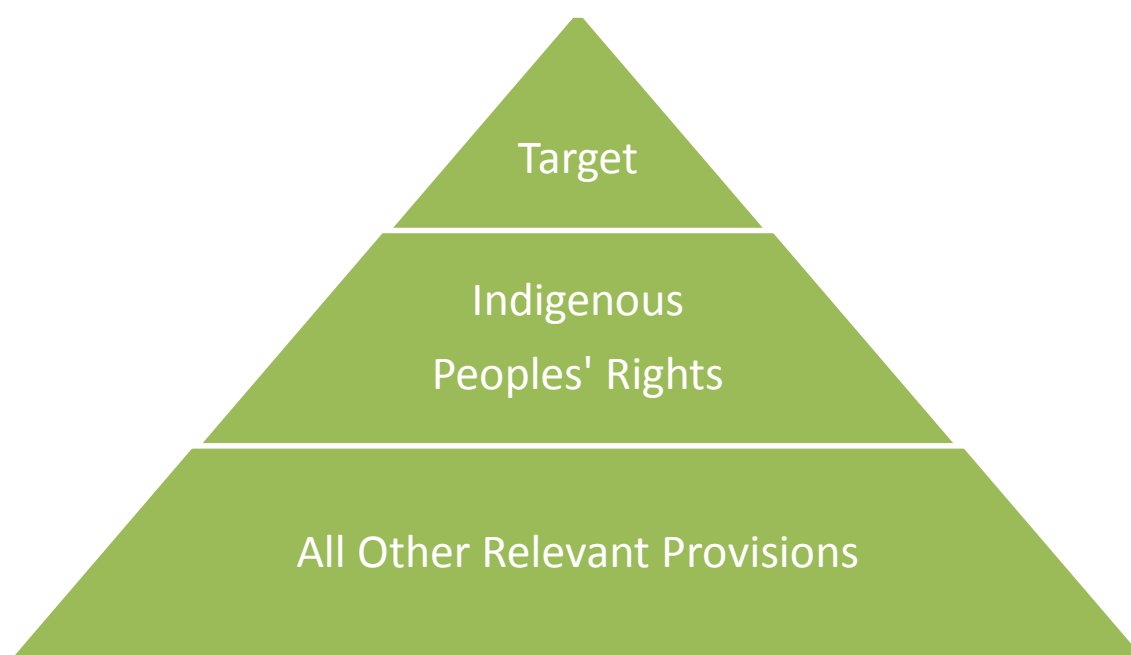
## **G. Bundling the Provisions under the Core Rights**

Each individual provision was considered in the context of these core rights and included under the most relevant one. For example, ILO Convention No. 169's relevant provisions were included under the following core rights:

- Overarching Indigenous peoples' rights
- Traditional governance systems and customary laws
- Knowledge, innovations and practices
- Education and languages
- Development
- Overarching rights
- Non-removal from lands or territories
- Governance of territories, lands and natural resources
- Local agricultural systems

- Free, prior and informed consent relating to lands, waters and natural resources
- Information, decision making and access to justice
  - Participation and decision making
  - Equality before the law and access to justice

Within each core right, it was initially considered useful to have the most legally-binding provisions listed at the top. However, due to the challenge related to legal weight (see Annex V), this approach was not adopted, and the order in which the provisions appear does not intend to communicate anything about their relative importance or legal weight. Instead, any relevant targets (such as the Aichi Biodiversity Targets) are privileged within each core right and appear at the top of the section. These are followed by provisions from instruments relating only to Indigenous peoples and finally, by all other provisions. This order (as per Figure 3 below) seems appropriate for this first edition, but remains open to discussion.



**Figure 3:** The internal structure of each core right.

Importantly, even though some provisions could clearly have been put under more than one core right, for this publication, the provisions were not duplicated. In this light, the core rights under which specific provisions are placed are merely indicative and are not intended to ascribe categorical labels. An online version of the Compendium (such as a searchable database) may overcome this issue.

It is also noted that while the methodology draws heavily on Posey *et al.*'s integrated rights approach, the Compendium *integrates* but does not intend to *merge* the

referenced provisions. The rights of Indigenous peoples, for example, are found in a number of focused and hard-fought instruments (such as the UN Declaration on the Rights of Indigenous Peoples), as well as in specific provisions from other international instruments (such as Article 8(j) of the Convention on Biological Diversity). To merge them with a number of other less-specific rights runs the risk of diluting their significance. Nothing in this document should be used in any way to undermine fundamental human rights and Indigenous peoples' rights. To underscore this point, all provisions that appear in the Compendium from instruments solely relating to Indigenous peoples (i.e. ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples) are identified with an asterisk.

## H. Developing the Compendium

In the context of what is described above, the Compendium's internal logic is designed according to an actual territory or landscape. With reference to Figure 2 above, it begins with the substantive human rights of individuals, communities and peoples. It then works outwards to substantive rights relating to land tenure and non-removal from lands and territories, then across agricultural fields and into forests and dry lands. Finally, it enters the realm of legislatures and judicial systems by addressing the procedural rights afforded to individuals, communities and peoples. In this light, the Compendium's internal structure, illustrated in Figure 4 below, is a case of form following function.<sup>414</sup> Both the preamble and operative provisions of the Compendium are implicitly structured in this way.<sup>415</sup> Despite the blurring between the two categories, to assist the accessibility of the document it is divided into two categories: substantive rights and procedural rights.<sup>416</sup>

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<sup>414</sup> Phraseology adapted from: "It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things super-human, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law." Sullivan L., "The Tall Office Building Artistically Reconsidered." Published Lippincott's Magazine (March 1896).

<sup>415</sup> Notably, the authors considered organizing it along the same lines as the UN Declaration on the Rights of Indigenous Peoples, but felt that using that framework could be critiqued for trying to "extend" Indigenous peoples' rights to local communities. The landscape approach seemed more appropriate. As per the thrust of this section, there is nothing fixed about the framework used, and debate about the most useful way to structure the Compendium in the future is welcome.

<sup>416</sup> The authors hope that providing clarity about the underlying structure of the Compendium will foster discussion about ways to improve this aspect of the methodology.

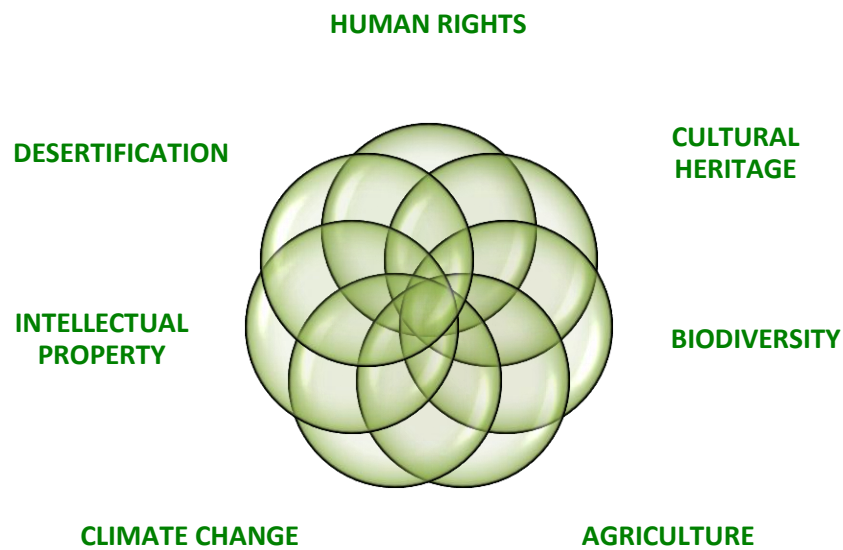


**Figure 4:** The internal structure of the Compendium.

### **Concluding Observations: Re-centering International Law**

The Compendium promotes an overall methodological approach to the law that can be visually represented in a Venn diagram, as set out in Figure 5 below. The Compendium should be seen as constituting the core of a number of areas of international law that are relevant to biocultural diversity. Rather than continuing to see the bodies of law as separate, they can be re-conceptualized in terms of their common but differentiated recognition of the rights of Indigenous peoples and local communities to protect their territories, natural resources, and cultures.

The diagram below attempts to underscore this point, with the centre representing the provisions in each category of law of *most relevance* to biocultural diversity, working out to less directly relevant provisions at the periphery of each. Notwithstanding this perspective, the work does not intend to divorce the provisions included in the Compendium either from the instrument from which they are drawn or from the larger area of law in which they are located (human rights, biodiversity, etc.).



**Figure 5:** Bodies of law presented as intersecting circles.

Studying the diagram leads to the emergence of a deeper point. For the first time, the rights of Indigenous peoples and local communities to protect their biocultural diversity are posited at the centre of the framework, forming the axis around which a range of instruments revolves. It begins to shift the emphasis away from the established way of thinking about the law as blocks of distinct instruments, within which Indigenous peoples and local communities find rights of relevance to themselves, to one where their rights to protect biocultural diversity becomes the fundamental determinant of the law's function and thus its form. It is effectively a case of reimagining or re-centering the law to privilege local realities (both of communities and of natural ecosystem processes) for a new juridical and political ecology of biocultural diversity.

## CLARIFICATIONS

There are a number of important clarifications to be made.

### A. Biocultural Diversity

“Biocultural diversity” is an evolving and contested term.<sup>417</sup> The concept of biocultural diversity can be described most simply as the “inextricable link”<sup>418</sup> between biological, cultural and linguistic diversity. For tens of thousands of years, diverse systems of values, beliefs, practices, languages, institutions, social norms, and worldviews have mediated the interrelationships between humans and our natural surroundings.

The close relationship between biological, cultural and linguistic diversity also means that they are subject to many common threats, ranging from privatization of natural resources to culturally inappropriate forms of education and healthcare. However, given that both natural and cultural systems are dynamic processes with great capacity for change, adaptation and renewal, interaction with dominant external forces doesn't necessary result in homogenization. Important elements of cultures can still transcend social, economic and political upheaval and enable peoples and communities to interact with the environment within natural limits.

In this light, and in order to avoid essentialising or exoticising certain peoples or ways of life, it has been argued that the notion of biocultural diversity should also be extended to non-indigenous communities as well as people in urban and industrialized areas.<sup>419</sup> Assuming that all humans have an innate connection with nature<sup>420</sup> – and given that the primary drivers of biodiversity and cultural loss are rooted in industrialized and urbanized societies – there is an urgent need to reinvigorate a diversity of cultural and spiritual values and practices in order to ensure that humanity as a whole can attain wellbeing within the natural limits of the environment.

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<sup>417</sup> For more on biocultural diversity, heritage and systems, see: <http://biocultural.iied.org/>. As noted in footnote 3, some people may prefer the term ‘ecocultural’, as ‘biocultural’ may be perceived as referring only to biological diversity (the variety of life at the genetic, species and ecosystem levels), rather than the full extent of ecological diversity (which includes both biotic and abiotic components).

<sup>418</sup> International Society of Ethnobiology, 1988. *Declaration of Belém*. Available at: <http://ethnobiology.net/docs/DeclarationofBelem.pdf>.

<sup>419</sup> Cocks, M., 2006. “Biocultural Diversity: Moving Beyond the Realm of ‘Indigenous’ and ‘Local’ People”. *Human Ecology*, 34(2): 185-200.

<sup>420</sup> Kellert, S.R., and E.O. Wilson (eds.), 1993. *The Biophilia Hypothesis*. Washington, DC: Island Press.

## B. Indigenous Peoples' Rights vis-à-vis Local Communities' Biocultural Rights?

Indigenous peoples are "*indigenous*, because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands of in close proximity."<sup>421</sup> The source of Indigenous peoples' rights, briefly put, is an extensive connection to the land of their ancestors and subsequent marginalization, primarily resulting from colonialism and related activities. The rights of Indigenous peoples are now enshrined in a recognized body of human rights law and are the focus of two major international instruments, namely, ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. These rights are considered inherent, indivisible, interrelated, and inalienable.

Local communities, unlike Indigenous peoples, do not have a natural source for rights beyond universal human rights. While Indigenous peoples can claim a range of specific rights due to their international recognition as peoples, local communities lack a similar touchstone. Instead, some groups of local communities have argued in the negotiations of international instruments that where their ways of life are connected to landscapes, territories and natural resources, and where their ways of life conserve biological (including agricultural) and cultural diversity, they should be afforded protections under international law against actions that would negatively affect them. They have managed to secure a range of rights to this effect, for example, Article 8(j) of the Convention of Biological Diversity, which calls on Parties to the Convention to "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."<sup>422</sup> Courts are also recognizing non-Indigenous communities as deserving of rights in relation to their lands and natural resources, as exemplified in the Saramaka judgement handed down by the Inter-American Court of Human Rights.<sup>423</sup> In the context of the increased global focus on biodiversity, food sovereignty and ecosystem processes, local communities' biocultural rights are gaining prominence in all levels of law and policy.<sup>424</sup>

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<sup>421</sup> Anaya S., 2004. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2nd ed. Page 3. Original emphasis.

<sup>422</sup> CBD Article 8(j). Emphasis added.

<sup>423</sup> *Saramaka v Suriname*, Inter-American Court of Human Rights (Ser. C) No. 172 (28 November 2007) (IACHR No. 172).

<sup>424</sup> To read the evolving discussion and different viewpoints about biocultural rights, see: Jonas, H., K. Bavikatte & H. Shrumm, 2010. "Community Protocols and Access and Benefit Sharing" in *Asia Biotechnology and Development Review*, 12(3); Bavikatte, K., and D.

For total clarity, this document does not in any way intend to merge Indigenous peoples' distinct rights with other types of rights, or to extend Indigenous peoples' rights to other groups of people. It adopts Posey *et al.*'s integrated rights methodology, but remains true to the bodies of law from which the specific provisions have been sourced.

### C. Objectivity and Terminology

Four points are relevant to the discussion about the objectivity of the Compendium and the terminology it uses. First, critical to the Compendium's credibility is its objectivity. The document is a statement of fact and represents the state of the law as it exists at the international level. Accordingly, the Compendium does not contain any new language. Each of its provisions is reproduced directly from the original international instrument, with two possible additions. In the first instance, footnotes are inserted in the provisions to provide cross-references and commentary where deemed useful. In the second instance, where a provision cites either the document from which it is taken or another international instrument without providing sufficient clarity about the specific instrument to which it refers, the name has been added in italics to increase the document's readability. The example in Box 2 illustrates the approach.

**Original:** *Recalling* that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the Convention, and recognizing that this Protocol pursues the implementation of this objective within the Convention.

**Edited:** *Recalling* that the fair and equitable sharing of benefits arising from the utilization of genetic resources is one of three core objectives of the *Convention on Biological Diversity*, and recognizing that this *Nagoya Protocol* pursues the implementation of this objective within the *Convention on Biological Diversity*.

**Box 2:** Illustrative example of a situation where an addition to the text was necessary to ensure clarity.

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Robinson, 2011. Bavikatte, K., 2011. "Stewarding the Commons: Rethinking Property and the Emergence of Biocultural Rights" in *Common Voices, Volume 7*; and 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.

Second, for the reason set out above, there is variance in the terminology used throughout the Compendium. For example, provisions from ILO 169 refer to “tribal and indigenous peoples”, the UN Declaration on the Rights of Indigenous Peoples refers to “indigenous peoples”, and the Convention on Biological Diversity and its subsidiary instruments refer to “indigenous and local communities”. While Indigenous peoples have been calling for all international instruments to recognize them as ‘peoples’, not all have yet done so.<sup>425</sup> The provisions remain true to the source document, and for this reason, it is important to refer to the source to contextualize each provision.

Third, following from the above point, the law is inherently political. For this reason, it is important to avoid decontextualizing provisions from the broader social, political and economic contexts within which the respective instruments were developed. The role of such movements and larger processes in shaping each instrument is critical to achieving a nuanced understanding of the actual provisions and in understanding the trajectory of the law.<sup>426</sup>

Fourth, international law is to a great extent state-centric, with primacy generally given to state sovereignty and economic interests. The majority of instruments reviewed are the outcomes of inter-governmental negotiations that often lack the full and effective participation of Indigenous peoples or local communities.<sup>427</sup> As a result, the overall rights-centric approach and language do not represent many Indigenous peoples’ and local communities’ worldviews. Moreover, while international law is setting an increasingly high standard for upholding the rights of Indigenous peoples and local communities - indeed, the provisions in the Compendium represent a high-water mark for the state of biocultural diversity law

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<sup>425</sup> This is the case with regard to the Convention on Biological Diversity that references “indigenous and local communities”, for example.

<sup>426</sup> Bavikatte, K., and D. Robinson, 2011. “Towards a peoples history of the law: Biocultural jurisprudence and the Nagoya Protocol on access and benefit sharing.” *The Law, Environment and Development Journal* 7(1). <http://www.lead-journal.org/content/11035.pdf>. Accessed: January 2012.

<sup>427</sup> ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples are notable exceptions. Also see: Expert Mechanism on the Rights of Indigenous Peoples, 2011. *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-making*, UN General Assembly, A/HRC/18/42, Annex Paragraph 1 (noting that “Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society. This has had a negative impact on their ability to determine the direction of their own societies, including in decision-making on matters that affect their rights and interests.”).

internationally - the standards therein do not necessarily represent a zenith in real terms.<sup>428</sup>

Fifth, as underscored in second footnote,<sup>429</sup> a number of different formulations are used throughout the document to refer to the main themes of this publication. At its core, it is directed towards Indigenous peoples and local communities whose identities, ways of life, and cultures are rooted in particular territories or areas. There are many ways to describe this relationship and it is acknowledged that some of the terms that might be used to describe these dynamics have also become politically laden. As far as possible, the Compendium should be developed in parallel to these important discussions, and should serve as a resource to a range of peoples and communities who remain entitled to describe their ways of life and relationships in a diversity of ways.

#### **D. The Living Convention**

The Compendium represents the sum total of the most relevant provisions that have been agreed at the international level, collectively constituting a large extent of Indigenous peoples' and local communities' rights to protect their biological and cultural diversity. The publication is called *The Living Convention on Biocultural Diversity* because the Compendium is a living document that will change as the number of contributors to the next edition grows, and as international law develops. It also highlights the point that while the international community has never established a process to elaborate and negotiate an international instrument relating to biocultural diversity, there is nevertheless a body of internationally negotiated law relating to the rights of Indigenous peoples and local communities to maintain the integrity of their biological and cultural systems. But it has been hidden from view due to the dispersed nature of the provisions from which it is constituted. By drawing the otherwise disparate provisions together in the Compendium, the 'Living Convention on Biocultural Diversity' comes into focus.

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<sup>428</sup> In jurisprudential terms, this exercise presents the law as it stands (a positivist approach) and not what many Indigenous peoples or local communities may consider to be the optimum substantive or procedural standards (a natural law approach), which have been practicably unattainable due to the state-centric nature of international law.

<sup>429</sup> For ease of reference, footnote two states that: "Throughout the document, a number of different formulations are used to refer to, among other things, territories, land, landscapes, resources, knowledge, biocultural diversity, integrity, and resilience. We cannot and do not attempt to fully encapsulate the myriad of ways in which specific Indigenous peoples or local communities define their biological and cultural heritage. Rather than potentially restricting the scope by setting out specific definitions or terms, this publication attempts to focus instead on enabling a range of peoples and communities to engage with international law on their own terms and in pursuit of their self-determined priorities ... ."

## A NOTE ON LEGAL WEIGHT

The Compendium sets out a more accessible range of Indigenous peoples' rights and local communities' biocultural rights. However, it does not provide the reader with insight into the binding nature, i.e. legal weight, of each of those provisions. As the creation of international law has proliferated and evolved over the years, a perceived dichotomy has emerged between so-called "hard" (binding) and "soft" (non-binding) international law. In this context, the central question becomes the legal weight of an element of international law (as the answer will differ depending on which instrument, set of guidelines, etc. is being referenced). Annex V provides a detailed analysis of the question in the context of the Convention on Biological Diversity (CBD). This section provides a brief synopsis of the issues.

It is generally agreed that treaties adopted and entered into force pursuant to the Vienna Convention on the Law of Treaties (Vienna Convention) create binding legal obligations upon their member states. These treaties form the backbone of what is commonly considered hard law. Increasingly, however, international obligations are being created not through the Vienna Convention's treaty-making process, but rather through decisions issued by Conferences of the Parties (COP) to international treaties such as the Convention on Biological Diversity.

There is much debate over the legal weight of such decisions. Arguably, because they were not created strictly pursuant to the Vienna Convention, such decisions cannot be called hard law. However, some commentators have suggested that legal obligations can be created not only through the formal treaty-making process, but also through internal processes created by the international treaties themselves, or through state actions in response to COP decisions. At present, there is little clarity on the precise legal weight of COP decisions. However, it is hoped that state practice in response to such decisions and continuing legal analysis by commentators and practitioners will help clarify where COP decisions fit within the hard/soft law continuum – or whether an entirely new way of understanding and describing the legal nature of international law may be necessary.

## **PART III**

### **LOOKING AHEAD**

## FUTURE PATHWAYS

In *Indigenous Peoples in International Law*, James Anaya, the United Nations 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.<sup>430</sup> Based on such an analysis, Anaya concludes that international law is developing – albeit “imperfectly and grudgingly”<sup>431</sup> – in ways that support Indigenous peoples’ demands.

Perhaps for the first time, this Compendium orders the broad sources of an emerging body of international law relating to biocultural diversity, offering a means to systematically explore its current status and trajectory, identify gaps and make suggestions for legal reform. In doing so, it raises a number of important questions, including:

- Considering the plethora of provisions at the international level relating to the relationship between biological diversity and cultural heritage, why is biocultural diversity still being lost at an alarming rate?
- How can a diversity of legal systems (i.e. legal pluralism) and corresponding worldviews be fostered and nurtured in mutually supportive ways?
- How can integrated rights approaches be used to augment more conventional sectoral approaches to legal frameworks relating to human rights, the environment and cultural heritage?
- What is the legal weight of international law and thus what are States’ legal obligations to implement it? Is there an existing process or is a new initiative required to clarify this critical question?
- Considering its current limitations, how can international law be reformed to better reflect local realities and priorities? How can it be more inclusive of Indigenous peoples, local communities and civil society?
- Is there a need for an international mechanism to monitor compliance with non-human rights-based international instruments such as the Convention on Biological Diversity?
- Is there a need for an international body or consortium to synthesise best practice and provide independent assessments of state and non-state actors’ adherence to a range of procedural rights, including FPIC processes?

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<sup>430</sup> Anaya, S., 2004. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2nd ed.

<sup>431</sup> Anaya, 2004. Page 4.

- What are effective strategies for ensuring enactment and implementation of international commitments at the national level?
- How can Indigenous peoples, communities and civil society better assist governments to uphold their international commitments, including monitoring, evaluating and reporting on their performance?
- How are Indigenous peoples, local communities, networks, and broader social movements using international provisions at the national and local levels?
- What kinds of legal and other forms of empowerment can assist individuals, peoples and communities to better affirm their responsibilities and assert their rights?

The above questions highlight the range and scope of critical engagement that will be required if international law is to become a medium for effective participation of Indigenous peoples and local communities and for genuine engagement with the full extent of legal and policy frameworks that affect biocultural diversity. As previously noted, Darrell Posey suggested that proper development of TRRs would require “a process of dialogue” between Indigenous peoples, local communities and governmental and non-governmental institutions on a wide array of issues.<sup>432</sup> Similarly, it may be useful to convene people from such groups, as well as lawyers and applied academics, into a dedicated working group. They could begin by engaging with a focused set of activities, examples of which are suggested below.

## **A. Revising and Reforming International Law**

Questions about the legal weight of specific international instruments of importance to Indigenous peoples and local communities should be a high priority. Moreover, Posey *et al.* suggest that having mapped and bundled existing rights to form a new picture of the law (as undertaken in this document), further processes should be undertaken to “harmonize” existing international instruments and “equitize” the law to ensure Indigenous peoples and local communities are involved in its development and implementation. This could involve exploring the mutually supporting nature and conflicts between various instruments relevant to biocultural diversity, providing technical guidance and recommendations for reform, and actively engaging in the relevant fora.

Subsequent editions of the Compendium will consider adding provisions from the following relevant instruments and bodies, among others:

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<sup>432</sup> Posey, 1995. Page 19.

- United Nations General Assembly Resolutions and Proposals;
- Decisions issued by Conferences of the Parties to multilateral environmental agreements;
- Guidelines and best practices issued by organizations such as the FAO;
- Operating procedures and other guidance documents issued by financial institutions such as the World Bank; and
- Resolutions, recommendations and plans of action adopted by the IUCN World Conservation Congress and World Parks Congresses.

## **B. Enabling National Implementation of International Commitments**

In a recent interview with the CBD Alliance,<sup>433</sup> the new Executive Secretary of the CBD, Braulio Ferreira de Souza Dias, said that his three immediate and overriding priorities are “implementation, implementation, and implementation.”<sup>434</sup> His comments coincided with the publication of a report that explores perceived weaknesses in the implementation of the CBD and suggests ways to increase Indigenous peoples’ and civil society’s involvement in the implementation and monitoring of the CBD.<sup>435</sup> When considering the wide array of international commitments adopted but not fulfilled, it becomes clear that lack of implementation is nearly a universal issue in international biocultural diversity law. Concerted multi-stakeholder action, including developing genuine processes of participation and legal and institutional reform, could be undertaken in select countries with conditions favourable to positive change.

## **C. Increasing the Accessibility of International Law at the Local Level**

One of the main objectives of this Compendium is make international law accessible to Indigenous peoples, local communities and supporting organisations. However, it is acknowledged that its 76 pages of text could be framed in a much more accessible

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<sup>433</sup> Founded after the 6<sup>th</sup> COP in Den Haag, the Netherlands (April 2002), The Convention on Biological Diversity Alliance (CBD Alliance) is a loose network of activists and representatives from non-governmental organizations (NGOs), community-based organizations (CBOs), social movements and Indigenous Peoples’ Organizations (IPOs) advocating for improved and informed participation in CBD processes. For more information, see: [www.cbdalliance.org](http://www.cbdalliance.org)

<sup>434</sup> “Fewer decisions, more implementation”, Square Brackets, May 2012, Issue 6.

<sup>435</sup> 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: Malaysia. As follow-up to this report, the CBD Alliance will host a side event at the 11<sup>th</sup> Meeting of the Conference of the Parties to the CBD in Hyderabad to explore these very issues.

way. One suggestion is to develop a website and searchable database of relevant international and regional laws as well as jurisprudence.<sup>436</sup> This could be accompanied by a comprehensive list of which countries have ratified or become signatories to each instrument and clarity on each respective instrument's legal weight. Such a project would require input from members of Indigenous peoples and local communities, legal scholars and activists, and support from governments, international organizations and funders. This would dovetail with the need to make the Compendium more inclusive of the decisions, resolutions and other soft law instruments that have been omitted from this first edition.

In the context of an upsurge in rights-based approaches to conservation,<sup>437</sup> this would be usefully augmented by a community-led process of documentation, analysis and dissemination of inspiring experiences of Indigenous peoples and local communities using the law and legal tools to secure their territories and areas.

Support for the above initiatives would further invigorate the current discussion about rights-based approaches, introduce innovative dynamics into the way Indigenous peoples and local communities assert their rights and affirm responsibilities, and lead to much-needed reforms in the way laws and policies are developed and implemented.

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<sup>436</sup> This is not the first call for such a web-based portal. A number of Natural Justice's partners have suggested a need for it and it was also brought up at an informal meeting of lawyers on the fringes of the 13<sup>th</sup> International Society of Ethnobiology Congress (Montpellier, France, 20-25 May 2012). While there is clearly a need for this kind of a website, questions abound about its emphasis, structure and content. The authors thank Thomas Greiber for his comments on the issue of online legal databases (14 September, 2012. Jeju, Republic of Korea).

<sup>437</sup> Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), 2009. *Rights-based Approaches: Exploring Issues and Opportunities for Conservation*. CIFOR and IUCN: Bogor, Indonesia. For a critique of the current rights-based approach paradigm, see: Jonas, H., H. Shrumm and K. Bavikatte, 2010. "Biocultural Community Protocols and Conservation Pluralism", pages 102-112 in Shrumm, H. (ed.), *Exploring the Right to Diversity in Conservation Law, Policy and Practice*. IUCN-CEESP Policy Matters 17: Malaysia.

## TOWARDS THE RIGHT TO RESPONSIBILITY

The horizon leans forward,  
Offering you space to place new steps of change.  
Here, on the pulse of this fine day  
You may have the courage  
To look up and out and upon me, the  
Rock, the River, the Tree, your country.

**Maya Angelou**

*On the Pulse of Morning*<sup>438</sup>

Lawyers are highly adept at monopolizing information about the law and charging exorbitant fees for accessing their knowledge. It is hoped that this publication further illustrates the importance of *democratizing the law* by providing information about important rights and responsibilities in a form that is readily accessible to the people to whom it is of most use.

In light of this publication's focus on rights (due to the nature of international law), the irony is the fact that many Indigenous peoples and local communities downplay the assertion of rights<sup>439</sup> in favour of affirming their responsibilities to care for their communities and territories. While rights rely on a claim of entitlement against another person or body, responsibilities are the result of mutually-supportive relationships. In this context, the above Compendium can be seen as a body of law that has been agreed internationally to support Indigenous peoples' and local communities' *right to responsibility*.<sup>440</sup> Only by being recognized and supported in their roles as responsible stewards of their territories and areas will they be able to properly fulfill their self-imposed duties.<sup>441</sup>

Looking ahead, this publication represents one element of a much larger process and is itself a work in progress. It is the authors' sincere hope that it contributes to the ongoing work in this area and, by promoting an unorthodox reading of an existing legal landscape, helps Indigenous peoples, local communities and their supporters to identify 'space to place new steps of change'.

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<sup>438</sup> Maya Angelou, *On the Pulse of Morning*. Last accessed on 23 September 2012: <http://www.america.gov/st/texttrans-english/2009/January/20090112155227berehellek0.2457697.html&distid=ucs>.

<sup>439</sup> This is the case, at least in the first instance. Whereas Western systems privilege rights over responsibilities, many Indigenous and traditional communities espouse the opposite.

<sup>440</sup> This idea returns no hits on Google. It would be interesting to explore the right to responsibility within the group that hopefully forms to advance this work.

<sup>441</sup> For a recent report on the importance of legal recognition and institutional support for the local roles of Indigenous peoples and local communities see: Jonas, H., A. Kothari and H. Shrumm, 2012.

## ANNEXES

### ANNEX I: TABLE SETTING OUT THE INSTRUMENTS, GUIDELINES AND DECISIONS (ETC.) THAT WERE REVIEWED, IDENTIFYING WHICH ARE INCLUDED IN THE COMPENDIUM

INCLUDED IN THE COMPENDIUM?	NAME OF INSTRUMENT, GUIDELINES etc.	YEAR
<b>HUMAN RIGHTS</b>		
✓	Universal Declaration of Human Rights	1948
✓	ILO Convention No. 169	1989, 1991 <sup>442</sup>
✓	United Nations Declaration of the Rights of Indigenous Peoples	2007
✓	International Covenant on Civil and Political Rights	1966, 1976
✓	International Covenant on Economic, Social and Cultural Rights	1966, 1976
✓	International Convention of the Elimination of All Forms of Racial Discrimination	1965, 1969
✓	Convention on the Elimination of All Forms of Discrimination against Women	1979, 1981
X	Convention against Torture and Other Cruel,	1984, 1987

<sup>442</sup> Unless otherwise indicated, when two years are provided, the first indicates the year adopted and the second indicates the year of entry into force. Where there is only one year provided that is the year of adoption.

	Inhuman or Degrading Treatment or Punishment	
✓	Convention on the Rights of the Child	1989, 1990
✓	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	1992
	<b>Regional Charters and Conventions on Human Rights</b>	
x	African Charter on Human and Peoples' Rights	1981, 1986
x	Arab Charter on Human Rights	1994, new version adopted 2004
x	Asian Human Rights Charter	Declared 1998
x	European Convention on Human Rights	1950, 1953
x	American Convention on Human Rights	1969, 1978
	<b>United Nations General Assembly and Subsidiary Bodies</b>	
x	United Nations General Assembly Resolutions and General Comments	
x	United Nations Human Rights Council Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework	2011
x	Reports of the United Nations Permanent Forum on Indigenous Issues	Established

		2000
X	Reports of the Expert Mechanism on the Rights of Indigenous Peoples	Established 2007
	<b>United Nations Special Rapporteurs and Independent Experts</b>	
X	Reports of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the right to Non-discrimination in this Context	Established 2000
X	Reports of the Special Rapporteur on the Right to Food	Established 2000
X	Reports of the Special Rapporteur on the Situation of Human Rights Defenders	Established 2000
X	Reports of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples	Established 2001
X	Reports of the Independent Expert on Minority Issues	Established 2005
X	Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation	Established 2008
X	Reports of the Special Rapporteur in the Field of Cultural Rights	Established 2009
X	Reports of the Special Rapporteur of Internally Displaced Persons	Established 2010 (Representative operating since

		1994)
<b>BIODIVERSITY</b>		
<b>Convention on Biological Diversity</b>		
✓	Convention on Biological Diversity	1992, 1993
✓	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization	2010
✓	Cartagena Protocol on Biosafety	2000, 2003
✓	Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Nagoya Protocol	2010
✓	Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities	2010
✓	Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity	2004
✓	Akwé: Kon Guidelines	2004
✓	Aichi Biodiversity Targets (Decision X/2)	2010
X	Consolidated Update of the Global Strategy for Plant Conservation 2011-2020 (Decision X/17)	2010
X	Protected areas (Decision X/31)	2010
X	Sustainable use of biodiversity (Decision X/32)	2010

X	Biodiversity and climate change (Decision X/33)	2010
X	Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity (Decision X/43)	2010
✓	Programme of Work on Protected Areas	2004
X	Select CBD COP Decisions that are not listed above, including: <ul style="list-style-type: none"> <li>• Article 8(j) and related provisions (Decision V/16)</li> <li>• Article 8(j) and related provisions (Decision VI/10)</li> <li>• Protected areas (Articles 8(a) to (e)) (Decision VII/28)</li> <li>• Protected areas (Decision VIII/24)</li> <li>• Article 8(j) and related provisions (Decision IX/13)</li> <li>• Protected areas (Decision IX/18)</li> </ul>	
✓	Convention on Wetlands of International Importance	1971, 1975
X	Convention on the International Trade in Endangered Species of Wild Fauna and Fauna	1973, 1975 (Amended 1979)
X	Convention on the Conservation of Migratory Species of Wild Animals	1979, 1983
<b>IUCN Resolutions and Recommendations from World Conservation Congresses and the Fifth World Parks Congress</b>		

X	First World Conservation Congress	1996
X	Second World Conservation Congress	2000
X	Third World Conservation Congress	2004
X	Fourth World Conservation Congress	2008
X	Fifth World Parks Congress	2003
<b>CLIMATE CHANGE</b>		
✓	United Nations Framework Convention on Climate Change	1992, 1994
✓	UNFCCC Cancun Agreements	2010
<b>DESERTIFICATION</b>		
✓	United Nations Convention to Combat Desertification	1994, 1996
<b>FOOD AND AGRICULTURE</b>		
✓	The International Treaty on Plant Genetic Resources for Food and Agriculture	2001, 2004
✓	Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration on Animal Genetic Resources	2007
✓	FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security	2004

✓	FAO Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the Context of National Food Security	2012
x	FAO International Guidelines for Securing Sustainable Small-scale Fisheries	2012 (Zero Draft)
<b>WATER</b>		
✓	Convention on the Law of the Non-navigational Uses of International Watercourses	1997
<b>INTELLECTUAL PROPERTY</b>		
✓	The Agreement on Trade-Related Aspects of Intellectual Property Rights <sup>443</sup>	
x	Ongoing WIPO negotiations on Effective Protection of Traditional Knowledge, Traditional Cultural Expressions/Folklore and Genetic Resources	
<b>CULTURAL HERITAGE</b>		
✓	UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage	1972
✓	UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions	2005, 2007

<sup>443</sup> Many developing countries have been required to go beyond the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) when signing trade agreements with the United States and European Union. These have been called “TRIPS-Plus Provisions.”

✓	UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage	2003, 2006
<b>FORESTS</b>		
✓	United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests	1992
X	FAO Responsible Management of Planted Forests: Voluntary Guidelines	2006
X	FAO Fire Management: Voluntary Guidelines. Principles and Strategic Actions	2006
✓	United Nations Forum on Forests Non-legally Binding Instrument on All Types of Forests	2007
<b>BIOCULTURAL DIVERSITY</b>		
X	Declaration on Biocultural Diversity	2010
X	UNESCO-CBD Joint Programme of work on Biocultural Diversity (referenced in Decision X/20)	2010
<b>SUSTAINABLE DEVELOPMENT</b>		
X	Declaration of the United Nations Conference on the Human Environment	1972
X	United Nations Declaration on the Right to Development	1986

X	Rio Declaration on Environment and Development	1992
X	Agenda 21	1992
X	Programme for the Further Implementation of Agenda 21	1997
X	Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Declaration on Sustainable Development and the Plan of Implementation) of the World Summit on Sustainable Development	2002
X	United Nations Programme of Action on the Sustainable Development of Small Island Developing States	1994
X	Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of SIDS (2005)	2005
X	The Future We Want	2012
<b>INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE</b>		
✓	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters	1998

## ANNEX II: A NON-EXHAUSTIVE LIST OF INTERNATIONAL AND REGIONAL JUDGEMENTS

<b>International Judgments</b>
Western Sahara, Advisory Opinion, I.C.J. 12 (1975).
Poma Poma v. Peru, Human Rights Committee, Comm. No. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006 (2009).
<b>Regional Judgments</b>
<i>Africa</i>
The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights (2001)
Endorois Welfare Council v Kenya, Communication No. 276/2003, Decision of the African Commission on Human and Peoples' Rights (2010)
<i>Americas</i>
Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights (Ser. C), No. 79 (2001).
Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights, (Ser. C), No. 125 (2005).
Sawhoyamaxa Indigenous Community v. Paraguay, Inter-American Court of Human Rights, (Ser. C) No. 146 (2006).
Moiwana Village v. Suriname, Inter-American Court of Human Rights (Ser. C), No. 124 (2005).

Saramaka v. Suriname, Inter-American Court of Human Rights (Ser. C), No. 172 (2007).

Sarayaku v. Ecuador, Inter-American Court of Human Rights (Ser. C), No. 245 (2012)

**ANNEX III: A NON-EXHAUSTIVE LIST OF INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' DECLARATIONS**

NAME	YEAR	INFORMATION
<b>General Environment and Development</b>		
The Iquitos Declaration	1990	Coordinating Body for Indigenous Peoples' Organizations of the Amazon Basin (COICA) and environmental and conservationist organizations to analyze the serious deterioration of the Amazon biosphere and look for joint alternatives.
Kari-Oca Declaration and Indigenous Peoples Earth Charter	1992	<a href="http://www.dialoguebetweennations.com/ir/english/kariocakimberley/KOCharter.html">http://www.dialoguebetweennations.com/ir/english/kariocakimberley/KOCharter.html</a>
International Alliance Charter	1992, Revised 2002	Regarding "indigenous and tribal peoples of the tropical-forests"  <a href="http://www.international-alliance.org/charter_eng.htm">http://www.international-alliance.org/charter_eng.htm</a>
The Heart of the Peoples Declaration	1997	Prepared by participants in the North American Indigenous Peoples Summit on Biological Diversity and Biological Ethics  <a href="http://www.ipcb.org/resolutions/htmls/dec_heartopeoples.html">http://www.ipcb.org/resolutions/htmls/dec_heartopeoples.html</a>
Redstone Statement	2010	Prepared at the 2010 International Summit on Indigenous Environmental Philosophy

Draft Universal Declaration on the Rights of Mother Earth	2010	Outcome of 2010 Cochabamba World Conference on Climate Change and the Rights of Mother Earth  <a href="http://www.celdf.org/rights-of-nature-universal-declaration-on-the-rights-of-mother-earth">http://www.celdf.org/rights-of-nature-universal-declaration-on-the-rights-of-mother-earth</a>
Rio+20: Indigenous Peoples International Declaration on Self-Determination and Sustainable Development	2012	<a href="http://www.iwgia.org/news/search-news?news_id=542">http://www.iwgia.org/news/search-news?news_id=542</a>
Declaration of Indigenous Peoples of Africa on Sustainable Development and Rio+20	2012	<a href="http://www.uncsd2012.org/index.php?page=view&amp;nr=1151&amp;type=230&amp;menu=38">http://www.uncsd2012.org/index.php?page=view&amp;nr=1151&amp;type=230&amp;menu=38</a>
Collective Statement of Khoes Tribal Groupings and Partners from South Africa on the International Day of the World's Indigenous Peoples	2012	
<b>Genetic Resources, Access and Benefit Sharing and Intellectual Property Rights</b>		
Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples	1993	<a href="http://www.ankn.uaf.edu/IKS/mataatua.html">http://www.ankn.uaf.edu/IKS/mataatua.html</a>
Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project.	1995	<a href="http://www.ipcb.org/resolutions/htmls/dec_phx.html">http://www.ipcb.org/resolutions/htmls/dec_phx.html</a>
Coordinating Body for	1994	Outcome of 1994 regional meeting

Indigenous Peoples' Organizations of the Amazon Basin Regional Meeting on Intellectual Property Rights and Biodiversity		hosted by COICA and the United Nations Development Programme  <a href="http://himaldoc.icimod.org/record/9889">http://himaldoc.icimod.org/record/9889</a>
Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge	2007	Prepared at UNFPII 2007  <a href="http://www.grain.org/article/entries/2222-unpfii-6-indigenous-peoples-rights-to-genetic-resources">http://www.grain.org/article/entries/2222-unpfii-6-indigenous-peoples-rights-to-genetic-resources</a>
Iskenisk Declaration on the Access, Use, and Fair and Equitable Sharing of Benefits Arising Out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada	2011	Outcome of 2011 session convened by Maritime Aboriginal Peoples Council, a regional institution based in Canada
Nagoya Protocol - Joint Submission on Substantive and Procedural Injustices	2011	<a href="http://www.ubcic.bc.ca/News_Releases/UBCICNews05191102.html#axzz27bjZ9UWd">http://www.ubcic.bc.ca/News_Releases/UBCICNews05191102.html#axzz27bjZ9UWd</a>
<b>Climate Change and Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD)</b>		
Indigenous Peoples Global Strategy on REDD	2008	Adopted at the Global Indigenous Peoples Consultation on Reducing Emissions from Deforestation and Forest Degradation (REDD)  <a href="http://www.unutki.org/default.php?doc_id=133">http://www.unutki.org/default.php?doc_id=133</a>
The Anchorage Declaration	2009	Regarding climate change, prepared by Indigenous representatives from the Arctic, North America, Asia, Pacific, Latin America, Africa,

		Caribbean and Russia <a href="http://worldpulse.com/node/10409">http://worldpulse.com/node/10409</a>
Position Paper of Nepal Federation of Indigenous Nationalities (NEFIN) on Climate Change and Reducing Emission from Forest Deforestation and Degradation (REDD)	2010	<a href="http://ccmin.aippnet.org/index.php?option=com_content&amp;view=article&amp;id=96:position-paper-of-nepal-federation-of-indigenous-nationalities-nefin-on-climate-change-and-reducing-emission-from-forest-deforestation-and-degradation-redd&amp;catid=17:national-statements&amp;Itemid=29">http://ccmin.aippnet.org/index.php?option=com_content&amp;view=article&amp;id=96:position-paper-of-nepal-federation-of-indigenous-nationalities-nefin-on-climate-change-and-reducing-emission-from-forest-deforestation-and-degradation-redd&amp;catid=17:national-statements&amp;Itemid=29</a>
Declaration of Solidarity – International Conference on Indigenous Peoples’ Rights, Alternatives and Solutions to the Climate Crisis	2010	Prepared by 76 Indigenous peoples representatives and advocates from 15 countries in Asia, Pacific, Australia, Africa, North and South America, and Europe  <a href="http://www.redd-monitor.org/2010/11/18/international-indigenous-peoples-groups-reject-market-based-mechanisms/">http://www.redd-monitor.org/2010/11/18/international-indigenous-peoples-groups-reject-market-based-mechanisms/</a>
Declaration of Iquitos: There is No REDD+ without Territories, Rights and Autonomy for Indigenous People	2011	<a href="http://www.rightsandresources.org/blog.php?id=700">http://www.rightsandresources.org/blog.php?id=700</a>
Kari-Oca 2 Declaration, “Indigenous Peoples Global Conference on Rio+20 and Mother Earth	2012	<a href="http://indigenous4motherearthrioplus20.org/kari-oca-2-declaration/">http://indigenous4motherearthrioplus20.org/kari-oca-2-declaration/</a>
<b>Extractive Industries</b>		
The Manila Declaration of the International Conference on	2009	Prepared by Indigenous Peoples and support organisations from 35

Extractive Industries and Indigenous Peoples		countries  <a href="http://www.escr-net.org/docs/i/871960">http://www.escr-net.org/docs/i/871960</a>
The Ka Nui Conference Declaration	2012	Regarding extractive industries, prepared by Indigenous peoples (tangata whenua) and community activists from Aotearoa  <a href="http://kanuiconference.wordpress.com/2012/08/26/conference-declaration/">http://kanuiconference.wordpress.com/2012/08/26/conference-declaration/</a>
<b>Indigenous Peoples' and Community Conserved Areas and Territories</b>		
The Manila Declaration on Indigenous Peoples' and Community Conserved Areas and Territories	2012	Approved and delivered at the 'First National Conference on ICCAs in the Philippines'
<b>Pastoralists and Livestock Keepers</b>		
Segovia Declaration of Nomadic and Transhumant Pastoralists	2007	<a href="http://data.iucn.org/wisp/WISP_events_gathering_2.htm">http://data.iucn.org/wisp/WISP_events_gathering_2.htm</a>
Declaration on Livestock Keepers' Rights	2009	<a href="http://www.new-ag.info/en/news/newsitem.php?a=1570">http://www.new-ag.info/en/news/newsitem.php?a=1570</a>
Mera Declaration of the Global Gathering of Women Pastoralists	2010	<a href="http://www.landcoalition.org/news/mera-declaration-global-gathering-women-pastoralists">http://www.landcoalition.org/news/mera-declaration-global-gathering-women-pastoralists</a>
<b>Sacred Natural Sites and Territories</b>		
Statement of Custodians of	2008	<a href="http://sacrednaturalsites.org/items/c">http://sacrednaturalsites.org/items/c</a>

Sacred Natural Sites and Territories		<a href="#">ustodians-statement/</a>
The Aanaar/Inari Statement on Diversity of Sacred Natural Sites in Europe	2010	

## ANNEX IV: MULTILATERAL DEVELOPMENT BANKS AND FINANCIAL INSTITUTIONS

Multilateral Development Banks <sup>444</sup>	Relevant Policies <sup>445</sup>
World Bank <sup>446</sup>	Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10) (2005)
African Development Bank	Involuntary Resettlement Policy (2003)
Asian Development Bank	Safeguard Policy Statement (2009)
European Bank for Reconstruction and Development	Indigenous Peoples Guidance Note (2010)
Inter-American Development Bank	Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (2006)

<sup>444</sup> “Multilateral Development Banks are institutions that provide financial support and professional advice for economic and social development activities in developing countries.” The World Bank, “About Us”. Last accessed 19 September 2012 at [www.worldbank.org](http://www.worldbank.org).

<sup>445</sup> For purposes of brevity, only the major policies of Multilateral Development Banks have been listed. These and other banks listed below may have other policies that affect Indigenous peoples and local communities.

<sup>446</sup> The World Bank Group comprises three sub-institutions that make loans and grants to developing countries: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC).

<b>Multilateral Financial Institutions</b> <sup>447</sup>
The European Commission and The European Investment Bank
International Fund for Agricultural Development
The Islamic Development Bank
The Nordic Development Fund and The Nordic Investment Bank
The OPEC Fund for International Development
<b>Sub-regional Banks</b> <sup>448</sup>
Corporacion Andina de Fomento
Caribbean Development Bank
Central American Bank for Economic Integration
East African Development Bank
North American Development Bank
West African Development Bank

<sup>447</sup> “Several other banks and funds that lend to developing countries are also identified as multilateral development institutions, and are often grouped together as other Multilateral Financial Institutions (MFIs). They differ from the MDBs in that they have a narrower ownership/membership structure and they focus on special sectors or activities.” The World Bank, “About Us”. Last accessed 19 September 2012 at [www.worldbank.org](http://www.worldbank.org).

<sup>448</sup> “A number of Sub-Regional Banks, established for development purposes, are also classified as multilateral banks, as they are owned by a group of countries (typically borrowing members and not donors).” The World Bank, “About Us”. Last accessed 19 September 2012 at [www.worldbank.org](http://www.worldbank.org).

## ANNEX V: A NOTE ON LEGAL WEIGHT<sup>449</sup>

### 1. Introduction

It is in the nature of human beings to organize our world into a hierarchical structure, whether it may be with regard to leadership, sports teams, or — more prosaically — the classification of international laws. On the latter point, two simple categories have developed to organize international law into such a structure. At the top is so called “hard law,”<sup>450</sup> generally created by treaties, which theoretically imposes binding legal obligations on member states. Below that is “soft law,” created by other instruments that theoretically are more in the nature of aspirational or moral goals. The operative word, of course, is “theoretically.” In practice, it can be quite difficult to determine whether a particular instrument operates as hard or soft law.<sup>451</sup>

One such instrument that is difficult to classify is the Convention on Biological Diversity (CBD) and its subsidiary instruments. In theory, the CBD is hard law, a binding international treaty negotiated by governments. In practice, however, it has been argued that the “CBD conforms to the characteristics of other international hard laws that possess a soft nature.”<sup>452</sup>

This section explores the international legal context within which multilateral environmental agreements (MEAs) such as the CBD are developed. It then provides a brief description and preliminary analysis of the legal weight of the CBD.<sup>453</sup>

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<sup>449</sup> This Annex is drawn from J. Eli Makagon, *Analyzing The Binding Nature of COP Decisions Through the Convention on Biological Diversity* (Natural Justice, New York 2012). <http://naturaljustice.org/library/our-publications/articles>.

<sup>450</sup> Abbot, K.W., and D. Snidal, *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”). “The realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.” Abbot and Snidal, at 422.

<sup>451</sup> Some suggest that such a clear distinction between hard and soft law may actually be a misnomer, given the process of compromise that leads to multilateral environmental agreements. Harrop, S.R., and D.J. Pritchard, *A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity’s Current Trajectory* (2011) Global Environmental Change 21, 474-480, at 476 (citing DiMento, J.F.C., 2003. *The Global Environment and International Law*, University of Texas Press, Austin).

<sup>452</sup> Harrop and Pritchard, at 476.

<sup>453</sup> 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[.]” Morgera, E., and E. Tsioumani, *Yesterday, Today, and*

## 2. Traditional International Law

Traditionally, binding<sup>454</sup> international law (including international environmental law) is created pursuant to the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>455</sup> Under the Vienna Convention, parties consent to be bound by a treaty at an international conference and the treaty enters into force once it has been ratified by a minimum number of parties.<sup>456</sup> This is the “traditional process of lawmaking, [where] states protect their individual interests by exercising their sovereign right to withhold their consent to be bound and their prerogative to demand reciprocal concessions of their bargaining partners.”<sup>457</sup> This is the method under which conventions such as the CBD<sup>458</sup> and the United Nations Framework Convention on Climate Change (UNFCCC)<sup>459</sup> entered into force.

While this process protects states’ sovereign rights to withhold or grant consent to be bound by a treaty, it has been criticized in the context of MEAs as being inadequate to respond to the realities of environmental degradation and loss of biodiversity in a timely and effective manner.<sup>460</sup> This has prompted calls for “new approaches to international environmental law-making”,<sup>461</sup> including approaches aimed at overcoming the constraints of the consent requirement. The Conference of

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*Tomorrow: Looking Afresh at the Convention on Biological Diversity* (2011) University of Edinburgh School of Law Working Paper 2011/21, at 17.

<sup>454</sup> 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. For purposes of this discussion however, they will be employed in order to provide an overview of the legal status of MEAs. In-depth discussion regarding practical issues of enforcement can be addressed more fully at a later date.

<sup>455</sup> Vienna Convention on the Law of Treaties, Vienna 23 May 1969, entry into force 27 January 1980.

<sup>456</sup> Vienna Convention 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).

<sup>457</sup> Werksman, J., *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.

<sup>458</sup> Morgera and Tsioumani, at 3 (noting that the CBD is “[w]idely seen as a framework convention”); Harrop and Pritchard, *supra* note 43 at 476; D. McGraw, *The CBD – Key Characteristics and Implications for Implementation* (2002) 11 *R.E.C.I.E.L.* 17, 18 n.10.

<sup>459</sup> United Nations Framework Convention on Climate Change.

<sup>460</sup> See Werksman, at 56; Brunee, at 2.

<sup>461</sup> Brunee, at 2.

the Parties (COP) to MEAs is one avenue through which restraints imposed by the consent requirement is being addressed.

### **3. The Conference Of The Parties (COP)**

MEAs generally consist of two stages: the treaty-making stage, where the text of the instrument is negotiated and adopted, and the implementation stage.<sup>462</sup> 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.”<sup>463</sup> The COP is typically the plenary, ‘supreme’ organ of the MEA.<sup>464</sup> 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.”<sup>465</sup>

Where Parties ratify texts adopted by COPs, the role of the COP approximates the traditional, consent-based method of treaty law. On the other hand, where “more autonomous forms of law-making take place,” questions are raised about the legitimacy and binding nature of COP decisions, at least as traditional treaty law theory is understood.<sup>466</sup> One method then for determining the “hardness” of a particular COP action according to traditional treaty law involves the manner in which the action entered into force. Because COPs are taking on a “growing role”<sup>467</sup> in international environmental law-making, determining the binding nature of their actions becomes increasingly important.

### **4. 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”.<sup>468</sup> At least initially, it was seen as “balanc[ing] the needs and concerns of developing countries against the goals of industrialized countries”.<sup>469</sup> The CBD entered into force pursuant to the traditional

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<sup>462</sup> Werksman, at 57.

<sup>463</sup> Werksman, at 57.

<sup>464</sup> Brunee, at 4 note 12.

<sup>465</sup> 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.

<sup>466</sup> Brunee, at 5.

<sup>467</sup> Brunee, at 6.

<sup>468</sup> Morgera and Tsioumani, at 1.

<sup>469</sup> C. Tinker, *A New Breed of Treaty: The United Nations Convention on Biological Diversity* (1995) 12 Pace Env’tl L. Rev. 191, 192-93.

treaty-making process and thus is binding upon its Parties.<sup>470</sup> Despite its perceived progressive nature, the CBD has “attracted intense criticism for its vague and heavily qualified text, which is fraught with loopholes.”<sup>471</sup> The responsibility for implementing this text falls to the COP established by the CBD.<sup>472</sup>

#### **4.1 CBD Rules, Protocols, Annexes, and Amendments**

Along with adopting rules of procedure and financing,<sup>473</sup> the CBD sets forth three major activities for the COP: adoption of protocols<sup>474</sup>; amendment of the CBD or protocols<sup>475</sup>; and adoption and amendment of annexes.<sup>476</sup> 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.”<sup>477</sup>

Adoption of protocols is governed by CBD Articles 28, 34, and 36, among others. Article 28 states:

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.*
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

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<sup>470</sup> Tinker, at 195 (noting that the CBD “becomes binding on all parties, rather than being mere ‘soft law’ or non-binding declaratory language”); Harrop and Pritchard, at 474.

<sup>471</sup> Morgera and Tsioumani, at 1.

<sup>472</sup> CBD Article 23(1).

<sup>473</sup> CBD Article 23(3).

<sup>474</sup> CBD Article 28.

<sup>475</sup> CBD Article 29.

<sup>476</sup> CBD Article 30.

<sup>477</sup> CBD Article 23(4)(i).

protocol will enter into force for that Party once the Party “ratifies, accepts or approves that protocol or accedes thereto”.<sup>478</sup>

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 Depository<sup>[479]</sup> to all Parties for ratification, acceptance or approval.”<sup>480</sup> Parties then notify the Depository of their acceptance of the amendment. Amendments only enter into force with regard to a particular Party if that Party has accepted enforcement.<sup>481</sup>

Adoption and amendment of annexes to the CBD or any protocol is governed by CBD Article 30.<sup>482</sup> 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 Depository within one year from the date that it is notified of the annex’s adoption.<sup>483</sup> 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”.<sup>484</sup> Amendments to annexes follow the same procedure as proposal, adoption and entry into force of annexes.<sup>485</sup>

As these provisions demonstrate, different rules apply to different COP actions under the COP. For example, the minimum number 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 for those Parties that have agreed to be bound by it.

With 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.

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<sup>478</sup> CBD Article 36(4).

<sup>479</sup> The Depository is the Secretary General of the United Nations. CBD Article 41.

<sup>480</sup> CBD Article 29(3).

<sup>481</sup> CBD Article 29(4).

<sup>482</sup> “[A]nnexes shall be restricted to procedural, scientific, technical and administrative matters.” CBD Article 30(1).

<sup>483</sup> CBD Article 30(2)(b).

<sup>484</sup> CBD Article 30(2)(c).

<sup>485</sup> CBD Article 30(3).

Amendments only enter into force for those Parties that have agreed to be bound by it.<sup>486</sup>

Annexes and amendments thereto are adopted pursuant to the same process as amendments to the CBD or protocols with one important distinction. Unlike amendments to the CBD or protocols, 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”,<sup>487</sup> “the lines between the ‘technical’ and the ‘substantive’ are often fluid.”<sup>488</sup> 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.<sup>489</sup>

#### **4.2 CBD COP Decisions**

After each meeting of the COP, “decisions” are issued addressing a variety of different subjects, ranging from amending procedural rules to guidelines related to conducting social and environmental impact statements. The CBD is more or less silent in regard to the legal weight of COP decisions.<sup>490</sup> Presumably the issuance of COP decisions falls under the catchall provision in Article 23, which allows the CBD to

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<sup>486</sup> Only two protocols to the CBD 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.

<sup>487</sup> CBD Article 30(1).

<sup>488</sup> Brunee, at 20.

<sup>489</sup> 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”).

<sup>490</sup> 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[.]”<sup>491</sup>

Rule 40 of the CBD COP Rules of Procedure (“Rules of Procedure”) addresses decision-making on matters of substance and provides the following:

*[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...]*<sup>492</sup>

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.

### **3.4.3 Legal Weight<sup>493</sup> of CBD COP Actions**

Under traditional treaty law analysis, the actions<sup>494</sup> 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

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<sup>491</sup> Stan Stevens, the Treasurer for the Indigenous and Community Conserved Areas consortium, provides anecdotal evidence. At the GEF Council meetings with civil society in November 2011 he was told by a policy officer in GEF Secretariat that the GEF Council did not consider PoWPA to have the same weight as CoP decisions because it is “only an annex” to a CoP decision. Subsequently he was told that the GEF Council maintained that they did not need to include FPIC because “FPIC is only mentioned in PoWPA, and not in a CoP decision.”

<sup>492</sup> Brackets in original. In a rather ironic twist, 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 Paragraph 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.

<sup>493</sup> The term “legal weight” is used here to refer to whether the CBD COP action is binding or non-binding.

<sup>494</sup> “Actions” encompasses all activities of the COP, including adoption of protocols and issuance of Decisions.

hard law.<sup>495</sup> 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 Article 11 of the Vienna Convention, 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.

On the other hand, the legal weight of actions which take place outside of this context (such as certain COP Decisions) are “at best ambiguous.”<sup>496</sup> In regard to COP Decisions in particular, “they do not appear to be binding in a formal sense.”<sup>497</sup> 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.”<sup>498</sup> It is important to note that some commentators argue that traditional treaty analysis is inadequate to address the scope of COP decision-making.<sup>499</sup> Brunee “argue[s] for an interactional understanding of international law ... [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.”<sup>500</sup> 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.

#### **4.4 Other Issues**

Some commentators have noted that by its nature, the CBD is 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 many of the details to be implemented by individual Parties.<sup>501</sup> Rather than implementing additional hard law

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<sup>495</sup> 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”).

<sup>496</sup> Brunee, at 32.

<sup>497</sup> Brunee, at 32.

<sup>498</sup> Brunee, at 32-33.

<sup>499</sup> Brunee, at 6.

<sup>500</sup> Brunee, at 33 and 34.

<sup>501</sup> Harrop and Pritchard, at 476.

instruments, however, the CBD COP “develop[ed] soft instruments which are not backed by obligations.”<sup>502</sup>

Additionally, CBD COP Decisions themselves, which are often long and poorly organized, may hamper the hard nature of the instrument.<sup>503</sup> One commentator has suggested that because “it is quite difficult to determine the legal strength of CBD COP [D]ecisions 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 [D]ecisions at the national and local level.”<sup>504</sup>

## 5. Summary

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 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 CBD COP in particular, is essentially nonexistent.<sup>505</sup> 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 definitive answers regarding the binding nature of COP actions.

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<sup>502</sup> Harrop and Pritchard, at 479. Harrop 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.*

<sup>503</sup> 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 Edinburgh School of Law Working Paper Series 2011/05, at 2 (noting that “it is difficult to obtain a clear and comprehensive 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”).

<sup>504</sup> Morgera, at 36.

<sup>505</sup> 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”).

## ANNEX VI: ABBREVIATIONS

Aarhus Convention	Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice In Environmental Matters
Aichi Biodiversity Targets	The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets
Akwé: Kon Guidelines	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
Addis Ababa Principles and Guidelines	Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity
Cartagena Protocol on Biosafety	Cartagena Protocol on Biosafety and the Nagoya Kuala Lumpur Supplementary Protocol on Biosafety
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
Code of Ethical Conduct	Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities
Convention on Cultural	UNESCO Convention on the Protection and

Expressions	Promotion of the Diversity of Cultural Expressions
Convention on Desertification	United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
Convention on Intangible Cultural Heritage	UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
Convention on Non-navigational Watercourses	Convention on the Law of the Non-navigational Uses of International Watercourses
Convention on the Rights of the Child	Convention on the Rights of the Child
Declaration on the Right to Development	United Nations Declaration on the Right to Development
Declaration on the Rights of Minorities	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
FAO Food Security Guidelines	FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
FAO Tenure Guidelines	FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
GPA	Global Plan of Action for Animal Genetic Resources
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO Convention No. 169	Indigenous and Tribal Peoples Convention No. 169
Interlaken Declaration	Interlaken Declaration on Animal Genetic Resources
ITPGRFA	The International Treaty on Plant Genetic Resources for Food and Agriculture
N-KL Supplementary Protocol	Nagoya-Kuala Lumpur Supplementary Protocol On Liability and Redress to the Cartagena Protocol on Biosafety
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
PoWPA	Program of Work on Protected Areas
Ramsar Convention	Convention on Wetlands of International Importance Especially as Waterfowl Habitat
REDD	Reducing Emissions from Deforestation and Forest Degradation
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Law
UDHR	Universal Declaration of Human Rights
UNCED Forest Principles	United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable

	Development of All Types of Forests
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNFCCC Cancun Agreements	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
UNFF Instrument on Forests	United Nations Forest Forum Non-legally Binding Instrument on All Types of Forests
World Heritage Convention	UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage